

RENDERED: FEBRUARY 11, 2005; 2:00 p.m.  
NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2003-CA-001450-MR

DANIEL REESE HAMPTON

APPELLANT

v. APPEAL FROM PIKE CIRCUIT COURT  
HONORABLE STEVEN D. COMBS, JUDGE  
ACTION NO. 01-CR-00126

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: BARBER, HENRY, AND JOHNSON, JUDGES.

JOHNSON, JUDGE: Daniel Reese Hampton has appealed from the final judgment and order of imprisonment of the Pike Circuit Court entered on July 3, 2003, which revoked his pretrial diversion and sentenced him, pursuant to his guilty plea, to one year in prison for the offense of flagrant nonsupport.<sup>1</sup> Having

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<sup>1</sup> Kentucky Revised Statutes (KRS) 530.050(2) provides:

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

concluded that the trial court did not abuse its discretion in sentencing Hampton, we affirm.<sup>2</sup>

Hampton and his former wife, Debra, were divorced in 1992, and pursuant to their decree of dissolution of marriage, Hampton was to pay Debra child support of \$265.00 per month for their minor child Brandon. From 1992 to November 2000, Hampton repeatedly failed to pay child support, and the Commonwealth, on Debra's behalf, filed a motion to hold Hampton in contempt of court. Subsequently, on November 17, 2000, the trial court issued a bench warrant for Hampton's arrest, and ordered that he could purge himself of contempt by paying his child support arrearage through November 2000 in full, which totaled \$10,918.82.<sup>3</sup>

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order to a minor child . . . and the failure results in:

- (a) An arrearage of not less than one thousand dollars (\$1,000.00); or
- (b) Six (6) consecutive months without payment of support; or
- (c) The dependent having been placed in destitute circumstance. . . .

<sup>2</sup> Hampton states in his brief to this Court that his due process rights were violated when the trial court denied his motion for an appeal bond pending the resolution of this case. However, the Commonwealth in its brief revealed that an agreed order was entered on July 3, 2003, between the parties allowing Hampton to remain on bond pending his appeal to this Court. In his reply brief, Hampton has conceded this argument and we have no reason to further review this issue.

<sup>3</sup> The records of the Pike County Child Support Office indicated that as of November 1, 2000, Hampton had paid a total of \$10,106.94 in child support.

On June 4, 2001, Hampton was indicted by a Pike County grand jury on one count of flagrant nonsupport, pursuant to KRS 530.050. On April 16, 2002, Hampton was arraigned and pled not guilty. Prior to trial, on July 19, 2002, Hampton signed a motion to enter guilty plea and motion for pretrial diversion of a Class D felon.<sup>4</sup> On that same date, Hampton's guilty plea was accepted and the trial court entered an order on July 22, 2002, granting the pretrial diversion for five years, which was signed by the Commonwealth, Hampton, and his attorney. Hampton's child support arrearage was set at \$14,346.35.<sup>5</sup> The terms of the diversion agreement included payment of \$200.00 per month on the arrearage, payment of \$265.00 per month for current child support, and no commitment of another offense during the period of diversion. Hampton was to remain on pretrial diversion for five years, or until the arrearage was paid in full. In return for his guilty plea, the Commonwealth recommended a one-year sentence of imprisonment,<sup>6</sup> in the event Hampton failed to complete the terms and conditions of the diversion agreement, and the Commonwealth agreed not to oppose Hampton's motion for pretrial diversion.

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<sup>4</sup> These motions were filed on July 22, 2002.

<sup>5</sup> Pursuant to the diversion agreement, Hampton appeared in open court on July 19, 2002, to enter a plea of guilty on the charge of flagrant nonsupport.

<sup>6</sup> The maximum possible sentence of imprisonment on the charge was five years.

Because Hampton failed to honor the provisions of the diversion agreement, the Commonwealth, on October 14, 2002, moved the trial court for appropriate action. The trial court held a hearing on December 13, 2002, and in an order dated December 20, 2002, gave Hampton one more chance and stated as follows:

1. The Defendant, Daniel Reese Hampton, shall pay a total of \$1,260 in January 2003, to be applied \$265.00 to current support and \$995.00 to be applied to arrearages. This payment shall be made to the Pike County Attorney's Office, Division of Family Support.
2. He shall continue to make payments of \$1,260 each month after January until he has paid the entire arrearage or until further order of this Court.
3. The hearing on the [Commonwealth's] motion to revoke his diversion and sentence him to prison is continued until February 21, 2003 [emphasis added].

