RENDERED: AUGUST 16, 2013; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-000882-DG

COMMONWEALTH OF KENTUCKY — APPELLANT

v.

ON DISCRETIONARY REVIEW
FROM ESTILL CIRCUIT COURT
HONORABLE THOMAS P. JONES, JUDGE
ACTION NOS. 10-XX-00001 & 11-XX-00001

SCOTTY SLAWSON AND
TAMEKA NAPIER — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON, COMBS AND NICKELL, JUDGES.

NICKELL, JUDGE: We have granted the Commonwealth's motion for discretionary review of the Estill District Court's revocation of conditionally discharged sentences for Scotty Slawson and Tameka Napier.[1] Revocation

[1] The parties executed an agreed order of consolidation in February 2011.

occurred immediately after the court found probable cause existed to believe both had committed new offenses. Acting as an appellate court, the Estill Circuit Court held that combining a preliminary hearing on a new felony charge with a revocation hearing on a conditionally discharged sentence, and revoking the discharged time solely upon a showing of probable cause of the commission of a new felony, did not comport with the minimum requirements of due process.[2] The matters were remanded to the district court with direction that Slawson and Napier be released from confinement and their conditionally discharged time be reinstated unless a new revocation order was entered after a new revocation hearing was held consistent with the minimum requirements of due process. We granted the Commonwealth's request for discretionary review and affirm the circuit court order entered April 21, 2011.

CHALLENGED PROCEDURE

The challenged district court procedure begins with a criminal defendant signing a document styled "Order of Conditional Discharge"[3] in which

[2] Minimum due process for a revocation requires: service of "written notice of the claimed violations"; disclosure of evidence to be relied upon; opportunity "to be heard in person, present witnesses and documentary evidence"; absent a finding for good cause, "confrontation and cross-examination of witnesses is afforded"; a hearing by a "neutral and detached" body; and "a written statement is made by the fact finder(s) as to the evidence relied on and the reasons for" the revocation. *Murphy v. Commonwealth*, 551 S.W.2d 838, 840 (Ky. App. 1977) (citing *Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972) and *Gagnon v. Scarpelli*, 411 U.S. 778, 786, 93 S.Ct. 1756, 1761-62, 36 L.Ed.2d 656 (1973)). We make no distinction in the context of this Opinion between revocation of parole, probation and conditional discharge time.

[3] This is not an AOC form. The origin of the form is unidentified.

he agrees not to commit another offense[4] and further agrees that if he does, his "conditional discharge may be revoked upon a probable cause showing to the Court that the Defendant has violated the terms of this Order." While Slawson and Napier both signed the controversial order in unrelated misdemeanor cases, and benefitted from conditionally discharged sentences, they objected to enforcement of the order when they were subsequently charged with new felonies, arguing that combining the preliminary hearing for the new felony with the conditional discharge revocation hearing denied them the opportunity to present a meaningful defense, and reducing the standard of proof for a revocation hearing from a preponderance of the evidence to probable cause eviscerated their right to minimal due process.

The Commonwealth argues the procedure is constitutionally sound because Slawson and Napier agreed they would not commit another offense as part of their desire for conditional discharge of any sentence imposed, but broke their word by being arrested on new charges. Based on those new charges, the Commonwealth moved to revoke the conditionally discharged time. While acknowledging *Murphy v. Commonwealth,* 551 S.W.2d 838, 841 (Ky. App. 1977), sets the standard of proof in a revocation hearing as a preponderance of the evidence, the Commonwealth argues that because KRS[5] 533.050, the statute

[4] Other potential conditions are paying restitution by a date certain, paying court costs by a date certain, attending and completing drug and/or alcohol counseling, and "other."

[5] Kentucky Revised Statutes.

governing conditional discharge, does not specify the burden of proof that must be satisfied to authorize revocation, Slawson and Napier were free to agree a different burden of proof—probable cause—would apply in any future revocation hearing. Characterizing Slawson's and Napier's signatures on the Order of Conditional Discharge as binding agreements, the Commonwealth urged the district court to apply traditional principles of contract construction, enforce the terms of the agreement, and impose the full original sentence on both defendants.

PROCEDURAL HISTORIES

Lest we get ahead of ourselves before beginning our analysis, we describe the paths traveled by Slawson and Napier in reaching this Court. On July 14, 2010, Slawson was sentenced to 365 days conditionally discharged for a period of two years, after pleading guilty to a single count of receiving stolen property under $500.00.[6] The written Order of Conditional Discharge was signed that day by Slawson, his attorney, the county attorney, and the district judge. When Slawson was charged with assault in the second degree[7] on July 31, 2010, and with operating on a suspended/revoked operator's license[8] on August 11, 2010, and had failed to pay restitution by September 8, 2010, the Commonwealth moved to revoke his conditional discharge and asked the court to impose the full 365-day

[6] KRS 514.110, a Class A misdemeanor.

[7] KRS 508.020, a Class C felony.

[8] KRS 186.620(2), a Class B misdemeanor per KRS 186.990(3).

sentence. The Commonwealth served Slawson with notice of the grounds for revocation.

