

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-000755-MR

JESSE JONES, JR.

APPELLANT

v.

APPEAL FROM GRAVES CIRCUIT COURT
HONORABLE JOHN T. DAUGHADAY, JUDGE
ACTION NO. 97-CR-00103

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING
** ** * * * * *

BEFORE: DYCHE, GUIDUGLI AND JOHNSON, JUDGES.

GUIDUGLI, JUDGE. Jesse Jones, Jr. (Jones) appeals an order revoking probation entered by the Graves Circuit Court on March 10, 1998. Having thoroughly reviewed this matter, we affirm.

On November 21, 1994, Jones was sentenced to five (5) years in the penitentiary by the Graves Circuit Court after he pled guilty to a charge of assault, second degree. Said sentence was probated for a period of five (5) years.

Thereafter, on January 22, 1998, Jones was found guilty, after a jury trial, of first-degree trafficking in a controlled substance (cocaine). On the same day, the jury

recommended Jones be sentenced to ten (10) years based upon his conviction. Immediately thereafter, Jones entered a plea of guilty to being a persistent felony offender (PFO), second degree. The Commonwealth recommended that Jones' sentence be enhanced to twelve (12) years imprisonment. At the conclusion of the hearing, Jones' probation status was discussed and the trial court then continued the matter for formal sentencing and revocation of Jones' probation. Specifically, the following exchange took place:

THE COURT: I just want to be sure that this is on the record. The court will accept the Commonwealth's recommendation in this case and at the time of sentencing in this case, the court will impose the twelve year sentence on the PFO, second, based on the underlying ten year sentence from the jury. The court will also be entering an order revoking Mr. Jones probated status and (sic) the previous felony being 97-CR-039 and by statute those two terms of incarceration shall run consecutive for a total of seventeen years. Did you understand that to be the case, Mr. Jones?

DEFENDANT: Yes, Sir.

THE COURT: Miss Byrn, do you have any other matters:

MISS BYRN [Counsel for Jones] Yes, sir. Just to make everything look exactly right, can we put a conditional plea on the PFO, Second?

Formal sentencing was set for March 9, 1998. At the sentencing hearing, the trial court imposed the recommended twelve (12) year sentence on the trafficking in a controlled substance and PFO charges. Then the trial court entered an order revoking Jones' previously probated sentence and imposed the additional five (5)

years to run consecutive for a total sentence of seventeen (17) years. This appeal followed.

It should be noted that appellant initially only appealed his conviction for trafficking in cocaine and his conditional guilty plea to PFO from the Graves Circuit Court (case number 97-CR-103). However, by order of this Court, entered July 21, 1998, Jones was permitted to supplement the record on appeal "to include the transcript of record in Commonwealth v. Jones, No. 94-CR-039", (the case dealing with his previously imposed probation). Subsequently, the only issue raised on appeal is that the trial court erred by "exceeding its jurisdiction in revoking appellant's probation in an unrelated case at sentencing." Although we do not believe that appellant timely or properly appealed the probation revocation in case 94-CR-039, and thus, we would be justified in dismissing the appeal, we will, nonetheless, address the issue raised by appellant on appeal.

Jones admits that the issue raised on appeal was not preserved at the trial court level. However, appellant alleges that the trial court lacked jurisdiction to revoke his probation and lack of jurisdiction can be raised at any time during the proceedings (RCr 8.18) and even for the first time on appeal. The Commonwealth argues that what appellant is arguing is not jurisdiction but a procedural due process claim which must be raised and presented at the lower court to be preserved. We agree with the Commonwealth. The trial court did not lack

jurisdiction over the appellant when it revoked Jones' probation.

Jurisdiction relates to several concepts. A court may lack jurisdiction over the subject matter, e.g., a felony tried in district court, a crime occurring outside Kentucky, or a federal crime tried in state court. The crime may not have occurred in the county of trial and thus the court had no venue jurisdiction. The court may also lack jurisdiction over the person to try him or her. (Footnotes omitted).

