IMPORTANT NOTICE

NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.

RENDERED: OCTOBER 23, 2003
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL
DATE 11-13-03 Ella Growitt, D.C.

2002-SC-1070-MR

ANTHONY WENTWORTH — APPELLANT

V.

APPEAL FROM HENRY CIRCUIT COURT
HONORABLE PAUL W. ROSENBLUM, JUDGE
1998-CR-0017 AND 1998-CR-0045

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Anthony Wentworth, pursuant to a plea agreement, pled guilty to two counts of first-degree rape, one count of first-degree sodomy, one count of first-degree burglary, two counts of tampering with physical evidence, and one count of retaliation against a witness. He was sentenced to a total of twenty years' imprisonment and appeals to this Court as a matter of right. On appeal, Wentworth argues that the trial court erred in not allowing him to withdraw his plea. Further, he argues that the trial court applied the wrong standard of proof when it determined that he had violated the terms of the plea agreement. For the reasons set forth below, we affirm the judgment of the Henry Circuit Court.

I. Facts and Procedural History

In April 1998, Wentworth was indicted for a number of serious offenses, including first-degree rape and first-degree sodomy, in connection with a sexual assault

against the thirteen-year-old daughter of his girlfriend at the time. Wentworth initially pled not guilty and was released from custody on bail. Subsequently, he was indicted for additional offenses in connection with another assault on the same thirteen-year-old girl on or about August 17, 1998. These additional charges included first-degree rape, first-degree burglary, and kidnapping. Wentworth again pled not guilty, but this time he remained in custody.

On September 13, 2000, Wentworth appeared before the Henry Circuit Court and pled guilty to the majority of the counts in each indictment. Sentencing was delayed, however, for two (2) years. Instead, Wentworth was released on a $50,000.00 unsecured property bond and placed in home detention monitoring through the Kentucky Alternative Program. Further, a number of other restrictions and conditions were placed on Wentworth's release. These included avoiding all contact with the victim or the victim's family, enrolling in and completing a sexual offender treatment program, being regularly employed at one of four specified locations, earning his GED and, finally, refraining from all illegal activity. Under the plea agreement, if Wentworth adhered to the restrictions and met the conditions, he would, two years hence, be allowed to withdraw his guilty plea and enter a plea to lesser offenses, for which he would receive a probated sentence.

On August 10, 2001, the Commonwealth moved to revoke Wentworth's bond and to have final sentence imposed for the crimes to which Wentworth pled guilty. After a hearing on the motion, the trial court entered an order on August 22, 2001, in which the trial court found that Wentworth had violated the conditions of his release. Consequently, the trial court revoked Wentworth's bond and remanded Wentworth to custody to await sentencing. In the order, the trial court found that Wentworth had

violated the terms of his release by failing to furnish satisfactory evidence of his hours employed and failed to engage in active employment in one of the four locations. Wentworth moved to reconsider.

After a hearing on the motion to reconsider, the trial court entered an order on April 19, 2002, that set aside its previous order. The trial court did so because (1) the Commonwealth took the position on the motion to reconsider that it was not seeking to revoke Wentworth's bond based on the hours worked by Wentworth, and (2) the Commonwealth failed to prove by clear and convincing evidence that there was indeed work available at one of the four locations established in the plea agreement. Nonetheless, the trial court still revoked Wentworth's bond because it found, by clear and convincing evidence, that Wentworth materially breached the plea agreement by engaging in criminal activity. Specifically, the trial court found that Wentworth was guilty of second-degree forgery, KRS 516.060, in connection with a forged GED certificate Wentworth presented to a potential employer when applying for a job. Wentworth was again remanded to custody to await re-sentencing.

Wentworth responded to his Pyrrhic victory by moving to withdraw his guilty plea. The trial court denied the motion and entered a judgment on December 3, 2002, which sentenced Wentworth to a total of twenty years' imprisonment. This appeal followed.

II. Discussion

Withdrawal of Guilty Plea

Wentworth first argues that the trial court erred in denying his motion to withdraw his guilty plea. In support of this argument, he maintains that the trial court had no authority to accept the plea agreement in the first place, which he tries to show with a shotgun blast of arguments. We will take each pellet fired in turn.

First, Wentworth argues that the delay in sentencing established in the plea agreement violates RCr 11.02(1), which provides in pertinent part that "[s]entence shall be imposed without unreasonable delay." While Wentworth did have the right to a speedy sentence under the rule, "[a]bsent some manifest injustice, the right to complain about the denial of such right is contingent upon having demanded its exercise in the first place." Commonwealth v. Tiryung, Ky., 709 S.W.2d 454, 457 (1986). Not only did Wentworth not demand the imposition of a speedy sentence, he waived the right by entering into the plea agreement. Just as the constitutional right to a speedy trial can be waived, see Barker v. Wingo, 407 U.S. 514, 529, 92 S. Ct. 2182, 2191, 33 L. Ed. 2d 101 (1972), so too can a rule-made right to speedy sentencing. This is especially true in a case like this where the delay in sentencing actually benefits the defendant. For had the trial court promptly sentenced Wentworth, he would have lost all opportunity to withdraw his plea. See RCr 8.10.

