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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-000031-MR

DAWN CHANTE RUSSELL,
AKA DAWN ZABAD

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE BARRY WILLETT, JUDGE
ACTION NOS. 06-CR-000300 AND 06-CR-000875

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CAPERTON, NICKELL AND WINE, JUDGES.

NICKELL, JUDGE: Dawn Chante Russell, aka Dawn Zabad, appeals from an order revoking shock probation entered by the Jefferson Circuit Court on November 30, 2010. Russell alleges the trial court abused its discretion in revoking shock probation without giving her the opportunity to confront and cross-

examine adverse witnesses and without giving her adequate notice of the grounds for revocation. Having reviewed the briefs, the record and the law, we affirm.

Russell headed a criminal syndicate responsible for a series of thefts by deception by passing counterfeit payroll checks in Louisville, Kentucky. Russell plead guilty to one indictment charging her with fifty-five counts of criminal possession of a forged instrument in the second degree; two counts of theft by deception over \$300.00 (false impression); two counts of fraudulent use of credit card; two counts of theft of identity; and one count each of possession of forgery device; tampering with physical evidence; illegal possession of controlled substance in the first degree, Schedule II (cocaine); and illegal use or possession of drug paraphernalia. All charges were based on complicity.

She also plead guilty to a second indictment charging her with one count of theft of identity, five counts of criminal possession of a forged instrument in the second degree, and being a persistent felony offender in the first degree (PFO I). In exchange for Russell's guilty plea and truthful cooperation in future prosecutions, the Commonwealth agreed not to pursue a criminal syndication charge. The court accepted and entered Russell's guilty plea on January 4, 2007.

On February 28, 2007, Russell was sentenced to serve concurrent terms of twenty years on the first indictment and ten years on the second, but imprisonment was withheld and Russell was placed on probation for five years. Based upon special supervision reports filed by Probation and Parole Officer Carole Stiles, the Commonwealth moved the court to revoke Russell's probation.

Following a hearing, at which Russell stipulated the probation violations documented by Stiles, her probation was revoked and the twenty-year sentence that had originally been withheld, was imposed on July 23, 2009. However, defense counsel and the Commonwealth reached an agreement, entered by the court, whereby Russell, who was pregnant, was allowed to remain on probation but serve 120 days in the county jail.

A hearing was scheduled for September 28, 2009, on Russell's motion for shock probation. Judge Ann O'Malley Shake presided over the hearing in the absence of Judge Barry Willett. Defense counsel stated that Russell's outstanding charges had been dismissed since her last court appearance and she had paid about \$1,200.00 in restitution. She had also suffered a miscarriage and her medical problems persisted. The Commonwealth argued that if shock probation were granted, the court should condition it upon no drug use, adherence to probation and parole requirements including timely reporting, and no contact with convicted felons since Russell had recently posted bond on behalf of a felon. The Commonwealth also noted that Russell should remain on probation until the full restitution amount had been repaid. Judge Shake took the matter under submission and an order denying the motion was entered on October 1, 2009.

A *pro se* motion seeking reconsideration of the denial of shock probation was heard by Judge Willett on November 23, 2009. Russell was granted shock probation for a term of five years, provided she comply with the conditions of release imposed on February 28, 2007. This time, the court warned her there

would be “zero tolerance” and any violation would end in revocation without a hearing. In a special supervision report prepared on June 4, 2010, Stiles stated that Russell had been arrested in Louisville and charged with theft by unlawful taking and criminal trespassing for leaving a Meijers store with \$315.67 in merchandise for which she had not paid. The first condition of probation was that Russell “not commit another federal, state, or local crime during the period of probation.”

