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Supreme Court of Kentucky

2023-SC-0295-MR

APREN POORE — APPELLANT

V.

ON APPEAL FROM WHITLEY CIRCUIT COURT
HONORABLE DANIEL BALLOU, JUDGE
NO. 21-CR-00167

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION OF THE COURT BY JUSTICE KELLER

AFFIRMING AND VACATING, IN PART

Appellant, Apren Poore, pleaded guilty to, and was convicted of, one count of receiving a stolen firearm, one count of possession of a handgun by a convicted felon, and one count of being a persistent felony offender in the first degree. The Whitley Circuit Court sentenced Poore to a term of imprisonment of twenty-years. He now appeals as a matter of right and challenges his plea agreement and the manner in which the sentence was imposed, and the trial court's order concerning payment of court costs and fees. *See* KY. CONST. Sec. 110(2)(b).

Because we conclude that the trial judge exercised independent discretion in sentencing, but thereafter improperly imposed court costs, we vacate the portion of the judgment imposing the court costs and fees and affirm the remainder of the Whitley Circuit Court's judgment.

I. FACTUAL AND PROCEDURAL BACKGROUND

On June 21, 2021, Apren Poore was indicted by a Whitley County Grand Jury on three counts: (1) Receiving Stolen Firearm; (2) Possession of a Handgun by a Convicted Felon; and (3) Persistent Felony Offender in the First Degree. Poore was released on his own recognizance and set to remain on a $2,500 cash bond posted in a different case. The conditions of his bond required that he make all scheduled court dates, refrain from drug and alcohol use, not possess any firearms, and not commit any further violations of the law.

In exchange for Poore's guilty pleas to the charges, the Commonwealth agreed to a recommended sentence of five (5) years on Count 1, five (5) years on Count 2, and entry of "Guilty" on Count 3. The charges would run consecutively for a total of ten (10) years' imprisonment. Importantly, the plea agreement contained a "hammer clause." A hammer clause is a provision in a plea agreement that allows a defendant to be released on his own recognizance pending sentencing, provided the defendant complies with the agreed-upon condition(s) of release. *Prater v. Commonwealth*, 421 S.W.3d 380, 385 (Ky. 2014). Here, the hammer clause stated as follows:

> FAILURE TO APPEAR AT SENTENCING WITHOUT JUST CAUSE SHALL RESULT IN THE COMMONWEALTH MOVING THE COURT TO MODIFY THE SENTENCE RECOMMENDATION TO THE MAXIMUM SENTENCE ON THE CHARGE OR CGARGES, [sic] TO RUN CONSECUTIVELY, OR TO THE MAXIMUM AGGREGATE SENTENCE ALLOWED BY LAW.

Poore signed this agreement and appeared before the trial judge on March 6, 2023. The trial judge conducted a *Boykin*[1] colloquy before determining that Poore voluntarily entered into the plea agreement. The trial court then accepted Poore's guilty plea.

The case was initially scheduled for sentencing in April 2023 but was later moved to May 1, 2023. On April 25, 2023, Poore's counsel ("Defense Counsel") filed a motion to withdraw as his attorney, citing "irreconcilable differences." Defense Counsel explained that Poore wished to withdraw his March 8, 2023, guilty plea, despite being informed of the potential adverse consequences. Poore then informed Defense Counsel of his admission into a rehabilitation facility, which was later confirmed by documentation from Addiction Recovery Care ("ARC"). However, in late April, Defense Counsel received an email from ARC stating that Poore had exited treatment. On April 25, 2023, in accordance with Poore's wishes, Defense Counsel also filed a motion to withdraw the guilty plea. Both motions were set to be heard on May 1, 2023, the same date as Poore's sentencing.

Before his sentencing date, Poore was arrested in Pike County and detained in the Pike County Detention Center on shoplifting charges. As a result, Poore failed to appear for his sentencing hearing on May 1, 2023, thereby violating the conditions of the plea agreement.

[1] *Boykin v. Alabama*, 395 U.S. 238 (1969).

At the May 1 hearing, the trial court granted Defense Counsel's motion to withdraw from representation, and a new attorney was immediately appointed to represent Poore. However, the trial court then denied Poore's motion to withdraw his guilty plea for lack of a "compelling reason." Specifically, the trial court stated that "just because he is getting a new lawyer is not a reason" and subsequently issued a bench warrant for Poore's arrest.