At 11:22 a.m. on September 8, 2010, the district court began Slawson's preliminary hearing on the assault charge. The Commonwealth called one investigating officer who was questioned and cross-examined. Slawson called no witnesses. At about 11:34 a.m., the district court found probable cause existed to bind over the assault charge to the grand jury.

Without a break and barely a breath, the revocation hearing commenced at 11:36 a.m. The Commonwealth stated three grounds for revocation —the two new charges and the failure to make restitution. Neither party called any witnesses nor offered any proof. The court held the traffic charge in abeyance and addressed the assault charge and the nonpayment of restitution. Defense counsel argued restitution was due *that day* so there had not yet been a violation. Regarding the assault charge, counsel argued a finding of probable cause was insufficient grounds to revoke a conditional discharge. The Commonwealth responded that Slawson had made a promise when he signed the order and broke that promise. Calling Slawson's conduct "disrespect" to the court system, the district court expressed concern that the new charges had followed so quickly on the heels of the guilty plea and conditional discharge of the sentence. Thereafter, the court found sufficient proof of the assault charge had been offered; found Slawson had ample time to make restitution; and revoked the conditional discharge imposing the full 365-day sentence. At 11:44 a.m. the district court accepted

Slawson's guilty plea on the charge of operating on a suspended license and sentenced him to serve ten days concurrently with his other time.

We turn now to Napier. On December 9, 2009, she pled guilty to theft by unlawful taking under $500.00[9] and was sentenced to ninety days in jail, conditionally discharged for 24 months pursuant to an order signed by Napier, the county attorney and the district judge. A condition of release was completion of in-house rehabilitation for drugs and alcohol. On July 14, 2010, in a separate case, she pled guilty to theft by unlawful taking/shoplifting and was "sentenced to 120 days in jail, of which 90 days are conditionally discharged for a period of 24 months[.]" A further notation states: "[t]his time shall be consecutive to time under 09-M-401 and if revoked she will serve 180 days. 12 months shall be on supervised probation and 12 unsupervised." This order was signed by Napier, her attorney, the county attorney and the district judge. When Napier was charged with burglary in the third degree[10] on November 29, 2010, the Commonwealth moved to revoke her conditional discharge on both misdemeanor cases and served Napier with notice of its grounds for revocation.

On December 8, 2010, the preliminary hearing on the burglary charge began at 3:38 p.m. One investigating officer was questioned by the prosecutor and cross-examined by Napier's attorney as well as counsel for her co-defendant. When the Commonwealth closed its proof, each co-defendant was given the

[9] KRS 514.030, a Class A misdemeanor.

[10] KRS 511.040, a Class D felony.

opportunity to present proof but called no one. At 4:07 p.m. the district court found probable cause to bind over the matter to the grand jury. After resolving an issue regarding the co-defendant, at 4:10 p.m. the district court commenced Napier's revocation hearing, noting that Napier's failed drug test was not alleged as a basis for revocation. At that point, the proceeding was interrupted to handle other cases and resumed at 4:50 p.m. when defense counsel objected first to the court's use of testimony from the preliminary hearing to resolve the revocation motion and then to reducing the burden of proof for revocation from a preponderance of the evidence to probable cause. Without any additional proof, the district court acknowledged the applicable standard in a revocation hearing is a preponderance of the evidence but stated a defendant may waive that standard and agree to a different one—implying without stating—that Napier had done this by signing the Order of Conditional Discharge. The court then imposed Napier's full 180-day sentence, giving her credit for time served since December 1, 2010.

Once the revocation orders were entered, Slawson and Napier appealed to the Estill Circuit Court where the cases were consolidated. However, Slawson and Napier were not the first defendants to challenge the procedure. The same arguments were advanced in *Commonwealth v. Brian Samples*, Estill District Court Case No. 09-T-955, where on August 9, 2010, a three-page order analyzing and approving the procedure was entered by the district court. The *Samples* order was referenced in the Slawson and Napier litigation. We quote the *Samples* findings verbatim:

1) That the correct evidentiary standard regarding revocation of conditionally discharged time, as established by the Kentucky Court of Appeals in *Rasdon v. Commonwealth,* 701 S.W.2d 716 (Ky. App. 1986), is a preponderance of the evidence;

2) That certain rights and privileges afforded by law may be waived by Defendants in criminal cases. This Court finds that among these waivable rights and privileges include standards of proof;

3) That the waiver of a standard of proof does not contradict the holding of *McClanahan v. Commonwealth,* 308 S.W.3d 694 ([Ky.] 2010). *McClanahan* held that requirements clearly enumerated by statute may not be waived. The statute concerning revocation of conditionally discharged time, KRS 533.050, does not require any specific standard be used by the court;

4) That because the use of the preponderance of the evidence standard is not a right guaranteed by statute this Court finds that standard of proof may be waived by the Defendant if done so knowingly, voluntarily, intelligently, and in a writing signed by the Defendant;

5) That the Defendant's Due Process rights are not suborned by the use of a lower evidentiary standard for conditional discharge revocation if previously properly waived;

6) That this Court may make a probable cause finding that the Defendant has violated the terms of the Conditional Discharge Order based upon testimony gathered at a Defendant's Preliminary Hearing, provided that the defendant properly waived the right to have his case reviewed on a preponderance of the evidence standard. *See Murphy v. Commonwealth,* 551 S.W.2d 838 (1977);

7) That if the Preliminary Hearing is also to serve as the Revocation Hearing this Court must make findings on the

> record based on the evidence heard at the Preliminary Hearing;
>
> 8) That in order for Preliminary Hearing to also to (sic) serve as the Revocation Hearing, written notice must be supplied to the Defendant prior to the Preliminary Hearing;
>
> 9) That this Court will entertain argument and allow questioning regarding the revocation of conditionally discharged time after making a ruling as to Probable Cause at the Preliminary Hearing.