On September 14, 2010, based upon a special supervision report prepared by Probation and Parole Officer Lindsey Jagers “for Adam Green,” the Commonwealth moved to revoke Russell’s shock probation. A copy of the motion to revoke and Jagers’ report were mailed to Russell at “2116 W. Main Street Louisville, KY 40212.” Jagers requested revocation due to Russell’s:

1. Failure to report as directed
2. Associating with a convicted felon
3. Failure to pay restitution
4. Failure to have substance abuse evaluation

According to Jagers’ report: on July 15, 2010, Russell was arrested and charged with forgery in the second degree and criminal possession of a forged instrument in the second degree while in the company of a convicted felon; after being released from jail on these new charges on July 21, 2010, Russell had not reported to probation and parole; a letter was sent to Russell directing her to report to the office on August 31, 2010, but she did not appear or contact Jagers; that letter was “returned to sender” as undeliverable and unable to forward; Russell failed to report to a social services clinician on March 17, 2010; that appointment was

rescheduled for April 21, 2010, and while Russell appeared, she left without being evaluated for drug treatment; a condition of being shock probated was the payment of restitution at a weekly rate of \$50.00 but no payments had been verified; and, Russell had pending charges of theft by unlawful taking (shoplifting) and criminal trespass in the third degree. On November 1, 2010, the Commonwealth supplemented its motion to revoke with another report from Jagers “for Adam Green” stating that Russell had absconded from supervision by failing to appear “for motion hour on her pending Motion to Revoke” and “failed to contact the Office of Probation and Parole in anyway (sic) and thus her whereabouts are unknown at this time.” Russell’s address was listed as “CAL”¹ on the supplement and according to the certificate, it was delivered only to Jagers.

An evidentiary hearing on the Commonwealth’s motion to revoke was held on November 29, 2010. Russell attended in person and with counsel. Probation and Parole Officer Lyle Smith also attended, “covering for Adam Green” according to the court. Defense counsel immediately requested a continuance, stating he was attempting to locate Green who was no longer employed as a probation and parole officer. He requested more time to investigate Green and determine whether it was in Russell’s best interest to confront him on the witness stand. Defense counsel stated his client had just seen Smith for the first time at the hearing and there were other desirable witnesses, including medical professionals and Russell’s mother, who were unable to attend that day’s hearing.

¹ According to Russell’s brief, “CAL” is an abbreviation for “city at large.”

He did not elaborate on why the other witnesses were unavailable. Defense counsel did not explain the steps he had taken, or planned to take, to locate Green or to bring the desired witnesses to court. A search of the record reveals no subpoenas were issued for the hearing. When asked Green's status by the court, Smith stated he did not know Green's whereabouts, only that he had not worked for the Commonwealth for more than six months. The continuance was denied.

As Smith approached the witness stand, defense counsel objected to going forward with the hearing because his client had not received notice of the grounds alleged for revocation. The court stated one reason for the alleged lack of notice might be her alleged absconding from supervision. The court stated the grounds were included in the record and Russell was held accountable for the contents of the record. Thereafter, the court denied the objection and moved forward with the hearing.

Smith was the only witness called by the Commonwealth. He testified he was assigned Russell's case following her most recent arrest about two weeks before the hearing. He testified Russell's prior probation and parole officers were Green and then Jagers.² He said Russell's case was transferred to him from the Fugitive Office in the normal course of business following her arrest. Smith stated he had reviewed Green's original file prior to the hearing, but had no notes to review and had not discussed the case with Green. He then read the basis of each violation as stated in the two special supervision reports prepared by Jagers.

² Smith testified Jagers was in the office supervising her offenders at the time of the hearing.

On cross-examination, Smith confirmed he had no personal knowledge of Russell's case. He also confirmed the letter Jagers sent to Russell at "2116 W. Main Street" was returned as undeliverable and he did not know whether Jagers had tried to contact Russell at any other address. Smith testified he was unaware of any other returned mail. At the conclusion of Smith's testimony, the Commonwealth closed its case.

Russell testified in her own behalf. She said her last meeting with her original probation and parole officer, Stiles, occurred on May 19, 2010. Russell then moved, and was contacted by Green with a report date of June or July of 2010. She said she and her five-year-old daughter went to Green's office on the report date, but Green told her it was unwise to have her daughter in the office because it was visited by sex offenders. He directed her to leave, find a babysitter, and call him when she had made arrangements for her child. Russell testified she called Green twice to tell him she could not find a sitter. During the second call, Green said he was busy and would call her back with a new report date but he never called. She then called Green about "thirty times" leaving messages and voice mails, but none of her calls was ever returned.

