

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-002260-MR

JEFFREY ROGERS

APPELLANT

v. APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE RON DANIELS, JUDGE
ACTION NO. 92-CR-00203

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING AND REMANDING
** **

BEFORE: KNOPF, MILLER, AND SCHRODER, JUDGES.

KNOPF, JUDGE: The appellant, Jeffrey Rogers, appeals from an order of the McCracken Circuit Court revoking his probation. We find that the Tennessee documents which served as a basis for the revocation were not admissible because they were not certified. We further find that the use of the documents alone, without other evidence that Rogers violated the conditions of his probation, was insufficient to establish that a violation had occurred by a preponderance of the evidence. Hence, we reverse the trial court and remand with directions to reinstate his probation.

On January 29, 1993, Rogers entered a plea of guilty to the charge of possession of a controlled substance (cocaine). The trial court sentenced him to two (2) years' imprisonment, probated for five (5) years. In November 1995, the trial court revoked Rogers' probation after he tested positive for amphetamines, methamphetamines and cocaine metabolites. Shortly thereafter, the trial court granted shock probation to Rogers.

On January 23, 1998, the Commonwealth again moved to revoke Rogers' probation, on the ground that he had been arrested in Coffee County, Tennessee for possession of cocaine for sale or delivery. At the probation revocation hearing, Rogers' probation officer introduced the following documents:

1) An uncertified copy of an indictment by the grand jury of the circuit court of Coffee County, Tennessee, charging a "Jeffrey L. Rodgers" with possession of a controlled substance (cocaine) with intent to sell or deliver;

2) An uncertified copy of an order of the Coffee County Circuit Court, appointing counsel for "Jeffrey Rodgers" as an indigent defendant;

3) An uncertified copy of the Coffee County Sheriff's report, detailing the arrest of "Rogers, Jeffrey L." on October 17, 1997;

4) An uncertified copy of a laboratory report from the Tennessee Bureau of Investigation, identifying as cocaine a white powder seized following the arrest of "Jeffrey Rodgers."

Rogers' counsel objected to introduction of the documents after the Commonwealth's Attorney informed the trial court that the documents were not certified. The trial court

overruled the objection and admitted the documents into evidence. The Commonwealth then closed its case. Rogers moved for a directed verdict, arguing that the Commonwealth had failed to prove by a preponderance of the evidence that he had violated the conditions of his probation. The trial court denied the motion. Rogers' wife testified that she had not seen Rogers use cocaine since his prior revocation proceeding. At the conclusion of the hearing, the trial court found that there was probable cause to find that Rogers had violated the conditions of his probation, and that Rogers had failed to present any evidence rebutting the Commonwealth's prima facie case. Consequently, the trial court revoked Rogers' probation and ordered him to serve the remaining time on his conviction. This appeal followed.

Rogers argues that the trial court applied the wrong standard to revoke his probation. We agree. From our review of the record, we find that the Commonwealth failed to establish by competent evidence that Rogers had violated the conditions of his probation. Primarily, we agree with Rogers that the uncertified copies of the Tennessee proceedings were not competent to prove that a violation occurred.

The Commonwealth argues that Rogers failed to preserve this issue because his attorney did not make a contemporaneous objection to admission of the documents. Commonwealth v. Mixon, Ky., 827 S.W.2d 689, 690 (1992). However, the record shows that a timely objection was made. Although defense counsel did not initially object, he did raise an objection after the Commonwealth advised the trial court that the copy of the

indictment which had been introduced was not certified. Thus, the issue is properly presented in this appeal.

The trial court stated its opinion that certified copies were not required. Although the rules of evidence do not apply to probation revocation proceedings, KRE 1105, such hearings must be conducted in accordance with minimum requirements of due process of law. Gagnon v. Scarpelli, 411 U.S. 778, 36 L. Ed. 2d 656, 93 S. Ct. 1756 (1973); Morrissey v. Brewer, 408 U.S. 471, 33 L. Ed. 2d 484, 92 S. Ct. 2593 (1972). A certain amount of hearsay testimony by a probation officer is admissible in a revocation of probation proceeding, especially when the reliability of the witnesses can be easily ascertained. Marshall v. Commonwealth, Ky.App., 638 S.W.2d 288 (1982).

However, the relaxed rules for revocation proceedings do not authorize admission of uncertified documents from another state. Both KRS 422.040 and RCr 9.44(1) grant full faith and credit only to certified copies of the records and judicial proceedings of any court of any state. Thus, for a court of this Commonwealth to properly give full faith and credit to the judgment of a court of another state, certification by that court is required. Davis v. Commonwealth, Ky., 899 S.W.2d 487, 489 (1995). In the absence of any such certification, the authenticity of the Tennessee documents tendered by the probation officer was not readily ascertainable. Furthermore, there was no oral testimony, hearsay or otherwise, that Rogers was the person named in the Tennessee indictment and police report.

