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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000983-MR

JEFFREY NEWELL, JR.

APPELLANT

v. APPEAL FROM PULASKI CIRCUIT COURT
HONORABLE DAVID A. TAPP, JUDGE
INDICTMENT NOS. 06-CR-00296-002 & 06-CR-00298-002

COMMONWEALTH OF KENTUCKY

APPELLEE

AND:

NO. 2007-CA-000984-MR

ANGELA NEWELL

APPELLANT

v. APPEAL FROM PULASKI CIRCUIT COURT
HONORABLE DAVID A. TAPP, JUDGE
INDICTMENT NOS. 06-CR-00298-001 & 06-CR-00308-002

COMMONWEALTH OF KENTUCKY

APPELLEE

AND:

NO. 2007-CA-000985-MR

v. APPEAL FROM PULASKI CIRCUIT COURT
HONORABLE DAVID A. TAPP, JUDGE
INDICTMENT NO. 06-CR-00299

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON AND STUMBO, JUDGES; GRAVES,¹ SENIOR JUDGE.

CLAYTON, JUDGE: In these consolidated cases, Jeffrey, Angela, and Pharian Newell challenge on appeal the revocation of their probation. They contend that they were denied due process at their revocation hearings because insufficient evidence was provided by the Commonwealth to prove the alleged probation violations, and therefore, the findings of the trial court were inadequate and not supported by evidence. We agree with the circuit court that the Newells' claims are without merit, and thus, affirm.

I. Factual and Procedural Background

On October 25, 2006, the Pulaski County Grand Jury indicted Jeffrey, Angela, and Pharian Newell. The indictments charged the Newells, individually,

¹ Senior Judge John W. Graves sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

with multiple counts of trafficking in a controlled substance, first degree, first offense for selling cocaine to a confidential informant. On January 4, 2007, Angela and her two sons, Jeffrey and Pharian pled guilty in Pulaski Circuit Court to charges of trafficking in a controlled substance. Later, at the sentencing on January 25, 2007, each party was sentenced to ten (10) years imprisonment. The sentences, however, were suspended, and Jeffrey, Angela, and Pharian were placed on probation for a period of five (5) years. As a condition of probation, the trial court directed the Newells, among other requirements, to “provide truthful cooperation regarding all related matters.” During their plea colloquies, the trial court specifically asked Jeffrey, Angela, and Pharian, individually, whether they understood the obligation to provide truthful cooperation. Each responded affirmatively. Again, at sentencing, each party agreed on the record as is reflected in the final judgment, that “as a condition of this plea agreement and a condition of probation, that [s]he shall provide truthful cooperation regarding all related matters.”

Shortly after the Newells pled guilty, the Commonwealth, in reliance on the Newells’ probation agreement, called them to testify before the Pulaski Grand Jury on February 20, 2007. The grand jury was seeking information about the source of the drugs involved in the Newells’ trafficking charges. At the grand jury, the Newells told nearly identical versions of the events surrounding the acquisition of the drugs. They testified that Brandon Newell, another son of Angela, had a car stolen from him in May 2005. At that time, the Newells reported

the car stolen to the sheriff's department. In November 2005, the car was recovered and returned to Angela's apartment. Because of financial need, the Newells decided to sell the car. Then, in January 2006, while preparing the car for sale, Angela discovered two packages – one taped under the right and the left front seats. After discovering the packages, Angela contacted Jeffrey and Pharian. Because the Newells' renditions vary somewhat here, it is not exactly clear as to who actually removed the drugs from the car. In fact, Angela testified differently at the grand jury and the revocation hearings. At the grand jury, she stated she had her sons remove it because of an injury to her hands. Yet, at the revocation hearing, Angela stated that she removed the drugs. Notwithstanding this ambiguity, the parties learned that the packages contained crack cocaine. They then decided to sell the drugs in order to earn money to help with their financial problems. According to the Newells, they divided the drugs among themselves to sell, which ultimately resulted in their arrests for trafficking in a controlled substance. In short, Jeffrey, Angela, and Pharian gave evidence at the grand jury that they did not have a supplier and the drugs were the result of a "windfall" discovery of cocaine taped under the front seats of Brandon Newell's stolen vehicle after its return.

Following the grand jury testimony, on February 26, 2007, the Commonwealth filed a motion to revoke all three parties' probation. The Commonwealth alleged that the Newells gave materially false testimony to the grand jury, and thus, violated the terms of their probation by not being truthful and

honestly cooperating before the Pulaski Grand Jury. Pursuant to KRS 533.050, an evidentiary hearing was held on April 23, 2007.

To support its position, the Commonwealth presented video and audio recordings of each defendant involved in drug transactions. Besides this evidence, the Commonwealth provided witnesses who further corroborated that the Newells had not been honest in their grand jury testimony. For instance, Jeffrey had testified that upon the Newells' discovery of the contents of the package, they took it to a local drug addict, Rick Goggins, to determine whether it was crack cocaine. Goggins, at the revocation hearing, denied that this ever happened. With regard to Angela, the Commonwealth stated that she gave differing stories about the removal of the drugs from the car and that her video/audio statements on the presented tapes sound like ones from an experienced street level dealer rather than a novice drug dealer. Finally, the Commonwealth presented Pharian on tape referring to someone else as the source of his drugs, and provided a witness, Lisa Ingram, who testified that she had bought drugs from him many times prior to the incident, which is the subject of the original charge.