Russell testified she never spoke to Green again and never had the opportunity to explain her dire financial situation to anyone at probation and parole. At the time, she was in the midst of a high-risk pregnancy and was having trouble paying her bills, including rent. In August of 2010 her electricity and water

were turned off and she was evicted. That same month, she was placed on federal house arrest³ with releases for medical and child care reasons. Focusing on her financial woes, Russell stated she stopped calling the probation and parole office. She testified that while she changed addresses, Green had her telephone number and it never changed.

Russell testified that Stiles had told her to report to a social services clinician and she went to the appointment, but the clinician was ill. Thereafter, Stiles told Russell she did not have to report to the clinician because Russell was transferring. Russell stated she was attending daily mental health sessions at Seven Counties⁴ and had never missed an appointment except due to illness; she had been diagnosed with paranoia, suicidal ideation, depression and psychotic disorder; she had followed the adult treatment plan created for her and received drug counseling; and, each time she had been drug tested by federal authorities she had tested clean.

Russell testified no one ever told her Green was no longer a probation and parole officer and she had never received a copy of a special supervision report. She said she learned of the motion to revoke when a federal officer told her

³ Federal house arrest resulted from Russell's arrest by St. Matthews Police on July 15, 2010, after attempting to pass forged checks at two banks. At the time, Russell was in the company of Michael Briggs, a convicted felon. As a result, Russell was charged with forgery in the second degree and criminal possession of forged instrument in the second degree.

⁴ According to its website, "Seven Counties Services, Inc. is a private, not-for-profit corporation and is the state-designated regional behavioral health and developmental services center for Bullitt, Henry, Jefferson, Oldham, Shelby, Spencer and Trimble counties of Kentucky. Seven Counties is not a government agency. However, it is, by state statute, responsible for comprehensive planning and resource allocation in community mental health, substance abuse treatment and developmental services for its region."

the Jefferson Circuit Court had issued a bench warrant for a probation violation on her birthday, October 21, 2010. Upon receiving this information, she immediately called her attorney, Chad Graham.⁵

On cross-examination, Russell testified she last went to the probation and parole office in June or July, 2010, and while she knew she was to report monthly, she did not report for four months. She stated she had undergone a substance abuse evaluation in 2008, and she understood Stiles to say she did not have to be re-evaluated in April 2010. Russell confirmed “2116 W. Main” was her physical address “at one point in time” but said it was never her mailing address. She testified most of her mail goes to her mother’s post office box and her mother always gives her mail to her. She said she had never received any mail from the probation and parole office addressed to her at her mother’s post office box.

After hearing testimony from Russell’s eldest daughter and introducing a letter from Russell’s mother and an adult treatment plan from Seven Counties, defense counsel closed his case and renewed his objection to Green (and perhaps Stiles) being unavailable for cross-examination; Jagers’ absence was not mentioned. Counsel argued that without questioning Green, there was real doubt as to how or whether Green had tried to reach Russell and what had happened between June and August 2010. In support of allowing Russell to remain free on shock probation, counsel argued that Russell was on track to receive disability payments that would enable her to better comply with the conditions of release and

⁵ Graham moved to set aside the bench warrant on October 28, 2010.

her family was trying to pay down the restitution obligation. Counsel proposed that Russell spend a year in a community corrections center with only minimal releases followed by a year in a halfway house.

The Commonwealth, which had steadfastly maintained the decision to grant shock probation rested squarely within the court's discretion, argued that Russell had failed to obey most of the conditions of release and her actions were unknown for more than four months due to her failure to report. The Commonwealth noted that Russell, a PFO I, was previously granted shock probation even though she was not a good candidate because it is intended for first-time offenders. The prosecutor also argued Russell did not want to report to the probation and parole office because she would fail, and granting shock probation again would be a "recipe for disaster."

After hearing the evidence and summations, the court told Russell he was very familiar with her file because she had stood before him "over, and over, and over again." He said shock probating her was "mercy, if nothing else" and he probably should not have granted it. He characterized her as a "chronic check writer" and noted she had repeated the crimes that had resulted in her original conviction. He also read aloud some of the conditions of release⁶ before specifically finding she had violated the terms of shock probation by not cooperating with Probation and Parole; not reporting to Probation and Parole;

⁶ "1. Shall not commit another federal, state, or local crime during the period of probation. 2. Comply with any other regulations and supervision of the Division of Probation and Parole Office and the direction of the Probation Officer."

