

RENDERED: MAY 24, 2019; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2018-CA-000656-MR

SCOTTY ANTHONY ANDERSON

APPELLANT

v. APPEAL FROM MARSHALL CIRCUIT COURT
HONORABLE JAMES T. JAMESON, JUDGE
ACTION NO. 17-CR-00219

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: CLAYTON, CHIEF JUDGE; COMBS AND KRAMER, JUDGES.

COMBS, JUDGE: This is a criminal case in which Scotty Anthony Anderson, Appellant, entered a plea of guilty to first-degree possession of a controlled substance. He received a sentence of two-and-one-half years of probation with one

year to serve in jail as an alternative sentence. He now appeals that sentence.

After our review, we affirm.

On September 12, 2017, Anderson was indicted on one count of first-degree possession of a controlled substance,¹ first offense (heroin). The record reveals that while on bond, Anderson failed to report for drug testing and the Commonwealth moved to revoke his bond. At his arraignment, the circuit court released Anderson on an ankle monitor and ordered him to participate in a short-term recovery program. Within a few weeks, Anderson was dismissed from the program because he tested positive for methamphetamine and oxycodone. The Commonwealth again filed a motion to revoke Anderson's bond, which the circuit court granted. On January 23, 2018, Anderson entered a plea of guilty to the sole charge in the indictment based upon the Commonwealth's recommendation of a sentence of two-and-one-half years' imprisonment.

At sentencing, Anderson requested a continuance for additional time to find a bed at a long-term drug rehabilitation facility. The circuit court declined to grant a continuance and proceeded with sentencing. After consulting counsel, Anderson requested to forgo probation and be remanded to the Department of Corrections to wait for parole. Counsel informed the circuit court that a motion for

¹ Kentucky Revised Statutes (KRS) 218A.1415, a Class D felony.

shock probation would be filed as soon as a bed at a rehabilitation facility was secured for Anderson.

The circuit court cited the presumption of probation for the offense to which Anderson pled.² Citing consideration of Anderson's pre-sentence investigation (PSI) report and the KRS 533.010 factors, the circuit court found probation appropriate in Anderson's case and sentenced him to two-and-one-half years' probation with an alternative sentence of one year to serve in jail. Upon defense counsel's objection, the circuit court cited Anderson's history of failing drug court and "continued manipulation" as reasons for imposing the alternative sentence. This appeal followed.

We review a trial court's determination of whether or not to grant probation for abuse of discretion. *Arnett v. Commonwealth*, 366 S.W.3d 486, 489 (Ky. App. 2011) (citations omitted). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Id.* (citations and internal quotation marks omitted).

On appeal, Anderson argues that the circuit court's imposition of an alternative sentence was improper and that it must be vacated. Anderson primarily relies upon the legislative commentary to KRS 533.010 in support of his argument. This commentary states, in part, that the purpose of the statute was to "establish a

² KRS 218A.1415(2)(b).

policy in favor of rehabilitation of offenders within the community and free of incarceration.” Although the intent of the legislature may have been to favor probation in certain cases, “the granting of probation is wholly within the discretion of the [circuit] court.” *Burke v. Commonwealth*, 506 S.W.3d 307, 314 (Ky. 2016) (citing *Ridley v. Commonwealth*, 287 S.W.2d 156, 158 (Ky. 1956)). The legislative commentary on KRS 533.010 acknowledges that the statute is meant only “to guide the court in the exercise of [its] discretion.” Furthermore, although KRS 533.010(1) allows the circuit court to sentence any person to probation except for those sentenced to death, it does not *require* probation. The statute also specifically allows for the imposition of an alternative sentence, including up to twelve months to be served in jail, “when the court deems it in the best interest of the public and the defendant.” KRS 533.010(6)(c).

In the case before us, the circuit court considered both Anderson’s PSI report and the statutory factors in KRS 533.010 in determining Anderson’s sentence. The court explained Anderson’s history of failing to successfully complete drug court and manipulative behavior as its reasons for imposing an alternative sentence. Therefore, the circuit court did not abuse its discretion by imposing probation with an alternative sentence.

We affirm the judgment of the Marshall Circuit Court.

CLAYTON, CHIEF JUDGE, CONCURS.

KRAMER, JUDGE, DISSENTS.

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