Poore's final sentencing took place on June 5, 2023. Because he had failed to appear for the May hearing and thereby violated his plea agreement, the Commonwealth recommended that Poore receive the maximum lawful sentence of twenty years' imprisonment. The trial court then sentenced Poore to twenty-years' imprisonment, and the final judgment was entered accordingly.

II. ANALYSIS

Poore raises several issues on appeal. First, he argues that the trial judge abused his discretion by relying on the hammer clause in Poore's plea agreement in imposing a twenty-year sentence. Second, Poore argues that his court costs should be vacated.

A. Hammer Clause

We review a court's alleged improper adherence to a hammer clause provision for abuse of discretion. *Prater*, 421 S.W.3d at 384 (citing *Knox v. Commonwealth*, 361 S.W.3d 891, 899 (Ky. 2012)). "The test for an abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Anderson v. Commonwealth,*

231 S.W.3d 117, 119 (Ky. 2007) (citing *Goodyear Tire & Rubber Co. v. Thompson,* 11 S.W.3d 575, 581 (Ky. 2000)).

Plea agreements between prosecutors and criminal defendants are a vital part in the administration of justice. *Knox*, 361 S.W.3d at 896-97. Accordingly, the Commonwealth and a criminal defendant are free to enter into a plea agreement that both parties deem fitting; however, the trial court is not bound by the terms of the agreement. *Covington v. Commonwealth*, 295 S.W.3d 814, 816 (Ky. 2009). Therefore, while plea agreements are significant considerations in a judge's sentencing decision, they can never be the only factor. *Knox*, 361 S.W.3d at 897. A plea agreement does not relieve the judge of the statutory directives with respect to sentencing and it does not supplant the judge's duty to make an independent determination of the appropriate sentence. *Id.*

A hammer clause is a provision in a plea agreement which allows the Commonwealth to recommend a harsher sentence than that originally agreed upon in exchange for the guilty plea if the defendant fails to comply with the conditions of his bond. *Prater*, 421 S.W.3d at 385. A hammer clause may be included in a plea agreement so long as the trial court accords the clause no special deference and makes no commitment that compromises the court's independence or impairs the proper exercise of judicial discretion. *Id.* Though we have acknowledged that hammer clauses "generate[] a tension that obscure[s] the judge's duty to decide what sentence is appropriate," *Knox*, 361 S.W.3d at 900, we have nonetheless held that a hammer clause which remains within the legislatively authorized sentencing ranges is an appropriate plea-

bargaining tool subject to the trial court's review and exercise of its independent discretion. *McClanahan v. Commonwealth*, 308 S.W.3d 694, 702 (Ky. 2010).

Preliminarily, we note that Poore does not dispute that he entered into the plea agreement knowingly, intelligently, and voluntarily, nor does he argue that he should have been permitted to withdraw his guilty plea. Instead, Poore alleges that the trial judge abused his discretion by considering the hammer clause in his plea agreement as a factor in sentencing. Addressing this argument involves a dual inquiry. We must review both Poore's plea hearing and final sentencing hearing to determine whether the trial judge made any statements that indicate he abdicated his independence in sentencing. We turn first to Poore's plea hearing.

Upon entry of a guilty plea, the trial court shall not threaten to impose a specific sentence, or announce an intention to impose a specific sentence, or otherwise commit to a specific sentence. *Knox*, 361 S.W.3d at 898. The sentencing court must simply accept the entry of the plea (assuming the guilty plea was made voluntarily, intelligently, and knowingly), note the recommendation or agreement concerning the sentence, and set a date and time for sentencing. *Id*.

In *Knox v. Commonwealth*, 361 S.W.3d 891 (Ky. 2012), we addressed a situation in which a trial judge abused his discretion by improperly predetermining that any violation of bond conditions by the Appellant would result in the automatic denial of any motion to withdraw the guilty plea. There,

upon taking the plea, the trial judge told Knox that the hammer clause was a serious matter and that if any conditions of his release were violated, "your sentence is going to be twenty years to serve." *Id.* at 896. The judge then reiterated, "The court is going to enforce the agreement if you violate [the terms of release]." *Id.* As a result, we reversed Knox's sentence and held that the trial judge had compromised his independence and abused his discretion by imposing a sentence prescribed in the hammer clause without considering any alternative sentence or any other relevant facts and circumstances. *Id.* at 900-901.

