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Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-001517-MR

RYAN JONES — APPELLANT

v.

APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE JANET P. COLEMAN, JUDGE
ACTION NO. 06-CR-00208

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; THOMPSON, JUDGE; HARRIS,[1] SENIOR JUDGE.

THOMPSON, JUDGE: Ryan Jones appeals from an order of the Hardin Circuit Court revoking his probation. The issue presented is whether the circuit court's failure to continue the probation revocation hearing or, alternatively, grant Jones

[1] Senior Judge William R. Harris sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

"use" immunity unconstitutionally forced him to choose between asserting his right against self-incrimination and his right to present a meaningful and complete defense. Because we conclude that Jones should have been informed that his testimony at his probation revocation hearing could not be used against him at his subsequent criminal trial, we reverse and remand.

On February 27, 2007, Jones entered a plea of guilty to trafficking in a controlled substance in the first degree; tampering with physical evidence; possession of marijuana; and possession of drug paraphernalia, first offense. His sentences were ordered to run concurrently for a total of seven-years' imprisonment, probated for five years.

The events leading to the probation revocation occurred on March 20, 2008, when Hardin County Probation and Parole Officer Steven Whitley, Jones's probation supervisor, received information from the Radcliff Police Department that witnesses reported seeing Jones shoot a gun near his residence. Officer Whitley, Officer Sullivan McCurdy, and other officers arrived at the residence where they found a male, Justin Valentine, and two females on the front porch. Jones was not at the residence. After Officer McCurdy smelled marijuana, the three were arrested and taken into custody.

Vicki Spencer, appellant's aunt, spoke with the officers and escorted them to the basement of the residence where Jones and Valentine lived. According to Officer Whitley, he observed in plain view marijuana residue on a dresser. A

search of the area produced digital scales, fifty dollars in cash, marijuana in plastic bags, a white powdery residue in a gray tray and marijuana in the pockets of clothing.

Upon Jones's arrival at the residence, he was arrested and taken into custody. Although Jones denied any knowledge of the drugs, when asked if he could pass a drug test, Jones responded, "No," and admitted that he had smoked marijuana the previous day.[2]

Jones was indicted for possession of a controlled substance. At his probation revocation hearing, Jones sought a continuance on the grounds that the underlying facts that supported the probation revocation were the same used to support the felony indictment. As a consequence, he argued that he could not present a complete defense to the revocation because his testimony could be used against him at his criminal trial. The continuance was denied. Fearing that his testimony would be used against him at his subsequent criminal trial, Jones elected to remain silent. Following the hearing, Jones's probation was revoked.

A probation revocation proceeding is not a criminal proceeding; thus, the probationer is not entitled to the full panoply of rights afforded a criminal defendant. *Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972). "Indeed, if an individual released on probation has failed to abide by the conditions of his release, the State has an overwhelming interest in being able to

[2] Jones represents to this Court that if he had been allowed to testify under a grant of immunity, he would have denied making these statements.

return the individual to imprisonment without the burden of a new adversary criminal trial." *Robinson v. Commonwealth,* 86 S.W.3d 54, 56 (Ky.App. 2002) (internal quotations omitted).

Although a probationer's rights are limited at a revocation hearing, it is constitutionally required that the probationer be given the opportunity to testify. *Gagnon v. Scarpelli,* 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973); *Murphy v. Commonwealth,* 551 S.W.2d 838, 840 (Ky.App. 1977). The right to testify is significant to the probationer and the Commonwealth because it ensures that the proceeding leads to an accurate and informed result so that the probationer's liberty is not unjustifiably taken and the Commonwealth does not unnecessarily interrupt the rehabilitative process or prejudice the safety of the community. It derives from the succinct proposition that the probationer is entitled to be treated with "basic fairness." *Morrissey*, 408 U.S. at 484, 92 S.Ct. at 2602.

Basic fairness requires that a probationer not be forced to sacrifice one constitutional right for another. *Simmons v. United States*, 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968). *See also, Shull v. Commonwealth*, 475 S.W.2d 469 (Ky.App. 1971)(holding that Section Eleven of the Kentucky Constitution and the Fifth Amendment of the United States Constitution prohibit the Commonwealth from using a defendant's testimony at a suppression hearing as substantive evidence at the criminal trial). The rights afforded through due process cannot be exercised at the expense of an equally important right, the right to be free from

self-incrimination. Jones contends that the exercise of his right to testify exposed him to self-incrimination unless his testimony was excluded from use at his criminal trial or his revocation hearing postponed until the criminal charges were resolved. Thus, the question presented is whether he was entitled to Fifth Amendment protection.

