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ACTION.

Supreme Court of Kentucky

2012-SC-000808-MR

JARED GODIN

APPELLANT

V. ON APPEAL FROM PULASKI CIRCUIT COURT
HONORABLE DAVID A. TAPP, JUDGE
NOS. 12-CR-00143-001 AND 12-CR-00228-001

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

On April 5, 2012, Appellant, Jared Godin, was indicted for Manufacturing Methamphetamine, first offense; Tampering with Physical Evidence; and the offense of Controlled Substance Endangerment to a Child, fourth degree.¹ He was later indicted for an additional count of Manufacturing Methamphetamine, first offense.² The Commonwealth offered Godin a sentence of thirty years in prison, probated for a period of five years, in exchange for his guilty plea. As part of the agreement, all other charges were dismissed. Godin accepted the Commonwealth's offer and was subsequently released on a \$10,000 third-party signature bond. One of the conditions of his bond was home incarceration with electronic monitoring. The facts of the

¹ Pulaski Circuit Court Indictment No. 12-CR-000143-001

² Pulaski Circuit Court Indictment No. 12-CR-000228-001

underlying crimes are not germane to this appeal. Only the circumstances surrounding Godin's guilty plea and sentencing are at issue.

On July 26, 2012, the trial court conducted a plea colloquy with Godin that satisfied the requirements of *Boykin v. Alabama*, 395 U.S. 238, 289 (1969). The terms of the plea agreement as to his sentence and recommended probation were agreed to on the record. The Commonwealth stated that the original offer had been ten years in prison, but Godin had refused that offer and instead accepted a greater sentence of thirty years, probated for five years. On the same date of his guilty plea, Godin was placed on a \$10,000 surety bond with home incarceration. The court advised Godin that the bond conditions were being incorporated as part of the plea agreement. The written bond agreement was signed by Godin and entered of record on August 1, 2012. Therefore, the plea agreement was effectively amended by the written bond agreement which Godin signed, acknowledging that if he violated the law pending final sentencing, the plea agreement would no longer be binding and he would not be allowed to withdraw his guilty plea. Significantly, Godin does not contest the efficacy of the plea bargain, including the terms of the written bond agreement which includes the restriction of not being allowed to withdraw his guilty plea if he breached its terms. The court further advised Godin that he could be sentenced up to forty years if he violated the terms of the plea agreement, including any of the conditions of bond. Final sentencing was set for October 5, 2012.

On August 17, 2012, Godin appeared in court with his attorney and asked to be released from home incarceration so that he could seek employment. After extensive conversation between Godin, his lawyer, and the court, the latter very reluctantly agreed to release Godin from home incarceration. The court once again advised Godin of a range of penalty which could be imposed if he were to violate the terms of the plea agreement and practically begged, "Please don't mess up."

Unfortunately, Godin "messed up." On October 5, 2012, the trial court held an extensive evidentiary hearing to determine whether Godin had violated the conditions of his bond. The court found that Godin had committed fourth-degree assault, alcohol intoxication, and disorderly conduct. The court also found that Godin had committed bribery when he attempted to procure the unavailability of his wife as a witness by offering her consideration in exchange for not testifying against him. Lastly, Godin was charged with contempt of court as a result of his behavior at the hearing.

In light of the evidence presented, the trial court held that Godin's behavior had breached his bond conditions. Therefore, the Commonwealth was relieved of its obligation under the plea agreement. The court further reasoned that Godin had sixteen prior convictions, including the felony offenses of robbery and assault in New Hampshire. Even still, Godin's attorney made an admirable argument for probation and petitioned the court for a sentence less than the thirty years set out in the plea agreement. The court considered the argument of counsel and went to great lengths to review the

history of the case. The court showed admirable patience with Godin's miscreant behavior and denied the Commonwealth's request to impose the maximum sentence. Instead, the trial court sentenced Godin to fifteen years for each offense of manufacturing methamphetamine, with both counts to run consecutively for a total sentence of thirty years. This was ten years less than the statutory maximum sentence allowed and the same term contained in the plea agreement, except that Godin was denied probation.

Godin now appeals his conviction and sentence as a matter of right pursuant to the Ky. Constitution § 110(2)(b). Two issues are raised and addressed as follows.

Withdrawal of Guilty Plea

Godin argues that the trial court erred by not providing him the opportunity to withdraw his guilty plea, as provided by RCr 8.10, since the final sentence deviated from the plea agreement in that Godin did not receive probation. RCr 8.10 states in pertinent part as follows:

If the court rejects the plea agreement, the court shall, on the record, inform the parties of this fact, advise the defendant personally in open court or, on a showing of good cause, in camera, that the court is not bound by the plea agreement, afford the defendant the opportunity to then withdraw the plea, and advise the defendant that if the defendant persists in that guilty plea the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement.

Not only is this issue not properly preserved, we find no error. Therefore, not even palpable review is warranted. *See Martin v. Commonwealth*, 409 S.W.3d 340, 345 (Ky. 2013) (barring palpable error review for unpreserved

claims that the trial court erred in the giving or the failure to give a specific jury instruction). While unnecessary to confront, we nevertheless will briefly address the two glaring fallacies in Godin's argument.

First, the court did not "reject" the plea agreement as anticipated by RCr 8.10. In fact, the court recognized the plea agreement by conducting an extensive evidentiary hearing to determine if Godin had breached its terms. The plea agreement was rendered inoperative because of Godin's misconduct—not because the court "rejected" it.