Here, at Poore's guilty plea hearing, the trial judge made no predetermining statements of the kind we disavowed in *Knox*. Instead, the trial judge advised Poore of all his constitutional rights and confirmed that Poore understood he would be waiving those rights by entering the guilty plea. Poore affirmed his understanding. Notably, the trial judge did not address the hammer clause with Poore. This absence indicates that the concerns highlighted in *Knox* are not applicable here. Indeed, the lack of discussion about the hammer clause suggests that the trial judge did not exhibit any predetermination, thus preserving his responsibility to impose an independent sentence during the final sentencing hearing.

Importantly, while the trial judge did not directly discuss the hammer clause, he ensured that Poore was fully informed about the plea agreement and that its terms were clear. The following exchange occurred:

> **Trial Judge**: Are you satisfied with the legal services provided to you?
> **Poore**: Yes, sir.
> **Trial Judge**: Doing a good job, isn't he [referring to Poore's counsel]?
> **Poore**: He actually did a pretty good job, yeah.
> . . .
> **Commonwealth**: He did a phenomenal job…and I don't say that about a lot of defense lawyers.
> **Trial Judge** [speaking to Poore]: Have you had a chance to read this? [holding up the motion to enter the guilty plea]
> **Poore**: Yes, sir.
> **Trial Judge**: Do you understand it?
> **Poore**: Yes, sir.

The discussion between the trial judge and Poore demonstrates a strong basis for the trial judge to infer that Poore's attorney had adequately explained *all* of the terms of the plea agreement. Accordingly, we conclude that the trial judge did not abuse his discretion during the guilty plea hearing.

We turn next to Poore's final sentencing hearing. Poore makes two arguments at this juncture. First, Poore cites the following statement of the trial judge from the final sentencing hearing, "The Commonwealth's motion is sustained. Apren, I hate to do this, but I got to, I have to, got to hold you accountable," and argues that this statement, specifically the use of the verb "*have,"* indicates an improper forfeiture of the trial judge's discretion under our holding in *McClanahan*. Second, Poore argues that the trial judge also abused his discretion when he failed to articulate why Poore's detention in the Pike County Detention Center did not constitute "just cause" to excuse his absence from the May 1 sentencing hearing.

In *McClanahan*, the defendant triggered a hammer clause in his plea agreement by violating the terms of his pre-sentencing release from custody.

308 S.W.3d at 697. As a result, the defendant was given a thirty-five-year sentence based on the hammer clause, instead of a ten-year sentence. *Id.* We reversed this sentence for two reasons: (1) the thirty-five-year sentence exceeded the maximum sentence authorized by statute; and (2) the trial court imposed the sentence without considering "the nature and circumstances of the crime and the history, character and condition of the defendant," and therefore failed to exercise independent discretion in imposing the sentence. *Id.* at 702.

In reaching this result, we looked to the statements made by the trial judge during entry of the guilty plea and at sentencing. At sentencing, the judge told counsel she would "entertain" his comments but that the decision to impose a forty-year sentence had been made. *Id.* at 703. The Court addressed the judge's statement that she had "review[ed] the case" and decided to rule "in accordance with the recommendation [of the Commonwealth]." *Id.* However, the Court found this statement to constitute nothing more than a "superficial reference" which "was no substitute for the 'meaningful hearing' contemplated by our decision in *Edmonson*, and required by our statutes." *Id.* (citing *Edmonson v. Commonwealth*, 725 S.W.2d 595 (Ky. 1987)). As a result, this Court held that because the trial judge "assur[ed] Appellant upon acceptance of his guilty plea that should he violate the terms of his release, the full force of the 'hammer clause' would be dropped upon him," the judge failed to exercise independent judicial discretion. *Id.* at 704.

Poore's argument that the trial judge's statement[2] constituted a forfeiture of the judge's independence and discretion is not persuasive. First, we note that rather than looking at one statement in isolation, the *McClanahan* Court instead examined the trial judge's remarks in their entirety and within the context of the sentencing hearing. Second, our holding in *McClanahan* condemned the statements for their predetermined quality and explicit reliance on the hammer clause. Here, the mere use of the auxiliary verb "have" cannot be said to rise to the level of predetermination, but instead simply reflects the trial judge's acknowledgement of his sentencing responsibilities.