We have no record of the *Samples* opinion being appealed to the Estill Circuit Court, but can confirm discretionary review was not requested in this Court.

On April 21, 2011, the Estill Circuit Court issued a single nine-page opinion pertaining to both Napier and Slawson finding: under RCr[11] 3.14, the standard of proof for a preliminary hearing is probable cause; under *Rasdon v. Commonwealth,* 701 S.W.2d 716, 719 (Ky. App. 1986), the standard of proof for a revocation hearing is preponderance of the evidence; preponderance of the evidence is a more stringent standard than probable cause; although informal, a revocation hearing must still comport with minimum requirements of due process including the preponderance of the evidence standard of proof; while constitutional rights are waivable, and are waived each time a guilty plea is entered, "rights in potential future revocation proceedings [cannot be waived if doing so] would interfere with the defendant's due process" rights; and, only by *present day* acts, not by *future* acts, may a defendant who has committed a violation and been

[11] Kentucky Rules of Criminal Procedure.

appointed counsel waive the rights at the heart of this appeal "by stipulating to the violation or by agreeing that the Commonwealth does not have to meet its burden of proof." Otherwise, the Estill Circuit Court reasoned, the accused is agreeing to less than minimal due process.

The Estill Circuit Court rejected three other allegations. First, the court found the same judge may preside at both the preliminary hearing and the revocation hearing without jeopardizing the requirement of a neutral magistrate. Second, citing *Tiryung v. Commonwealth,* 717 S.W.2d 503, 504 (Ky. App. 1986), the court found the revocation hearing need not be delayed while awaiting conviction on the new felony because the Commonwealth need only prove a violation to the trial court by a preponderance of the evidence, not to a jury beyond a reasonable doubt. Finally, the court stated that as a practical matter, defendants rarely testify at preliminary hearings, but any restriction on Slawson's and Napier's ability to testify at their revocation hearings is now moot because the court has ruled the preliminary hearing must occur separately from the revocation hearing. The Estill Circuit Court went on to say, on remand the district court may determine in its discretion whether testifying at a revocation hearing will impact Slawson's and Napier's Fifth Amendment right against self-incrimination. Ultimately, the Estill Circuit Court concluded Slawson and Napier were entitled to a preliminary hearing with a probable cause finding and a separate revocation proceeding using the preponderance of the evidence standard.

ANALYSIS

Upon viewing the combined hearings for both Slawson and Napier, we agree with the Estill Circuit Court's analysis. While we appreciate the quest for efficiency and expediency, the challenged procedure cuts too many corners. Mere seconds separated the preliminary hearings from the revocation hearings and no proof was taken during either revocation hearing. For all intents and purposes, the revocation was a done deal as soon as the district court found probable cause and bound over the felony charges to the grand jury. All that remained to do was calculate any credit for time served and formally impose the conditionally discharged sentences.

Slawson and Napier received revocation hearings in name only. But that is not what is envisioned by *Morrissey*, *Gagnon* and *Murphy*, each of which recites the minimum required to comply with due process. We simply cannot say Slawson's and Napier's constitutional rights were protected.

We understand the defendants agreed not to commit future violations and further agreed that if they did, their conditionally discharged sentences would be revoked upon a showing of probable cause that a crime had been committed. While we appreciate swift justice, it cannot come at the expense of due process. We are unconvinced Slawson and Napier were aware that by signing the Order of Conditional Discharge they were reducing the Commonwealth's burden of proof at a future revocation hearing, if one occurred. We have not been cited to any point at which an attorney or the court advised them of the impact of their decisions.

As a result, we follow the lead of *McClanahan* (Ky. 2010) (a defendant may agree to any sentence, but a court may not impose a sentence exceeding the lawful penalty range for the crime committed), and hold the Estill District Court may not revoke conditionally discharged time upon a showing of probable cause. Even though Slawson and Napier agreed to the lower standard of proof in the event the Commonwealth moved for revocation by signing the Order of Conditional Discharge, the trial court is barred from applying that portion of the order because it directly contravenes established case law requiring a preponderance of the evidence for revocation. *Murphy,* 551 S.W.3d at 841. To hold otherwise would destroy the concept of due process. By reinforcing that different standards of proof apply in the preliminary hearing and the revocation hearing, it follows that the two hearings shall be separate and distinct.

WHEREFORE, the order of the Estill Circuit Court entered on April 21, 2011, is affirmed.

ALL CONCUR.

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