

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-000399-MR

JENNIFER GRAYSON

APPELLANT

v. APPEAL FROM MASON CIRCUIT COURT
HONORABLE STOCKTON B. WOOD, JUDGE
ACTION NO. 08-CR-00054

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE AND DIXON, JUDGES; LAMBERT,¹ SENIOR JUDGE.

DIXON, JUDGE: Jennifer Grayson appeals an order of the Mason Circuit Court revoking her felony probation and sentencing her to ten years' imprisonment.

Finding no error, we affirm.

¹ Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

On September 12, 2008, Grayson pled guilty to criminal possession of a forged prescription (17 counts) and obtaining a controlled substance by fraud (29 counts). The trial court sentenced Grayson to ten years' imprisonment, which was probated for a period of five years. As one of the conditions of her probation, Grayson was required to successfully complete the drug court program.

In November 2010, Grayson was terminated from drug court for violating the terms of the program by submitting forged attendance records for AA/NA meetings. The Commonwealth moved to revoke Grayson's probation, and the court held a hearing on December 9, 2010. At the hearing, Grayson's counsel objected to the violations alleged by the Commonwealth, contending Grayson did not receive notice of the evidence that would be used against her. After lengthy discussion, the court granted a continuance; however, the court agreed to hear testimony from defense witness Connie Neal, the state supervisor for drug court, who had traveled from Frankfort. Through Neal's testimony, Grayson sought to establish that participants were generally not terminated from drug court due to a violation like forged attendance records. At Grayson's request, Neal tendered statewide statistical data regarding drug court participation. At the conclusion of the hearing, Grayson moved to disqualify the prosecutor and the trial judge from the case due to their involvement in the drug court program. The prosecutor agreed to withdraw; however, the trial judge declined to recuse, noting he had no knowledge that warranted disqualification.

A special prosecutor was assigned to the case, and the revocation hearing resumed on January 27, 2011. The Commonwealth introduced three AA/NA meeting attendance records. Two of the forms were signed by Cara Gibson and one form was signed by Norman Estill. Gibson testified that she had not been at the meetings in question and that she had not signed Grayson's attendance records. Hazel Graham, recovery coordinator for Mason County Drug Court, testified she had noticed inconsistencies in the signatures on the forms submitted by Grayson. Graham was suspicious about the authenticity of the signature "Norman Estill," because the meeting leader was actually named Norman Ellison. Graham stated Ellison subsequently confirmed he had not signed the document. At the conclusion of the hearing, the court made findings of fact on the record and entered an order revoking Grayson's probation. This appeal followed.

Grayson contends the probation revocation proceedings violated her due process rights because she did not have notice of the "Norman Estill" forgery, she was denied the opportunity to present a defense, and she was denied an impartial hearing.

We review a trial court's decision to revoke probation pursuant to the abuse of discretion standard. *Tiryung v. Commonwealth*, 717 S.W.2d 503, 504 (Ky. App. 1986). Accordingly, we will not disturb the court's judgment unless it "was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

A defendant facing probation revocation is not entitled to the “full panoply of rights accorded to one not yet convicted[.]” *Tiryung*, 717 S.W.2d at 504. Accordingly, our courts have held that a defendant receives minimum due process in a revocation proceeding when: (1) a written notice of the claimed violations of [probation] 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 . . . , (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].” *Murphy v. Commonwealth*, 551 S.W.2d 838, 840 (Ky. App. 1977).

Grayson asserts she was unfairly surprised when the court allowed the Commonwealth to present evidence of the “Norman Estill” forgery because the original prosecuting attorney stated she would not rely on the Estill document at the December 9, 2010, revocation hearing. As a result, Grayson contends she did not have notice of the evidence that would be used against her at the hearing on January 27, 2011.

