

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001848-MR

JONATHAN PUCKETT

APPELLANT

v.

APPEAL FROM TAYLOR CIRCUIT COURT
HONORABLE ALLAN RAY BERTRAM, JUDGE
INDICTMENT NO. 00-CR-00086

COMMONWEALTH OF KENTUCKY

APPELLEE

AND

NO. 2002-CA-001871-MR
NO. 2002-CA-001872-MR

JONATHAN PUCKETT

APPELLANT

v.

APPEALS FROM GREEN CIRCUIT COURT
HONORABLE ALLAN RAY BERTRAM, JUDGE
INDICTMENT NOS. 00-CR-00005
AND 00-CR-00031

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

** ** * * *

BEFORE: EMBERTON, CHIEF JUDGE; DYCHE AND TACKETT, JUDGES.

DYCHE, JUDGE. Jonathan D. Puckett was charged as follows:

Green Circuit Court indictment No. 00-CR-005, returned February 9, 2000, Unlawful Transaction with a Minor, 2d Degree, offense date February 5, 2000; Taylor Circuit Court indictment No. 00-CR-86, returned May 2, 2000, Burglary, 3d Degree, offense date February 10, 2000; and Green Circuit Court indictment No. 00-CR-31, returned July 5, 2000, Receiving Stolen Property, value more than \$300.00, offense date February 10, 2000.

On November 21, 2000, pursuant to his guilty plea to the offenses, Puckett entered into a Pretrial Diversion Agreement with the Commonwealth (KRS 533.250-.262) providing that upon successful completion of a five-year period of refraining from violating the Penal Code or Controlled Substances Act, and compliance with other conditions, the charges in the three indictments would be "designated as Dismissed-Diverted" and subject to expungement.

The agreement also provided that, if Puckett failed to successfully complete the Pretrial Diversion, the agreement would be voided, and that the court "may impose a sentence equal to or less than the penalty recommended by the prosecutor, or

the Court may permit the defendant to withdraw his/her plea. If the defendant persists in his/her plea, the Court may enter a sentence which exceeds the Commonwealth's prior recommendation." The Commonwealth's recommendation for failure to successfully complete the diversion was "five years probated five years (if probation applicable)."

The Division of Probation and Parole, which was in charge of supervising Puckett's diversion and attendant conditions, moved the court to revoke the diversion. A hearing was held on October 16, 2001. At the conclusion of that hearing, the court found that Puckett had violated the terms of his diversion by leaving the area of supervision without permission, failing to pay his supervision fee, failing to make restitution, failing to maintain employment, being out past his curfew, failing to report to the Probation/Parole officer as directed, and being charged with new crimes; he had already been convicted of one new offense, and had several more very serious charges pending against him. The court revoked the diversion, and scheduled formal sentencing for November 20, 2001. During this hearing, it was openly discussed among the court, the Commonwealth, counsel for Puckett, and the Probation/Parole officer that probation might not be applicable to Puckett's situation, and that imprisonment might be the result of his

continued transgressions. No mention was made of Puckett withdrawing his plea.

At the sentencing hearing, counsel for Puckett admitted that, due to Puckett's conduct since the Diversion Agreement, probation was not applicable, and asked that the court sentence him to two years' imprisonment, to run concurrently with other charges. The Commonwealth responded that he had had his chance with Diversion, and that consecutive sentences were merited.

The court indicated that it was going to follow the agreement of the parties, that probation was not applicable or appropriate in this case, and sentenced Puckett to five years' imprisonment on each indictment, to run concurrently with each other, but consecutively with a separate sentence from Green County. Again, no mention was made of withdrawing the guilty pleas.

Puckett subsequently moved to withdraw his pleas, both through counsel and *pro se*, and to amend the sentences so that they run concurrently. The court denied the motions, and this appeal followed. We find no merit in Puckett's arguments, and affirm.

RCr 8.10 allows the defendant to withdraw his plea at any time before judgment. Puckett did not ask for this relief. That rule also makes it mandatory that the court allow a

defendant to withdraw his plea if the court refuses to accept the plea agreement between the Commonwealth and the defendant. The court honored the agreement; Puckett was not entitled to withdraw his plea.

KRS 532.110 makes it within the discretion of the sentencing court whether to run concurrent or consecutive sentences for multiple convictions. We find no abuse of discretion by the trial court in this case. Puckett was clearly unable to conform his conduct to the requirements of society, and refused to take advantage of leniency by the court in the Diversion agreement.

Puckett makes an argument that the language "if applicable" in the Diversion agreement makes it mandatory upon the court to probate him if the statutes permit. We disagree. The court would be abandoning its duty to the Commonwealth and to Puckett if it blindly committed to an action without considering individualized circumstances of each defendant. Probation was neither applicable nor appropriate in this case.

The order of the Green and Taylor Circuit Courts is affirmed.

ALL CONCUR.

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