

Commonwealth of Kentucky
Court of Appeals

NO. 2017-CA-001225-MR

JOHN D. LEE

APPELLANT

v. APPEAL FROM NELSON CIRCUIT COURT
HONORABLE CHARLES C. SIMMS III, JUDGE
ACTION NO. 15-CR-00337

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * **

BEFORE: ACREE, DIXON, AND THOMPSON, JUDGES.

DIXON, JUDGE: John D. Lee appeals from the Nelson Circuit Court order voiding his pretrial diversion agreement, sentencing him to three years' imprisonment, and denying his motion to extend diversion period, or in the alternative, motion for probation. After a careful review, we affirm.

Following an investigation into alleged thefts of money from his aunt, for whom he had a power of attorney, Lee was indicted on charges of knowing

exploitation of an adult, over \$300, and theft by unlawful taking, over \$10,000 but less than \$1,000,000. As the result of a mediation, the Commonwealth agreed to dismiss the first charge, to amend the second charge to theft by unlawful taking, over \$500 but less than \$10,000, and to recommend pretrial diversion for a period of one year or until restitution is paid. Lee claims that the Commonwealth agreed to change the pretrial diversion condition of no new offenses to a condition requiring a new conviction prior to revocation, not simply arrest. Though this condition was provided for in the Commonwealth's offer on a plea of guilty, it does not appear in the motion for pretrial diversion submitted to the trial court or in the trial court's order granting pretrial diversion of a Class D felony.¹ On May 20, 2015, the trial court entered a judgment in accordance with the Commonwealth's recommendation as it appeared on the motion for pretrial diversion.

Thereafter, allegations were made in Jefferson County that Lee had been repeatedly violating a no-contact order, and the Nelson Circuit Court ordered Lee to appear before the court to show cause why his pretrial diversion agreement

¹ Lee's brief contains two incorrect exhibits. Exhibit Two, titled Commonwealth's Offer on a Plea of Guilty, is a different version from the version contained in the certified record. The record version includes the requirement for a new conviction prior to voiding of the pretrial diversion agreement. Exhibit Three, titled Motion for Pretrial Diversion, is not the same version as that entered into the record and signed by the trial court. The record version does not include the provision requiring a new conviction, rather than a new offense, for voiding the pretrial diversion agreement. Our review of this appeal is guided by the documents contained in the certified record, not Lee's incorrect exhibits.

should not be voided. A hearing was held, which resulted in the court voiding Lee's pretrial diversion agreement based on evidence that Lee was harassing his ex-girlfriend and that he had violated an emergency protection order (EPO) issued in Jefferson County. At the time of the hearing, there had not been any convictions based on these allegations. This appeal followed.

At the outset of our review, we note that Lee has failed to include any part of the video record, including a recording of the plea colloquy, revocation hearing, or sentencing, in the appellate record. Pursuant to Kentucky Rules of Civil Procedure (CR) 75.07(5), the onus falls on the appellant or the appellant's counsel to ensure that the record is accurately prepared and certified to this Court. *See also Fanelli v. Commonwealth*, 423 S.W.2d 255, 257-58 (Ky. 1968).

Kentucky jurisprudence has long held that "when the complete record is not before the appellate court, that court must assume that the omitted record supports the decision of the trial court." *Commonwealth v. Thompson*, 697 S.W.2d 143, 145 (Ky. 1985). As the Commonwealth correctly argues, we are constrained to follow this rule of law here.

Lee's arguments on appeal can best be summarized as follows: (1) the trial court erred by failing to advise Lee pursuant to Kentucky Rules of Criminal Procedure (RCr) 8.10 when it disregarded the plea agreement; and (2) the trial court abused its discretion in revoking his pretrial diversion without

complying with Kentucky Revised Statute (KRS) 439.3106 and *Commonwealth v. Andrews*, 448 S.W.3d 773 (Ky. 2014).

First, Lee claims that the trial court failed to follow the plea agreement and before doing so the trial court was required to inform Lee of this on the record and give Lee the opportunity to withdraw the plea, in accordance with RCr 8.10. In addition to arguing that we must assume in favor of the trial court when we do not have the complete record, the Commonwealth claims that Lee is precluded from making this argument because it is not preserved for review. While Lee contends this issue was preserved “by the express terms of the Commonwealth’s Offer on a Plea of Guilty and Motion for Pretrial Diversion, and by [his] Motion to Extend the Term of Diversion and Motion for Probation,” nowhere in any of these documents does Lee raise an RCr 8.10 violation. Therefore, this issue was not preserved for appellate review and we will not consider it. *Kennedy v. Commonwealth*, 544 S.W.2d 219, 222 (Ky. 1976), *overruled on other grounds by Wilburn v. Commonwealth*, 312 S.W.3d 321 (Ky. 2010).

