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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-000163-MR
AND
NO. 2012-CA-000748-MR

CHARLES HOWARD COOK

APPELLANT

v. APPEAL FROM WHITLEY CIRCUIT COURT
HONORABLE DANIEL BALLOU, JUDGE
ACTION NO. 10-CR-00230 & 10-CR-00271

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION VACATING AND REMANDING

** ** * * * * *

BEFORE: CLAYTON, LAMBERT, AND VANMETER, JUDGES.

VANMETER, JUDGE: Charles Cook appeals from the January 11, 2012, orders of the Whitley Circuit Court which revoked his probation in two criminal cases for failing to make contact with his probation officer and remanded him to jail.

Finding the trial court erred, we vacate and remand.

On October 11, 2010, Cook was indicted on one count of failure to comply with sex offender registration (10-CR-00230). Thereafter, Cook was indicted on a second charge of failure to comply with sex offender registration (10-CR-00271). Per defense counsel's request, Cook was evaluated by the Kentucky Correctional Psychiatric Center ("KCPC") in February 2011. The trial court held a competency hearing on May 23, 2011, during which Dr. Amy Trivette of the KCPC testified that Cook suffered from vascular dementia. She further testified that Cook had problems with his memory due to strokes he had suffered. In spite of these difficulties, Dr. Trivette opined that Cook was competent to stand trial. Because Dr. Trivette had not evaluated Cook in over three months, the trial court ordered a second evaluation to determine if Cook's condition had worsened and/or would continue to worsen.

On Cook's motion, the court consolidated the two offenses for trial. On July 6, 2011, the court held a second competency hearing, during which Dr. Trivette testified that she still believed Cook was competent to stand trial, but suggested that frequent breaks be taken during the trial in order for Cook to refresh and be reminded of what had occurred. Following the hearing, the trial court found Cook competent to stand trial for the two offenses.

Cook subsequently pled guilty to both offenses. During an August 11, 2011, hearing, defense counsel informed the court that Cook was planning on moving to Tennessee and sought a probated sentence. The Commonwealth agreed to the

arrangement, but requested the proceedings be continued until arrangements were made to send Cook to Tennessee. The trial court continued the proceedings.

The proceedings resumed on September 6, 2011, at which time defense counsel informed the court that Cook was unable to move to Tennessee. Cook moved the court to sentence him in accordance with the original plea agreement. The Commonwealth objected on the basis that the probated sentence in the original plea deal was negotiated under the premise that Cook would be leaving the Commonwealth. The trial court then set aside Cook's guilty pleas to both offenses.

On November 9, 2011, defense counsel notified the trial court that arrangements had in fact been made for Cook to move to Tennessee. The trial court reinstated the guilty pleas, and, in accordance with the plea agreements, ordered Cook to be released from custody in order to report to the sheriff's office within 24 hours to be driven to Tennessee. Final judgment was entered in both cases, and Cook was sentenced to 30 months' imprisonment for each conviction, to run consecutively for a total of 60 months, and probated for five years in accordance with the plea agreements.

On December 28, 2011, the Commonwealth moved the court to revoke probation in both cases, alleging Cook failed to make contact with his probation officer in violation of the probation order. Cook appeared in court on January 3, 2012, at which time defense counsel informed the trial court that Cook's mental condition had worsened and moved for a stay in the proceedings until a third competency evaluation by KCPC could be completed. The court denied the

motion and, following a probation revocation hearing, revoked Cook's probation and remanded him to jail. These appeals followed and were consolidated by this court.

On appeal, Cook first argues the trial court abused its discretion by denying his motion to stay the proceedings until KCPC could conduct a third competency evaluation prior to revoking his probation. We disagree.