After several orders were entered rescheduling the hearing on the Commonwealth's motion to revoke diversion, a hearing was held on May 23, 2003.<sup>7</sup> Hampton's failure to comply with the requirements of the pretrial diversion agreement was

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<sup>7</sup> In April 2003, the Commonwealth agreed to a continuance pending resolution of Hampton's Social Security claim. This Social Security claim was denied in April 2003, and Hampton appealed. It is clear that the Commonwealth was sensitive to this attempt by Hampton, negating Hampton's argument to this Court that his constitutional rights were violated as he attempted to pursue his Social Security claim.

undisputed.<sup>8</sup> Hampton stated that he had had no income since July 2002, when he was laid off from his job as a laborer for a gas company, and his failure to comply with the pretrial diversion agreement was due to his inability to work,<sup>9</sup> inability to draw unemployment benefits,<sup>10</sup> and the denial of his Social Security disability claim. Hampton argued that he should not be punished for failing to pay his child support, because he was not able to pay what he owed. However, the trial court was not persuaded and stated that Hampton had agreed to the terms of the pretrial diversion agreement in July 2002, despite being laid off a month earlier. Further, the back injury that he complained of had occurred in 1991, yet there was evidence that he had worked as recently as June 2002. The trial court entered orders on July 16, 2003, and July 24, 2003, finding that Hampton had violated the conditions of his pretrial diversion,<sup>11</sup> and pursuant to KRS 533.256(1),<sup>12</sup> ordered the diversion revoked, and scheduled a

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<sup>8</sup> Hampton testified that he had paid his wife some money for his son since the date of the diversion agreement, however he had failed to pay this through the child support office and was unable to produce any receipts or cancelled checks to support his testimony.

<sup>9</sup> Hampton testified that he aggravated his 1991 back injury and was currently under a doctor's care. He argued that he only had a tenth-grade education and only had experience working jobs requiring manual labor.

<sup>10</sup> Hampton testified that when he entered the pretrial diversion agreement, he thought he was going to be eligible for unemployment, but he was not because he had applied for Social Security benefits.

<sup>11</sup> The trial court found that Hampton's child support arrearage through April 30, 2003, was \$17,261.35.

<sup>12</sup> KRS 533.256(1) provides:

sentencing hearing. On June 27, 2003, Hampton was sentenced<sup>13</sup> to one year in prison<sup>14</sup> pursuant to the pretrial diversion agreement and on July 3, 2003, a final judgment and order of imprisonment was entered. This appeal followed.

Hampton claims that the Commonwealth failed to prove that he could reasonably pay child support. He cites the Supreme Court of Kentucky case of Schoenbachler v. Commonwealth,<sup>15</sup> in support of his contention that the Commonwealth had the burden of proving that he was reasonably able to pay support. While we agree with Hampton's statement of the law, we conclude that Schoenbachler does not support his position. In Schoenbachler, the defendant was found guilty pursuant to a jury verdict of flagrant nonsupport, and sentenced

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If the defendant fails to complete the provisions of the pretrial diversion agreement within the time specified, or is not making satisfactory progress toward the completion of the provisions of the agreement, the Division of Probation and Parole, the victim, or a peace officer may inform the attorney for the Commonwealth of the alleged violation or noncompliance, and the attorney for the Commonwealth may apply to the court for a hearing to determine whether or not the pretrial diversion agreement should be voided and the court should proceed on the defendant's plea of guilty in accordance with the law.

<sup>13</sup> At the sentencing hearing, Hampton declined the invitation to speak on his behalf as to any mitigating factors to be considered. Further, he was given an opportunity to review the pre-sentence investigation report and had no objection.

<sup>14</sup> Hampton received four days credit for time served.

<sup>15</sup> 95 S.W.3d 830 (Ky. 2003).

to one year in prison. The Supreme Court noted that the Commonwealth had the burden of proving that Schoenbachler did not have the ability to provide child support, and it ruled that the evidence was sufficient to support the jury's verdict.<sup>16</sup>

In this case, Hampton pled guilty to the charge of flagrant nonsupport in order to receive a pretrial diversion, rather than being sentenced to one year in prison or going to trial and facing a prison sentence of up to five years. At the guilty plea hearing, the trial judge specifically asked Hampton if he understood that he was waiving his right to have the Commonwealth prove beyond a reasonable doubt that he was guilty of flagrant nonsupport. He answered affirmatively. Furthermore, by entering his plea of guilty, Hampton admitted he violated the elements of flagrant nonsupport and he was "deemed convicted".<sup>17</sup> By pleading guilty, Hampton waived his right to trial and his right to have the Commonwealth prove he had the ability to reasonably provide child support.<sup>18</sup> Thus, once Hampton pled guilty to the charge, all that was required of the Commonwealth to prove was that he had not complied with the pretrial diversion agreement.