Second, Lee claims that the trial court erred in voiding his pretrial diversion agreement and denying probation by failing to comply with KRS 439.3106 and *Andrews*. In determining whether to void a pretrial diversion agreement, “the court shall use the same criteria as for the revocation of probation,

and the defendant shall have the same rights as he or she would if probation revocation was sought.” KRS 533.256(2). The standard of review for a decision to revoke probation is whether the trial court abused its discretion. *Commonwealth v. Lopez*, 292 S.W.3d 878, 881 (Ky. 2009). This requires us to determine whether “the trial judge’s decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

Pursuant to KRS 439.3106, the trial court is required to make two findings of fact prior to revoking a defendant’s probation, or in this case, voiding a defendant’s pretrial diversion. KRS 439.3106 provides as follows:

Supervised individuals shall be subject to:

- (1) Violation revocation proceedings and possible incarceration for failure to comply with the conditions of supervision when such failure constitutes a significant risk to prior victims of the supervised individual or the community at large, and cannot be appropriately managed in the community; or
- (2) Sanctions other than revocation and incarceration as appropriate to the severity of the violation behavior, the risk of future criminal behavior by the offender, and the need for, and availability of, interventions which may assist the offender to remain compliant and crime-free in the community.

Accordingly, probation can only be revoked after finding that the defendant’s failure to abide by the probation conditions constitutes a significant

risk and the defendant cannot be safely managed in the community. The court retains its broad discretion in matters of probation, but according to *Andrews*, such discretion must be “exercised consistent with statutory criteria.” 448 S.W.3d at 780. The court is required to make explicit findings as to each element, either orally on the record or in the court’s written order. *Lainhart v. Commonwealth*, 534 S.W.3d 234, 238 (Ky. App. 2017).

Here, the trial court’s written order voiding Lee’s pretrial diversion agreement consists of notes made on the docket sheet during the hearing and the final judgment of conviction entered on June 23, 2017. The notes on the docket sheet state that Lee has violated his pretrial diversion agreement by harassing his ex-girlfriend and by violating an EPO from Jefferson County. The final judgment of conviction marked that probation was denied because it would unduly depreciate the seriousness of Lee’s crime. This is the extent of the trial court’s findings available to this Court. Because the video record of the hearing and sentencing was not provided, we must assume that the trial court made the requisite findings to support its decision to void Lee’s pretrial diversion agreement and to deny probation. Thus, the trial court did not err in voiding the pretrial diversion agreement or denying probation.

Based on the foregoing, the order of the Nelson Circuit Court is affirmed.

ACREE, JUDGE, CONCURS IN ALL ASPECTS BUT FILES
SEPARATE OPINION.

THOMPSON, JUDGE, DISSENTS AND FILES SEPARATE
OPINION.

ACREE, JUDGE, CONCURRING: I concur.

The “function of the Court of Appeals is to review possible errors made by the trial court[.]” *Matthews v. Commonwealth*, 371 S.W.3d 743, 753 (Ky. App. 2011) (quoting *Kaplon v. Chase*, 690 S.W.2d 761, 763 (Ky. App. 1985)). The dissent is appealing, even persuasive, on some level. I agree especially with the dissent’s apparent embrace of the principle that “each time we do not strictly apply the rules we erode them.” *Gambrel v. Gambrel*, 501 S.W.3d 900, 902 (Ky. App. 2016). Still, nothing in the dissent points to any error by the trial court.

On the other hand, what this Court said next in *Gambrel* applies here:

We certainly hope this case serves as a warning to practitioners to carefully read and follow CR 98 to avoid missteps on behalf of their clients and to ensure a complete record—containing all relevant videos, CDs and DVDs—is certified to the appellate court. Additionally, we strongly encourage the Supreme Court of Kentucky to clarify this apparently grey area which predominantly occurs in family court practice to revise CR 98 to specify hearings resulting in a final determination (DVO, Dependency, Neglect and Abuse—DNA, Termination of Parental Rights—TPR, etc.) must be designated by the appellant to be included in the record on appeal, or circuit clerks must certify such hearings as part of the record automatically.

