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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-001205-MR
AND NO. 2000-CA-002419-MR

SULTAN SALAT — APPELLANT

v.

APPEALS FROM JEFFERSON CIRCUIT COURT
HONORABLE GEOFFREY P. MORRIS, JUDGE
ACTION NO. 99-CR-002615

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING IN CASE NO. 2000-CA-001205-MR
AND VACATING AND REMANDING IN CASE NO. 2000-CA-002419-MR
** ** ** ** **

BEFORE: JOHNSON, MILLER, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: Sultan Salat appeals from his conviction of theft by deception over $300 and theft by failure to make required disposition of property over $300. In a separate appeal, Salat appeals from an order of the Jefferson Circuit Court revoking his probation. Having reviewed the record and applicable law, we affirm the conviction and vacate and remand the order revoking probation.

Glynn Jones (Jones), the victim, was employed as an assistant football coach at the University of Louisville from 1995-1997, but lost his job when the head coach, Ron Cooper, was

let go in 1997. Jones had worked as a football coach for approximately 15 years, and, after being let go from U of L, decided to change careers in order to be able to spend more time with his family. In 1998, after submitting numerous job applications and experiencing financial difficulties, Jones started his own businesses - a lawn care service and a janitorial business.

On August 17, 1998, Sultan Salat called Jones and urgently wanted to meet with him. Jones was acquainted with Salat, having met him on two or three previous occasions. Salat came over to Jones's house and said he had an investment opportunity. Jones explained his financial situation to Salat and told Salat that he was not in a position to get involved in anything that would cause financial harm to his family. Salat assured Jones that the deal he had was 100% guaranteed and that he was not going to do anything that would hurt Jones's family. Salat then pulled out official looking documents and explained that he was involved in a construction deal in Nigeria, but needed $7,000 to complete the transaction. Salat indicated to Jones that he had relatives in Nigeria and was friends with the Nigerian official in charge of the deal. Salat told Jones that he (Jones) would make $20,000 off of the investment. Salat explained to Jones that the transaction would be completed within 72 hours at the most, at which time Jones would have his initial investment back, plus the $20,000.

Believing he was participating in a legitimate business deal, Jones gave Salat two cashier's checks on August 17, 1998,

one for $5,000 and one for $2,830. Three days later, Salat gave Jones a personal check for $20,000, but the check was not dated. Salat told Jones that there was no money in his account at the time, but that the money would be in the account after three days and then Jones could take the check to Salat's bank and cash it. Salat assured Jones that he (Salat) had enough money in his retirement account to cover the check if anything went wrong.

On September 2, 1998, Salat called Jones and said that there was a glitch in getting the money, and that he needed to "tip" a Nigerian official to get the money released. Salat came to Jones's house and showed him more official looking documents and asked if Jones knew anyone else who wanted to get in on the investment. Jones called a friend with whom he had invested before, who agreed to lend Jones the $25,000 Salat said he needed. Salat assured Jones that he would get the money back in three days. The friend subsequently wired the money to Jones, who then gave a cashier's check for $25,000 to Salat.

After receiving the $25,000 check, Salat stopped contacting Jones. After about five days, a worried Jones began contacting Salat, who assured him that everything was okay. Jones asked Salat to show him documentation that he had actually wired the money to Nigeria, or show him bank statements, but Salat refused. Finally, realizing that he was the victim of a scam, on November 1, 1998, Jones contacted the Attorney General's office, met with Robert Winlock, an investigator in the consumer protection division, and filed a complaint. Salat did not

respond to the complaint, and after an investigation, a warrant was issued for Salat's arrest.

