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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000323-MR

CHARLES KELLY — APPELLANT

v.

APPEAL FROM CRITTENDEN CIRCUIT COURT
HONORABLE C. RENE WILLIAMS, JUDGE
ACTION NO. 03-CR-00036

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: STUMBO AND VANMETER, JUDGES; PAISLEY,[1] SENIOR JUDGE.

STUMBO, JUDGE: This appeal comes from a judgment from the Crittenden Circuit Court revoking Appellant's probation and sentencing him to serve the five-year sentence on charges of second-degree burglary, theft by unlawful taking, and resisting arrest. Appellant raises two issues on appeal. The first is that the trial court erred in failing to hold a competency hearing regarding Appellant's competency to participate in a probation revocation hearing. The second issue is that the trial court erred in refusing to

[1] Senior Judge Lewis G. Paisley sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

allow Appellant to call two witnesses on his behalf at the revocation hearing. We affirm the trial court.

The facts leading up to the revocation of probation are as follows. On March 16, 2003, Appellant was arrested by the Kentucky State Police because he was resisting the attempt of firemen to rescue him while responding to a fire at his residence. Appellant reportedly threatened them with a knife and stole a fireman's pickup truck that was on the scene. While in the process of fleeing, Appellant struck a pedestrian. When the police came to take him into custody he resisted, but was eventually taken in by force.

On March 19, 2003, Appellant was transported to the Kentucky Correctional Psychiatric Center (KCPC) pursuant to an agreed order from the Crittenden District Court to be evaluated in order to see if he was competent to stand trial.

A competency hearing was held February 12, 2004, in which Dr. Richard Johnson testified. He testified that upon Appellant's admittance to KCPC he was not competent to stand trial. He went on to state that Appellant was prescribed medication and as long as he was on this medication he was competent to stand trial.

On April 13, 2004, Appellant accepted a plea offer by the Commonwealth and filed a motion to enter a guilty plea. Pursuant to the offer, Appellant would plead guilty and would receive a total of 5 years, probated. On May 13, 2004, the final judgment and sentence was entered and Appellant was put on probation.

Then, on October 5, 2005, Probation Officer Michael Scott filed an affidavit to revoke Appellant's probation because he failed to report an arrest for assault and

possession of a firearm on September 9, 2005. On November 10, 2005, a hearing was held on a motion to revoke probation. During this hearing, Officer Scott testified that his basis for revocation was that Appellant had been arrested for assault, that he had been in possession of a firearm, and he did not report the arrest within 72 hours as required. The defense did not cross-examine Officer Scott, but instead approached the bench and stated that there might be an issue with the competence of Defendant/Appellant. He stated that when Appellant was arrested that he was sent to KCPC for 40 days.

The court inquired as to whether a report had come back from KCPC, but it had not. The records were searched and a previous report from KCPC (from when Appellant was sent there on March 19, 2003) was found. The court read the document which said Appellant would remain competent as long as he was on his medication. At this point the judge indicated she was going to revoke probation. Counsel for Appellant then stated he had two potential witnesses, Appellant's brother and the victim of the September 9 incident. Counsel for Appellant described to the judge what each witness would purportedly testify to, but the judge stated she did not need to hear from any more witnesses and revoked Appellant's probation. Appellant was then sentenced to serve five years. This appeal followed.

Appellant's first argument is that the court should have held a competency hearing before it revoked Appellant's probation. Appellant points to KRS 504.100(3) and RCr 8.06 for support of this argument. KRS 5004.100(3) states:

> (1) If upon arraignment, or during any stage of the proceedings, the court has reasonable grounds to believe the

> defendant is incompetent to stand trial, the court shall appoint at least one (1) psychologist or psychiatrist to examine, treat and report on the defendant's mental condition.
> (2) The report of the psychologist or psychiatrist shall state whether or not he finds the defendant incompetent to stand trial. If he finds the defendant is incompetent, the report shall state:
> (a) Whether there is a substantial probability of his attaining competency in the foreseeable future; and
> (b) What type treatment and what type treatment facility the examiner recommends.
> (3) After the filing of a report (or reports), the court shall hold a hearing to determine whether or not the defendant is competent to stand trial.

RCr 8.06 states:

> If upon arraignment or during the proceedings there are reasonable grounds to believe that the defendant lacks the capacity to appreciate the nature and consequences of the proceedings against him or her, or to participate rationally in his or her defense, all proceedings shall be postponed until the issue of incapacity is determined as provided by KRS 504.100.

The main issue here, and it seems both parties agree, is whether there were "reasonable grounds" to believe the Appellant was incompetent to assist in the revocation hearing. Appellant argues that since he has a 22-year history of mental illness, was receiving outpatient psychiatric care, had been sent to KCPC after the September arrest, and had been previously evaluated by KCPC, there was sufficient evidence to suggest mental incompetency. Appellant contends that the judge was on notice that he had competency issues and therefore should have held a competency hearing.

