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Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001590 -MR
&
NO. 2007-CA-001591-MR

THOMAS VAN HOOSER, JR., AND
DONALD LAMAR YOUNG — APPELLANTS

v.

APPEALS FROM HANCOCK CIRCUIT COURT
HONORABLE RONNIE DORTCH, JUDGE
ACTION NO. 00-CR-00019 AND 00-CR-00041

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: CAPERTON AND STUMBO, JUDGES; BUCKINGHAM,[1] SENIOR JUDGE.

BUCKINGHAM, SENIOR JUDGE: Thomas Van Hooser, Jr., and Donald Lamar Young appeal from separate orders of the Hancock Circuit Court revoking their probations. They claim that the court violated their due process rights. We agree.

[1] Senior Judge David C. Buckingham 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.

Therefore, we vacate the orders of revocation in these consolidated cases and remand to the trial court for revocation hearings.[2]

Van Hooser and Young had both been convicted in the Hancock Circuit Court of the felony offense of flagrant nonsupport. *See* Kentucky Revised Statutes (KRS) 530.050(2). The court had sentenced Van Hooser to five years' imprisonment in 2001 and had sentenced Young to five years' imprisonment in 2004. In each case, the court had probated the sentence on various conditions, including a condition that each defendant must pay child support in set amounts.

Both Van Hooser and Young apparently violated conditions of their probation by not making the required child support payments. Both were arrested in other states after the court had issued bench warrants for their arrests following motions by the Commonwealth to revoke each defendant's probation. Coincidentally, both were brought before the court on July 6, 2007.

When the court called Van Hooser's case, the court first read him the charge and then appointed a public defender attorney to represent him. The attorney stated to the court that neither she nor Van Hooser had seen the motion to revoke probation. The court then provided the attorney with the court's file and called another case while the attorney reviewed the motion. When the judge recalled the case, the attorney moved the court to continue the case until the next motion hour to allow her time to confer with Van Hooser. The court denied the

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[2] These cases, though unrelated, were consolidated because the facts that led to the appeals occurred before the same court on the same day and involved the same issue.

continuance motion and instead revoked Van Hooser's probation. The court stated that the county would be incurring the financial burden of Van Hooser's incarceration until a revocation hearing could be held if a continuance were granted. Further, the court stated that it would entertain a motion for probation at the next motion hour if Van Hooser had obtained employment and if the attorney first talked with the prosecutor.

Slightly more than four minutes elapsed between the time the court called the case and Van Hooser's probation was revoked. During that time, another case was discussed. Van Hooser was not given the opportunity to speak and was not asked if he admitted or denied violating the terms of his probation. Further, no argument was made by his attorney. In addition, no evidence was presented, although the court's file contained an affidavit from a child support worker. In other words, no hearing took place.

The court then called Young's case and advised him of the charge. The court appointed the same public defender attorney to represent Young, and it provided the attorney with the court's file, which included an affidavit from a child support worker. The court then advised Young and his attorney that it was going to handle the case "just like the other one," and it revoked Young's probation without asking him if he admitted or denied violating his probation, without giving him or his attorney the opportunity to speak in defense, and without otherwise providing a hearing. Young then asked the court a question about his prior payment history, and the court replied that it did not have that information. A total

of less than three minutes elapsed between the time Young's case was called and the next case was called.

A specific Kentucky statute addresses probation revocation hearings. The applicable statute states:

> 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.

KRS 533.050(2).

The U.S. Supreme Court has plainly addressed the due process requirements for revocation hearings of parolees and probationers. The minimum requirements of due process regarding revocation hearings for parolees

> 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 such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the fact finders as to the evidence relied on and reasons for revoking parole.

Morrisey v. Brewer, 408 U.S. 471, 489, 92 S.Ct. 2593, 2604, 33 L.Ed.2d 484 (1972). "[A] probationer, like a parolee is entitled to a . . . revocation hearing, under the conditions specified in *Morrissey v. Brewer*[.]" *Gagnon v. Scarpelli,* 411 U.S. 778, 782, 93 S.Ct. 1756, 1760, 36 L.Ed.2d 656 (1973).

In discussing the application of due process requirements to such hearings, the Court noted that "[w]hat is needed is an informal hearing structured to assure that the finding of a [probation] violation will be based on verified facts and that the exercise of discretion will be informed by an accurate knowledge of the [probationer's] behavior." *Morrisey*, 408 U.S. at 484. The Court also emphasized that a parole (or probation) revocation hearing does not equate to a criminal prosecution "in any sense." *Id*. at 489. Rather, [i]t is a narrow inquiry; the process should be flexible enough to consider evidence including letters, affidavits, and other material that would not be admissible in an adversary criminal trial." *Id*.

Although apparently there was evidence that Van Hooser and Young had violated their probations, the court clearly denied them their due process rights when it revoked their probations without giving them an opportunity for a meaningful hearing, an opportunity to cross-examine witnesses against them, an opportunity to call witnesses to testify on their behalf, and an opportunity for them to testify themselves as to the reasons why they had not paid child support in accordance with the conditions of their probation. It is not far-fetched to think that perhaps one or both defendants could have presented evidence that would have persuaded the court not to revoke their probation. Regardless, to revoke a defendant's probation and order his or her imprisonment without having a meaningful hearing offends due process standards. Furthermore, it was a gross abuse of discretion to deny the appellants' motion to continue for the sole reason

that Hancock County would bear the financial burden of housing the prisoners for another 25-30 days until a revocation hearing could be held. *See Taylor v. Commonwealth*, 545 S.W.2d 76, 77 (Ky. 1976) ("the granting of a continuance is within the sound discretion of the trial court").

Van Hooser and Young also argued that the trial court erred by not providing a written statement in each case that set forth the reasons their probations were revoked. They correctly note that in each case the court's order merely stated that probation was revoked. The orders do not state the reason for revocation.

Concerning probation revocation, "[f]indings are a prerequisite to any unfavorable decision and are a minimal requirement of due process of law." *Rasdon v. Commonwealth*, 701 S.W.2d 716, 719 (Ky.App. 1986). It is clear that the trial court did not make such written findings.

The Commonwealth argues that Van Hooser and Young failed to preserve this issue for appellate review by not moving the court for specific findings. This issue is moot in light of our vacating the revocation orders. On remand, however, should the court revoke either or both of the appellants' probations after conducting a meaningful hearing, it must give written reasons for revocation.

The revocation orders of the Hancock Circuit Court are vacated, and these cases are remanded for revocation hearings.

ALL CONCUR.

BRIEF FOR APPELLANTS:

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