RENDERED: April 9, 1999; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-000293-MR

FRED T. TAYLOR, JR. — APPELLANT

v.

APPEAL FROM McCRACKEN CIRCUIT COURT
HONORABLE RON DANIELS, JUDGE
INDICTMENT NO. 95-CR-00220

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

* * * * * * * * * * *

BEFORE: GUDGEL, Chief Judge; COMBS and GARDNER, Judges.

COMBS, JUDGE. Fred Taylor (Taylor) appeals from an order of the McCracken Circuit Court revoking his probation and ordering him to serve four years in prison. Finding no error, we affirm.

In October 1995, the McCracken County Grand Jury indicted Taylor on one felony count of trafficking in a controlled substance (marijuana) within 1,000 yards of a school while in possession of a handgun (KRS 218A.1411). In November 1995, Taylor entered a guilty plea pursuant to a plea agreement with the Commonwealth to the amended charge of possession of marijuana while in possession of a handgun. Under the plea

agreement, the Commonwealth proposed a sentence of four years to the amended charge — a recommendation adopted by the trial court in February 1996. However, the court suspended service of the sentence and placed Taylor on probation for a period of five years.

In May 1996, Taylor's probation officer filed an affidavit with the court seeking revocation of probation based on the positive results of a random drug test for the presence of marijuana. After conducting a hearing in July 1996, the trial court found that Taylor had violated the conditions of probation by using marijuana and revoked his probation. Upon appeal of the order, this Court in November 1997 vacated the order revoking Taylor's probation because the trial court had erroneously used a probable cause standard as to the violation. We remanded the case for a new hearing, mandating that the "preponderance of the evidence" standard be utilized in lieu of "probable cause."

Before the second revocation hearing was held, the Commonwealth filed a notice in January 1998 to raise additional grounds to support revocation of Taylor's probation: 1) an Illinois conviction (entered on July 9, 1997) for unlawful delivery of a controlled substance; and 2) an assault on another inmate in December 1997 while he was in the county jail.

On January 16, 1998, the trial court conducted the second probation revocation hearing. Taylor and the Commonwealth stipulated that the factual evidence relating to the positive drug test of May 20, 1996, would be the same as that which had been offered at the first revocation hearing. While no new

evidence was presented on that issue, the Commonwealth presented evidence on the two additional grounds. After this second hearing, the trial court concluded that Taylor had violated the terms of probation as evidenced both by the positive drug test of May 20, 1996 (properly examined at this hearing according to the preponderance of the evidence standard) and by the Illinois criminal conviction. It revoked Taylor's probation and sentenced him to serve the four-year suspended sentence. This appeal followed.

We have no hesitation in affirming the action of the trial court based solely upon the positive marijuana test of May 20, 1996. It is undisputed that Taylor had tested positive for use of marijuana during his probationary period. Although the court erred at the first revocation hearing in utilizing the probable cause standard, it corrected that error at the second revocation hearing of January 16, 1998 (at issue here) and correctly revoked his probation pursuant to the preponderance of the evidence standard. This offense alone would suffice to sustain the revocation of probation. Directly on point is Messer v. Commonwealth, Ky. App., 754 S.W.2d 872, 873 (1988): "Whether the trial court revoked upon one violation or three is of no consequence ... so long as the evidence supports at least one violation."

However, coupled with this incident is a second ground equally capable of sustaining the revocation of probation: Taylor's conviction of another drug offense in Illinois. Ignoring the sufficiency of the positive drug test of May 20,

1996, Taylor premises his appeal upon alleged defects in the trial court's treatment of the Illinois conviction.

Taylor notes that the trial judge had correctly rejected the Commonwealth's reliance upon his assault of a fellow inmate in December of 1997 since the incident occurred during his period of incarceration and not during his time on probation. He attempts to expand upon that logic by analogy with respect to his Illinois conviction, arguing that the conviction occurred on July 9, 1997 (while he was incarcerated) and that, therefore — as in the assault offense — it cannot serve as the basis of his probation revocation.

The Commonwealth presented evidence at the revocation hearing that Taylor had committed the felony offense of unlawful delivery of a controlled substance in Illinois while free on probation in May of 1996. Taylor does not dispute this allegation. However, he contends that since the actual conviction of this offense occurred ten months after he was incarcerated, that conviction cannot be utilized as a legitimate basis for the revocation of probation. We disagree. The timing of the conviction is irrelevant; the significant fact serving as the "triggering event" for purposes of revocation of probation is that Taylor indeed committed the offence during his period of probation in accordance with the plain language of KRS 533.030(1):

> The court shall provide as an explicit condition of every sentence of probation or conditional discharge that the defendant not commit another offense during the period for which the sentence remains subject to revocation. (Emphasis added).

Thus, the fact of the commission of the Illinois offense — regardless of the date of the ultimate conviction — alone suffices to sustain the revocation of his probation. His attempted distinction between "date of commission" and "date of conviction" is merely semantic and not substantive.

In summary, we wholly agree with the conclusion of the McCracken Circuit Court that either ground would justify revocation of probation, but that "the two of them together certainly are enough grounds."

We therefore affirm the judgment of the McCracken Circuit Court.

ALL CONCUR.

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