RCr¹ 8.06 provides that if reasonable grounds exist to believe the defendant “lacks the capacity to appreciate the nature and consequences of the proceedings against him or her, or to participate rationally in his or her defense, all proceedings shall be postponed until the issue of incapacity is determined[.]” The trial court maintains discretion to determine whether reasonable grounds exist to believe the defendant is incompetent to stand trial. *Sloane v. Commonwealth*, 382 S.W.3d 851, 859 (Ky. 2012) (citation omitted). Our review of a competency decision is “[w]hether a reasonable judge, situated as was the trial court judge whose failure to conduct an evidentiary hearing is being reviewed, should have experienced doubt with respect to competency to stand trial.” *Woolfolk v. Commonwealth*, 339 S.W.3d 411, 423 (Ky. 2011) (citation omitted).

We do not find the trial court abused its discretion by denying Cook's motion for a continuance to conduct a third competency evaluation prior to revoking his probation. As an initial matter, we note that the law cited by the parties concerns whether a defendant is competent to stand trial; Cook was

¹ Kentucky Rules of Criminal Procedure.

declared competent to stand trial following two competency hearings, during which Dr. Trivette of the KCPC attested to Cook's competency. This court is unaware of any law entitling a probationer to a competency hearing prior to a probation revocation. Probation revocation proceedings are not considered part of the original criminal prosecution, are treated with less formality, and require less proof. *Hunt v. Commonwealth*, 326 S.W.3d 437, 439 (Ky. 2010) (citation omitted).

Furthermore, at the time of the revocation hearing, Cook had been evaluated by KCPC approximately six months prior and was deemed competent to stand trial. At the revocation hearing, defense counsel argued that Cook's mental condition had worsened, but did not set forth any evidence to support this claim. The record from the hearing indicates Cook still had issues with his memory, but does not demonstrate a worsening of his condition since the prior hearing during which the trial court found him competent to stand trial. Under these circumstances, we find the trial court's decision to deny Cook's motion to stay the proceedings was reasonable and not an abuse of its discretion.

Next, Cook argues he was denied his rights to due process of law when the trial court revoked his probation without requiring the Commonwealth to present any evidence to establish its burden of proof. We disagree.

Cook concedes this error was not preserved for our review, and requests that we review it for palpable error under RCr 10.26. Under that rule, "an unpreserved error may be noticed on appeal only if the error is 'palpable' and 'affects the

substantial rights of a party[.]” *Commonwealth v. Jones*, 283 S.W.3d 665, 668 (Ky. 2009). An error is “palpable” and “affects the substantial rights of a party” only if “it is more likely than ordinary error to have affected the judgment.” *Id.* (citations omitted). Relief is not warranted unless the palpable error has “resulted in a manifest injustice . . . in other words, the error so seriously affected the fairness, integrity, or public reputation of the proceeding as to be ‘shocking or jurisprudentially intolerable.’” *Id.* (citation omitted).

As we stated above, a revocation proceeding is not a part of the criminal prosecution, is treated with less formality, and requires less proof. *Hunt*, 326 S.W.3d at 439 (citation omitted). Nonetheless, certain minimal due process requirements still apply due to the liberty interest involved. *Id.* (citation omitted).

The United States Supreme Court specified those rights as:

- (a) written notice of the claimed violation of (probation or) parole;
- (b) disclosure to the (probationer or) 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 . . . and
- (f) a written statement by the factfinder [] as to the evidence relied on and reasons for revoking (probation or) parole.

Gagnon v. Scarpelli, 411 U.S. 778, 786, 93 S.Ct. 1756, 1761-1762, 36 L.Ed.2d 656 (1973) (citation omitted).

In the present case, Cook received notice of the alleged violation, was represented by counsel at a formal hearing before an impartial decision-maker and

was afforded the opportunity to present evidence on his behalf. The Commonwealth presented the sworn affidavit of Cook's probation officer, which stated that Cook had failed to make contact with the probation officer. Cook neither disputed the affidavit, nor offered any rebuttal evidence; he simply requested a continuance for a third competency hearing. We find that the probation officer's sworn affidavit was sufficient evidence to prove Cook violated the terms of his probation.