The Fifth Amendment of the United States Constitution provides that no person in a criminal case shall be compelled to be a witness against himself. Section Eleven of the Constitution of Kentucky provides identical protections against self-incrimination. *Commonwealth v. Buford*, 197 S.W.3d 66, 74 (Ky. 2006).

The right against self-incrimination "not only permits a person to refuse to testify against himself at a criminal trial in which he is a defendant, but also privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings." *Allen v. Illinois*, 478 U.S. 364, 368, 106 S.Ct. 2988, 2991, 92 L.Ed.2d 296 (1986) (internal quotes and citations omitted). "As a general proposition, the privilege against self-incrimination may be invoked whenever a witness has a real and appreciable apprehension that the information requested could be used against him in a future criminal proceeding." *Hodge v. Commonwealth*, 17 S.W.3d 824, 841 n.2 (Ky. 2000).

We have had occasion to address self-incrimination in the context of

probation revocation hearings and have held that because a revocation proceeding is not a criminal proceeding, the Fifth Amendment of the United States Constitution and Section Eleven of the Kentucky Constitution do not apply. Citing federal authority, in *Childers v. Commonwealth*, 593 S.W.2d 80 (Ky.App. 1979), the Court held that the "privilege against self-incrimination is fundamentally inconsistent with the acquisition and maintenance of probationary status." As a consequence, there is no right to assert the Fifth Amendment at a probation revocation hearing. *Id*. at 81. Recently, in *Gamble v. Commonwealth*, 293 S.W.3d 406 (Ky.App. 2009), this Court reaffirmed *Childers* and rejected the probationer's assertion that his Fifth Amendment rights were implicated when he refused to answer questions at his probation hearing regarding his failure to pay child support.

We do not deviate from the precedent cited and reaffirm that the Fifth Amendment of the United States Constitution and Section Eleven of the Kentucky Constitution are not applicable to testimony used solely to establish grounds for probation revocation. However, a different conclusion is required when revocation is sought prior to a criminal trial arising from the same facts as the revocation. Our reasoning is premised on two constitutional principles: the concept that due process requires basic fairness in all judicial proceedings; and the concept that the state cannot compel incriminating testimony.

The tension between the probationer's right to be heard and the possible use of that same testimony against the probationer at his subsequent

criminal trial has been the subject of a plethora of legal opinions. The probationer must choose between remaining silent or presenting a defense to probation revocation, which divulges his defense to the criminal charge and risks self-incrimination at his criminal trial. The probationer's precarious position was artfully summarized in a concurring opinion by the then-Chief Justice of the Alaska Supreme Court in *McCracken v. Corey*, 612 P.2d 990, 999 (Alaska 1980), as follows:

> The probationer or parolee when confronted with a revocation hearing prior to a criminal trial still must weigh several factors in deciding whether to testify. Not to testify may mean that parole or probation will be revoked because no response had been made to the state's evidence. The commentary to the ABA standards on probation point out the greater difficulty in defending such an action:
>
> > The relative informality of a probation revocation proceeding, as compared to the trial of an original criminal charge, underlines the danger. Relaxation of rules of admissibility of evidence, the absence of a jury, a lesser burden of proof factors such as these can lead to an abuse of the proceedings by basing revocation upon a new criminal charge when the offense could not be proved in an ordinary criminal trial.
>
> ABA Standards relating to Probation, s 5.3, at 63 (Approved draft 1970). To testify and put forth a full defense, if successful, may still be a hollow victory. For while the parolee or probationer may be successful in persuading the parole board or the court that parole or probation should not be revoked, the prosecution has most likely been given a fairly comprehensive

> presentation of the parolee or probationer's defense. At the criminal trial, the prosecution will thus be better prepared because the revocation proceeding was held prior to the trial on the underlying criminal conduct.