Appellee argues to the contrary claiming there was no evidence to suggest Appellant was incompetent at the time of the revocation hearing and that Appellant put

on no evidence to suggest such. While there was a documented history of past mental problems, these were all past instances. Also, the KCPC report the court reviewed, which was from the initial March 2003 arrest, stated that Appellant would remain competent to stand trial as long as he was on his medication. There is a presumption that a defendant is competent to stand trial. *Gabbard v. Commonwealth*, 887 S.W.2d 547, 551 (Ky. 1994). It is up to the defendant to contest this presumption. The case of *Matthews v. Commonwealth*, 468 S.W.2d 313 (Ky. 1971) states:

> A hearing for the purpose of determining the mental capacity of a defendant is required under this rule only in a situation where there are reasonable grounds to believe that the defendant is insane. The reasonable grounds for such belief must be called to the attention of the trial court by the defendant or must be so obvious that the trial court cannot fail to be aware of them.

Id. at 314. "The trial court has a broad discretion in determining whether a defendant has the ability to participate rationally in his defense," *Hopewell v. Commonwealth*, 641 S.W.2d 744, 748 (Ky. 1982), and as such the standard of review is abuse of discretion. *Id*. "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

Here, we can find no overt acts that should have alerted the court as to Appellant's mental incompetence. We only have a past history of mental instability, but nothing that would show a present state of mental incompetence. The best way to have resolved this would have been for Appellant's counsel to have moved for a competency

hearing, but he did not. There was some discussion during the hearing as to Appellant's mental state, but nothing equivocal as to it being in question. We do not think the judge's decision not to hold a hearing was arbitrary or unreasonable. This judge was able to view Appellant in the courtroom and saw nothing out of the ordinary that would question his present mental competence. Appellant's counsel did not explicitly state that his client's mental capacity was such that he cannot aid in his defense. Finding nothing to reasonably put the court on notice of mental incompetence, no competency hearing was required and the revocation hearing was proper.

Appellant's next contention is that the trial court erred when it refused to allow Appellant to call two witnesses on his behalf at the hearing. First, we agree that Appellant had a right to call witnesses on his behalf. *See Morrissey v. Brewer*, 408 U.S. 471 (1972) (giving certain rights, including right to call witnesses, to defendants at parole revocation hearings); *Gagnon v. Scarpelli*, 411 U.S. 778 (1973) (holding that the rights from *Morrissey* should also be applied to revocations of probation); *Murphy v. Commonwealth*, 551 S.W.2d 838 (Ky. App. 1977) (adopting the rights concerning revocation from *Morrissey* and *Gagnon*).

However, we must consider whether this issue is properly preserved. Appellant claims the issue was preserved when the judge declined to allow him to put on his witnesses. Alternatively Appellant contends that if it was not preserved, then a review under RCr 10.26 is required. RCr 10.26 states:

> 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.

We believe that the issue was not preserved. During the hearing, Appellant's counsel advised the court that there were two witnesses to be presented and the substance of their proposed testimony. Counsel then states: "If the court wants to hear from them I will be glad to question them, or if the court wants to stick with ruling of revocation we will accept that." We believe this is an acquiescence to the court and therefore a waiver of any objection to not letting his witnesses testify.

Moving on to the RCr 10.26 matter, we find that this does not amount to a palpable error. The Kentucky Supreme Court has interpreted this rule and its "manifest injustice" to mean that "the error must have prejudiced the substantial rights of the defendant i.e., a substantial possibility exists that the result of the trial would have been different." *Brock v. Commonwealth*, 947 S.W.2d 24, 28 (Ky. 1997) (citations omitted). The *Brock* court also stated the palpable error rule another way. It stated the rule "[requires] that the error must seriously affect the fairness, integrity or public reputation of judicial proceedings." *Id.* Considering these two interpretations of the rule, we cannot see how not allowing Appellant to put on his two witnesses so upset the balance and integrity of the hearing as to amount to palpable error. Even without these witnesses, there was evidence that Appellant had been arrested for possessing a firearm and fourth-degree assault on September 9, 2005. Also, Appellant does not deny that he did not report this arrest to his probation officer as he was required to do. Each of these are

grounds to revoke probation. Had these witnesses testified, they might have been able to show mitigating circumstances, but it does not change the fact that Appellant violated his probationary terms on September of 2005.

The standard of review for revocation of probation is abuse of discretion. *Tiryung v. Commonwealth*, 717 S.W.2d 503, 504 (Ky. App. 1986). Considering Appellant's two arguments and the record, we find no abuse of discretion. The judge was fair and reasonable in her decisions. Probation is a privilege rather than a right, therefore, one may retain his status as a probationer as long as the trial court is satisfied that he has not violated any terms or conditions of the probation. *Id.*

Accordingly, we affirm the lower court's decision to revoke Appellant's probation.

VANMETER, JUDGE, CONCURS.

PAISLEY, SENIOR JUDGE, DISSENTS AND FILES SEPARATE OPINION.

PAISLEY, SENIOR JUDGE, DISSENTING: I respectfully dissent. Based upon the Appellant's long history of mental illness and his counsel's statements to the court, the trial court had reasonable grounds to believe the Appellant was incompetent. Under these circumstances, the court was required to postpone the proceedings until the issue of his incapacity could be determined. RCr 8.06, KRS 504.100(3). I also believe the trial court erred when it refused to allow Appellant to call witnesses and that the issue was preserved when Appellant's counsel attempted to call those witnesses. I would reverse and remand this matter to the Crittenden Circuit Court.

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