Cook further claims that since the probation officer did not testify at the hearing, he was not afforded the opportunity to confront an adverse witness. However, revocation proceedings are intended to "be flexible enough to consider evidence including letters, affidavits, and other material that would not be considered admissible in an adversary criminal trial." *Morrissey v. Brewer*, 408 U.S. 471, 489, 92 S.Ct. 2593, 2604, 33 L.Ed.2d 484 (1972). Thus, courts have not prohibited the use of "conventional substitutes for live testimony, including affidavits, depositions, and documentary evidence." *Gagnon*, 411 U.S. at 782 n.5, 93 S.Ct. at 1760 (emphasis added). Kentucky courts have adopted this rationale and held that a probationer does not have an absolute right to confront witnesses at a probation revocation proceeding. *Barker v. Commonwealth*, 379 S.W.3d 116, 129 (Ky. 2012); *Marshall v. Commonwealth*, 638 S.W.2d 288, 289 (Ky. App. 1982).

We find that the circumstances here did not demand the opportunity to confront the parole officer. Cook did not object to or contest the evidence

presented in the probation officer's affidavit. He merely sought a third mental health evaluation prior to the court's ruling on the Commonwealth's motion to revoke his probation. Due to this, we fail to appreciate the merit afforded Cook of cross-examination of the parole officer in this instance. Furthermore, since Cook's strategy did not involve attacking the legitimacy of the contents of the affidavit, in essence, he waived any right to confront the parole officer. *See Parson v. Commonwealth*, 144 S.W.3d 775, 783 (Ky. 2004) (a defendant may waive his right to confrontation, so long as it can be said that the attorney's decision to not confront a witness was a legitimate trial tactic or part of an overall trial strategy). Accordingly, we find that the affidavit was sufficiently reliable and Cook's due process rights were not violated.²

Finally, Cook argues the trial court erred by revoking his probation without considering lesser penalties as required under KRS 439.3106. We agree.

Cook failed to preserve this issue for our review, and thus we will apply the palpable error standard of review discussed above.

KRS 439.3106 is a relatively new statute, enacted in 2011, and has yet to be reviewed by our Supreme Court. It provides:

Supervised individuals shall be subject to:

² We note, however, since we are vacating the trial court's order for failure to make findings in compliance with Kentucky Revised Statutes (KRS) 439.3106, *infra*, and remanding to the trial court, we anticipate that the trial court will have another hearing in order to consider that statute, and that participation of Cook's probation officer will be required. In connection with that hearing, if Cook wants to cross-examine the probation officer as to the grounds for revocation, the trial court should afford Cook that opportunity.

(1) Violation revocation proceedings and possible incarceration for failure to comply with the conditions of supervision when such failure constitutes a significant risk to prior victims of the supervised individual or the community at large, and cannot be appropriately managed in the community; or

(2) Sanctions other than revocation and incarceration as appropriate to the severity of the violation behavior, the risk of future criminal behavior by the offender, and the need for, and availability of, interventions which may assist the offender to remain compliant and crime-free in the community.

Two recently published cases, *Jarrell v. Commonwealth*, 384 S.W.3d 195 (Ky. App. 2012), and *Southwood v. Commonwealth*, 372 S.W.3d 882 (Ky. App. 2012), both held that the decisions to revoke probation and incarcerate the probationers conformed to the requirements of KRS 439.3106 because the trial court made findings regarding the defendant's behavior and risk to commit another felony. The court is not required to make specific findings of fact. *Id.* at 884. However, we must discern whether the trial court "appropriately considered the General Assembly's wishes, as espoused in KRS 439.3106." *Jarrell*, 384 S.W.3d at 203.

In the case before us, the court made no specific findings under KRS 439.3106. Furthermore, a review of the hearing reveals that none of the additional factors in KRS 439.3106 were even considered by the trial court. The record indicates the trial court merely considered Cook's failure to contact his probation officer as grounds for revoking his probation and remanding him to jail. KRS

439.3106 requires a consideration of additional factors. As a result, we find the trial court abused its discretion when it revoked Cook's probation without considering the factors in KRS 439.3106.

We vacate the order of the Whitley Circuit Court, and remand this matter to that court in order for the court to make findings that comport with KRS 439.3106.

ALL CONCUR.

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