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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000113-MR

DERRIC E. TURNER

APPELLANT

v. APPEAL FROM CARROLL CIRCUIT COURT
HONORABLE STEPHEN L. BATES, JUDGE
ACTION NO. 03-CR-00111

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: JOHNSON, TAYLOR, AND VANMETER, JUDGES.

JOHNSON, JUDGE: Derric E. Turner has appealed from a final judgment and sentence of imprisonment and order of probation of the Carroll Circuit Court, convicting him of theft by unlawful taking of property with a value of \$300.00 or more¹ and sentencing him to prison for three and one-half years and probating the sentence for five years and fining him \$1,000.00. While Turner is indigent and the imposition of a fine would have

¹ Kentucky Revised Statutes (KRS) 514.030.

been prohibited by KRS 534.030(4), since Turner agreed to the fine in accordance with the terms of a valid plea agreement, we affirm.

On October 28, 2003, Turner was indicted for felony theft by unlawful taking of property with a value of more than \$300.00 for allegedly stealing \$1,190.04 in cash while working as a cashier at a Speedway Market. The Commonwealth made a written offer on a plea of guilty that stated in pertinent part as follows:

On a plea of guilty to the above [the charge of theft by unlawful taking] and conditioned upon Defendant paying \$1,190.04 in restitution to Speedway, the Commonwealth will recommend a sentence of three and a half (3 1/2) years in prison and a fine of \$1,000.00. The Commonwealth will not oppose placement of Defendant on reporting probation for a period of five (5) years on standard conditions . . . [and] that Defendant serve 90 days of actual jail time [emphasis original].

At a hearing held on November 24, 2003, Turner entered a plea of guilty. The Commonwealth's Attorney clearly described the primary elements of the plea offer to the trial court as follows:

[T]he Commonwealth's recommendation on the charge of theft by unlawful taking over three hundred dollars is a sentence of three and a half years and a thousand dollar fine. The Commonwealth would not oppose the Defendant being placed on five years['] reporting probation on the standard conditions of probation.

In addition that he serve ninety days, that he pay \$1,190.04 in restitution as outlined in the plea agreement and that he abide by all of the other standard conditions of probation and all the conditions set forth in the plea agreement.

The trial court then inquired of Turner's counsel, "Is that your understanding of the plea agreement and the agreement you discussed with Mr. Turner?" Turner's counsel replied, "Yes, Your Honor." The trial court also asked Turner if that was his understanding of the plea agreement, and Turner responded, "Yes, sir." The trial court thereafter conducted the required colloquy and accepted Turner's guilty plea.

At the sentencing hearing held approximately three weeks later, the Commonwealth's Attorney repeated the terms of the plea agreement. Turner's attorney raised the following objection for the first time:

[W]e would . . . ask the Court to follow the recommendation of the Commonwealth, other than the thousand dollar fine. I think the statute is quite clear that Mr. Turner has been determined to be indigent pursuant to Chapter 31 that a fine of a thousand dollars shall not, I believe is the wording of the statute, be imposed.

Defense counsel also pointed out that Turner was already required to pay a significant amount of restitution under the plea agreement. The trial court replied:

I'll adopt as my judgment the plea agreement. I read that differently than you do. I think they can be required to pay as

long [as] they are given a reasonable amount of time. Many people in his case is [sic] probably like that. They are indigent because they choose to be indigent. So, I think he can make payments. It is part of the penalty imposed by the Commonwealth, and if the fine were not going to be imposed, I think we would have to back up and go ninety days maybe to 150 or 180, 240.

And I'm quite comfortable he would rather pay the fine over a reasonable period of time rather than to revisit the plea agreement he's got which he has already completed one part of. So, I'll adopt as my judgment the plea agreement.

The final judgment sentenced Turner in accordance with the plea agreement to a term of imprisonment of three and one-half years, to be probated for a period of five years and a fine of \$1,000.00. Turner was also ordered to pay restitution of \$1,190.04. This appeal followed.