On October 25, 1999, Salat was indicted by the Jefferson County Grand Jury on one count of theft by deception over $300 and one count of theft by failure to make required disposition of property over $300. A jury trial was held on March 16, 2000. Jones testified to the facts as stated above. Salat did not testify and presented no evidence. The jury found Salat guilty as charged. On April 25, 2000, the court entered its judgment of conviction and sentence, sentencing Salat to four years' imprisonment on each charge, with the sentences to run consecutively for a total of eight years' imprisonment. The court then probated the sentence for five years. As a condition of probation, Salat was required to pay $33,600 in restitution in the amount of $300 per month for 110 months. On May 12, 2000, Salat filed a notice of appeal from the April 25, 2000 judgment, case number 2000-CA-001205. Salat subsequently failed to pay restitution, and, following a revocation hearing on September 8, 2000, on September 11, 2000, the court entered an order revoking Salat's probation. On October 11, 2000, Salat filed a separate notice of appeal from the September 11, 2000 order, case number 2000-CA-002419.

In 2000-CA-001205, Salat first contends that the trial court erred by allowing improper hearsay, character, and opinion evidence at trial through the testimony of Robert Winlock. Salat concedes that these errors were not preserved, but requests this court review them per RCr 10.26. At trial, Winlock, the

investigator from the Attorney General's office, testified as to the procedure used by the Attorney General's office in investigating a consumer complaint. He then explained what Jones had told him in the interview about the deal with Salat. Salat argues that this was improper hearsay to allow the investigator to testify as to Jones's allegations. "Background information supplied to a police officer may be admissible under the 'verbal act' doctrine in circumstances where it has a 'proper nonhearsay use' to explain 'the action subsequently taken by the police officer.'" Carter v. Commonwealth, Ky., 782 S.W.2d 597, 600 (1989), overruled in part on other grounds, Norton v. Commonwealth, Ky., 37 S.W.3d 750 (2001) (quoting Sanborn v. Commonwealth, Ky., 754 S.W.2d 534, 541 (1988)). Further, Jones, who made the statements to Winlock, testified at trial and was available for cross-examination. Barnes v. Commonwealth, Ky., 794 S.W.2d 165 (1990). Hence, we conclude Winlock's testimony was not improper.

Salat next contends an improper introduction of character evidence occurred when, in discussing the process of investigating a complaint, Winlock stated, "We always check on the offender and we found out that Mr. Salat's background was not too clean." While we believe that this allusion to prior bad acts was improper per KRE 404(b), in light of the totality of evidence we cannot say that Salat's substantial rights were prejudiced by the statement.

Salat further argues that Winlock offered improper opinion evidence when he "assure[d] the jury that Salat was in

fact guilty" when "Winlock outlined the elements of the two crimes charged and said that he felt that Salat had committed the crimes for which he was being tried." Winlock, explaining the procedures the Attorney General's office goes through to obtain a warrant, testified that he put in the affidavit that "Salat had created a false impression and taken money. Jones had given him money and he had not properly disposed of it as he was supposed to have - no proof of that." We believe Winlock's testimony as to the statements included in the affidavit was improper. The fact that an arrest warrant was obtained, which requires only probable cause, is not relevant to a determination of guilt, which requires proof beyond a reasonable doubt. Further, the use of the statements constituted hearsay as they were used to prove guilt. See Barnes, 794 S.W.2d at 168. However, in light of the testimony of Jones, we conclude that Salat's substantial rights were not affected by Winlock's statements. RCr 10.26.

Salat next contends that the trial court erred in failing to appoint an attorney for him without holding a hearing and without obtaining a waiver. At Salat's arraignment on November 1, 1999, the trial court asked him if he had an attorney. Salat answered that he did not, and the court informed him that he had a right to have an attorney. The court noted that Salat's case had started in district court, and asked Salat if he had been given a public defender in district court, to which Salat replied that he had not. The judge inquired as to who owned the house Salat lived in, to which Salat replied that he did. The court then explained that by law, the court cannot

appoint an attorney for him if he owns real estate. The judge then encouraged Salat to find an attorney to help him. At the December 12, 1999 hearing, the judge asked Salat if he was still proceeding without an attorney. Salat replied that he had asked the court to appoint an attorney for him, but had been told he could not get one because he owned real estate. Salat acknowledged that he still owned his house, and the court told him he was welcome to hire an attorney. At the January 18, 2000 hearing, the court again inquired if Salat was still choosing to proceed without an attorney. Salat again requested an appointed attorney, but conceded that he still owned his house, although he had filed for bankruptcy. The court again explained to Salat that it could not appoint a public defender if he owned real estate.

