

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-002369-MR

DELLITHI THOMAS

APPELLANT

v. APPEAL FROM McCRACKEN CIRCUIT COURT
HONORABLE CRAIG Z. CLYMER, JUDGE
ACTION NO. 99-CR-00260

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

** ** * * *

BEFORE: DYCHE, GUIDUGLI AND McANULTY, JUDGES.

GUIDUGLI, JUDGE. Dellithi Thomas (hereinafter "Thomas") has appealed from the McCracken Circuit Court's October 16, 2002, order revoking her probation and ordering her to serve the remainder of her five year sentence for a criminal abuse conviction. We affirm.

On November 22, 1999, Thomas and her husband, Flaminto Thomas (hereinafter "Flaminto"), were indicted by the McCracken

County Grand Jury on a charge of Second Degree Criminal Abuse¹ for injuries sustained by their two-year old child when he ingested Valium and cocaine. Thomas was also indicted on a PFO II charge for a November 22, 1996, felony conviction.² The two co-defendants went to trial and were both convicted on the criminal abuse charge. Thomas was not convicted on the PFO II charge, although Flaminto was convicted on his PFO I charge. The jury recommended a five-year sentence for Thomas and a seventeen-year sentence of Flaminto.³ On July 24, 2000, the trial court entered its final judgment as to Thomas, and imposed the recommended five-year sentence, despite her request for probation, as it found that imprisonment was necessary. Thomas did not take a direct appeal from the final judgment.

On October 24, 2000, Thomas filed a motion to suspend the further execution of her sentence and for probation pursuant to KRS 439.265. On November 21, 2000, the trial court granted shock probation, and on November 22, 2000, entered an amended order granting Thomas's motion for probation. The trial court placed Thomas on probation for five years subject to the usual requirements of Probation and Parole, including that she abide by all rules and regulations that might be imposed upon her, and

¹ KRS 532.080.

² A superseding indictment added a PFO I charge to Flaminto.

³ Flaminto's conviction is currently on discretionary review before the Supreme Court of Kentucky in Thomas v. Commonwealth, case No. 2002-CA-000021-DG.

warned her that any violation would most likely result in the revocation of her probation.

On August 8, 2002, the Commonwealth filed a motion for a warrant and for a show cause hearing, and requested that Thomas's probation be revoked, attaching an affidavit from Probation and Parole Officer Barry Dean (hereinafter "Dean") indicating that Thomas had violated several conditions of her probation. These conditions provided that she not use alcohol or drugs unless prescribed by a physician, that she not violate any law or ordinance, and that she maintain steady employment. Pursuant to Dean's affidavit, Thomas had used both marijuana and cocaine based upon positive test results from urine samples taken on May 28 and July 24, 2002. She was also arrested on July 24, 2002, and charged with DUI, reckless driving, and driving without a license or registration. Thomas admitted at that time that she had been drinking alcohol and had used cocaine and marijuana prior to her arrest. After the trial court entered the order issuing a warrant and notifying Thomas of a show cause hearing, the Commonwealth filed an amended affidavit from Dean, which included additional violations. These included her failure on two occasions to abide by the curfew imposed by Dean on July 29, 2002, her arrest for trafficking on September 12, 2002, after purchasing one pound of marijuana in a Wal-Mart parking lot, and for driving on a DUI-

suspended license. Additionally, a September 13, 2002, urine sample tested positive for marijuana and cocaine. Dean also indicated that Thomas has not maintained any employment from November 22, 2000, when she was placed on probation, until she began work through a temporary agency on August 5, 2002. She was terminated for poor attendance on September 12, 2002.

The trial court held a revocation hearing on October 10, 2002, at the beginning of which Thomas stipulated to the results of the urine tests, that she was out during her curfew, and that one of the conditions of her probation was that she refrain from the use of drugs. Dean testified as to the contents of his affidavit, Paducah Police Detective Mike Miller testified as to the circumstances of Thomas's purchase of one pound of marijuana, and Paducah Police Officer Sam Adams testified as to the July 24, 2002, DUI arrest and as to the traffic stop during which Thomas was charged with driving on a DUI-suspended license. Thomas testified in her own behalf, and blamed her relapse on an incident during which another individual put a gun to her head and threatened her and her children. She indicated that she wanted long-term treatment for her admitted substance abuse problem.

At the conclusion of the hearing, the trial court found that Thomas had used marijuana and cocaine on more than one occasion, had violated her curfew, and had driven on a DUI-

suspended license. Additionally, the trial court found probable cause that she had participated in the purchase of one pound of marijuana and that she had had previous opportunities to get treatment. Therefore, the trial court revoked Thomas's probation. On October 16, 2002, the trial court entered its Findings of Fact, Conclusions of Law and Order Revoking Probation memorializing its bench ruling. In the written order, the trial court found that Thomas received a probated sentence on November 22, 2000, that conditions of her probation included that she refrain from using alcohol or drugs not prescribed by a physician, and that she stipulated to the use of marijuana, cocaine, and alcohol while on probation. The trial court concluded that she had violated the conditions of her probation and revoked her probation.⁴ This appeal followed.