Based on the evidence presented at the revocation hearing, the trial court entered an order on May 1, 2007, revoking the Newells' probation. The trial court, in its order, found the witnesses' testimony, despite the witnesses' drug related history and convictions, to be credible. But the trial court, in its order revoking probation, observed therein that the most convincing evidence was the Newells' plea colloquies at the sentencing hearing. Jeffrey, Angela, and Pharian

each confirmed that the factual basis of their pleas were accurate. The trial court opined “[t]his testimony, during the plea colloquy, was under oath and cannot be reconciled with the version of events provided by the defendants[.]” At the time of the plea agreement, the Newells acknowledged, under oath, that Jeffrey had delivered two bags of cocaine to Angela who, in turn, sold it to a police informant. And with regard to the second transaction, it was acknowledge, under oath, that Angela had traveled with Ingram for forty minutes to procure cocaine, and only upon the return, did Ingram transfer the drugs to the informant. The testimony, during the plea colloquies, cannot be reconciled with the Newells’ grand jury statements that each sold only the “windfall” cocaine and only their own share of that “windfall.”

II. Standard of Review

Our standard of review in probation revocation appeals “is limited to a determination of whether, after a hearing, the trial court abused its discretion in revoking the appellant's parole [probation].” [*Tiryung v. Commonwealth*, 717 S.W.2d 503, 504 \(Ky. App. 1986\)](#). The Kentucky Supreme Court further explains the standard by noting that “[t]he 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 \(Ky. 1999\)](#).

III. Analysis

A court may revoke probation for a violation of any specific conditions imposed by the probation order. A condition of the Newells’ probation

was that they “shall provide truthful cooperation regarding all related matters.” To summarize this case, the Commonwealth asserts that the Newells did not meet this requirement, and hence, requested the revocation of their probation. In contrast, the Newells claim that they did provide truthful cooperation and that the trial court revoked their probation without sufficient evidence.

KRS 533.050(2) provides that “[t]he 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.” Beyond this statute, there are no specific rules for the conduct of the probation revocation hearing except that the probationer is entitled to the minimum requirements of due process of law in these hearings.

In *Robinson v. Commonwealth*, 86 S.W.3d 54, 56 (Ky. App. 2002), the Court held that due process requires a probation revocation proceeding to comply with the requirements set forth in *Morrissey v. Brewer*, 408 U.S. 471, 480, 489, 92 S. Ct. 2593, 2600, 33 L. Ed. 2d 484, 494 (1972). According to the *Robinson* Court, those requirements are: 1) written notice of the alleged probation violations; 2) disclosure to the probationer of the evidence supporting the violations; 3) opportunity for the probationer to be heard in person and to present evidence; 4) the right to confront and cross-examine witnesses; 5) a fact finder that is neutral and detached; and 6) a written statement by the fact finder setting forth

the evidence relied upon and the reasons for revocation. *Robinson*, 86 S.W.3d at 56 quoting *Morrissey*, 408 U.S. at 489.

Notwithstanding the due process requirements for a revocation hearing, generally speaking, criminal proceedings and probation revocation hearings are dissimilar in both form and substance. As the United States Supreme Court has noted, “[r]evocation [of probation] deprives an individual, not of the absolute liberty to which every citizen is entitled, but only of the conditional liberty properly dependent on observance of special parole restrictions.”

Morrissey, 408 U.S. at 480. Clearly, the State has an interest in being able to return individuals released on probation to prison if they have failed to abide by the conditions of the release. Moreover, a probation revocation hearing is not meant to become a second criminal prosecution. For example, “the process should be flexible enough to consider evidence . . . that would not be admissible in an adversary criminal trial.” *Id* at 489. Furthermore, revocation hearings do not require proof beyond a reasonable doubt but, merely, proof of an occurrence by a preponderance of the evidence. [*Rasdon v. Commonwealth*, 701 S.W.2d 716, 719 \(Ky. App. 1986\).](#)

In the case at hand, each of the due process requirements was met in the proceedings, and no violation is alleged. Instead, the Newells contend that they did not understand the condition of their probation. In particular, they assert that they did not know the meaning of the probation condition that they “provide truthful cooperation regarding all related matters.” Yet it is clear from the record

that, at both the plea hearing and the sentencing hearing, the Newells were asked individually if they understood the meaning of those words. Both times they acknowledged their understanding of the words. Additionally, at the plea hearing, the sentencing hearing, and the revocation hearing, the Newells were represented by counsel.

Furthermore, the Newells believe that the Commonwealth did not introduce sufficient evidence to support the alleged violations of their probation. From this contention, they proffer that there was palpable error which affected the substantial due process rights of the Newells and resulted in manifest injustice. We note, however, that the trial court in a careful and reasoned fashion considered all the evidence and concluded that the Newells' grand jury testimony did not meet the probation condition requiring them to "provide truthful cooperation regarding all related matters." At the revocation hearing, the evidence presented by the Commonwealth showed inconsistency in their statements before the grand jury, inconsistency in Angela's testimony at the revocation hearing, inconsistency between the Newells' plea colloquies and their statements made before the grand jury and the revocation hearing. The Commonwealth also played audio and video tapes of the Newells involved in drug transactions and provided witnesses at the revocation hearing who contradicted the Newells' statements.

Therefore, we find no abuse here as there was sufficient evidence to revoke the Newells' probation. Further, we conclude that the revocation hearing

did not abridge the Newells' due process rights and that the trial court did not abuse its discretion in revoking the Newells' probation.

ALL CONCUR.

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