

RENDERED: July 17, 1998; 10:00 a.m.
NOT TO BE PUBLISHED

NO. 97-CA-1429-MR

DAVID JOHN KING

APPELLANT

v.

APPEAL FROM McCREARY CIRCUIT COURT
HONORABLE PAUL BRADEN, JUDGE
CRIMINAL ACTION NO. 96-CR-00020

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

* * * * *

BEFORE: BUCKINGHAM, EMBERTON and GUIDUGLI, Judges.

GUIDUGLI, JUDGE. David John King (King) appeals from an order of the McCreary Circuit Court that revoked his probation and imposed a sentence of ten years in the state penitentiary. Having thoroughly reviewed the arguments presented by appellant and the applicable statutes and case law, as well as, the record, we affirm.

On March 29, 1996, a McCreary County Grand Jury issued an indictment charging King with first-degree criminal possession of a forged instrument in violation of KRS 516.050. The indictment alleged that King had presented to a local bank a forged income tax refund check in the sum of \$878. Prior to disposition of this charge, King was indicted on another felony charge of receiving stolen property over \$300 in violation of KRS 514.030. That indictment alleged that on or about

November 2, 1996, King was in possession of a stolen shotgun valued in excess of \$300.

On December 23, 1996, King entered a guilty plea to indictment number 96-CR-00020, the criminal possession of a forged instrument, first degree. At that time the second felony indictment had been issued and King, the Commonwealth and the court were fully aware of that fact. Although the Commonwealth had agreed to a probated sentence on the possession of forged instrument charge, there was lengthy discussion concerning what effect the new indictment would have. The public advocate advised King not to enter a guilty plea. The Commonwealth advised King that if he is found guilty of the new charge (receiving stolen property) that the Commonwealth would seek revocation of his probation. The trial court specifically advised King that if he was convicted of the receiving stolen property charge in the future that his probation would be revoked. Despite these clear warnings, King knowingly and voluntarily entered a guilty plea indicating that he was not worried about the new charge and that he "just wanted to get this over with." The Commonwealth's recommendation on this charge was ten (10) years probated for five (5) years. The trial court continued the matter for a pre-sentence report and final sentencing.

The hearing for imposition of the final sentence was held January 27, 1997. At that hearing, King was represented by a new public advocate. During the hearing, the trial court again went into specific detail as to what impact a guilty finding on

the receiving stolen property charge would have on King's probation. The trial judge advised King that because of his lengthy criminal record that the court did not believe King deserved probation at that time. However, the court stated that it would reluctantly followed the Commonwealth's recommendation of a probated sentence. The trial court then addressed the issue of the pending receiving stolen property charge. The following exchange took place:

THE COURT: Because you have a record that does not, in my mind, truly justify probation. However, because you have agreed and you have a pre-sentence worked out of a ten-year sentence in this case, and this is quite a lengthy sentence, you understand, and because of your health situation I am going to go ahead and enter the sentence that the two of you, you and the Commonwealth agreed to. However, I do it with some reservation. I want you to understand that, because of your lengthy criminal record. Even though most of it in the past ten years has been in district court rather than in circuit court, but you do have an extensive record.

MR. KING: But that's all behind me now and there won't be no problem.

THE COURT: Well, I want you to understand and I understand there's another charge pending against you in this court and it's my understanding that you were advised at the time you agreed to this plea bargain that you understood if you were found guilty on that charge that that would revoke this probation. Is there any question about that in your mind?

MR. KING: No, sir.

THE COURT: All right. Because if that happens I don't want it to be brought up later if there's any question about that. And do you understand that I'm going to put forth certain conditions which involve alcohol and drugs and a few other things? If you violate any of those conditions, you

know, if you don't pay the \$50 a month, for example, this Court will not hesitate to revoke your probation. I just want you to understand that you're really going to have to live at the foot of the cross. If you don't, the next time you come in here, if it's before me or before Judge--on this case it would be in front of me, then I won't hesitate to revoke your probation. I just want you to understand that.