Next, Wentworth argues that the plea agreement is not authorized by either the statutory pretrial diversion program, KRS 533.250, et seq., or the pretrial diversion rule set forth in RCr 8.04. Of course, as noted by the trial court, this is not a pretrial diversion. Rather, it is a plea agreement and the issue is whether the agreement is valid. The answer to this question is found in Jones v. Commonwealth, Ky., 995 S.W.2d 363 (1999), in which we unanimously upheld the validity of a similar plea agreement.

The relevant facts surrounding the plea agreement in Jones are as follows:

> As part of the plea agreement, the Commonwealth agreed to Jones' release on an unsecured bond of $50,000, with the understanding that the recommended 6-year sentence was contingent upon three conditions: 1) that Jones give a statement of his illegal activities; 2) that he meet with a member of the Attorney General's office on a set date and give a full and

> complete statement; and 3) that he reappear in court for final sentencing. If Jones complied with these provisions, the Commonwealth agreed not to oppose parole in his case, and to advise the parole board of his cooperation. If he did not comply with these conditions, the Commonwealth would recommend a maximum sentence of twenty years instead of six years. After conducting a guilty plea colloquy, the circuit court accepted Jones' guilty plea and released him on the unsecured $50,000 bond pending his date of sentencing. Inexplicably, he did not appear on the scheduled date for sentencing and a bench warrant was issued for his arrest. Following his arrest several months later, Jones was sentenced to twenty years in prison in accordance with the plea agreement.

Jones, 995 S.W.2d at 365. After considering all of Jones' arguments on appeal, we held that the plea agreement was valid and enforceable and, therefore, affirmed his conviction and sentence. Id.

The only substantial difference between the terms of the plea agreement struck in Jones and the one struck between the Commonwealth and Wentworth, is that the agreement in Jones merely provided for a reduced sentence if the defendant complied with the terms of the agreement. Whereas the agreement at issue here provided that Wentworth had the right to withdraw his original plea and then to plead guilty to lesser charges -- for which he would receive a probated sentence -- if he complied with the terms of the agreement. This wrinkle, while novel, achieved the same result, i.e., a reduced sentence in exchange for complying with the plea agreement, and did not somehow invalidate the plea agreement.

Finally, we turn to the real issue here, which is whether, in denying Wentworth's motion to withdraw his guilty plea, the trial court abused its discretion under the criminal rules to entertain the motion. See RCr 8.10. ("At any time before judgment the court may permit the plea of guilty . . . to be withdrawn and a plea of not guilty substituted.") "The test for abuse of discretion is whether the trial judge's decision was arbitrary,

unreasonable, unfair, or unsupported by sound legal principles." Commonwealth v. English, Ky., 993 S.W.2d 941, 945 (1999). We hold that the trial court did not abuse its discretion in denying Wentworth's motion.

The trial court's order in this case is a model of clarity and reason. The order carefully sets forth both arguments, the trial court's findings of fact, and then its conclusions of law based on these facts. In the order, the trial court found that (1) Wentworth knowingly and voluntarily entered the guilty plea and thereby waived his right to trial; (2) the Commonwealth announced a zero tolerance policy with respect to all conditions set forth in the plea agreement, and that any deviation with respect to any condition would result in motions for revocation of bond and immediate imposition of a final sentencing on the guilty plea; (3) Wentworth understood, at the time the plea agreement was entered into, that he would be incarcerated if he didn't fulfill the conditions of the plea agreement; (4) one of the conditions of the plea agreement was that Wentworth must refrain from all criminal activity; (5) Wentworth materially violated the conditions of the plea agreement by using a forged GED certificate in the job application process; and (6) the plea agreement did not bind the Commonwealth to recommend any specific sentence for the crimes to which Wentworth pled guilty.

In denying Wentworth's motion to withdraw his guilty plea, the trial court reasoned that Wentworth "agreed to a deferral of sentencing so that he could receive a better disposition, conditioned on compliance with various terms and conditions. Having failed to comply with those conditions, he cannot now complain of being sentenced in accordance with the agreement." We agree completely with this reasoning and adopt it as our own.

Burden of Proof

In his final argument, Wentworth argues that the trial court erred in holding the Commonwealth to a clear and convincing standard to show that he violated the plea agreement. (This is the standard applied in a hearing to change the conditions of a prisoner's release under RCr 4.42.) Rather, he argues that the trial court should have employed a beyond a reasonable doubt standard. We disagree.

In Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), the U.S. Supreme Court addressed the constitutionality of a New Jersey hate crime sentence enhancement statute. Under the statute, a trial judge had the discretion to increase a sentence subsequent to a hearing establishing, by a preponderance of the evidence, that a discriminatory motive fueled commission of the crime. The Supreme Court held that, aside from a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proven beyond a reasonable doubt. Id. Apprendi, however, is inapposite to the case sub judice because its holding applies only when the punishment exceeds the statutorily fixed maximum sentence for the crime charged. That is not the case here.

The most serious charges against Wentworth consisted of four (4) Class B felonies. The penalty range for each of these charges was ten (10) to twenty (20) years. As previously noted, Wentworth was ultimately sentenced to a total of twenty (20) years in prison. Thus, Apprendi is not applicable to this case because Wentworth's sentence did not exceed the maximum sentence allowed by law. Consequently, the trial court was not required to hold the Commonwealth to a beyond a reasonable doubt standard to show that Wentworth violated the plea agreement.

For the reasons set forth above, we affirm the judgment of the Henry Circuit Court.

All concur.

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