Id. The good news for Lee is that, unlike the appellant in *Gambrel*, he has not exhausted his right to appeal errors by his counsel, and that is where Lee's constitutional protections arise.

For this reason, and for the reasons set forth in the majority opinion, I concur.

THOMPSON, JUDGE, DISSENTING: Respectfully, I dissent. Based on the lack of the video recordings of the guilty plea hearing, pretrial diversion revocation hearing and sentencing hearing in the appellate record, the majority assumes the record supports the trial court's judgment and sentence. That assumption essentially disposes of the issues raised. I cannot join in such a harsh result, which does nothing to assure that this criminal defendant's constitutional rights were protected, and statutory sentencing mandates were followed.

Defense counsel did not file a designation of record. The initial question and one not addressed by the majority is whether a designation of record is required where the only record in this criminal appeal consists of the written record and video recordings. Two rules are relevant.

First, Kentucky Rules of Civil Procedure (CR) 75.01 states that "[u]nless an agreed statement of the case is certified as provided in Rule 75.15, the proceedings were taken exclusively by video recording as governed by Rule 98, or there are no proceedings to transcribe, the appellant shall file a designation of

untranscribed material.” The proceedings at issue in this case were all recorded on video and, therefore, CR 98 is controlling.

CR 98(3) states in part:

The official video recordings, together with the clerk’s written record, shall constitute the entire original record on appeal. To facilitate the timely preparation and certification of the record as set out in this rule, appellant or counsel for appellant, if any, shall provide the clerk with a list setting out the dates on which video recordings were made for all pre-trial and post-trial proceedings necessary for inclusion in the record on appeal.

(a) Preparation and Certification by Clerk. *The circuit court clerk shall prepare and certify the entire original record on file in his/her office.*

(Emphasis added.)

I submit that a reasonable interpretation of CR 75.01 and CR 98(3) is that the video recording of a guilty plea, pretrial diversion revocation hearing and sentencing hearing are part of the original record that the clerk has a ministerial duty to automatically include in the record on appeal. Those proceedings resulted in a final determination of guilt and sentencing. That being so, this Court has the power to direct a supplemental record to be certified and transmitted by the circuit court clerk pursuant to CR 75.08. I suggested this Court do just that by order, but my panel members disagreed.

I am aware of cases holding that the appellant bears the burden of ensuring that the record is adequately certified and, absent a complete record, it

may be assumed that the record supports the trial court's decision. I make three points as to why it is inappropriate to assume anything from the lack of a complete record in this case.

First, Lee alleges that he was not fully informed of the consequences of his plea and that the trial court failed to follow Kentucky Revised Statutes (KRS) 439.3106. These are laws that must be shown to have been affirmatively followed by the trial court. That can be done only by a review of the guilty plea hearing, pretrial diversion revocation hearing and sentencing hearing.

Second, I again point out that with a simple order, this Court could obtain the video recordings from the clerk. Unlike untranscribed material which must be transcribed by a court reporter at the attorney's direction, the video recordings are in the clerk's office under the clerk's control and possession. It is unacceptable for this Court to essentially deny a criminal defendant his right to appeal based on a perceived procedural error by counsel and one that has not prejudiced the Commonwealth. The approach taken by the majority is particularly repugnant to the concept of judicial review where a criminal defendant alleges that there were constitutional deficiencies in the plea process and that his sentencing did not comply with statutory law.

My final point is a practical one. The majority has not punished the attorney in this case for his perceived error. It has punished the defendant who has

lost his right to meaningful review because of that error. The next step for Lee will almost certainly be a claim for ineffective assistance of appellate counsel, causing additional motions and hearings. This is nonsensical when this Court could simply obtain the video recordings of the hearings and put this matter to rest instead of inadvertently creating an ineffective assistance of appellate counsel claim. In short, sanction the attorney for his error, not the defendant.

It has been said that “each time we do not strictly apply the [civil] rules we erode them.” *Gambrel v. Gambrel*, 501 S.W.3d 900, 902 (Ky.App. 2016). I submit that each time we apply those same rules to deny a criminal defendant the right to appellate review, we erode the federal and state constitutions. I would direct the circuit clerk to certify the guilty plea hearing, the pretrial diversion revocation hearing and the sentencing hearing to this Court and decide the appeal on the merits.

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