“absconding supervision;” and, “engaging in criminal conduct (multiple counts).”

As a result, the court revoked Russell’s shock probation in its entirety, imposed the original sentence of twenty years, and reminded her the obligation to repay \$11,374.20 in restitution remained. The court then told Russell not to bother moving for shock probation in the future because the motion would not be entertained. This appeal followed. We affirm.

LEGAL ANALYSIS

Probation revocation “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 . . . restrictions.” *Robinson v. Commonwealth*, 86 S.W.3d 54, 46 (Ky. App. 2002) (quoting *Morrissey v. Brewer*, 408 U.S. 471, 480, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972)). Our review of a probation revocation “is limited to a determination of whether, after a hearing, the trial court abused its discretion in revoking [probation].” *Tiryung v. Commonwealth*, 717 S.W.2d 503, 504 (Ky. App. 1986).

Murphy v. Commonwealth, 551 S.W.2d 838, 840 (Ky. App. 1977),

lists six requirements for due process in probation revocation hearings:

- (1) a written notice of the claimed violations of parole are 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 finder(s) as to the evidence relied on

and the reasons for revoking [probation].

On this appeal, Russell contends she was denied due process because she had no opportunity to cross-examine Green (and perhaps Stiles) about the contents of the special supervision reports from which Smith read at the hearing. We disagree.

In *Marshall v. Commonwealth*, 638 S.W.2d 288, 289 (Ky. App. 1982), we held *Murphy* does not require in-person testimony because the probation revocation process is “flexible” and relaxed. Further, KRE⁷ 1101(d)(5) exempts probation revocation hearings from compliance with the rules. Thus, the introduction of evidence that would be considered inadmissible hearsay in a trial is allowed as evidence in a probation revocation hearing. Therefore, the absence from the revocation hearing of the author of the special supervision reports from which Smith read, in and of itself, does not require reversal.

This allegation arises in the context of whether the trial court erred in denying Russell’s request for a continuance at the beginning of the hearing to locate Green. We begin with the recognition that a trial court has the inherent power “to control the disposition of the causes on its docket with economy of time and of effort for itself, for counsel, and for litigants.” *Rehm v. Clayton*, 132 S.W.3d 864, 869 (Ky. 2004) (quoting *Landis v. North American Co.*, 299 U.S. 248, 254, 57 S.Ct. 163, 166, 81 L.Ed.2d 153 (1936)). Thus, the decision to grant or deny a continuance is within the sound discretion of the trial court and will not be disturbed absent an abuse of discretion. *Hunter v. Commonwealth*, 869 S.W.2d

⁷ Kentucky Rules of Evidence.

719 (Ky. 1994). Whether a trial court abuses its discretion depends upon the facts of each case. *Greeley v. Commonwealth*, 825 S.W.2d 617 (Ky. 1992); *Brashear v. Commonwealth*, 328 S.W.2d 418, 419 (Ky. 1959).

To determine an abuse of discretion has occurred, we must conclude “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 note that defense counsel did not recite the steps he had taken to locate Green, what he planned to do to find him, nor how much time he anticipated success would require. We do know, however, from a review of the record, that no attempt was made to subpoena Green nor any other witness for the hearing. Thus, responsibility for not getting the desired witnesses to the courthouse falls at Russell’s own feet. Furthermore, since the two reports from which Smith read during the hearing were prepared by Jagers, it would seem *she*, not Green, is the probation officer who could have actually shed light on the case. According to Smith, Jagers was sitting in her office during the hearing. Russell did not object to Jagers’ absence, nor did she attempt to offer testimony from her.

Russell cites us to *Hunt v. Commonwealth*, 326 S.W.3d 437, 439 (Ky. 2010), which states that probation hearings are less formal, require less proof than criminal trials, and allow the admission of hearsay. At the probation revocation hearing held in *Hunt*, a probation officer other than the one assigned to Hunt was not placed under oath before listing Hunt’s alleged violations. Our Supreme Court reversed the circuit court in *Hunt* for several due process violations, including the

denial of “the right to confront and cross-examine adverse witnesses” because “no testimony was taken” and “[d]ue process requires that alleged violations be established through sworn testimony, with the opportunity for cross-examination by the probationer.” As pointed out by the Commonwealth, *Hunt* was not reversed due to the admission of hearsay or the fact that Hunt’s probation officer was absent from the hearing; *Hunt* was reversed because a witness was permitted to give unsworn testimony.

