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Kate R. Morgan, Clerk

Kentucky Court of Appeals

Commonwealth of Kentucky
Court of Appeals
No. 2024-CA-0436-MR
Electronically filed

COMMONWEALTH OF KENTUCKY**APPELLANT**

v.

Appeal from Fayette Circuit Court
 Hon. Julie M. Goodman, Judge
 Indictment No. 23-CR-394

DOMONICK JONES**APPELLEE**

Brief for the Commonwealth of Kentucky

Submitted by,

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Grant.burdette@ky.govCERTIFICATE OF SERVICE

I certify that on this 13th day of August, 2024 a copy of the Brief for the Commonwealth of Kentucky has been served as follows: via U.S. Mail to Hon. Julie M. Goodman, Judge, Fayette Circuit Court, Robert F. Stephens Courthouse, 120 N. Limestone, Lexington, KY 40507, via state messenger mail to Hon. Kathleen Schmidt, Department of Public Advocacy, 5 Mill Creek Park, Section 101, Frankfort, Kentucky 40601 and via email to Hon. Kimberly Henderson Baird, Commonwealth's Attorney. The appellate record has been returned to the Clerk of this Court.

/s/J. Grant Burdette

Assistant Solicitor General

INTRODUCTION

Dominick Jones pleaded guilty to trafficking fentanyl in violation of KRS 218A.1412. The circuit court sentenced Jones to five years' imprisonment but probated him, despite 218A.1412(3)(d) prohibiting the court from doing so. The Commonwealth appeals from that final judgment. The Court should reverse.

STATEMENT CONCERNING ORAL ARGUMENT

The Commonwealth does not request oral argument because the issues presented can be readily resolved under existing Kentucky precedent.

STATEMENT CONCERNING CITATIONS TO THE RECORD

The Commonwealth cites the paper record as "TR at [number of page]." The Commonwealth cites the video record as "(VR: date; time)."

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STATEMENT OF THE CASE

1. In recent years, Kentucky’s sentencing jurisprudence has been open to question. That said, one thing has remained abundantly clear: “sentences falling outside the permissible sentencing range cannot stand uncorrected.”

McClanahan v. Commonwealth, 308 S.W.3d 694, 700 (Ky. 2010). This is so because “[a] sentence that lies outside the statutory limits is an illegal sentence, and the imposition of an illegal sentence is inherently an abuse of discretion.” *Id.* at 701. In other words, “[i]f the sentence goes beyond the jurisdiction of the court imposing it, then it must be considered a legal nullity.” *Phon v. Commonwealth*, 545 S.W.3d 284, 305 (Ky. 2018).

Even more importantly, an illegal sentence violates the separation-of-powers doctrine enshrined in the Kentucky Constitution. “Sections 27 and 28 of the Kentucky Constitution explicitly require separation of powers between the branches of government” *Prater v. Commonwealth*, 82 S.W.3d 898, 901 (Ky. 2002). The Kentucky Supreme Court has described those sections as “embodying the ‘cardinal principle of our republican form of government’ and one that is among the most ‘emphatically cherished and guarded’ principles in our Constitution.” *Id.* (quoting *Bloemer v. Turner*, 137 S.W.2d 387, 390 (Ky. 1940) and *Arnett v. Meredith*, 121 S.W.2d 36, 38 (Ky. 1938)). Key here, a trial court’s sentence that circumvents what the General Assembly has proscribed

“is a violation of the separation of powers doctrine embodied in Sections 27 and 28 of the Kentucky Constitution, and is an abuse of discretion.”

McClanahan, 308 S.W.3d at 698.

2. That brings us to this case. Dominick Jones was pulled over for operating his vehicle with expired registration. (TR at 7.) Trooper J. Gabriel smelled marijuana as he approached the vehicle. (*Id.*) Jones was asked to step out of the vehicle and Trooper Gabriel noticed that he was hiding something in his groin area. (*Id.*) Jones was detained and admitted to having narcotics in his underwear. (*Id.*) The narcotics turned out to be roughly 75 grams of fentanyl. (*Id.*) After further search of the vehicle, 11 grams of cocaine were located as well. (*Id.*)

Jones was indicted by a Fayette County Grand Jury for one count of aggravated trafficking greater than 28 grams of fentanyl,¹ one count of possession of cocaine,² operating on a suspended/revoked license,³ and no/expired registration plates.⁴ (TR at 2–3.) Jones decided not to test his chances at trial and accepted the Commonwealth’s offer on a plea of guilty. In exchange for his guilty plea, the Commonwealth recommended five years’

¹ KRS 218A.142.