Turner claims that he was wrongfully ordered to pay the \$1,000.00 fine because KRS 534.030 excludes indigents convicted of felonies from having to pay a fine. KRS 534.030 states in relevant part as follows:

- (1) Except as otherwise provided for an offense defined outside this code, a person who has been convicted of any felony shall, in addition to any other punishment imposed upon him, be sentenced to pay a fine in an amount not less than one thousand dollars (\$1,000) and not greater than ten thousand dollars (\$10,000) or double his gain from commission of the offense, whichever is greater.

- . . .
- (4) Fines required by this section shall not be imposed upon any person determined by the court to be indigent pursuant to KRS Chapter 31.

In addition to the statutory provision, Turner also relies on Simpson v. Commonwealth,² in which the Supreme Court of Kentucky determined under KRS 534.030 that the trial court had erred in imposing a fine on an indigent defendant. As the Commonwealth has argued, however, Turner's situation is clearly distinguishable. In Simpson, the fine was imposed by the trial court after a jury trial. Turner, by contrast, agreed to the fine as part of a plea bargain. It is the essence of a plea bargain that the defendant "may 'make a deal' for a lesser punishment that is ascertainable rather than risk the full panoply of reprisals that might result from a trial on the merits."³

Our Supreme Court has held that, as part of such a plea agreement, a criminal defendant may waive rights provided by statute and accept sentences that would otherwise be unlawful. In Myers v. Commonwealth,⁴ the Court held that a defendant could waive the maximum aggregate sentence restriction in KRS 532.110(1)(c) in order to receive the benefit of earlier

² Ky., 889 S.W.2d 781, 784 (1994).

³ Kennedy v. Commonwealth, Ky.App., 962 S.W.2d 880, 882 (1997).

⁴ Ky., 42 S.W.3d 594 (2001).

eligibility for parole. Similarly, in Commonwealth v. Griffin,⁵ the Court held that a defendant could waive the five-year limitation on a sentence of probation found in KRS 533.020(4) in order to avoid revocation of probation and imprisonment. "In both Myers and Griffin, the voluntariness of the waiver was premised upon the existence of a quid pro quo[.]"⁶ Based on these cases, we conclude that the exclusion in the statute that provides that an indigent cannot be required to pay a fine may be waived by a defendant, particularly where it is in exchange for a reduced or probated sentence. If Turner had chosen to go to trial and been convicted, he could have faced a prison sentence of one to five years.⁷

Turner argues that his case is distinguishable from Myers and Griffin because he did not specifically waive the application of the statute. However, such an express waiver is not necessary, because a waiver is presumed by Turner's agreement to the terms of the plea offer. The record indicates that Turner entered his plea with the advice of counsel. He stated in open court that he understood the plea agreement and had discussed it with his counsel.

[I]n this case, an inquiry into the validity of the waiver [by Turner] would

⁵ Ky., 942 S.W.2d 289 (1997).

⁶ Commonwealth v. Townsend, Ky., 87 S.W.3d 12, 15 (2002).

⁷ See KRS 532.070(2)(d).

focus primarily on defense counsel's knowledge of the law and defense counsel's rationale for negotiating the agreement. While such an inquiry might avoid the issue recurring on collateral attack, this is not sufficient reason to impose an affirmative duty on the trial court to inquire into the validity of the waiver.⁸

After Turner entered the guilty plea but prior to his sentencing, he attempted to have only the \$1,000.00 fine excluded from the terms of the plea agreement. But Turner did not attempt to withdraw the guilty plea itself. The trial court did not err by refusing to remove the \$1,000.00 fine from Turner's sentence, and it correctly noted that such an action would have required the plea agreement to have been renegotiated.

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

ALL CONCUR.

BRIEF FOR APPELLANT:

Donna L. Boyce
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General

George G. Seelig
Assistant Attorney General
Frankfort, Kentucky

⁸ Johnson v. Commonwealth, Ky., 90 S.W.3d 39, 45 (2002).