

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2003-CA-001259-MR

ROBERT L. BAKER

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE LAURANCE B. VANMETER, JUDGE  
ACTION NO. 03-CR-00313

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: BUCKINGHAM, DYCHE AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Robert L. Baker brings this appeal from a May 20, 2003, Final Judgment and Sentence of Imprisonment of the Fayette Circuit Court. We affirm.

Appellant was indicted by the Fayette County Grand Jury on the offenses of flagrant non-support (Kentucky Revised Statutes (KRS) 530.050) and with being a persistent felony offender in the second degree (PFO II)(KRS 532.080). Subsequently, appellant filed a motion to dismiss the PFO II

count as the "actual offense date of the underlying count [flagrant non-support] would be before the defendant was convicted of a felony in December, 1998." The circuit court eventually denied the motion. Appellant, thereupon, entered a conditional plea of guilty to both offenses and was sentenced to a total of five years' imprisonment. Ky. R. Crim. P. 8.09. This appeal follows.

Appellant contends the circuit court committed error by denying the motion to dismiss the PFO II count of the indictment. The record reveals appellant was convicted of first-degree possession of a controlled substance in December 1998. The indictment alleged appellant initially committed the offense of flagrant non-support on November 6, 2001.<sup>1</sup> However, appellant contends:

[T]he Commonwealth arbitrarily chose November 6, 2001 as the first date to begin calculation of support arrearage. In fact, the appellant had committed the crime of flagrant non-support several years before November 6, 2001. The crime was committed by appellant as early as November 1991. . . .

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<sup>1</sup> An Order was entered by the Fayette District Court on December 28, 1998, ordering payment of support for appellant's minor child, Robert, in the amount of \$50.00 per week, retroactive to April 1, 1998. By Amended Order entered April 8, 1999, support was ordered for both appellant's minor children, Robert and Jason, at \$50.00 per week, again retroactive to April 1, 1998. Appellant made sporadic payments between December 1998 and November 2001.

The present felony, flagrant non-support was committed as early as November 6, 1991. . . . The appellant was convicted of a felony on December 22, 1998. It should not be used as a basis for sentencing appellant as a persistent felony offender.

Appellant's Brief at 4-5.

Essentially, appellant is alleging the Commonwealth was "arbitrary" in choosing the date of November 6, 2001, and, in fact, the actual date of the offense of flagrant non-support first occurred prior to his December 1998 felony conviction. As such, he argues the PFO II count should have been dismissed.

On the one hand, appellant contends he committed the offense of flagrant non-support well before he was actually charged with committing that offense; yet, he certainly does not maintain he should be re-indicted so as to be charged in conformity with the alleged actual dates of commission. Instead, appellant curiously argues that the PFO II count of the indictment should be dismissed. We view such argument as untenable.

KRS 530.050 provides in pertinent part:

(2) A person is guilty of flagrant nonsupport when he persistently fails to provide support which he can reasonably provide and which he knows he has a duty to provide by virtue of a court or administrative order to a minor or to a child adjudged mentally disabled, indigent spouse or indigent parent and the failure results in:

- (a) An arrearage of not less than one thousand dollars (\$1,000); or
- (b) Six (6) consecutive months without payment of support; or

In the case at hand, it is undisputed that since November 6, 2001, appellant failed to make the required child support payments and that such failure resulted in an arrearage of more than five thousand dollars. Accordingly, we are of the opinion the circuit court did not err by denying appellant's motion to dismiss the PFO II count of the indictment.

For the foregoing reasons, the Judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

John Rampulla  
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BRIEF FOR APPELLEE:

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