Abramson, Kentucky Practice: Criminal Practice and Procedure, Volume 8, 1997).

In the case sub judice, the conviction for which Jones' original probation was being revoked had been imposed by the Graves Circuit Court. The new offense, conviction and sentence occurred within the same circuit court. The trial court had proper jurisdiction over Jones and the two cases before the court. As such, appellant's argument that the Graves Circuit Court lacked jurisdiction is without merit and his attempt to raise this issue for the first time on appeal, as the Commonwealth argues, should not be considered. Commonwealth v. Petrey, Ky., 945 S.W.2d 417 (1977); RCr 9.22.

However, as stated previously, we will consider the appeal on its merits. Even then, however, we do not believe appellant can prevail. Appellant contends that the trial court did not comply with KRS 533.050(2) when it failed to provide Jones with a "written notice of the grounds for revocation or modification." However, the record is clear that appellant had been given clear notice on the date of the jury trial (January 22, 1998) that the court would address his probation revocation at the sentencing hearing scheduled for March 9, 1998.

During the sentencing phase of his jury trial, counsel for Jones, Ms. Byrn, and Mr. Brady, of probation and parole, had the following exchange:

Q 8. And although like on a ten year sentence, he is eligible to see the Parole Board at the end of two years, there is no guarantee that he would get that. Is that correct?

A That would be on a ten year sentence that he would be eligible for two years.

Q. 9 But there's no guarantee that he would get it at that time?

A No. There's no guarantee. That is the minimum eligibility time.

Q. 10 And any time that he gets on this charge, actually would have to run consecutive to that five year sentence that was probated. Is that right?

A I believe that is correct pursuant to law.

Q. 11 Okay. So, he could be looking at fifteen years total?

A. Yes.

Q. 12 With what he was probated on before and this?

A Yes.

MISS BYRN: I don't have any more questions. Thank you.

Later, in her closing argument to the jury, Miss Byrn stated, in part:

I don't know whether I made it clear or not in speaking with Mr. Brady. We got into talking about fifteen years. Jesse has been on probation on a five year sentence which means five years in the penitentiary but he

was given probation for a period of five years. That probation will be revoked since he has been convicted of another felony; so, he will go to prison for that five years plus any time that you give him will be added to the end of that. So, that is where we came up with the fifteen years.

...

We would just ask that you consider the minimum sentence for this. Keep in mind that it will be added to that five years that he already has. Thank you.

Still, later during the penalty phase of the trial, the trial court addressed the jury and advised it of the consequences of Jones' conviction and plea. This statement was made in the presence of appellant and his counsel:

So, what has happened now is that the Commonwealth has advised the court and the defense has advised the court that they have entered into an agreement based upon your verdict in the penalty phase of count one of this charge and that the defendant would enter a plea of guilty to being a persistent felony offender in the second degree under the statute and the Commonwealth will recommend a sentence of twelve years in the penitentiary as opposed to the ten years which you have just fixed on the first count. As Miss Byrn has pointed out to you in her statements awhile ago, he has a five year sentence now pending on probation which will give Mr. Jones a total sentence of seventeen years in the penitentiary.

The trial court adequately advised appellant and counsel what would transpire at the March 8, 1998, formal sentencing hearing by stating:

THE COURT: I just want to be sure that this is on the record. The Court will accept the Commonwealth's recommendation in this case and at the time of sentencing in this case, the court will impose the

twelve year sentence on the PFO, second, based on the underlying ten year sentence from the jury. The court will also be entering an order revoking Mr. Jones probated status and the previous felony being 97-CR-039 and by statute those two terms of incarceration shall run consecutive for a total of seventeen years. Did you understand that to be the case, Jr. Jones? (Emphasis added)

DEFENDANT: Yes, sir. (Emphasis Added)

Finally, the following exchange took place at the sentencing hearing on March 9, 1999:

THE COURT: Mr. Brady, does Mr. Jones have backup time?