² KRS 218A.1415.

³ KRS 186.620(2).

⁴ KRS 186.170.

imprisonment on the amended charge of Class C felony trafficking in fentanyl.⁵ (TR at 38–39.) The Commonwealth also agreed to dismiss the remaining charges and charges pending against Jones in Fayette District Court Case No. 23-F-541, which was also a trafficking case. (TR at 33–39.)

On October 5, 2023, Jones appeared in Fayette Circuit Court and pleaded guilty. (VR: 10/5/23; 11:00:37–11:10:20.) At that time, the circuit court suggested that Jones participate in drug court, and he agreed. (VR: 10/5/23; 11:04:45.) Jones was then referred for a drug court assessment. (TR at 41–42.) On November 30, 2023, the drug-court team asked the circuit court to continue Jones’s sentencing so they could determine his true eligibility for drug court. (VR: 11/30/23; 9:20:04.) On December 7, 2023, the circuit court orally sentenced Jones to five years probated for two years, with the condition of completing drug court.⁶ (VR: 12/07/23; 9:16:18.) Soon after, the parties were notified that Jones received an illegal sentence because he was ineligible for probation under the statute that he was charged.⁷ Then, on December 18, 2023, nearly three months before the final judgment was entered, the Commonwealth

⁵ KRS 218A.1412

⁶ At the sentencing hearing, the Commonwealth took no position on Jones’ receiving probation. (VR: 12/7/23; 9:18:08.) That said, the Assistant Commonwealth’s Attorney handling the case was in a trial in a different court when Jones was sentenced. (VR: 1/11/24; 9:12:50.)

⁷ On this record, it is unclear how the parties found out that Jones received an illegal sentence, but it seems that the drug court judge informed them. (VR: 3/8/24; 9:10:11.)

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moved the circuit court to resentence Jones in accordance with the statute. (TR at 51.)

Rather than grant the Commonwealth's motion and sentencing Jones under KRS 218A.1412's bar against probation, the circuit court urged the parties to reach an agreement that would allow Jones to have probation. (VR: 1/11/24; 9:12:35–9:15:22.) The Commonwealth explained to the circuit court that Jones was caught with 90⁸ grams of fentanyl and as a part of his plea deal the Commonwealth had dismissed another pending fentanyl trafficking case against him. (*Id.*) The defense asked to pass the case for a week to discuss another amendment of the charge. (*Id.*)

The case was then moved to February 22, 2024, so that the Department of Public Advocacy's Appellate Division could weigh in on the matter. (VR: 1/18/24; 10:05:00.) The case was again passed to March 8, 2024, so that Jones could argue that the circuit court should enforce an illegal sentence. (VR: 2/22/24; 11:08:00–11:09:30.)

At the March 8 hearing, the Commonwealth informed the judge that Jones had sued her. (VR: 3/8/24; 9:05:25.) The judge then advised that she would have to recuse from the case. (*Id.*) Jones then asked the judge to enforce

⁸ On this record, it is unclear the exact amount of fentanyl that Jones was trafficking. The citation states 75 grams but the Assistant Commonwealth's Attorney said that it was 90 grams. At any rate, it was a large amount of fentanyl well within the aggravating ranges as prescribed in KRS 218A.142.

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the judgment, and the judge stated she did not have the authority to do so because it would be an illegal sentence. (*Id.*) After further argument, the judge stated that she would enter the final judgment, *nunc pro tunc*, then recuse from the case. (*Id.*) The judge then signed an order of recusal on March 8, 2024, which was entered on March 11, 2024. (TR at 104.) Three days after signing the recusal order, the judge entered the final judgment on March 11, 2024, sentencing Jones and granting him probation, *nunc pro tunc*. This appeal followed.

ARGUMENT

The Court's task here is simple. It needs to decide only whether Jones received an illegal sentence. That is, did the circuit court act outside its jurisdiction when it granted Jones probation despite KRS 218A.1412(3)(d) expressly prohibiting probation? The answer to that question must be yes. As outlined below, the circuit court disregarded its jurisdictional boundaries and imposed a sentence that is not provided for under the law. Thus, the Court should reverse.