MR. KING: I do.

THE COURT: All right. Is there anything further that either you or your attorney would like to say to the Court before we finally pronounce sentence in this case?

MRS. CLARK (King's Public Advocate): No, your Honor.

At the conclusion of the hearing, the trial court made the following statement regarding King's probation:

THE COURT: It is further ordered on completion of the aforesaid period of probation the Defendant shall be finally discharged provided he has complied with the above-conditions of said probation and further provided that no warrant issued by the Court is pending against him and his probation has not been revoked or extended.

It is further ordered that upon proper hearing for that purpose it is determined the Defendant has violated a condition of his probation, the sentence of probation may be revoked and set aside and the Defendant shall thereupon be resentenced or the terms of the sentence of probation may be modified and/or the period of probation extended.

King was placed on reporting probation at the conclusion of the sentencing hearing on January 27, 1997.

A jury trial on the receiving stolen property charge was scheduled for April 9, 1997. King was present and again represented by the public advocate. King made a motion for a continuance due to the failure of certain witnesses to appear on

his behalf (including his wife). That motion was denied. An "off-the-record" discussion then ensued after which the parties advised the court that they had reached a plea agreement in the case. The following exchange took place at the time concerning the effect a guilty plea would have on King's probation.

MR. TRIMBLE (Commonwealth's Attorney): Judge, we've reached a plea agreement in this case. Let me outline before the Court with Mrs. Clark here so that we make sure we understand the terms. I'm offering in return for a plea of guilty to recommend a 90-day sentence to serve on a misdemeanor, being in possession of stolen property under \$300. I have also advised Mrs. Clark and they are aware that Mr. King is on probation. I will seek to revoke his probation. There's no agreement as to me not doing that, but that I will seek to revoke his probation. He is aware of that and in light of that he has agreed to accept the plea aware of that fact.

MRS. CLARK: That's correct, your Honor.

THE COURT: You're aware that if the Court accepts your plea agreement that you will be brought before the Court on revocation on another sentence.

MR. KING: Yes, sir.

THE COURT: There's no agreement on it. In all likelihood the Court would revoke. Do you understand?

MR. KING: Yes, sir.

THE COURT: Just so you understand. Just have a seat.

* * *

THE COURT: But, see, from the standpoint of the Commonwealth and from the standpoint of this Court, we have no problem with it, so what I'm saying is that if that, you know, if the jail or whoever it is works it out, then this Court has no problem with that, that's what I'm saying. So, you know, if that works, that works, but it's not up to us. Now, if you were revoked on the other charge, now you would be then rendered to the Department of Corrections. Then that's a different story, you understand. On the misdemeanor charge you go to the local jail and you're in charge of the local jail. If

you were to be revoked and then that's a different world and the Department of Corrections is in charge then and I have no idea what, what or where or what anything happens after that.

MR. KING: You know, your Honor, if I am revoked I'm going to lose my home and everything I've got.

* * *

THE COURT: The indictment charged that on or about the 2nd day of November, 1996 in McCreary County, Kentucky you committed the offense of receiving stolen property by having in your possession a stolen 410 shotgun of a value of \$300 or more which had been stolen from Goldie Eagleton.

Does the Commonwealth have a motion as to the indictment?

MR. TRIMBLE: Yes, your Honor. In consultation with the attorney for the Defendant, Mrs. Clark, we've reached a plea agreement. In return for a plea of guilty to an amended misdemeanor charge and a sentence of 90 days the Commonwealth would move to amend the indictment to reflect the charge of being in possession of stolen property with a value of less than \$300. The Commonwealth, based upon the plea agreement, would recommend a sentence of 90 days which would commence this coming Sunday, which would be April 13th, at 1:00 P.M.

The Commonwealth has further advised that Mr. King had previously entered into a plea agreement as to a felony charge and he has advised the attorney for the Defendant that this would not preclude the Commonwealth from seeking revocation of his current probation, based upon his conviction if he had a conviction which may be in existence, that is, if the Court accepts his plea on the other case.