MR. BRADY: Yes, sir. We can deal with that today I believe. He has probation granted in Case Number 94-CR-039, a five year sentence probated on November the 21st of '94. I believe at this time it can be revoked.

THE COURT: Yes. We will need to revoke that sentence and add this wording to the new judgment.

MR. BRADY: Yes, sir. The twelve years to run consecutive to the five year sentence in 94-CR-039.

THE COURT: Alright. Are there any matters before I pronounce sentence for Mr. Jones based on the jury's verdict in this case and his plea?

MISS BYRN: No, Your Honor.

THE COURT: Mr. Jones, on the finding of guilt by the jury on trafficking, the court finds that the sentence of the jury was ten years; and that you

entered a conditional plea of guilty pursuant to 8.09 to count two of this indictment which was PFO, second, thereby enhancing the jury's ten year sentence to a twelve year sentence and that is what this court now sentences you to, keeping in mind that you can withdraw that plea if your appeal is successful. In addition, this court will enter an order revoking your probation on the previous sentence in 94-CR-039 and ask that the clerk show on the new judgment that this twelve year sentence is in addition to any remaining time on that five year sentence. Mr. Brady, I don't have the number of days. The number of days originally set out was one day. That hasn't changed on the old conviction.

MR. BRADY: No, sir.

THE COURT: Alright. Here is the order revoking probation in 94-CR-039 and there is the judgment that...how many days credit on this new one?

MR. BRADY: Fifty-two.

MISS BYRN: Your, Honor, for the record, we will agree to waive any probation revocation hearing.

Based upon the above exchanges which transpired on the trial date and at the subsequent sentencing, approximately six weeks later, we believe Messer v. Commonwealth, Ky. App., 754 S.W.2d 872 (1988) to be controlling authority on this issue. In Messer, the Court stated:

We do agree that service of the notice of intention to revoke which indicates the grounds therefore is to be served upon the party and not his attorney, especially if the

representation by the attorney of record has been in a different concluded litigation as noted in Guthrie v. Guthrie, Ky., 429 S.W.2d 32 (1968). However, the purpose of service upon the party is to make that person aware of the proceedings instituted or about to be initiated against him or her. It seems clear that the purpose for the rule disappears or has been satisfied when the party appears with knowledge of the proceedings and participates or is given an opportunity to participate, does not even give the trial court the opportunity to correct any defect in the notice and only complains after his probation has been revoked and the case is on appeal. CR 12.08(1), made applicable here by RCr 13.04, states in part: "A defense of jurisdiction over the person, ...insufficiency of process, or insufficiency of service of process is waived" if, in effect, it is not brought to the court's attention by motion or pleading. Obviously, if Messer had notified the trial court of the service upon his attorney instead of him personally, the trial court could have corrected the error before proceeding further. The appellant cannot now be heard to complain.

The judgment is affirmed.

Messer, Id. at 874.

In light of the problems regarding the timely filing of the appeal, the issue being procedural due process and not jurisdictional, the actual notice given appellant, and controlling precedent as set forth above, we affirm the order revoking probation entered by the Graves Circuit Court.

DYCHE, JUDGE, CONCURS.

JOHNSON, JUDGE, CONCURS AND FILES SEPARATE OPINION.

JOHNSON, JUDGE, CONCURRING: I concur with the Majority Opinion. I write separately merely to state that an additional ground for affirming is Jones' counsel's waiver of a probation revocation hearing. If the defendant waives the hearing, then he

has, at least implicitly, waived the written notice. The whole purpose of the written notice is to give the defendant sufficient notice that he can adequately present his case at the hearing.

BRIEF FOR APPELLANT:

Irvin J. Halbleib
Appellate Public Advocate
Louisville, KY

BRIEF FOR APPELLEE:

A. B. Chandler, III
Attorney General

Anitria M. Franklin
Assistant Attorney General
Frankfort, KY