In 9 Ky. Prac. Crim. Prac. & Proc. § 31:156 (2009-2010), similar concerns are expressed by Professor Leslie W. Abramson, a recognized authority on Kentucky Criminal Procedures, who advises that the court afford the defendant insulation from the possible incriminating use of his or her testimony in other proceedings. Absent some assurance that a probationer's statement will not diminish his chances of acquittal at a subsequent criminal trial, "his opportunity to be heard is more illusory than real . . . ." *People v. Coleman*, 13 Cal.3d 867, 874, 120 Cal.Rptr. 384, 392, 533 P.2d 1024, 1031 (1975).

Despite criticism of pretrial revocation hearings, courts have been reluctant to mandate that a hearing be postponed until the concurrent criminal charge is resolved. Because the state has an interest in expeditiously removing recalcitrant criminals from society and the probationer has an interest in a speedy resolution of his probationary status, there is no constitutional requirement that the revocation hearing be postponed until resolution of any criminal charges based on identical facts. *See Lynott v. Story*, 929 F.2d 228 (6th Cir. 1991); *Tiryung v. Commonwealth*, 717 S.W.2d 503 (Ky.App. 1986).

Jurisdictions that have sought to ease the probationer's dilemma and diminish the possible tactical advantage gained by the prosecution presented by a

pretrial revocation hearing have declined to interfere with the Commonwealth's swift pursuit of revocation but, instead, have adopted the position that the probationer's testimony at the hearing cannot be used against him at a criminal trial. *See Melson v. Sard*, 402 F.2d 653, 655 (D.C.Cir. 1968); *Tinch v. Henderson*, 430 F.Supp. 964, 969 (M.D.Tenn.1977); *People v. Rocha*, 86 Mich.App. 497, 512, 272 N.W.2d 699, 706 (1978); *Avant v. Clifford*, 67 N.J. 496, 341 A.2d 629, 653-57 (1975) (requiring use immunity in the context of a prison disciplinary hearing); *State v. DeLomba*, 117 R.I. 673, 679, 370 A.2d 1273, 1276 (1977); *State v. Evans*, 77 Wis.2d 225, 252 N.W.2d 664, 668-69 (1977). By application of use immunity, the tension between the probationer's constitutional rights is eased without sacrificing the purported benefits of a pretrial revocation.[3]

The Commonwealth recognizes the authority cited but points out that other federal and state courts have held there is no constitutional mandate that the probationer's testimony be immunized from use at a subsequent criminal trial and those courts granting immunity have done so on state grounds. *See Lynott*, 929 F.2d 228 (6th Cir. 1990); *Ryan v. Montana*, 580 F.2d 988, 994 (9th Cir. 1978) (finding that immunity was not constitutionally required and that the courts had no supervisory power to grant immunity under Montana law); *Roberts v. Taylor*, 540

[3] Use immunity is defined as the prohibition against the use of the testimony, or any evidence derived directly or indirectly from that testimony, against the witness in a criminal prosecution. *See generally Kastigar v. United States,* 406 U.S. 441, 92 S.Ct. 1653, 32 L.Ed.2d 212 (1972)(defining use immunity).

F.2d 540, 542-43 (1st Cir. 1976), *cert. denied*, 429 U.S. 1076, 97 S.Ct. 819, 50 L.Ed.2d 796 (1977); *Flint v. Mullen*, 499 F.2d 100, 102 (1st Cir. 1974) (concluding that there was no "compulsion" involved and thus the prosecution did not need to hold the criminal trial first or grant use immunity for testimony given at the revocation hearing); *People v. Carr,* 185 Colo. 293, 524 P.2d 301 (1974); *State v. Randall*, 27 Or.App. 869, 557 P.2d 1386 (1976).

As evidenced by the divergence of judicial opinion, the United States Supreme Court has not given definitive guidance on the use of testimony given at a probation revocation hearing and, as a consequence, federal and state courts struggle to interpret the various Supreme Court decisions relating to the right against self-incrimination. However, we believe the confusion was clarified in *Minnesota v. Murphy*, 465 U.S. 420, 104 S.Ct. 1136, 79 L.Ed.2d 409 (1984), and conclude that the probationer's testimony at a probation revocation hearing cannot be used against him at a subsequent criminal trial.

