

Commonwealth of Kentucky
Court of Appeals

NO. 2015-CA-000895-MR

KENNETH D. JEFFERSON

APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE GREGORY M. BARTLETT, JUDGE
ACTION NO. 14-CR-000722-002

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: DIXON, JONES AND J. LAMBERT, JUDGES.

DIXON, JUDGE: Kenneth D. Jefferson brings this direct appeal from his trial in the Kenton County Circuit Court in which he was convicted of trafficking in a controlled substance under 2 grams. Because we hold that Jefferson waived appellate review of this issue by pleading guilty, we affirm.

Jefferson sold 1.5 grams of heroin to a confidential informant for the Northern Kentucky Drug Task Force. Later, the same confidential informant met with Jefferson to buy more heroin. The task force was waiting and arrested Jefferson, who had 1.6 grams of heroin in his vehicle. Jefferson was indicted for trafficking in a controlled substance in the first degree and for being a persistent felony offender in the first degree to which he subsequently pled guilty.

At the conclusion of Jefferson's sentencing hearing, the trial court stated that because Jefferson was 33 and had ten prior felonies, a sentence of 12.5 years was too lenient. Jefferson's defense counsel stated at that hearing that several of his convictions were from Ohio, and he did not know whether those convictions would be considered felonies in Kentucky. The trial court then set another hearing in order to determine whether to sentence Jefferson to 12.5 years. At that hearing, the court rejected the prosecution's sentencing offer because of Jefferson's lengthy criminal history.

At a third hearing, the Commonwealth and Jefferson agreed on a 15-year sentence, and the trial court accepted the Commonwealth's offer. Jefferson was sentenced to 15 years' imprisonment.

When asked if the defendant had reviewed the PSI, his counsel stated that he had. Jefferson did not dispute the findings of the PSI at that time. It was not until later that Jefferson's counsel stated that he was "unaware" of whether Jefferson's felony convictions in Ohio would be considered felony convictions in Kentucky.

Jefferson's sole argument on appeal is that the trial court erred when it failed to grant Jefferson a hearing on his PSI, which may or may not have included factual inaccuracies in regards to his number of previous felony convictions in Kentucky. Jefferson only disputes the classification of the crimes as felonies, and not that the crimes actually occurred.

“[W]hen an issue is unpreserved at the trial court, this Court will typically only review it for palpable error and only then upon the request of Appellant.” *Webster v. Commonwealth*, 438 S.W.3d 321, 325 (Ky. 2014). The parties do not dispute that this issue is unpreserved for our review. Jefferson does not request palpable error review, presumably because Jefferson pled guilty and because palpable errors are waivable by an unconditional guilty plea. “Even palpable errors may be waived.” *Johnson v. Commonwealth*, 180 S.W.3d 494, 503 (Ky. App. 2005). Instead, Jefferson argues that his PSI was a “sentencing issue”.

Our Supreme Court has stated that:

[w]hile an unconditional guilty plea waives the right to appeal many constitutional protections as well as the right to appeal a finding of guilt on the sufficiency of the evidence, *Taylor v. Commonwealth*, 724 S.W.2d 223, 225 (Ky. App. 1986), there are some remaining issues that can be raised in an appeal. These include competency to plead guilty; whether the plea complied with the requirements of *Boykin v. Alabama*, 395 U.S. 238, 244, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969); subject matter jurisdiction and failure to charge a public offense; and sentencing issues.

Windsor v. Commonwealth, 250 S.W.3d 306, 307 (Ky. 2008) (footnotes omitted).

“Sentencing issues include a claim that a sentencing decision is contrary to statute ... or was made without fully considering what sentencing options were allowed by statute....” *Commonwealth v. Reed*, 374 S.W.3d 298, 300 (Ky. 2012) (quoting *Grigsby v. Commonwealth*, 302 S.W.3d 52, 54 (Ky. 2010)). One example of a “a claim that a sentencing decision is contrary to statute” is “the imposition of a sentence that is longer than that which is allowed by statute for the crime committed.” *Webster*, 438 S.W.3d at 326. One example of a decision “made without fully considering what sentencing options were allowed by statute” is “the failure to take probationary options into account as required in certain situations by KRS 533.010.” *Id.* Our Supreme Court has also made it clear, however, that this only applies to situations in which “the trial judge did not fully consider statutory sentencing options in making his sentencing decision[,]” as

not every violation of a sentencing statute by a trial judge will entitle an appellant to automatic preservation of the alleged error. Our previous cases reveal that it is not uncommon for a trial court to fail to comply with a sentencing statute but for the appellant to still only be entitled to palpable error review (if requested). In *Baumia v. Commonwealth*, an appellant alleged that facts surrounding a prior conviction were admitted during her sentencing phase in violation of KRS 532.055(2)(a). 402 S.W.3d 530, 546 (Ky. 2013). Although the appellant had alleged that the trial court had failed to comply with a statutory mandate during sentencing, we did not treat the issue as automatically preserved, and we reviewed only for palpable error. *See id.* Similarly, in *Elery v. Commonwealth*, an appellant claimed that the trial court allowed a non-relative to make a victim impact statement during sentencing in violation of KRS 532.055(2)(a)(7), yet we reviewed only for palpable error. 368 S.W.3d 78, 98 (Ky. 2012). Because Appellant has not shown that the

trial court's failure to read the jury instructions at the conclusion of proof in alleged violation of KRS 532.055(2)(c) entitles him to appellate review of his unpreserved claim under *Grigsby*, we, accordingly, will not treat his claim as preserved.

Id. at 327. Jefferson does not argue that the trial judge imposed a sentence that was contrary to statute, and we do not believe that it was. KRS 532.050(6) provides as follows:

Before imposing sentence, the court shall advise the defendant or his or her counsel of the factual contents and conclusions of any presentence investigation or psychiatric examinations and afford a fair opportunity and a reasonable period of time, if the defendant so requests, to controvert them. The court shall provide the defendant's counsel a copy of the presentence investigation report. It shall not be necessary to disclose the sources of confidential information.

The plain language of KRS 532.050(6) does not implicate a sentencing decision that was “made without fully considering what sentencing options were allowed by statute[.]” *Webster*, 438 S.W.3d at 326. Instead, KRS 532.050(6) is narrowly written to only concern presentence investigations; nothing in KRS 532.050(6) mandates the trial judge to consider alternate sentencing.

It is true that “the court is required to review the contents of the PSI with the defendant at sentencing[,] and “[s]hould the defendant dispute any of the information contained in the PSI, including Probation and Parole’s preliminary calculation of the presentencing custody credit, the court may hear evidence and make appropriate findings.” *Bard v. Commonwealth*, 359 S.W.3d 1, 5 (Ky. 2011).

Reviewing a PSI with the defendant at sentencing and providing the defendant

with a hearing in which he or she may dispute the contents of the PSI, however, do not directly implicate the trial court's discretion in considering alternate sentencing options. Furthermore, even if the denial of such a hearing results in a denial of due process, that does not make an issue a "sentencing issue." *See Jones v.*

Commonwealth, 382 S.W.3d 22, 28 (Ky. 2011).

Because a KRS 532.050(6) hearing is not a true "sentencing issue" and because Jefferson has entered an unconditional guilty plea, he has waived our consideration of this issue on appeal.

In sum, we hold that, because trial judges do not consider sentencing alternatives under KRS 532.050(6), the failure to request such a hearing is not a "sentencing issue". Therefore, Jefferson waived this issue by pleading guilty.

For the foregoing reasons, the judgment of the Kenton Circuit Court is affirmed.

ALL CONCUR.

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