

RENDERED: May 7, 2004; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2003-CA-000253-MR

TERRY McCALL

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE THOMAS J. KNOPF, JUDGE
ACTION NO. 01-CR-001144

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

** ** * * * * *

BEFORE: BUCKINGHAM, MINTON, and TAYLOR, Judges.

MINTON, Judge: Terry McCall appeals from a final judgment of conviction entered by the Jefferson Circuit Court sentencing him to ten years' imprisonment. McCall contends that the sentence imposed by the Jefferson Circuit Court was in violation of his sentencing agreement with the Commonwealth, which provided that he would be sentenced to six years' imprisonment if he reported for his sentencing hearing. Because McCall breached the sentencing agreement by not appearing for his scheduled

sentencing hearing, or within a reasonable time thereafter, we affirm.

On May 9, 2001, McCall was indicted on one count of first-degree trafficking in a controlled substance (KRS¹ 218A.1412); illegal possession of a controlled substance (KRS 218A.1422); two counts of first-degree unlawful transaction with a minor (KRS 530.064); and second-degree persistent felony offender (KRS 532.080).

The charges resulted from events which occurred on March 20, 2001, at a Holiday Inn located on Dixie Highway in Shively, Kentucky. Police responded to a call that two juvenile females were unlawfully in the room with adults at the motel. Upon the officers' arrival and entry to room 316, marijuana was discovered on a desk in plain view along with a razor and cigar shavings. After assuring the officers' safety and making sure the juveniles were safe, a search warrant was obtained and executed. After a complete search of the room, police discovered eight bindles² of cocaine, a marijuana scale, razor blades, and \$586.00 in cash. These items were seized as evidence.

¹ Kentucky Revised Statutes.

² A "[s]mall packet of drug powder;" Office of National Drug Control Policy, [Http://www.whitehousedrugpolicy.gov/streetterms](http://www.whitehousedrugpolicy.gov/streetterms) (last visited 04/19/04).

Room 316 was registered to co-defendant Antonio Carney, and McCall was present in the room with the juveniles when the officers arrived. The eight bindles of cocaine were found in a pair of pants accompanied with McCall's wallet containing his personal identification and the cash seized.

On February 20, 2002, McCall entered into a plea agreement with the Commonwealth. Pursuant to the plea agreement McCall pled guilty to the amended charge of possession of a controlled substance; to the amended charge of second-degree unlawful transaction with a minor; to possession of marijuana; and to second-degree persistent felony offender. Pursuant to the agreement, McCall was to receive a total enhanced sentence of six years' imprisonment.

Under the agreement, the Commonwealth objected to probation but agreed to McCall's release on his own recognizance pending sentencing. However, the agreement provided that "[d]efendant agrees to serve ten years if he fails to appear for sentencing."

Sentencing was set for April 24, 2002. McCall did not appear at sentencing, and the case was passed for one day to give McCall a chance to appear. McCall failed to appear on April 25, 2002, and a bench warrant was issued for his arrest. On September 21, 2002, McCall was arrested in Louisville pursuant to the bench warrant.

On December 17, 2002, McCall's sentencing hearing was finally held. At the December hearing, McCall was questioned regarding his failure to appear for sentencing on April 24. McCall argued that he should be sentenced to six years rather than ten years because he was unable to come to court on his original sentencing date. McCall presented medical records to establish that he went to Caritas Medical Center on the morning before his scheduled sentencing complaining of injuries received during an altercation. According to the records, McCall was registered into the facility on April 24 at 3:17 a.m. and was released on the same date at 6:12 a.m. The records disclosed that McCall had suffered multiple lacerations to the head and forehead.

McCall stated that he called his attorney on April 25, and decided that his situation "didn't sound good." McCall claimed that following the April 24 altercation, he felt his life and the life of his girlfriend were in danger and that they fled to North Carolina. McCall acknowledged that from April until the time of his arrest in September he made no effort to contact the court or to turn himself in.

In response, the trial court indicated that it would not have held McCall's failure to attend the sentencing hearing against him if he had turned himself in rather than waiting to be arrested. The trial court determined that although McCall

was incapacitated and unable to appear in court on his scheduled sentencing date, he thereafter made no effort to turn himself in or to schedule a new sentencing date. As a result, the trial court sentenced McCall to ten years' imprisonment pursuant to the agreed-upon terms if he failed to appear for sentencing. This appeal followed.