Furthermore, we find no evidence that the trial judge compromised his independence and abused his discretion in sentencing Poore in accordance with the Commonwealth's recommendation under the hammer clause. Poore claims that the trial judge failed to explicitly explain why Poore's arrest in another county did not constitute "just cause" for his absence from the sentencing hearing, and that this in turn amounted to an abuse of discretion. However, in considering this argument, we find no indication that the judge's decision was "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Anderson,* 231 S.W.3d at 119. Our conclusion relies on the trial judge's statements in his final written judgment, as well as on the colloquy between the trial judge and Poore during the sentencing hearing. Our decision

[2] "The Commonwealth's motion is sustained. Apren, I hate to do this, but I got to, I have to, got to hold you accountable."

in *Knox v. Commonwealth* demonstrates the weight we must give to such aspects of the record. 361 S.W.3d at 896.

In *Knox v. Commonwealth*, our decision to reverse the defendant's sentence turned on our diligent review of the record and whether we could discern if the trial judge might have considered factors other than simply relying on the hammer clause:

> We have reviewed the record for ***some*** indication that, in fixing Knox's sentence, the trial judge ***might*** have considered something other than the plea agreement hammer clause. We find nothing that supplements the statements made in open court at the plea colloquy or the sentencing hearing. While the final written judgment makes specific findings about Knox's hammer clause violation, it says absolutely nothing that suggests compliance with any part of KRS 533.010(2) or that "due consideration" was given to the report of the presentence investigation.

Id. at 896-97 (emphasis added). Here, contrary to the silent record in *Knox*, there is ample evidence to indicate that the judge did not depend entirely on the hammer clause in reaching his decision. In his final written order, the trial judge articulated his findings on the matter, stating:

> After giving due consideration to the written report of the Division of Probation and Parole, to the nature and circumstances of the crime, and to the history, character, and condition of the Defendant, the Court is of the opinion that imprisonment is necessary for the protection of the public because . . . (2) there is a substantial risk that Defendant will commit another crime during any period of probation, probation with an alternative plan or conditional discharge; (3) the Defendant is in need of correctional treatment that can be provided most effectively by committing Defendant to a correctional institution; [and] (4) probation, probation with an alternative sentencing plan or conditional discharge would unduly depreciate the seriousness of the crime for which Defendant is convicted.

The written order demonstrates that the trial judge did not rely solely on the hammer clause, but instead considered "all the underlying facts and circumstances appropriate for the offense(s) in question." *Chapman v. Commonwealth*, 265 S.W.3d 156, 177 (Ky. 2007); *see also Knox*, 361 S.W.3d at 898 (holding that consideration of the "underlying facts and circumstances" involves review of the presentence report, the nature and circumstances of the specific crimes to which the defendant pled guilty, and the history, character, and condition of the defendant.).

The colloquy between the parties at Poore's final sentencing hearing on June 5, 2023, provides additional evidence concerning the trial judge's decision.

> **Commonwealth**: And you didn't show up for sentencing, isn't that correct?
> **Poore**: Yes.
> **Commonwealth**: And you were picked up and arrested in Pike County?
> **Poore**: Yes.
> **Commonwealth**: And you told your prior lawyer you were going to rehab. In fact, you were in Pike County getting arrested, were you not?
> **Poore**: I did go to rehab, went to a sober living house, and got arrested, yes.

The Commonwealth then referred to the hammer clause in the plea agreement and made a motion to impose a sentence of ten years for each count to be run consecutively for a total sentence of twenty years. The following exchange occurred.

> **Poore**: Yes sir, I was completely unaware of that [the hammer clause].
> . . .

> **Trial Judge**: On the plea format? I mean they all have that up there. Right, here it is, "Failure to appear at sentencing shall result…"
> **Defense Counsel**: He would've been here at the sentencing had he not been arrested, your honor.
> . . .
> **Poore**: Your honor I understand that, that I did not read, that's completely my fault, but that still don't change the fact that perjury was committed.

Poore alleged that an officer perjured himself during the grand jury proceeding, and that the case should therefore be dismissed. The parties engaged in a heated discussion regarding the alleged perjury before returning to the topic of Poore's absence from the sentencing hearing on May 1.

