

RENDERED: FEBRUARY 10, 2006; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001343-MR

DALE SCHINDEWOLF

APPELLANT

v. APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE KELLY MARK EASTON, JUDGE
ACTION NOS. 01-CR-00099 AND 02-CR-00250

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: BARBER, BUCKINGHAM, AND JOHNSON, JUDGES.

JOHNSON, JUDGE: Dale Schindewolf, pro se, has appealed from an order of the Hardin Circuit Court entered on June 25, 2004, which denied his motion for relief pursuant to RCr¹ 11.42.

Having concluded that Schindewolf's arguments are without merit, we affirm.

¹ Kentucky Rules of Criminal Procedure.

On February 28, 2001, a Hardin County grand jury indicted² Schindewolf for theft by deception under \$300.00,³ and theft by deception over \$300.00.⁴ He was arraigned on May 22, 2001. On May 31, 2002, Schindewolf was indicted⁵ by a Hardin County grand jury on 53 counts of criminal possession of a forged instrument in the second degree,⁶ four counts of theft by deception under \$300.00, one count of theft of mail matter,⁷ and one count of possession of stolen mail.⁸ He was arraigned on June 25, 2002.

On August 14, 2002, Schindewolf filed a motion in Case No. 02-CR-00250 requesting the trial court refer him to the drug court program and the trial court entered an order sustaining the motion on November 22, 2002. He filed a similar motion in Case No. 01-CR-00099 on November 6, 2002. On November 13, 2002, and December 18, 2002, the trial court entered orders allowing Schindewolf to apply for participation in the drug court

² Case No. 01-CR-00099.

³ Kentucky Revised Statutes (KRS) 514.040, Class A misdemeanor.

⁴ KRS 514.040, Class D felony.

⁵ Case No. 02-CR-00250.

⁶ KRS 516.060.

⁷ KRS 514.140.

⁸ KRS 514.050, Class D felony.

program.⁹ On December 18, 2002, pursuant to an offer by the Commonwealth, Schindewolf pled guilty in Case No. 01-CR-00099 to complicity to commit theft by deception under \$300.00 and complicity to commit theft by deception over \$300.00. In Case No. 02-CR-00250, Schindewolf pled guilty to all the charges as set forth in the indictment. Based upon his agreement with the Commonwealth, if Schindewolf pled guilty in both cases, if he got accepted into and completed the drug court program, and if he attended all court appearances, he would be sentenced to three years in Case No. 01-CR-00099,¹⁰ and 12 years in Case No. 02-CR-00250.¹¹ The sentence in Case No. 02-CR-00250 would be probated for ten years conditioned upon Schindewolf successfully completing the drug court program. He would also be required to pay full restitution over the ten-year period. The sentences in both cases were to run consecutively. If Schindewolf did not

⁹ The November 13, 2002, order was entered in Case No. 01-CR-00099 only and the December 18, 2002, was entered in both Case No. 01-CR-00099 and Case No. 02-CR-00250.

¹⁰ The sentence in Case No. 01-CR-00099 was broken down into 12 months on the conviction for complicity to commit theft under \$300.00, and three years on the conviction for complicity to commit theft over \$300.00, to run concurrently for a total of three years.

¹¹ The sentence in Case No. 02-CR-00250 was broken down as follows: five years for counts one through 25 of criminal possession of a forged instrument in the second degree, to run concurrently one with another; five years on counts 26 through 53 of criminal possession of a forged instrument in the second degree, to run concurrently one with another; two years for theft of mail matter and two years for possession of stolen mail matter, to run concurrently one with the other; and 12 months on each of the four counts of theft by deception under \$300.00. Each group of charges were to run consecutively, one with the other for a total of 12 years.

successfully complete the drug court program, the three-year sentence under Case No. 01-CR-00099 would run consecutively to Case No. 02-CR-00250, for a total of 15 years to serve.

On August 7, 2003, the trial court entered an order noting that Schindewolf had been terminated from the Hardin County drug court program, and set both of his cases for sentencing. On September 23, 2003,¹² Schindewolf was sentenced to 15 years to serve, with credit for 273 days of time served. Schindewolf filed a motion for shock probation on February 20, 2004, which was denied by the trial court on February 23, 2004.

On April 14, 2004, Schindewolf filed a motion to vacate sentence pursuant to RCr 11.42 and requested an evidentiary hearing. He raised one issue in his motion claiming that his trial counsel was ineffective for allowing a delay of eight months in sentencing because RCr 11.02 requires that a sentence be imposed "without reasonable delay," even though the delay was to allow Schindewolf to participate in the drug court program and receive a suspension of his sentence. The trial court denied the motion in an order entered on June 25, 2004. This appeal followed.

¹² This order was entered on October 1, 2003.

We first note that because Schindewolf pled guilty, he waived his right to a direct appeal of his sentence.¹³ Further, neither of the issues raised in his appeal are based on ineffective assistance of counsel, the original theory of his RCr 11.42 motion. In any event, Schindewolf's arguments on appeal are without merit. His claims are based on an erroneous conclusion that the trial court lost jurisdiction to sentence him following an eight-month period during which he was allowed to participate in the drug court program and failed to successfully complete the program.¹⁴ Schindewolf agreed to the delay when he signed a motion to plead guilty based upon the Commonwealth's offer that he could participate in the drug court program and have his sentence placed on diversion during that time. Had he successfully completed the drug court program, Schindewolf would have received a probated sentence.

"Delay in sentencing a defendant after conviction can in certain instances deprive the court of jurisdiction over him,

¹³ It is well-established that a defendant may waive his right to appeal and such a waiver is enforceable if it is agreed to knowingly and voluntarily. The waiver of such right is also a waiver to challenge the defendant's sentence, "regardless of the merits". See United States v. Khattak, 273 F.3d 557, 561 (3d Cir. 2001).

¹⁴ Schindewolf acknowledged the jurisdiction of the trial court to vacate his sentence pursuant to RCr 11.42 in his motion filed on April 14, 2004, negating his later argument to this Court that the trial court lacked jurisdiction to sentence him.

but the delay must be 'unreasonable'."¹⁵ When a delay in sentencing occurs at the request of the defendant and was not oppressive or a purposeful circumvention of the probation statutes, then no unreasonable delay has occurred which would deprive the trial court of jurisdiction to sentence. Furthermore, Schindewolf failed to object or to question the trial court's jurisdiction at the time he was sentenced. By such failure, Schindewolf has waived any objection to the trial court's jurisdiction to impose a delayed sentence.¹⁶

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

ALL CONCUR.

BRIEFS FOR APPELLANT:

Dale Schindewolf, Pro Se
Lexington, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General

Rickie L. Pearson
Assistant Attorney General
Frankfort, Kentucky

¹⁵ Payton v. Commonwealth, 605 S.W.2d 37, 38 (Ky.App. 1980) (citing Green v. Commonwealth, 400 S.W.2d 206 (Ky. 1966)).

¹⁶ See Payton, 605 S.W.2d at 38 (citing Singleton v. Commonwealth, 306 Ky. 454, 208 S.W.2d 325 (1948); and Dilley v. Commonwealth, 243 Ky. 464, 48 S.W.2d 1070 (1932)).