KRS 31.110 provides for the appointment of an attorney for a needy person. KRS 31.120 states:

> (3) It shall be prima facie evidence that a person is not indigent or needy within the meaning of this chapter if he . . .
>
> (a) Owns real property in the Commonwealth or without the Commonwealth;

The record shows that the court determined at each step of the proceedings whether Salat was a needy person, as required by KRS 31.120(1). We believe Salat had sufficient opportunity to present evidence of indigency but did not. In each instance Salat conceded that he owned his own house, and he presented no evidence other than his own assertions that he was indigent to rebut this prima facie evidence. Even in bankruptcy, there is a housing exemption that could be released to help hire an

attorney. See KRS 427.160; KRS 427.060. Further, Salat did not file an affidavit of indigency as required by KRS 31.120(6). Accordingly, we conclude the trial court did not err in failing to appoint an attorney for Salat.

In 2000-CA-002419, Salat argues that the trial court abused its discretion by revoking his probation without regard to his financial inability to make the monthly restitution payments of $300, and that his revocation hearing did not afford him the required due process. As a condition of his probation, Salat was required to pay restitution of $300 per month. On August 3, 2000, the Commonwealth filed a motion to revoke Salat's probation for failure to pay restitution. The Commonwealth submitted a report from the Division of Probation and Parole which stated that Salat had paid $300 in May and $77 in June, and which further stated that a letter was sent to Salat on June 26, 2000 informing him that if the fees were not made current by July 7, 2000, a report would be submitted to the court. Salat failed to comply, and a probation revocation hearing was held on September 8, 2000, at which Salat was represented by appointed counsel. On September 11, 2000, the trial court entered an order revoking Salat's probation.

In Bearden v. Georgia, 461 U.S. 660, 672-673, 103 S. Ct. 2064, 2073, 76 L. Ed. 2d 221 (1983), the United States Supreme Court held that:

> [I]n revocation proceedings for failure to pay a fine or restitution, a sentencing court must inquire into the reasons for the failure to pay. If the probationer willfully refused to pay or failed to make sufficient bona fide efforts legally to acquire the resources to

> pay, the court may revoke probation and sentence the defendant to imprisonment within the authorized range of its sentencing authority. If the probationer could not pay despite sufficient bona fide efforts to acquire the resources to do so, the court must consider alternative measures of punishment other than imprisonment. Only if alternative measures are not adequate to meet the State's interests in punishment and deterrence may the court imprison a probationer who has made sufficient bona fide efforts to pay. To do otherwise would deprive the probationer of his conditional freedom simply because, through no fault of his own, he cannot pay the fine. Such a deprivation would be contrary to the fundamental fairness required by the Fourteenth Amendment.

At the revocation hearing, Salat stipulated to the fact that restitution had not been paid as ordered, but contended that he had attempted to pay restitution as best he could.[1] Salat contended that he could not pay because he was disabled and could not work and received a total monthly income of $868 in social security benefits. The Commonwealth presented photographs taken by a probation officer which showed Salat's house, which he still owned, and furnishings, which included computers, artwork, and TV's, along with three cars. Salat explained that the furnishings in his house were old, only one of the cars ran, that he had filed for bankruptcy in November of 1999, and that he owed in excess of the value of his house. Salat did not present any evidence at the hearing to support his contentions. The trial court may revoke probation upon a showing of a violation of