McCall argues that the imposition of the ten year sentence against him was in violation of his agreement with the Commonwealth and that he is entitled to the imposition of the original sentence of six years to serve. Specifically, McCall alleges

[McCall] knew of his court date for sentencing and there is no indication that he would have breached his agreement relative to his appearance had he been capable of being present for the hearing. He was not capable. Instead, he had been severely beaten and hospitalized, an incident the court acknowledged was excusable non-compliance on that date. In the end, he was present for sentencing, was ready to serve a term of six years as posed by the Commonwealth, in exchange for his plea and waiver of the right to trial. That was essentially the intent of the parties in this agreement.

There is nothing in the plea agreement which details how such a situation should be handled given the time lapsing after the sentencing was set, and the time [McCall] was arrested a few months later. Such is the ambiguity in plea agreements written with such "either/or" language as this one contains. Everyone's intent was for [McCall] to show up for sentencing. The

fact that this compliance became frustrated by a physical assault against his person, followed by fear for his life in the time thereafter, should have been considered in [the] court's evaluation of whether he complied with the plea agreement. The Commonwealth did not anticipate an "in between" situation, and did not therefore detail in the agreement what would occur in that event. As such, the ambiguity of the situation should be construed in favor of [McCall], and he should have received the lesser sentence of six years, rather than ten.

Though plea agreements must be construed in light of a defendant's constitutional rights, nevertheless the law of commercial contracts is generally useful as an analogy or point of departure in construing a plea agreement.³ In general, plea agreements are contracts and are to be interpreted according to ordinary contract principles.⁴

"[A] defendant who breaches a plea agreement forfeits any right to its enforcement."⁵ Any ambiguities in a plea agreement must be resolved for the defendant and against the government.⁶ Although a court interpreting a plea agreement gives credence to the plain language of the document, it will not construe the language so literally that the purpose of the

³ Commonwealth v. Reyes, Ky., 764 S.W.2d 62, 64 (1989).

⁴ United States v. Ramunno, 133 F.3d 476 484 (7th Cir. 1998).

⁵ United States v. Wells, 211 F.3d 988, 995 (6th Cir. 2000).

⁶ U.S. v. Rodgers, 101 F.3d 247, 252 (2nd Cir. 1996), *cert. denied*, 20 U.S. 1188, 117 S.Ct. 1472, 137 L.Ed.2d 685 (1997).

agreement is frustrated; accordingly, the court considers terms implied by the plea agreement, as well as those expressly provided.⁷ A plea agreement includes an implied obligation of good faith and fair dealing.⁸

A plea agreement providing for a longer sentence if the defendant fails to appear at sentencing is an enforceable agreement.⁹ When no time is fixed for the performance of a contract or of any act or duty of either of the parties under it, the law requires that the performance of the contract or the act or duty shall be within a reasonable time after the execution of the contract.¹⁰

The agreement explicitly provided that if McCall did not report for his sentencing hearing, then his sentence would be increased from six years to ten years. It is uncontested that McCall did not appear. The trial court postponed his case until the next day before issuing a bench warrant. At the December 2002 sentencing hearing, the trial court indicated that McCall's injuries incurred during the early morning of April 24 provided a valid reason not to have appeared on that day.

⁷ U.S. v. Bunner, 134 F.3d 1000, 1003 (10th Cir. 1998).

⁸ U.S. v. Jones, 58 F.3d 688, 692 (D.C. Cir. 1995).

⁹ Jones v. Commonwealth, Ky., 995 S.W.2d 363 (1999).

¹⁰ Carhartt Holding Co. v. Mitchell, 261 Ky. 297, 87 S.W.2d 360, 362 (1935).

Indeed, the trial court indicated that if McCall had at least turned himself in at any time prior to his arrest, he would not have enforced the enhanced sentencing agreement but, rather, would have sentenced him to six years.

However, upon the improvement of his medical condition, rather than pursuing his obligation under the sentencing agreement, McCall absconded to North Carolina. While McCall alleges he feared for his and his girlfriend's life, we are not persuaded that this justified his failure to appear for sentencing within a reasonable time after he was medically able to do so. Fear of his April 24, 2001, assailant was not a basis for McCall to fail to comply with his obligation to report for sentencing.

By failing to appear for sentencing within a reasonable time after he was medically able to do so, McCall, not the Commonwealth, breached the agreement. As McCall breached the terms of the agreement by failing to timely report for sentencing, the trial court properly sentenced him to the enhanced sentence of ten years.

The judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Kim Brooks
Covington, Kentucky

BRIEF FOR APPELLEE:

Albert B. Chandler III
ATTORNEY GENERAL OF KENTUCKY

James Havey
ASSISTANT ATTORNEY GENERAL
Frankfort, Kentucky