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<sup>16</sup> Schoenbachler, 95 S.W.3d at 835-36.

<sup>17</sup> Thomas v. Commonwealth, 95 S.W.3d 828, 829 (Ky. 2003).

<sup>18</sup> See Centers v. Commonwealth, 799 S.W.2d 51, 54 (Ky.App. 1990).

Therefore, the issue becomes whether or not Hampton's plea was constitutionally valid. When a case is resolved by a plea of guilty, the guilty plea must represent a voluntary and intelligent choice among the alternative courses of action open to a defendant.<sup>19</sup> The trial court must determine that a defendant's guilty plea is intelligent and voluntary, and this determination must be put in the record.<sup>20</sup> The validity of a guilty plea must be determined from considering the totality of the circumstances surrounding it.<sup>21</sup> These circumstances include the accused's demeanor, background and experience, and whether the record reveals that the plea was voluntarily made.<sup>22</sup> Solemn declarations made in open court carry a strong presumption of verity.<sup>23</sup> The trial court is in the best position to determine if there was any reluctance, misunderstanding, involuntariness, or incompetence by the defendant in pleading guilty.<sup>24</sup>

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<sup>19</sup> North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970); Centers, 799 S.W.2d at 54; Sparks v. Commonwealth, 721 S.W.2d 726 (Ky.App. 1986).

<sup>20</sup> Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 1712, 23 L.Ed.2d 274 (1969); Centers, supra; Sparks, supra at 727.

<sup>21</sup> Commonwealth v. Crawford, 789 S.W.2d 779, 780 (Ky. 1990); Centers, supra; Kotas v. Commonwealth, 565 S.W.2d 445, 447 (Ky. 1978).

<sup>22</sup> Centers, supra; Sparks, supra; Littlefield v. Commonwealth, 554 S.W.2d 872 (Ky.App. 1977).

<sup>23</sup> Blackledge v. Allison, 431 U.S. 63, 74, 97 S.Ct. 1621, 1629, 52 L.Ed.2d 136 (1977).

<sup>24</sup> Centers, supra (citing Blackledge, supra).

Hampton argues to this Court that his guilty plea could not have been voluntary because he did not understand the law in relation to the facts. He argues that, at the guilty plea hearing, the trial judge merely asked "the laundry list of questions" and Hampton "rhythmically" answered. However, in reviewing the video record, it is apparent that the trial judge very carefully asked the questions to Hampton. There is no evidence that Hampton did not answer the questions with the level of understanding as required under Kentucky law.<sup>25</sup>

The order granting pretrial diversion and accepting Hampton's guilty plea specifically states that Hampton's attorney explained to him the terms and conditions of the pretrial diversion and that Hampton freely, voluntarily, intelligently, and knowingly entered into the agreement with the Commonwealth. The order further states that if Hampton failed to successfully complete pretrial diversion thereby voiding the agreement, the Court could impose a sentence equal to or less than the penalty recommended by the Commonwealth.<sup>26</sup>

We have reviewed the video record of the guilty plea hearing. The trial judge carefully asked Hampton if he was voluntarily waiving his various constitutional rights, if he was satisfied with his counsel, if he needed any more time to

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<sup>25</sup> See Turner v. Commonwealth, 647 S.W.2d 500 (Ky.App. 1982).

<sup>26</sup> This is similar to the language set out in the motion to enter guilty plea and motion for pretrial diversion of a Class D felon signed by Hampton.

consider his plea, if he was under the influence of any alcohol, drugs, or medication, if he desired to plead guilty, if he was pleading guilty based on guilt alone, and if anyone promised him they could bind the trial court to accept his plea. Hampton's answers to the questions support the conclusion that his guilty plea was constitutionally valid. Further, Hampton's attorney stated to the trial court that Hampton understood the nature of the charges against him. Thus, we conclude that the trial court properly determined that Hampton's plea of guilty was knowingly, intelligently, and voluntarily entered.

Based on the foregoing reasons, the judgment and sentence of the Pike Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Dennis Stutsman  
Samual Potter  
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo  
Attorney General  
  
Wm. Robert Long, Jr.  
Assistant Attorney General  
Frankfort, Kentucky