The differences in *Hunt* and the case at bar are vast. First, all the witnesses were sworn at Russell’s revocation hearing. Second, Russell’s *current* probation officer testified at the hearing and defense counsel cross-examined him. While it is true that Smith had been assigned to Russell’s case for only two weeks and had never met Russell, he was placed under oath before reading from the reports prepared by Jagers. Third, unlike *Hunt*, where defense counsel was appointed just minutes before the hearing began, Russell’s attorney was not new to the case; he had moved the court to set aside a bench warrant in the case as early as October 28, 2010, and the hearing did not convene until a month later on November 29, 2010. Fourth, in contrast to the hearing in *Hunt* which lasted a mere thirteen minutes, Russell’s hearing spanned the better part of a day. Fifth, *Hunt* did not occur in the context of a request for a continuance for the defense to locate an absent witness. Here, the previous probation officers were known to Russell and could have been subpoenaed or efforts made to determine their whereabouts. In light of these factual distinctions, *Hunt* does not require reversal.

The Commonwealth proved its case for revocation by having Smith read from the special supervision reports prepared and signed by Jagers on behalf of Green. We have been cited to no authority requiring the Commonwealth to track down Green and bring him to the courthouse. The court record contains no documents prepared by Green, and Russell never complained during the hearing that she was denied the opportunity to cross-examine and confront Jagers. Under the circumstances of this case, we are unwilling to say the trial court clearly abused its discretion in denying the requested continuance nor in revoking Russell's probation.

Russell's other complaint is that "the trial court abused its discretion in revoking Ms. Russell's probation without adequate notice of the violation of engaging in criminal conduct." Appellate counsel states this "issue is preserved by the trial court's denial of defense counsel's objection to Ms. Russell's lack of actual notice of the probation violations" and cites to defense counsel's comments just a few minutes into the hearing. We have watched the video record of the hearing and disagree.

Defense counsel objected to going forward with the hearing because Russell had not received notice of the grounds supporting the revocation motion. This is a different complaint than the one advanced on appeal—that the trial court revoked its prior grant of shock probation for a ground not pursued by the Commonwealth. Thus, if any error occurred, the trial court was denied the

opportunity to correct it. *Olden v. Commonwealth*, 203 S.W.3d 672, 675 (Ky. 2006).

It is well-established that a defendant is not “permitted to feed one can of worms to the trial judge and another to the appellate court.” *Kennedy v. Commonwealth*, 544 S.W.2d 219, 222 (Ky. 1976) (citations omitted). To preserve the issue advanced on appeal, defense counsel would have had to object at the *conclusion* of the hearing, after the trial court had stated his grounds for revoking probation, not at the beginning of the hearing. No such objection appears on the video record or in the written record.

Furthermore, as the Commonwealth has argued on appeal, “engaging in criminal conduct” was only one of four reasons the trial court gave for revoking probation. Russell does not take issue with the three other grounds, all of which were supported by sufficient evidence. “[W]hether the trial court revoked upon one violation or [more] is of no consequence to [Russell] so long as the evidence supports at least one violation.” *Messer v. Commonwealth*, 754 S.W.2d 872, 873 (Ky. App. 1988). Here, reversal on the grounds argued by appellate counsel would not change the ultimate outcome of the hearing as revocation was supported by the evidence on other grounds. Thus, reversal for a new hearing would be a waste of judicial resources.

Finally, the argument posed by defense counsel during the hearing does not require reversal. The Commonwealth filed a motion to revoke Russell’s shock probation on September 14, 2010. It then supplemented that motion on

November 1, 2010. Attached to both the motion and the supplement were special supervision reports detailing the alleged violations. Under *Burke v. Commonwealth*, 342 S.W.3d 296, 298 (Ky. App. 2011), Russell “had written notice of the grounds when the motion to revoke was filed.” Thus, her complaint is for naught.

Therefore, the order revoking shock probation is AFFIRMED.

ALL CONCUR.

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