I. The circuit court acted outside its jurisdiction by imposing an illegal sentence, thereby abusing its discretion.⁹

Jones was given what he viewed as a favorable deal. In exchange for his guilty plea, the Commonwealth amended a Class B felony down to a Class C, dismissed the remaining charges, and dismissed a different case where Jones was trafficking fentanyl. (TR at 33–35.) Still yet, the circuit court sentenced Jones to probation, which wasn't allowable under the law, even after being given ample opportunity to correct the sentence. That amounts to an abuse of discretion.

A. KRS 218A.1412(3)(d) expressly prohibits probation.

The General Assembly is vested with the authority to decide what constitutes a crime and the appropriate punishment for that crime. *Hoskins v. Maricle*, 150 S.W.3d 1, 11 (Ky. 2004) (“The power to define crimes and *assign their penalties* belongs to the legislative department.” (emphasis added)). The Kentucky Supreme Court has “recognized the extraordinarily strong separation of powers doctrine provided by Sections 27 and 28 of the Kentucky Constitution.” *McClanahan*, 308 S.W.3d at 700 (citing *Hoskins*, 150 S.W.3d at 11–12.)

⁹ The Commonwealth preserved this issue below by filing the motion for resentencing on December 18, 2023. (TR at 51.)

Given fentanyl's death-dealing nature, it comes as no surprise that our legislature has held firm against fentanyl traffickers. That stance is reflected in KRS 218A.1412(3)(d) that provides:

Any person convicted of a Class C felony offense or higher under this section shall not be released on probation, shock probation, parole, conditional discharge, or other form of early release until he or she has served at least fifty percent (50%) of the sentence imposed in cases where the trafficked substance was heroin, fentanyl, carfentanil, or fentanyl derivatives.

The legislature expressly prohibited fentanyl traffickers from receiving the benefit of probation.¹⁰ Making our laws and deciding their punishment is the purview solely of the legislature. Those laws must be followed—the opposite of what happened here.

B. Because KRS 218A.1412(3)(d) prohibits probation, the circuit court abused its discretion by granting Jones probation.

1. Start with a quick dive into our illegal sentence jurisprudence.

Kentucky courts have “consistently recognized that sentences falling outside the permissible sentencing range cannot stand uncorrected.” *McClanahan*, 308 S.W.3d at 700. Sentencing is jurisdictional “[b]ecause it is the trial judge, and not the jury or the prosecutor or the defendant, that actually imposes a sentence by signing his or her name to the final judgment, it is to the judiciary that the legislative commandments . . . are directed.” *Id.* at 701. “It is error for a

¹⁰ The original statute that Jones was charged under, KRS 218A.142, also expressly prohibits probation.

trial jury to disregard the sentencing limits established by the legislature, and no less erroneous for a trial judge to do so” *Id.* “A sentence that lies outside the statutory limits is an illegal sentence, and the imposition of an illegal sentence is inherently an abuse of discretion.” *Id.*

It's important to note that illegal probation has the same jurisdictional flaw as an illegal sentence. “The force of *McClanahan*’s holding is not lessened by the fact that it was dealing with a hammer clause on a term of imprisonment that imposed a sentence of imprisonment beyond the statutory limits, whereas here we only have an illegal probation.” *Commonwealth v. Moreland*, 681 S.W.3d 102, 107 (Ky. 2023). “It applies equally since probation is a statutory grant of authority to the judiciary and probation is merely ‘the suspension of the imposition of a sentence of incarceration.’” *Id.* (citing *Jones v. Commonwealth*, 319 S.W.3d 295, 297 (Ky. 2010)).

2. Here, Jones’s plea agreement would have and should have resulted in a five-year-prison sentence. (TR at 33–36.) But the judge probated the sentence, despite the statute he was charged under prohibiting it. (TR at 105–109.) That’s unquestionably an illegal sentence—or, more technically, an illegal probation. The circuit court even acknowledged as much after the Commonwealth moved to resentence Jones. (VR: 3/8/24; 9:07:40.)

The Commonwealth moved for resentencing nearly three months before final judgment was entered. (TR at 98–99.) At that time, the circuit court

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should have granted the Commonwealth's motion and corrected the sentence. This is compelled by the fact that "[t]he trial court has inherent authority to correct an unlawful sentence, at any time." *Phon*, 545 S.W.3d at 308. That was even more so the case here because final judgment had not yet been entered.