* * *

THE COURT: Now, in addition to that do you understand that the Commonwealth has indicated that you are on probation in this court for a rather serious sentence and the

Commonwealth has indicated that he would attempt to revoke that probation?

MR. KING: Yes, sir.

THE COURT: Do you understand that fully, that there's a part of this as well?

MRS. CLARK: That that's a possibility.

MR. KING: Yes, sir.

THE COURT: I mean th--well, right.

MRS. CLARK: If that's my understanding, that, you know, they will try.

THE COURT: He's going to try to revoke your probation. Do you understand that?

MR. KING: Yes, sir.

THE COURT: Based on this guilty plea. Do you understand that?

MR. KING: Yes, sir.

THE COURT: I don't want any misunderstanding or any question about that.

MR. KING: I understand.

THE COURT: All right. Now, if I reject the plea I will inform you and will give you a chance to withdraw it, or if I don't agree with the recommended sentence I'll give you an opportunity to withdraw your plea, or you could persist in it and the Court could then sentence you to whatever sentence would be available to the Court up to 12 months. Do you understand?

MR. KING: Yes, sir.

* * *

THE COURT: Now, Mr. King, do you plead guilty willingly, freely, and voluntarily without any threats or force, promises or pressure from any person or persons to cause you to so plead?

MR. KING: No, they didn't nobody force me.

THE COURT: Now, knowing that you have all the rights which the Court has described to you, and knowing that the Commonwealth will attempt to revoke your probation on the other sentence, it is still your desire to waive or give up all those rights by entering a plea of guilty to the charge of knowingly receiving stolen property under \$300 and to allow the Court to fix your punishment within the range permitted by law of up to 12 months in jail?

MR. KING: Yes.

THE COURT: Mrs. Clark, do you acknowledge you represent the Defendant in this action?

MRS. CLARK: Yes, sir.

THE COURT: Do you acknowledge the identity of the Defendant?

MRS. CLARK: Yes. This is David King.

THE COURT: Have you explained all the Constitutional rights to the Defendant?

MRS. CLARK: Yes, sir.

THE COURT: In your opinion does the Defendant understand those Constitutional rights and the nature of these proceedings now being held?

MRS. CLARK: Yes, sir.

THE COURT: Is the plea of guilty consistent with your advice to the Defendant?

MRS. CLARK: Yes, sir.

THE COURT: In your opinion based on your having conferred with the Defendant, is the Defendant's desire to plead guilty made voluntarily, freely, intelligently, and understandingly?

MRS. CLARK: Yes, sir, it is.

THE COURT: The Court makes a finding of fact that the Defendant's plea of guilty was made voluntarily, freely, intelligently, and understandingly. I accept your plea of guilty. Let the Defendant's plea of guilty

be accepted as pled and be entered in the record.

As forewarned on April 25, 1997, the Commonwealth filed a motion to revoke King's probation. The reasons stated in the motion were that King had violated the terms of probation in that he was to: (1) remain an good behavior; and (2) refrain from violating the law in any respect. The Commonwealth alleged that King's guilty plea to receiving stolen property on April 9, 1997, was a violation of his conditions of probation. A hearing on said motion was held April 28, 1997. At that time, King argued that his probation could not be revoked because the receiving stolen property charge had occurred prior to his being placed on probation. As such, King claimed that he had not violated the conditions of probation since he had not committed a new crime after being placed on probation. King testified that he did not understand that his probation would be revoked, only that the Commonwealth "was going to try to revoke it." King also stated that he thought he would have to commit a new crime, after the probation was in force, before his probation would actually be revoked. Despite King's best arguments, the trial court revoked King's probation and ordered him to serve ten (10) years imprisonment. Specifically, the trial court stated:

THE COURT: As I understand, it was a condition of his probation that he not be convicted on any other charge, including this charge, and this charge specifically was mentioned to Mr. King, and I understood from what I heard that day that this charge could, in fact, revoke Mr. King. And, quite frankly, I was astonished when he said, I plead guilty, and that's why I went over with him very carefully before I accepted his plea at all.