> **Trial Judge**: You came in here and knowingly, voluntarily, and intelligently entered a plea of guilty, and then when it came time for sentencing, you did not show up. So, your motion to withdraw your guilty plea is overruled and I'm kinda studying on the Commonwealth's motion.
> **Poore**: I ask you, your honor, to give me the original plea deal agreement, if I can't have my perjury. That's the least you can do for me.
> **Commonwealth**: Judge, I can support my argument for why I think it's a justified imposition of sentence. First of all, he agreed to it. Second of all, the defendant has been placed into custody in excess of thirty times. In excess of thirty times he has been arrested in this community for crimes and never really held accountable for his crimes to be frank. PFO speaks for itself. Thirty-two prior arrests. He is by, what I can recall, the second most arrested person in the history of Whitley County.
> . . .
> **Trial Judge**: That's the problem, Apren. You didn't come back.
> **Poore**: Well, I was going to come back, I mean it's not like I intentionally didn't, sir.
> **Trial Judge**: The Commonwealth's motion is sustained. Apren, I hate to do this, but I got to, I have to, got to hold you accountable.

Although the trial judge does not explicitly articulate why Poore's absence did not constitute a "just cause" for his absence from the May 1 sentencing hearing, such an explicit finding is not required. The trial judge's statements

that "when it came time for sentencing you [Poore] did not show up," and "That's the problem, Apren. You didn't come back" indicate an implicit finding that Poore's arrest in a different county was not "just cause" because it was still Poore's *own* actions that resulted in his ultimate detention and absence. As a result, we cannot say that the trial judge abused his discretion.

In reaching this conclusion, we reiterate that our role as a reviewing court in this case is merely to determine whether the trial judge abused his discretion and reached a judgment which was "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Anderson,* 231 S.W.3d at 119. We decline to speak to whether a defendant's involuntary detention constitutes "just cause" for his absence from a court proceeding, and our holding should not be read to condone such a finding either way. Moreover, while we commend trial courts for the extensive demands they encounter on a daily basis, we would be remiss if we did not also emphasize that due process is at its strongest when trial courts err on the side of caution and articulate clear, express findings, whether written or oral, on issues which directly impact an individual's liberty interests.

B. Court Costs

Poore argues that his court costs must be vacated. In the final judgment, the trial judge found Poore indigent pursuant to KRS 534.030, but thereafter ordered Poore to pay court costs in the amount of $130 and a fee of $10 for the Department of Kentucky State Police for Kentucky Internet Crimes Against Children Task Force. The trial judge ordered that Poore pay this sum in $25

monthly installments, with payment set to begin ninety days following Poore's release from jail. Although this issue was not properly preserved, this Court always has jurisdiction to correct sentencing errors. *Spicer v. Commonwealth*, 442 S.W.3d 26, 35 (Ky. 2014).

Regarding court costs, KRS 23A.205(2) "mandates the imposition of court costs on a convicted defendant, 'unless the court finds that the defendant is a poor person defined by KRS 453.190(2) and that he or she is unable to pay court costs and will be unable to pay the court costs in the foreseeable future.'" *Hall v. Commonwealth,* 551 S.W.3d 7, 21 (Ky. 2018) (quoting KRS 23A.205(2)). However, if the trial court finds that the defendant does not meet this standard and that the defendant is nonetheless unable to pay the full amount of the court costs, fees, or fines at the time of sentencing, then the trial court may establish an installment payment plan in accordance with KRS 534.020. KRS 23A.205(3). Where the trial court establishes an installment payment plan for the defendant, KRS 534.020(2)(b) requires that "all court costs, fees, and fines shall be paid within one (1) year of the date of sentencing notwithstanding any remaining restitution or other monetary penalty owed by the defendant and arising out of the conviction."

Here, the trial judge put Poore on an installment plan which would not be complete within one year of his sentencing, thereby violating the plain language of KRS 534.020(2)(b). Because this installment plan does not comply with the statutory requirements, we must vacate Poore's court costs and fees.

III. CONCLUSION

For the foregoing reasons, we hereby vacate the portion of the judgment imposing the court costs and fees upon Poore and affirm the remainder of the Whitley Circuit Court's judgment.

All sitting. VanMeter, C.J.; Bisig and Nickell, JJ., concur. Lambert, J., dissents by separate opinion in which Conley and Thompson, JJ., join.

LAMBERT, J., DISSENTING. I must dissent as I would hold that the sentencing court abused its discretion by enforcing the hammer clause without considering whether there was just cause for Poore's failure to appear. The court had the power to order his transport and Poore had no ability to appear without that court order.

The Commonwealth's offer on a plea of guilty in this case contained a hammer clause with only one condition. It read: "Failure to appear at sentencing **without just cause** shall result in the Commonwealth moving the court to modify the sentence recommendation to the maximum sentence on the charge or [charges] to run consecutively, or to the maximum aggregate sentence allowed by law." (Emphasis added). There were no other conditions to be found anywhere in the record; not in the Commonwealth's offer on a plea of guilty, Poore's motion to enter a guilty plea, nor the circuit court's order accepting the guilty plea. No conditions, failure to appear included, were discussed during Poore's plea colloquy either.

