

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2018-CA-000212-MR

ANTHONY GARRETT

APPELLANT

v. APPEAL FROM MONTGOMERY CIRCUIT COURT  
HONORABLE BETH LEWIS MAZE, JUDGE  
ACTION NO. 17-CR-00047

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING IN PART, VACATING IN PART,  
AND REMANDING

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

KRAMER, JUDGE: Anthony Garrett was convicted of three counts of first-degree, first offense, trafficking in a controlled substance and being a first-degree persistent felony offender. At final sentencing, the Montgomery Circuit Court sentenced Garrett to eighteen years of imprisonment and to pay restitution. After

careful review of the record and applicable law, we affirm in part, vacate in part, and remand.

### **FACTUAL AND PROCEDURAL BACKGROUND**

Garrett was indicted by a Montgomery County grand jury for trafficking in a controlled substance, first degree, first offense and being a persistent felony offender for selling cocaine in four separate controlled buys to the Mount Sterling Police Department (“MSPD”). Following this indictment, the Commonwealth filed a superseding indictment charging each of the controlled buys as separate trafficking charges, resulting in a total of six counts.

Two days before trial was to begin, a hearing was held on Garrett’s motion for a continuance. During the hearing, the circuit court noted that Garrett had rejected the Commonwealth’s plea agreement and explained that if Garrett changed his mind and decided not to go to trial, any future plea would be considered an open plea. Ultimately, the circuit court granted the continuance.

The day before trial was scheduled to begin, Garrett moved to enter a guilty plea. At the hearing, the Commonwealth explained that the previous offer of eight years was no longer being offered. The circuit court further explained that Garrett would now be entering an open plea and could be sentenced to a maximum of twenty years. The circuit court allowed Garrett to step outside of the courtroom to speak with his counsel to discuss the consequences of entering an open guilty

plea. Garrett decided to move forward with entering the open guilty plea. The circuit court questioned him to determine that he fully understood the consequences of the plea and ordered a presentencing investigation (“PSI”) to be completed before the final sentencing hearing.

At the final sentencing hearing, the circuit court acknowledged that it had received the PSI and allowed Garrett to make a statement to the court. The circuit court noted that Garrett had served honorably in the military and that he came from a good family. It also acknowledged that it was Garrett’s choice to reject the offer of the Commonwealth and that he had “rolled the dice.” The circuit court further explained that it believed that had this gone to trial, a jury would have convicted Garrett and sentenced him to the maximum sentence of twenty years. It noted also that Garrett had seven prior felonies and a lengthy criminal record. The circuit court sentenced Garrett to eighteen years and ordered \$400 in restitution to be paid to the MSPD within one year of his release.

This appeal followed.

### **ANALYSIS**

Garrett asserts that the circuit court erred by sentencing him to eighteen years of imprisonment and ordering him to pay restitution to MSPD. We will address each of these arguments in turn.

A. *The circuit court did not abuse its discretion by imposing the eighteen-year sentence.*

In cases involving sentencing issues, this Court reviews the decision of the trial court under the abuse of discretion standard.

Kentucky statutory law affords trial courts immense discretion in setting criminal penalties. . . . In reaching sentencing decisions, Kentucky law does require trial courts to consider certain factors. For example, the trial court must consider the contents of the written Pre-Sentencing Investigation (PSI) Report, and it must also consider the effect of a sentence on a defendant's potential future criminal behavior. But because such decisions are ultimately committed to the trial court's sound discretion, we review these rulings for an abuse of discretion. So we will not disturb the trial court's sentencing determination unless convinced that its decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.

*Howard v. Commonwealth*, 496 S.W.3d 471, 475 (Ky. 2016) (internal citations and quotation marks omitted).

Garrett argues that the circuit court abused its discretion when it considered extraneous factors during the sentencing hearing. We disagree.

These extraneous factors, according to Garrett, were: (1) that he inconvenienced the circuit court by not accepting the Commonwealth's plea agreement; and (2) that he moved to continue his trial. The record does not support these assertions. While it is true that the circuit court referenced Garrett's rejection of the Commonwealth's plea agreement when explaining the reason that

this was now an open plea, the record does not reflect that these were factors considered in determining Garrett's sentence.

Before a trial court imposes a sentence in a felony case, there are certain factors that must be given consideration. The Supreme Court of Kentucky has previously explained these factors to be as follows:

KRS<sup>[1]</sup> 532.050(1) states that “[n]o court shall impose a sentence for conviction of a felony, other than a capital offense, without first ordering a presentence investigation after conviction and giving due consideration to a written report of the investigation.” RCr<sup>[2]</sup> 11.02 requires “[b]efore imposing sentence the court shall . . . examine and consider the (presentence) report . . . [.]” KRS 533.010(1) provides “[b]efore imposition of a sentence of imprisonment, the court shall consider probation, probation with an alternative sentencing plan, or conditional discharge.” The trial court may impose a sentence of imprisonment (with exceptions not applicable here) only “after due consideration of the nature and circumstances of the crime and the history, character and condition of the defendant.” KRS 533.010(2).