At bottom, an illegal "sentence *must* be corrected to conform to the law." *Neace v. Commonwealth*, 978 S.W.2d 319, 322 (1998) (emphasis added). Even so, the circuit court instead urged the Commonwealth to change the plea agreement to conform to the court's sentence. (VR: 1/11/24; 9:12:30–9:15:25.) In the end, the sentence that Jones received was illegal. The circuit court knew it was illegal, was given at a minimum three court dates to correct it, but failed to do so.

Putting it all together, KRS 218A.1412(3)(d) prevented Jones from receiving probation. Before final judgment was entered, the circuit court acknowledged the sentence was illegal and should have re-sentenced Jones in accordance with the statute. Instead, the circuit court delayed the proceedings, which resulted in the judge recusing and entering a final judgment containing an illegal sentence. Thus, the Court should reverse and remand for Jones to be sentenced in accordance with the statute. "Any other result would permit [judges] to re-write penalty statutes and effectively nullify the sentencing laws." *Neace*, 978 S.W.2d at 322.

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CONCLUSION

For these reasons, the Commonwealth respectfully requests that the Court reverse the final judgment of the Fayette Circuit Court granting Jones probation and remand this case for Jones to be sentenced in accordance with KRS 218A.1412.

Respectfully submitted,

RUSSELL COLEMAN
Attorney General of Kentucky

/s/ J. Grant Burdette _____

J. Grant Burdette

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WORD COUNT CERTIFICATE

This document complies with the word limit of RAP 31(G)(3)(a) because, excluding the parts of the document exempted by RAP 15(D) and RAP 31(G)(5), this document contains 2,043 words.

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Kentucky Court of Appeals

**COMMONWEALTH OF KENTUCKY
KENTUCKY COURT OF APPEALS
CASE NO. 2024-CA-0436-MR
*Electronically Filed***

COMMONWEALTH OF KENTUCKY

APPELLANT

v.

DOMONICK JONES

APPELLEE

APPENDIX INDEX

1. March 11, 2024, Final Judgment and Sentence of Probation (TR I: pgs. 115–119.)

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TAB 1

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Vincent Riggs, Fayette Circuit Clerk

FAYETTE CIRCUIT COURT
CRIMINAL BRANCH
FOURTH DIVISION

COMMONWEALTH OF KENTUCKY

PLAINTIFF

vs.

FINAL JUDGMENT
SENTENCE OF PROBATION

23-CR-394

DOMONICK DEONTE JONES

DEFENDANT

CHARGE:

Count 1: AGG. Trafficking in Controlled Substance Greater than 28 GMS Fentanyl (F) (B)

(Recommendation: Amended: Trafficking in Controlled Substance, 1st Offense (Carfentanil or Fentanyl Derivatives) (F) (C))

Count 2: Possession of Controlled Substance 1st Degree, 1st Offense - Cocaine (F) (D)

(Recommendation: Dismissal in exchange for plea)

Count 3: Operating on Suspended/Revoked Operators License (M) (B)

(Recommendation: Dismissal in exchange for plea)

Count 4: No/Expired Registration Plates (V) (X)

(Recommendation: Dismissal in exchange for plea)

The Defendant, **Domonick Deonte Jones**, having entered a Plea of Guilty on the 5th day of **October 2023**, and the Court therefore having adjudged the Defendant guilty of the crimes of **Count 1: as amended: Trafficking in Controlled Substance, 1st Offense (Carfentanil or Fentanyl Derivatives) (F) (C) with Dismissal of Counts 2, 3, & 4 in exchange for plea.**

The Defendant, **Domonick Deonte Jones**, having appeared in open court on the 7th day of **December 2023**, and having been represented by counsel, the **Hon.**

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23-CR-00394 03/11/2024

Vincent Riggs, Fayette Circuit Clerk

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Vincent Riggs, Fayette Circuit Clerk

Marcel Radomile, the Commonwealth having been present and represented by counsel, and the Official Court Recorder of this Court, Mr. Jimmy Bunton, having mechanically recorded the testimony and proceedings of the hearing;

The Court having inquired of the Defendant and his counsel whether they had any legal cause to show why judgment should not be pronounced, and having afforded the Defendant and his counsel an opportunity to make statements on the Defendant's behalf and to present any information in mitigation of punishment, and the Court having given due consideration to the written report of the pre-sentence investigation prepared by the Division of Probation and Parole, and the Defendant having been given time within which to controvert the factual contents and conclusion contained in said report, and the Court having given due consideration to the nature and circumstances of the crimes, and to the history, character and condition of the Defendant, and the Court having considered as a sentence, probation, conditional discharge and probation with an alternative sentencing plan, has determined that the defendant is in need of the supervision, direction and guidance that can be provided by the Division of Probation and Parole, and the fact that the Defendant has served a total of Two Hundred Fifty-Two (252) days in custody.