[1] Salat stipulated to the violation report which stated that he paid $300 in May and $77 in June. At the hearing, Salat produced a receipt showing he had paid $50 in September, and stated that he had also paid $50 in August, and "something" in July.

probation by a preponderance of evidence. Rasdon v. Commonwealth, Ky. App., 701 S.W.2d 716, 719 (1986). The trial court has broad discretion to revoke the conditional grant of probation, and the appellate court cannot overturn the trial court's decision absent an abuse of discretion. Tiryung v. Commonwealth, Ky. App., 717 S.W.2d 503 (1986); Hardin v. Commonwealth, Ky., 327 S.W.2d 93 (1959). We believe the evidence of Salat's home and possessions set forth above was sufficient to support the trial court's finding that Salat had failed to make a bona fide effort to pay restitution. Hence, we cannot say that the trial court abused its discretion in revoking Salat's probation.

Salat finally argues that the trial court denied him a fair and impartial probation revocation hearing and failed to state in writing the evidence relied on and the reasons for the revocation, depriving him of his right to due process. In parole and probation revocation hearings certain due process rights must be provided to the defendant which include:

> (a) Written notice of the claimed violations of parole;
>
> (b) Disclosure to the parolee of evidence against him;
>
> (c) Opportunity to be heard in person and to present witnesses and documentary evidence;
>
> (d) The right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation);
>
> (e) A 'neutral and detached' hearing body . . .; and

> (f) A written statement by the factfinders as to the evidence relied on and reasons for revoking parole.

Marshall v. Commonwealth, Ky. App., 638 S.W.2d 288, 289 (1982), quoting Morrissey v. Brewer, 408 U.S. 471, 489, 92 S. Ct. 2593, 2604, 33 L. Ed. 2d 484 (1972).

Salat first contends that the trial court was not "neutral and detached" as evidenced by the judge's comments at the revocation hearing that Salat had tried "to con this jury", that Salat had "conned the court on at least two occasions, where he told me about what he would do in the future", and stated that "I don't think there's any hope for you, Mr. Salat." Salat contends that these comments demonstrated that the judge resented and held a personal grudge against him. We find no merit in Salat's allegations. The comments apparently refer to the truthfulness of representations Salat made to the court at trial, and at the sentencing hearing, which Salat has not made a part of the record. Further, the judge whom Salat contends resented him initially granted him the privilege of probation. Brown v. Commonwealth, Ky. App., 564 S.W.2d 21 (1977). Additionally, upon hearing the comments, Salat made no effort to challenge the judge's continued presence at the hearing per KRS 26A.015. Accordingly, we adjudge Salat's argument that the judge was not "neutral and detached" to be without merit.

Salat finally contends that the written order revoking his probation failed to state the evidence relied on and the reasons for revocation. The order states, in pertinent part:

> Having considered the record, having conducted a hearing, arguments and the

> stipulation of the parties having been considered; the Court having dictated the findings into the record, and being otherwise sufficiently advised,
>
> IT IS ORDERED that the motion of the Commonwealth to revoke is SUSTAINED.

The written statement required by Morrissey should "provide[] an adequate basis for review to determine if the decision rests on permissible grounds supported by the evidence." Black v. Romano, 471 U.S. 606, 613-614, 105 S. Ct. 2254, 2259, 85 L. Ed. 2d 636 (1985). The trial court did not dictate the findings into the record nor give a written statement as to the evidence relied on for revoking parole. Upon our review of the tape, the judge simply revoked and sentenced. Hence, we believe that the probation revocation order must be vacated and the matter remanded to the trial court to include a written statement as to the evidence relied upon and reason for revocation. See Morrissey, 408 U.S. at 489.

For the aforementioned reasons, the Jefferson Circuit Court's judgment of conviction is affirmed and the order revoking probation is vacated and remanded.

MILLER, JUDGE, CONCURS.

JOHNSON, JUDGE, CONCURS IN RESULT ONLY.

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