Even if the Tennessee documents had been properly certified, moreover, we do not agree that they were sufficient,

by themselves, to support the finding that Rogers violated the conditions of his probation. The trial court stated its belief that the Commonwealth was required to prove "by a preponderance of the evidence that probable cause existed" to believe that a violation has occurred. This is not a correct statement of the law. In revocation proceedings the Commonwealth must prove by a preponderance of the evidence that the defendant has violated the terms of his probation. Rasdon v. Commonwealth, Ky. App., 701 S.W.2d 716, 719 (1986); Murphy v. Commonwealth, Ky. App., 551 S.W.2d 838, 841 (1977). The Commonwealth is not required to prove a conviction in order to accomplish revocation of probation. Tiryung v. Commonwealth, Ky. App., 717 S.W.2d 503, 504 (1986). While a conviction for a new offense would be grounds for revocation, an arrest for the same offense may or may not be. Myers v. Commonwealth, Ky. App., 836 S.W.2d 431, 433 (1992).

In Rasdon v. Commonwealth, *supra*, this Court suggested that the facts that a probable cause hearing had been held wherein the accused was held to the grand jury and that the grand jury had found enough evidence to issue an indictment might be sufficient to revoke probation on the ground that probable cause existed to believe he had committed another crime. Id. at 719. However, this language in Rasdon is merely dicta because the trial court in that case had made no such finding.

Moreover, it is well established that a finding of probable cause is not the same standard of proof as preponderance of the evidence. Murphy v. Commonwealth, 551 S.W.2d at 841.

Probable cause is a "flexible, common-sense standard," which merely requires that facts available would "warrant a man of reasonable caution in the belief," that a violation has occurred. Texas v. Brown, 460 U.S. 730, 742, 75 L. Ed. 2d 502, 514, 103 S. Ct. 1535 (1983); Richardson v. Commonwealth, Ky. App., 975 S.W.2d 932, 935, n. 1 (1998). However, when the standard is preponderance of the evidence, the trier of fact is required to find that the defendant's liability (or guilt) is "more probably true than not." Rackhman v. Zusstone, Ky., 957 S.W.2d 241, 245 (1997). Clearly, the preponderance of the evidence standard for revocation of probation is higher than mere probable cause.

The essential purpose of an indictment is to charge a described act offensive to the law as established by the legislature. Offutt v. Commonwealth, Ky., 799 S.W.2d 815, 816 (1990). An indictment represents a finding by the grand jury that there is probable cause to believe that a crime has been committed, and that the accused committed it. Democratic Party of Kentucky v. Graham, Ky., 976 S.W.2d 423, 427 (1998); See also, Branzburg v. Hayes, 408 U.S. 665, 686, 33 L. Ed. 2d 626, 643 92 S. Ct. 2646 (1972).¹ Therefore, standing by itself, even a properly certified copy of an indictment does not establish by a preponderance of the evidence that Rogers violated the conditions of his probation.

Furthermore, we also find that the use of the other documents as a basis for revoking Rogers' probation violated his

¹ The role of the indictment in Tennessee is the same. State v. Hudson, 487 S.W.2d 672, 674 (Tenn. Crim. App., 1972).

due process rights. The minimal due process rights afforded to a defendant in a probation revocation proceeding include the right to confront and cross-examine adverse witnesses, unless the hearing officer specifically finds good cause for not allowing confrontation. Marshall v. Commonwealth, 638 S.W.2d at 289. Although hearsay is permitted in revocation proceedings, the procedure followed by the trial court afforded Rogers no opportunity to confront and cross-examine the witnesses against him. The probation officer merely offered the arrest report and laboratory report as proof that Rogers had been arrested in Tennessee and that he had cocaine in his possession. The probation officer did not offer any other evidence to corroborate the information contained in the reports. Had they been properly authenticated or had the information been presented in the form of an affidavit, the police officer's report and the laboratory report might have been sufficient to establish a probation violation by a preponderance of the evidence. However, an unsworn, uncertified police report and laboratory report, by themselves, cannot stand as a basis to find that Rogers violated the conditions of his probation. To hold otherwise would render meaningless even these minimal due process rights.

Since we have found insufficient evidence to support the trial court's finding that Rogers violated the conditions of his probation, we must direct the trial court to reinstate his probation. However, nothing in this opinion should be interpreted to prevent the Commonwealth from bringing a new motion to revoke if Rogers has been convicted on the Tennessee charges during the pendency of this appeal.

Accordingly, the order of the McCracken Circuit Court revoking the probation of Jeffrey Rogers is reversed, and this matter is remanded with directions to reinstate his probation as set forth in this opinion.

ALL CONCUR.

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