On the morning of Poore's first sentencing hearing, Poore's counsel, the Commonwealth, and the court were all present. The video record of that

hearing begins with an unidentified member of the court's staff informing both defense counsel and the court that Poore was arrested in a different jurisdiction over the weekend[3] and was currently in jail. The exchange was as follows:

> **Court Staff:** I got notified this morning [Poore is] in Pike County and he has new charges.
>
> **Court:** New charges in Pike County.
>
> **Defense Counsel:** In Pike? When did that happen, when did he get picked up?
>
> **Court Staff:** Over the weekend.
>
> **Defense Counsel:** Did he get picked up?
>
> **Court Staff:** Mhm (affirmative).
>
> **Defense Counsel:** Yeah, cause I talked to him—
>
> **Court Staff:** Cause she, they messaged me this morning actually when I was sitting in district court.
>
> **Defense Counsel:** Okay, well—
>
> **Court:** Okay.

The sentencing court was accordingly on notice that Poore failed to appear for sentencing because he was in jail, in Kentucky, but in another county. It goes without saying that, because he was in jail, Poore could not have transported himself. Under these circumstances the *only* way he would have been able to appear was if the sentencing court had issued a transport order to the jail that housed him. While Poore's own actions likely landed him in jail (a new charge

[3] The hearing occurred on a Monday.

for shoplifting) his ability to appear at sentencing once he was in jail was completely out of his control. Moreover, being charged with new crimes was *not* a violation of the hammer clause agreement. But, instead of issuing a transport order so that sentencing could proceed, the sentencing court issued a bench warrant for Poore based on his failure to appear.

The parties appeared again for sentencing roughly a month later, this time with Poore present. After Poore made a motion to withdraw his guilty plea the Commonwealth argued, for the first time, that the hammer clause in the plea agreement should be enforced. The sentencing court read the entirety of the hammer clause aloud after which Poore's attorney argued, "He would have been here at the sentencing had he not been arrested your honor." Instead of considering whether his incarceration might have constituted "just cause" for his failure to appear, the sentencing court responded, "Yeah, it doesn't matter." Later, the court again highlighted to Poore the fact that he did not appear for sentencing, to which Poore replied, "Well, I was going to come back it's not like I intentionally didn't sir." Without discussion, the sentencing court then sustained the Commonwealth's motion to enforce the hammer clause.

While it may be accurate that Poore is the "second most arrested person in the history of Whitley County," as the Commonwealth's Attorney claimed at his sentencing, once he was incarcerated elsewhere, he undeniably lacked the ability to show up for sentencing. Instead, the court possessed the ability to order him transported from the jail. Ultimately, what the circuit court did here was punish Poore because he did not do something that he objectively could

not do. That is fundamentally unfair, particularly because the *sole* basis for the enforcement of the hammer clause was his failure to appear and the sentencing court was the only entity with the authority to ensure he could appear in the first place.

We have very little published case law concerning hammer clauses. What little precedent we have can, in broad strokes, be distilled into the following: (1) this Court lacks the authority to prohibit the use of hammer clauses, as "the making of an agreement whereby the Commonwealth binds itself to recommend a particular sentence is a power of the executive branch." *Knox v. Commonwealth*, 361 S.W.3d 891, 899 (Ky. 2012); (2) when a hammer clause is violated, the sentencing court must still give due consideration to the applicable statutory sentencing factors and may not automatically impose a higher sentence based on a violation of a hammer clause alone. *Id.* at 895-97; *McClanahan v. Commonwealth*, 308 S.W.3d 694, 702-04 (Ky. 2010); and (3) a sentence imposed pursuant to a hammer clause must be within the statutory range of punishment permitted for the offenses of conviction. *Id.* at 698-702. Point being, we have not yet had occasion to address whether a defendant's post-plea incarceration may constitute just cause for failure to appear at sentencing.

Because of the foregoing, I would hold that the sentencing court abused its discretion by failing to enter a transport order and by enforcing the hammer clause based on Poore's failure to appear without considering whether his inability to appear constituted just cause under the agreement. Accordingly, I

would vacate the sentencing order and remand the matter for resentencing per the plea agreement.

Conley and Thompson, JJ., join.

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