

RENDERED: JULY 14, 2006; 2:00 P.M.  
NOT TO BE PUBLISHED

**Commonwealth Of Kentucky**  
**Court of Appeals**

NO. 2005-CA-001175-MR

JOSEPH GARY YOCUM

APPELLANT

v. APPEAL FROM WASHINGTON CIRCUIT COURT  
HONORABLE ALLAN RAY BERTRAM, JUDGE  
ACTION NO. 02-CR-00073

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: COMBS, CHIEF JUDGE; KNOPF,<sup>1</sup> JUDGE; BUCKINGHAM, SENIOR  
JUDGE.<sup>2</sup>

BUCKINGHAM, SENIOR JUDGE: Joseph Gary Yocum appeals from a  
judgment of the Washington Circuit Court wherein he was  
convicted and sentenced for the crime of possession of cocaine.  
We affirm.

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<sup>1</sup> Judge William L. Knopf concurred in this opinion prior to his retirement effective June 30, 2006. Release of the opinion was delayed by administrative handling.

<sup>2</sup> Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

On July 27, 2002, Yocum was involved in an automobile accident and was arrested for DUI. An intoxicated 14-year-old girl was with him at the time of the accident. A search of Yocum's person produced two baggies of cocaine.

Yocum entered into a plea agreement with the Commonwealth whereby he pled guilty to first-degree possession of a controlled substance, a felony, and first-offense DUI. Other charges in the indictment were dismissed.

The plea agreement provided that sentencing on the cocaine possession charge would be delayed for one year. The agreement stated, "If no further violation of law, charge will be amended to a misdemeanor with penalty of 12 months probated for 24 months. If does not comply, penalty for felony will be 2 years, probated for 3 years and a \$1,000.00 fine." On October 10, 2002, Yocum pled guilty to the two charges and was sentenced on the DUI charge. Sentencing on the cocaine possession charge was postponed for 12 months until October 2003.

Yocum was arrested on another DUI charge on March 1, 2003. His sentencing on the cocaine possession charge was then set for June 5, 2003. Prior to sentencing, the Commonwealth sent a letter to Yocum's attorney indicating that it would agree to withhold asking the court to sentence Yocum on the felony charge so long as he complied with several conditions. The relevant portion of the letter reads as follows:

In order for the Commonwealth to withhold asking the court to sentence your client to a felony because of his recent DUI, your client will need to do the following: serve 30 days in jail, agree to extend the set off sentencing one additional year to Oct. 2004 and if he is convicted of any other offenses during this set off sentencing, he will not only receive a felony but will have to serve an additional 120 days in jail as well.

Yocum agreed to these conditions, and he began serving his 30-day sentence on July 15, 2003. The court then set Yocum's final sentencing on the cocaine possession charge for October 7, 2004.

Yocum's final sentencing was not held until May 5, 2005. By that time, Yocum had been charged with several more crimes. However, he had not been convicted of any of the crimes prior to the one-year period that had ended in October 2004. Therefore, he contended that he was still entitled to having the cocaine possession charge amended to a misdemeanor offense because he had not been "convicted" of any new offenses during the relevant one-year period.

At the May 2005 sentencing hearing, the Commonwealth responded to Yocum's argument by stating that the intent of the extension agreement was for Yocum to be on good behavior and not to be committing new offenses during that period. After considering the arguments of counsel, the court observed that Yocum should not be in a position to be able to postpone the disposition of new charges so as to avoid the terms of the

agreement in this case. The court also noted that Yocum had been given the benefit of a new agreement that extended the final disposition of his case for another year, even though he had violated the initial agreement. Further, the court noted that Yocum had since been convicted of one of the charges that arose during the last extension period.

The court sentenced Yocum to two years in prison for first-degree possession of a controlled substance (cocaine), but it probated the sentence for a three-year period on various conditions, including the payment of a \$1,000 fine and supervised probation. This appeal followed.

Citing Workman v. Commonwealth, 580 S.W.2d 206 (Ky. 1979) overruled on other grounds by Morton v. Commonwealth, 817 S.W.2d 218 (Ky. 1991), Yocum argues that the Commonwealth broke its agreement with him "and persuaded the Judge to go along." In response, the Commonwealth argues that "it would not be reasonable or equitable to allow an appellant to postpone disposition of his charges merely to avoid the finality of new offenses during the time period in question." The Commonwealth cites as an example the apparent folly of a situation where Yocum could have committed a murder during the time period of the extension agreement, and then still have his cocaine possession charge amended to a misdemeanor because he was not convicted until thereafter. Further, the Commonwealth asserts

that this case does not present a question of the Commonwealth withdrawing from an agreement, but presents a question of an agreement's enforcement.

We agree with the court's interpretation of the agreement. Yocum was convicted of other offenses that occurred during the "set off" period. As such, we conclude that the court properly enforced the true agreement of the parties and denied Yocum's motion to have the charge amended to a misdemeanor.

The judgment of the Washington Circuit Court is affirmed.

ALL CONCUR.

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