No sufficient cause being shown why judgment should not be pronounced; sentence is imposed upon the Defendant;

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Vincent Riggs, Fayette Circuit Clerk

THEREFORE, IT IS ORDERED that the Defendant is sentenced on **Count 1: as amended: Trafficking in Controlled Substance, 1st Offense (Carfentanil or Fentanyl Derivatives) (F) (C)** to Five (5) years, with **Dismissal of Counts 2, 3, & 4** in exchange for plea.

IT IS FURTHER ORDERED that the Defendant is sentenced to a period of probation of **Two (2) years** subject to the following conditions:

1. Maintain good behavior, refrain from violating the law in any respect, report as directed by your Probation Officer, comply with the rules and regulations of the Division of Probation and Parole and the directions of your Probation Officer, and permit your Probation Officer to visit at home or elsewhere
2. Maintain gainful employment of at least 40 hours per week or full-time employment
3. Be assessed by Probation and Parole's substance abuse treatment coordinator and complete any substance abuse program or drug counseling selected by the coordinator
4. Submit to physical examination, including pupillary response, other eye function test, injection site examination, nasal passage examination and pulse, by your Probation Officer to detect recent drug usage, and submit to random drug testing at your own expense
5. Waive confidentiality and consent to release to your Probation Officer and the Court all records, reports, test, and information from all programs ordered or selected by the Court or your Probation Officer
6. Consent to search of your person or of places or property under your control when requested by your Probation Officer or Police Officer
7. Pay Fayette Circuit Court Clerk's Office a probation fee of \$10.00 per month

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8. Pay the cost of these proceedings in the sum of \$165.00 to the Fayette Circuit Clerk's Office
9. Be subject to 48 hours Discretionary Detention if substance abuse assessment is missed
10. Be subject to 90 days Discretionary Detention at the discretion of the Probation Officer without intervention by the Court
11. May not possess any weapon or firearms
12. The Defendant shall enter and successfully complete Judge Bunnell's Drug Court.
13. The Defendant shall remain in custody until his drug court appearance Thursday, December 14, 2023, at 12:30 p.m.
14. That if it becomes necessary to extend probation to comply the above said conditions, the Court will GRANT such extension.

IT IS FURTHER ORDERED that upon completion of the aforesaid probationary Period the Defendant shall be finally discharged provided that no warrant issued by the Court is pending against him, and that he has complied with the above conditions, and that his probation set forth above has not been revoked.

IT IS FURTHER ORDERED that the Defendant shall be awarded custody credit as calculated by the Division of Probation and Parole toward service of the maximum terms of imprisonment.

IT IS FURTHER ORDERED that the sentence imposed shall run **CONSECUTIVELY** to any previous felony sentence the defendant must serve.

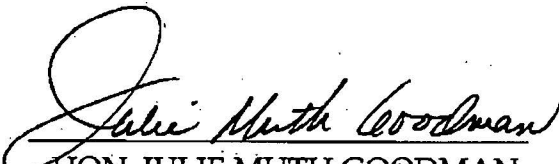
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Vincent Riggs, Fayette Circuit Clerk

IT IS FURTHER ORDERED that if a financial bond was posted, it shall be refunded in the following order: if the bond was posted by a third-party, the bond shall be refunded to the surety. If there is a valid bond assignment in place, the clerk shall first release the assigned amount and then the balance, if any, shall be refunded to the Defendant but only after fines and court costs have been paid.

Dated this the 7th day of December 2023.
(Nunc Pro Tunc.)


HON. JULIE MUTH GOODMAN
JUDGE, FAYETTE CIRCUIT COURT

ATTESTED COPIES TO:

Dated this ___ day of December 2023.

Commonwealth Attorney – Hon. Lindsey Studebaker
Hon. Marcel Radomile
Probation and Parole
Pretrial
FCDC
Bookkeeping

VINCENT RIGGS, C.F.C.C.
BY: _____ D.C.

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