* * *

THE COURT: I have to disagree with you, counselor. I very distinctly recall discussing and there's no question in my mind that Mr. King understood exactly what he was doing and no question in my mind that he understood that if he pled guilty to any of these charges that they are to be used as a basis for his revocation, and that time has come.

This appeal followed.

On appeal, King argues that his probation cannot be revoked because he has not committed a new crime since the imposition of probation. Relying on KRS 533.020(1) appellant states that the statute is very clear in its use of the language "if a defendant commits an additional offense or violates a condition... ." In addition, he claims that KRS 533.030(5) requires that he shall be given a written statement explicitly setting forth the conditions of said probation. In this case he was given written probation conditions but which did not specify revocation if he was convicted of the pending receiving stolen property charge. The Commonwealth responds that King was given ample warning of the consequences of his actions and that the trial court had discretion in the granting and revoking of probation and that, on appeal, our review is limited solely to a determination of whether or not the trial court abused its discretion.

Both parties cite Brown v. Commonwealth, Ky. App., 564 S.W.2d 21 (1977). In Brown, the Court held:

The appellant was on notice that commission of any crimes would be a violation of probation conditions. The revocation did not amount to a sentence imposed for the crime of

escape or the conviction of armed robbery committed prior to the commencement of the probationary period, but rather was an imposition of the sentence which appellant had already received for conviction of another crime. Probation is recognized as a privilege rather than a right. It is entirely within the trial court's discretion whether a defendant is given his liberty conditionally. Ridley v. Commonwealth, Ky., 287 S.W.2d 156 (1956). Since the revocation of probation did not increase the sentence on any of appellant's convictions and only imposed a sentence which he had previously received, there was no violation of the prohibition of ex post facto law. (Citations omitted).

Brown, 564 S.W.2d at 23.

In Keith v. Commonwealth, Ky. App., 689 S.W.2d 613 (1985), it was held that the trial court has wide discretion in the revocation of probation. If there is evidence to support a finding that the defendant has violated the terms and conditions of his probation and that the decision to revoke is not arbitrary, then the trial court's determination will not be disturbed.

In this case, King was thoroughly advised by the court that a conviction for the receiving stolen property charge would result in his probation being revoked. In fact, the trial court went to great lengths at three separate hearings to make sure that he understood the serious consequences that would occur if he was convicted of the separate charge. Despite warnings from the public advocate, the Commonwealth and the trial court, King knowingly and voluntarily entered a guilty plea to both charges. As such, he violated a stated, known condition of his probation and must suffer the results. Violation of any term of the

probation warrants revocation. Tiryung v. Commonwealth, Ky. App., 717 S.W.2d 503 (1986). The consequences (a ten year sentence) in this case may seem harsh but they are the result of King's actions and decisions and no one else.

The order of the McCreary Circuit Court is affirmed.

EMBERTON, JUDGE, CONCURS.

BUCKINGHAM, JUDGE, CONCURS IN RESULT ONLY AND FILES SEPARATE CONCURRING OPINION.

BUCKINGHAM, JUDGE, CONCURRING BY SEPARATE OPINION. I agree with the majority that the trial court committed no error in revoking King's probation. However, I believe that it is important to note that when King was placed on probation and was given a written statement explicitly setting forth the conditions of his probation as required by KRS 533.030(5), none of the fourteen listed conditions related to his conviction of the new offense.

Ordinarily, King's probation would not be subject to revocation since he did not violate any of these written conditions. In this case, however, the trial judge explained to King when he pled guilty that a conviction for the new charge would result in revocation of his probation. Although this condition was inadvertently not made a part of the written conditions of King's probation, it was nevertheless a condition which the trial judge specifically discussed with him.

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