Secondly, the rule only affords a defendant "the opportunity to then withdraw the plea." We searched the trial record in vain for evidence that Godin requested to withdraw his guilty plea. However, this is not surprising since, under the circumstances, it would have obviously been a meaningless attempt. Godin's attorney instead vigorously challenged the violation of the agreement and pursued a request for probation or a lesser sentence. She was successful in this attempt, as the trial court rejected the Commonwealth's recommendation and imposed the same sentence which Godin would have gotten under the plea agreement. Only probation was denied. The written bond agreement signed by Godin expressly states in pertinent part as follows:

In the event that a material breach occurs the Court will *not allow the defendant to withdraw his/her former plea of guilty* and the Court may release the Commonwealth from [its] former recommendation . . . [.]

(Emphasis added.).

It is clear that the trial court had sufficient evidence to find that Godin materially breached his bond conditions prior to final sentencing. Moreover,

we recognize that there are many tactical reasons for a defendant not to withdraw his guilty plea, even when withdrawal is allowed under RCr 8.10. Here, for instance, Godin received ten years less than what he might have received had his case gone to a jury trial. Accordingly, we find no merit in Godin's improperly preserved assignment of error.

Sentencing

For his second assignment of error, Godin contends that the final sentence imposed by the trial court was an abuse of its discretion. Specifically, Godin argues that the trial court erroneously imposed the plea agreement's "hammer clause." We review for an abuse of discretion. *See Chapman v. Commonwealth*, 265 S.W.3d 156, 177 (Ky. 2007) ("[A] trial court abuses its discretion by automatically accepting or rejecting a guilty plea without first . . . considering all the underlying facts and circumstances, appropriate for the offense(s) in question.").

The plea agreement in this case does not contain a "hammer clause" and, therefore, does not fall squarely within the cases cited by Godin in support of his argument. At no time prior to the sentencing hearing did the trial court commit to any particular sentence. The judge repeatedly referred to a penalty range he would consider and advised Godin that, if he breached the agreement, the court could impose a penalty greater than that originally agreed to and up to the maximum of forty years. This affirmation does not constitute a hammer clause, but merely explains the sentencing range to which Godin agreed was

authorized by statute. See KRS 218A.1432; KRS 532.020(1)(c). The written trial record similarly fails to reveal any provision constituting a hammer clause.

However, for purposes of review, the absence of a hammer clause is not dispositive. *Knox v. Commonwealth*, 361 S.W.3d 891, 899 (Ky. 2012). Prior to imposing any sentence, trial courts must comply with KRS 532.050(1); KRS 532.110(1); KRS 533.010(1) and (2); and RCr 11.02. The cumulative effect of these statutes, rule, and subsequent interpretive cases condemns sentencing decisions made prior to the sentencing hearing, “before ‘due consideration’ could have been given to the ‘nature and circumstances of the crime and the history, character and condition of the defendant.’” *McClanahan v. Commonwealth*, 308 S.W.3d 694, 703 (Ky. 2010) (citing KRS 533.010(2)); see also *Chapman*, 265 S.W.3d at 177.

In this case, the trial judge repeatedly and appropriately explained the sentencing range. He did not, at any time prior to sentencing and even after the breach of the plea agreement by Godin, declare that he was predisposed to impose a certain sentence within that range.

Godin urges this Court to consider additional language employed by the trial judge as evidence that the court failed to exercise its independent discretion in sentencing. Godin argues that the trial court stated: “If you mess up, you can’t really gripe at me because you’re going to the penitentiary for the thirty years you agreed to.” We have reviewed the record and find that this is an inaccurate recounting of the evidence and taken out of context by Godin. The court was asking the Commonwealth for its position upon Godin’s request

to be released from home incarceration. The court then simply answered by paraphrasing what it expected the Commonwealth to say—not what the court was saying. At the final sentencing hearing, the trial court stated to Godin that “[y]our decision in this case was that you wanted to take a much longer potential sentence hanging over your head rather than get that certain time in prison.” These statements are not conclusive of the trial court’s alleged failure to exercise its independent discretion in sentencing.

Unlike our decision in *McClanahan*, the fifteen-year sentences imposed for each of the methamphetamine offenses in this case were within the statutorily authorized range. *McClanahan*, 308 S.W.3d at 698; KRS 218A.1432; KRS 532.020(1)(c). A presentence investigation was also ordered and a report prepared, as required by KRS 532.050 and RCr 11.02. After an evidentiary hearing and a finding that a violation of bond conditions had occurred, the trial court then considered the arguments of counsel regarding final sentencing. The court further considered Godin’s request to impose a sentence of ten years, which had been the original offer by the Commonwealth.

In *Knox v. Commonwealth*, we reversed the judgment of the trial court because the record in that case failed to reveal any indication whatsoever that, “in fixing [defendant’s] sentence, the trial judge might have considered something other than the plea agreement hammer clause.” 361 S.W.3d 891, 896-97 (Ky. 2012). In stark contrast to the facts presented in *Knox*, the trial court in the present case duly considered the directives of KRS 532.050(1); KRS 532.110(1); KRS 533.010(1) and (2); and RCr 11.02 and expressly found

that imprisonment was necessary for the reasons provided in KRS 533.010(2)(a)-(c). Accordingly, the trial court did not abuse its discretion in its sentencing determination.

Conclusion

For the foregoing reasons, the judgment of the Pulaski Circuit Court is hereby affirmed.

All sitting. All concur.

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