*McClanahan v. Commonwealth*, 308 S.W.3d 694, 702 (Ky. 2010).

It is clear from the record that the circuit court considered all the appropriate factors before sentencing Garrett to eighteen years of imprisonment. During the final sentencing hearing, the circuit court had ordered and properly utilized the PSI, acknowledged Garrett's honorable service in the military, but

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<sup>1</sup> Kentucky Revised Statute.

<sup>2</sup> Kentucky Rule of Criminal Procedure.

noted that he had seven prior felonies. At previous court dates, the circuit court had also explained that Garrett was a danger to the community. Given this and Garrett's criminal history, imposing an eighteen-year sentence was not an abuse of discretion.

*B.                    Restitution*

Garrett contends that the circuit court's order to pay \$400 in restitution to MSPD violated his due process rights and that the Commonwealth was not entitled to restitution. However, Garrett admits that the issue is unpreserved and ask for review under the palpable error standard.

We review unpreserved issues under the palpable error standard of RCr 10.26. *Potts v. Commonwealth*, 172 S.W.3d 345 (Ky. 2005). Under that rule, an unpreserved error may be noticed on appeal only if the error is "palpable" and "affects the substantial rights of a party," and even then relief is appropriate only "upon a determination that manifest injustice has resulted from the error." RCr 10.26. In general, a palpable error "affects the substantial rights of a party" only if "it is more likely than ordinary error to have affected the judgment." *Ernst v. Commonwealth*, 160 S.W.3d 744, 762 (Ky. 2005). An unpreserved error that is both palpable and prejudicial still does not justify relief unless the reviewing court further determines that it has resulted in a manifest injustice, unless the error so seriously affected the fairness, integrity, or public reputation of the proceeding as to be "shocking or jurisprudentially intolerable." *Martin v. Commonwealth*, 207 S.W.3d 1, 4 (Ky. 2006).

*Wiley v. Commonwealth*, 348 S.W.3d 570, 574 (Ky. 2010).

Garrett alleges that there was no factual basis provided in the record to support the order of restitution, which denied him adequate notice and violated his due process rights. We agree. In *Jones v. Commonwealth*, 382 S.W.3d 22, 32 (Ky. 2011), the Supreme Court of Kentucky explained that,

when the issue of restitution under KRS 532.032 has not been resolved by an agreement between the Commonwealth and the defendant, constitutional due process requires an adversarial hearing that includes the following protections:

- reasonable notice to the defendant in advance of the sentencing hearing of the amount of restitution claimed and of the nature of the expenses for which restitution is claimed; and
- a hearing before a disinterested and impartial judge that includes a reasonable opportunity for the defendant, with assistance of counsel, to examine the evidence or other information presented in support of an order of restitution; and
- a reasonable opportunity for the defendant with assistance of counsel to present evidence or other information to rebut the claim of restitution and the amount thereof; and
- the burden shall be upon the Commonwealth to establish the validity of the claim for restitution and the amount of restitution by a preponderance of the evidence, and findings with regard to the imposition of restitution must be supported by substantial evidence.

Here, there is no mention of restitution in the record until the final sentencing hearing and order. There is also no evidence in the record that there

was any agreement between the parties concerning the issue of restitution. Nor is there any evidence explaining the factual basis for restitution. Therefore, a hearing regarding restitution was necessary; however, it appears that such a hearing was not held. Consequently, the minimal due process requirements set forth in *Jones* were not met, resulting in a manifest injustice. Therefore, we vacate the order of restitution and remand the case to the circuit court to conduct a proper hearing in conformity with *Jones*.

Garrett also alleges that palpable error occurred when the circuit court ordered restitution to be paid to MSPD to recoup expenses for the controlled buys. However, the Commonwealth asserts that this argument is a mere speculation because the record is unclear as to what the basis of restitution was. We agree, as the record is silent as to what the circuit court relied upon in making this determination. Because of the lack of evidence in the record to support a basis for restitution, there is no “present ongoing controversy.” Therefore, Garrett is asking this Court to make a speculation as to the basis for this order, which would require this Court to render an advisory opinion.

The existence of an actual controversy respecting justiciable questions is a condition precedent to an action . . . . The court will not decide speculative rights or duties which may or may not arise in the future, but only rights and duties about which there is a present actual controversy presented by adversary parties, and in which a binding judgment concluding the controversy may be

entered.

*Nordike v. Nordike*, 231 S.W.3d 733, 739 (Ky. 2007) (internal quotation marks omitted).

Accordingly, this is not a justiciable issue before this Court and we direct the circuit court to explain the basis for the restitution order at the future hearing.

### CONCLUSION

For the above stated reasons, we affirm the Montgomery Circuit Court's imposition of the eighteen-year sentence. We also vacate the restitution judgment and remand for a hearing consistent with this opinion.

ALL CONCUR.

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