This argument is without merit. “Due process requires only that a probationer be informed of the evidence to be presented against him.” *Robinson v. Commonwealth*, 86 S.W.3d 54, 57 (Ky. App. 2002). Here, the original prosecutor disclosed the Estill document to Grayson on December 8, 2010. At the hearing the following day, Grayson objected to the late disclosure of the evidence, which

prompted the Commonwealth to assert it would not rely on the Estill forgery in the hearing. Nevertheless, Grayson requested and received a continuance to investigate the evidence of alleged forgeries. Furthermore, the original prosecutor withdrew from the case at Grayson's request. At the final hearing, the special prosecutor argued that she had disclosed to defense counsel that the Commonwealth would be relying upon all evidence of forgery contained in Grayson's file.

“It is within the sound discretion of the trial court to determine whether the disclosure of the evidence by the Commonwealth was sufficient to meet minimum due process requirements.” *Id.* Here, the trial court ruled that the Commonwealth had properly disclosed its intent to rely on the Estill forgery prior to the second hearing. The court's ruling was supported by the evidence, and Grayson's due process rights were not infringed.

Grayson next asserts she was denied due process because she was prevented from presenting a defense and testifying on her own behalf. We disagree.

Grayson introduced the testimony of Connie Neal, and she cross-examined the Commonwealth's witnesses, Cara Gibson and Hazel Graham. Grayson fully argued her position that she was unfairly terminated from drug court and that she did not deserve to have her probation revoked. We also conclude the court did not deny Grayson the opportunity to testify on her own behalf. At the conclusion of the prosecution's case, defense counsel advised the court Grayson

wanted to testify. The court questioned counsel as to whether Grayson understood the implications of testifying, including the risks of perjury. After a brief recess, defense counsel advised the court that Grayson was not going to testify. The record simply does not reveal any improper conduct by the trial court regarding Grayson's decision. *See Woolfolk v. Commonwealth*, 339 S.W.3d 411 (Ky. 2011).

Grayson next argues she was denied an impartial hearing when the judge refused to disqualify himself from the case. Grayson relies on KRS 26A.015(2)(a), which requires disqualification of a judge “[w]here he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceedings, or has expressed an opinion concerning the merits of the proceeding[.]” Essentially, Grayson believes the trial judge was biased against her because he was also the presiding judge in the drug court program.

In *Liteky v. United States*, 510 U.S. 540, 551, 114 S. Ct. 1147, 127 L. Ed. 2d 474 (1994), the United States Supreme Court explained, “It has long been regarded as normal and proper for a judge to sit in the same case upon its remand, and to sit in successive trials involving the same defendant.” We believe this logic applies to the circumstances presented here, where the trial judge presided over the drug court proceedings and the probation revocation hearing. While Grayson opines the judge treated her unfairly in drug court, there was simply no reasonable basis to question the court's impartiality. After careful review, we conclude Grayson was not denied due process in the revocation proceedings.

Finally, Grayson asserts the court abused its discretion by revoking her probation and imposing a sentence of imprisonment. Grayson argues the court failed to consider that her crimes were “victimless” and that she had completed two years in the drug court program.

It is well settled that “[o]ne may retain his status as a probationer only as long as the trial court is satisfied that he has not violated the terms or conditions of the probation.” *Tiryung*, 717 S.W.2d at 504. Further, “[r]evocation proceedings 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).

At the revocation hearing, Grayson fully presented a defense that she was unfairly terminated from drug court and that she did not deserve to have her probation revoked. The Commonwealth presented evidence Grayson submitted forged attendance records in violation of the drug court rules, resulting in her termination from the program. Due to her termination, Grayson failed to complete drug court, which clearly violated a condition of probation. The trial court heard all of the testimony, weighed the evidence and concluded the violation warranted revocation of probation. After careful review, we believe the court’s decision to revoke Grayson’s probation was supported by substantial evidence and did not constitute an abuse of discretion.

For the reasons stated herein, the judgment of the Mason Circuit Court is affirmed.

ALL CONCUR.

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