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NOT TO BE PUBLISHED

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2018-CA-001431-MR

BRANDON TYLER JONES

APPELLANT

v. APPEAL FROM ADAIR CIRCUIT COURT  
HONORABLE JUDY VANCE MURPHY, JUDGE  
ACTION NOS. 18-CR-00040 AND 18-CR-00042

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
REVERSING AND REMANDING

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BEFORE: KRAMER, MAZE AND L. THOMPSON, JUDGES.

THOMPSON, L., JUDGE: Brandon Jones appeals from the Adair Circuit Court's decision to deny him probation on two drug related charges. Appellant argues that the trial court abused its discretion in denying him probation because it did not follow the relevant statute. We agree and reverse and remand.

## **FACTS AND PROCEDURAL HISTORY**

On January 19, 2018, Appellant was indicted in two separate cases.

In 18-CR-00040, Appellant was indicted on one count of possession of a controlled substance, first degree (methamphetamine).<sup>1</sup> In 18-CR-00042, Appellant was indicted on one count of possession of a controlled substance, first degree (methamphetamine),<sup>2</sup> possession of drug paraphernalia,<sup>3</sup> and possession of marijuana.<sup>4</sup> On July 10, 2018, Appellant entered a guilty plea that encompassed both criminal cases. The Commonwealth's guilty plea offer recommended a total sentence of two years for each case. The sentences were to run consecutively for a total of four years in prison.

The following was also included in the Commonwealth's offer on a plea of guilty in both cases:

If the Defendant violates any bond conditions pending sentencing, or if the Defendant fails to appear for final sentencing, then the Commonwealth will oppose probation. If the Defendant complies with all bond conditions and voluntarily appears on the scheduled sentencing date, then the Commonwealth will recommend probation for a period of five (5) years.

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<sup>1</sup> Kentucky Revised Statute (KRS) 218A.1415.

<sup>2</sup> KRS 218A.1415.

<sup>3</sup> KRS 218A.500(2).

<sup>4</sup> KRS 218A.1422.

Appellant was then released on bond and ordered to report to pretrial services. Appellant was released from custody on July 11, 2018, and as of July 17, 2018, he had not reported to pretrial services. Appellant's bond was revoked because he did not report to pretrial services and he was arrested.

Appellant appeared before the trial court for final sentencing on August 14, 2018. Due to Appellant failing to contact pretrial services when he was released on bond, the Commonwealth opposed probation. The trial court opined from the bench that it was denying probation because of Appellant's failure to contact pretrial services. Appellant was sentenced to a total of four years in prison. This appeal followed.

### **ANALYSIS**

Appellant's only argument on appeal is that the trial court abused its discretion in denying him probation. Specifically, Appellant argues that Kentucky statutory law provides for a presumption of probation for the crimes he pleaded guilty to. He cites to KRS 218A.1415(2)(d) and KRS 218A.010(44)<sup>5</sup> to support his argument.

KRS 218A.1415(2)(d) states that when convicted of possession of a controlled substance in the first degree, "[i]f a person does not enter a deferred

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<sup>5</sup> In his brief, Appellant uses the citation KRS 218A.010(43); however, after Appellant filed his brief, KRS 218A.010 was amended. The new version of this statute became effective on June 27, 2019. KRS 218A.010(43) is now KRS 218A.010(44).

prosecution program for his or her first or second offense, he or she shall be subject to a period of presumptive probation, unless a court determines the defendant is not eligible for presumptive probation as defined in KRS 218A.010.”

KRS 218A.010(44) defines presumptive probation as:

a sentence of probation not to exceed the maximum term specified for the offense, subject to conditions otherwise authorized by law, that is presumed to be the appropriate sentence for certain offenses designated in this chapter, notwithstanding contrary provisions of KRS Chapter 533. That presumption shall only be overcome by a finding on the record by the sentencing court of substantial and compelling reasons why the defendant cannot be safely and effectively supervised in the community, is not amenable to community-based treatment, or poses a significant risk to public safety[.]

Appellant argues that the trial court did not state on the record any of the reasons set forth by KRS 218A.010(44) that would overcome the presumption of probation. We agree.

The trial court stated orally during Appellant’s sentencing that it was not granting probation because Appellant did not contact pretrial services when he was released on bond. In the written judgement and sentence, the court stated:

Having given due consideration to the written report by the Division of Probation and Parole, and the nature and circumstances of the crime, and to the history, character and condition of the defendant, the court is of the opinion that imprisonment is necessary for the protection of the public because probation, probation with an alternative sentencing plan, or conditional discharge would unduly depreciate the seriousness of the defendant’s crime.

KRS 218A.1415(2)(d) and KRS 218A.010(44) indicate that Appellant should have been granted probation unless the trial court found, on the record, substantial and compelling reasons why Appellant could not be safely and effectively supervised in the community, was not amenable to community-based treatment, or posed a significant risk to public safety. There is no evidence in the record that the trial court considered whether Appellant could be supervised in the community or posed a significant risk to the public. The court only considered Appellant's failure to contact pretrial services and whether probation would depreciate the seriousness of Appellant's crimes.

While the decision as to whether to grant probation is within the discretion of the trial court, *Turner v. Commonwealth*, 914 S.W.2d 343, 347 (Ky. 1996), that discretion must be exercised consistent with the relevant statutory criteria. There is no evidence in the record that indicates the trial court considered the factors that would overcome the presumption of probation in this case. While it may be true that Appellant should not be granted probation, the trial court must indicate on the record that it considered the KRS 218A.010(44) factors.

### **CONCLUSION**

Based on the foregoing, we reverse and remand for a new sentencing.

ALL CONCUR.

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