On appeal, Thomas argues, under the palpable error rule of RCr 10.26, that she was denied due process in that the trial court failed to consider or find that the facts admitted to warranted incarceration rather than a reinstatement of her probation. Thomas relies primarily on the United States Supreme Court opinions of Gagnon v. Scarpelli, 711 U.S. 778, 93 S.Ct.

⁴ Although not pertinent to this appeal, we note that on October 22, 2002, Thomas entered guilty pleas to her July 24, 2002, DUI charge (02-T-03771) and to her September 12, 2002, driving on a DUI-suspended license charge (02-T-04658) and that she received two consecutive thirty-day sentences for these convictions. We also note that on May 5, 2003, Thomas entered a guilty plea to trafficking in marijuana and received a five-year sentence that was enhanced to an eight-year sentence pursuant to her amended PFO II conviction (02-CR-00352-001). The eight-year sentence is to run consecutive to any other indictment.

1756, 36 L.Ed.2d 656 (1973), and Morrissey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 474 (1972), to support her contention. The Commonwealth, on the other hand, argues that Thomas has not shown that a manifest injustice occurred or that the outcome would have been any different. The Commonwealth asserts that Thomas's due process rights were not violated as she was afforded written notice of the grounds for revocation and was represented by counsel at a full revocation hearing. We agree with the Commonwealth that Thomas's due process rights were not violated and that she has failed to show that any manifest injustice occurred.

Thomas concedes that the issue she raises on appeal was not preserved below, so that we must review her claim of error under the palpable error rule. CR 10.26 provides:

A palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error.

With this standard in mind, we shall address the merits of the appeal.

In 1974, the General Assembly enacted KRS 533.050, which provides for the arrest of a defendant who is on probation or conditional discharge, and reads as follows:

(1) At any time before the discharge of the defendant or the termination of the sentence of probation or conditional discharge:

(a) The court may summon the defendant to appear before it or may issue a warrant for his arrest upon a finding of probable cause to believe that he has failed to comply with a condition of his sentence; or

* * *

(2) The court may not revoke or modify the conditions of a sentence of probation or conditional discharge except after a hearing with defendant represented by counsel and following a written notice of the grounds for revocation or modification.

The previous year, the United States Supreme Court had issued the opinion of Gagnon v. Scarpelli, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973), in which it held that a defendant must be provided with the minimum requirements of due process prior to the revocation of his probation. In Murphy v. Commonwealth, Ky.App., 551 S.W.2d 838 (1977), this Court relied upon Morrissey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972), and Gagnon, supra, which dealt with the due process requirements necessary to revoke probation.

In Morrissey, 408 U.S. 471, 489, 92 S.Ct. 2593, 2604, at 33 L.Ed. 2d 484, 499 [,] the criteria [were] set forth by Chief Justice Burger speaking for the majority. A parolee's constitutional rights are protected when revocation is being

considered if (1) a written notice of the claimed violations of parole [is] served, (2) a disclosure of the evidence to be used is made, (3) an opportunity is granted to be heard in person, present witnesses and documentary evidence, (4) confrontation and cross-examination of witnesses is afforded (unless a specific finding for good cause is made to the contrary), (5) a neutral and detached hearing body conducts the procedure and (6) a written statement is made by the fact (finders) as to the evidence relied on and the reasons for revoking parole. We see no distinction between probation and parole because Gagnon deals with the former while Morrissey the latter. Since the appellant was tried by the circuit court, we do not believe that the Morrissey decision requires a preliminary hearing as well as a revocation hearing.

Murphy v. Commonwealth, 551 S.W.2d at 840. See also Baumgardner v. Commonwealth, Ky.App., 687 S.W.2d 560 (1985); and Rasdon v. Commonwealth, Ky.App., 701 S.W.2d 716 (1986).

In the present matter, we agree with the Commonwealth that Thomas was provided with all of the necessary due process safeguards in accordance with the statute and the applicable case law. She received written notice that the Commonwealth was moving to revoke her probation along with a listing of the violations acting as the basis for the revocation motion. She was afforded the right to be heard and appeared with retained counsel at a full hearing during which she was permitted to confront and cross-examine the witnesses against her and to testify in her own behalf. Lastly, the trial court, acting as a

neutral body, made sufficient and appropriate findings of fact supporting its decision to revoke her probation both at the hearing and in its written order.

Thomas has not established that any palpable error occurred or that any manifest injustice existed that would justify the granting of relief in this matter. Furthermore, the trial court did not commit any error in revoking Thomas's probation based upon the evidence of record, including her use on multiple occasions of alcohol, marijuana, and cocaine; her stipulation as to the positive drug test results; her stipulation as to her curfew violations; her driving on a DUI-suspended license; and her involvement in an incident of marijuana trafficking. All of the trial court's findings properly support the revocation of Thomas's probation and support the ultimate decision of incarceration rather than another probation of the sentence.

For the foregoing reasons, the McCracken Circuit Court's October 16, 2002, order revoking probation is affirmed.

ALL CONCUR.

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