In *Murphy*, the United States Supreme Court discussed the right against self-incrimination in the context of a requirement that a probationer be truthful with his probation officer. Although the Court held that the state may insist on answers to incriminating questions, it added the caveat that the answers cannot be used in a criminal proceeding. *Id*. at 465 U.S. at 435, 104 S.Ct. at 1146, n.7. Addressing the situation when a probationer's responses to the state's

questions might later incriminate him in a pending or subsequent criminal proceeding, the Court stated:

> A state may require a probationer to appear and discuss matters that affect his probationary status; such a requirement, without more, does not give rise to a self-executing privilege. The result may be different if the questions put to the probationer, however relevant to his probationary status, call for answers that would incriminate him in a pending or later criminal prosecution. There is thus a substantial basis in our cases for concluding that if the state, either expressly or by implication, asserts that invocation of the privilege would lead to revocation of probation, it would have created the classic penalty situation, the failure to assert the privilege would be excused, and the probationer's answers would be deemed compelled and inadmissible in a criminal prosecution.

Id. at 465 U.S. 420, 435, 104 S.Ct. 1136, 1146 (footnote omitted). On two occasions since *Murphy*, this Court has echoed the Supreme Court's statement.

In *Razor v. Commonwealth*, 960 S.W.2d 472 (Ky.App. 1997), we held the probationer's constitutional rights were not implicated. However, we did so because the probationer's non-compliance with his sex offender treatment could not serve as the basis for a criminal charge. We stated:

> On the contrary, even though the requirement was accompanied by a threat of possible probation revocation, *any incriminating admissions made by appellant could not have been used as a basis for criminal charges against him.*

Id. at 474 (emphasis ours).

Recently, in *Gamble*, this Court again made the identical distinction when it held that there was no Fifth Amendment protection when a probationer was questioned for the purpose of probation revocation based on his failure to pay child support. However, we explicitly stated that his testimony could not be used at a subsequent criminal proceeding. Quoting *State v. Cass*, 635 N.E.2d 225 (Ind.App. 1994), we stated:

> We agree with the State and conclude that a probationer is not entitled to the fifth amendment right against self-incrimination as afforded to a defendant in a criminal trial. *However, a probationer is protected by the fifth amendment from answering any questions where those answers could be used against him or her in any subsequent criminal proceedings.*

Id. at 410 (emphasis ours).

Based on this Court's interpretation of the United States Supreme Court decision in *Murphy* and Section Eleven of the Kentucky Constitution, we join those jurisdictions that hold the probationer's testimony at a probation revocation hearing cannot be used substantively against him at a subsequent criminal proceeding arising from the same facts. We further hold that the trial court must inform the probationer that, if he chooses to testify, his testimony at the probation revocation hearing cannot be used against him in a subsequent criminal trial on the underlying offense. However, consistent with our rules of evidence, the testimony might be admissible for the purpose of impeachment or rebuttal in an

appropriate instance. *See Rocha*, 86 Mich.App. at 512-513, 272 N.W.2d at 706, quoting *Coleman*, 13 Cal.3d at 889, 120 Cal. Rptr. at 402, 533 P.2d at 1042.

Our decision resolves a constitutional dilemma faced by the probationer without mandating that the state seek revocation only after the probationer's criminal trial and is a concession to the interest of the state in promptly resolving probation revocation proceedings. The application of use immunity will protect the probationer's right to testify in his defense and deter any abuse of the revocation hearing process that would provide an unfair advantage to the Commonwealth at a subsequent criminal trial. It remains within the trial court's discretion whether to grant or deny a probationer's request for a continuance of the probation revocation hearing.

Because Jones requested and was denied use immunity for his testimony as directed by this opinion, and thus did not testify, we reverse and remand for further proceedings consistent with this opinion.

HARRIS, SENIOR JUDGE, CONCURS.

COMBS, CHIEF JUDGE, CONCURS IN PART AND DISSENTS IN PART.

COMBS, CHIEF JUDGE, CONCURRING IN PART AND DISSENTING IN PART: While I concur with the majority of the reasoning in this well crafted opinion, I would refrain from speculating upon what use such

testimony could have for collateral matters such as impeachment or rebuttal. For the sake of consistency and in harmony with the constitutional principle against self-incrimination that is at the heart of this case, I would respectfully suggest that use of such testimony for any incriminating purposes would be barred. Therefore, I dissent as to this issue.

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