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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2012-CA-000361-MR

KIT PRESCOTT

APPELLANT

v. APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE KELLY MARK EASTON, JUDGE
ACTION NO. 04-CR-00045

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: COMBS, NICKELL AND STUMBO, JUDGES.

STUMBO, JUDGE: Kit Prescott appeals the denial of his CR 60.02 motion to vacate or reconsider his probation revocation. We find no error and affirm.

Prescott has already directly appealed the revocation of his probation to this Court; therefore, we will use that recitation of facts.

Prescott had been convicted of two counts of first-degree trafficking, second or subsequent offense. The

charges against him were Class B felonies, and Prescott was sentenced to a total of twenty years' imprisonment. The trial court ordered him to serve two hundred forty days and probated the balance of Prescott's sentence. One of the explicit conditions of his probation was that Prescott not possess any controlled substance unless it was prescribed by a physician. Prescott was released on May 7, 2005. The Commonwealth moved to revoke his probation on December 14, 2005, on the grounds that he had been cited for possession of marijuana and was associating with persons convicted of felony and misdemeanor offenses. The trial court, after an evidentiary hearing, revoked Prescott's probation solely on the basis of his possession of marijuana.

Prescott v. Commonwealth, 2007 WL 706848, 1 (Ky. App. 2007). It is worth noting that Prescott's probation was revoked prior to a trial on the possession of marijuana charge. This Court affirmed the revocation of Prescott's probation because a preponderance of the evidence presented at the revocation hearing supported the revocation. *Rasdon v. Commonwealth*, 701 S.W.2d 716 (Ky. App. 1986).

Prescott later brought the underlying CR 60.02 motion, alleging newly discovered evidence, because some time after his probation was revoked, the possession of marijuana charge was dismissed with prejudice. Prescott believes because this charge was dismissed and he was not convicted of the criminal charge that led to the revocation of his probation, his probation should be reinstated.

Probation can be revoked for committing an offense for which one has not yet been convicted. *Barker v. Commonwealth*, 379 S.W.3d 116 (Ky. 2012); *Tiryung v. Commonwealth*, 717 S.W.2d 503 (Ky. App. 1986).

Probation has dual goals, protection of the public and rehabilitation of the offender. The competing principles of due process for the probationer, efficiency for the criminal justice system, and protection for the public become highlighted when the state seeks to revoke probation. As stated in *Brown v. Commonwealth*, [564 S.W.2d 21 (Ky. App. 1977)] and reiterated in *Tiryung*, probation is a privilege by which the trial court restores conditional liberty to the probationer. Public safety demands quick and efficient procedures to restrict the liberty of a failing probationer. But because the probationer has received conditional liberty through the grant of probation, due process safeguards intercede to ensure that liberty is not unfairly taken away. A probation revocation hearing provides the process through which trial courts balance these conflicting concerns. In Kentucky, the probation revocation process is addressed by statute.

KRS 533.050 provides, in pertinent part, that “the court may not revoke or modify the conditions of a sentence of probation ... except after a hearing with defendant represented by counsel and following a written notice of the grounds for revocation or modification.” But this statute does not control the timing of the probation revocation hearing. So, for guidance on timing, we turn to KRS 533.030, which governs conditions of probation and conditional discharge.

KRS 533.030(1) states that “[t]he court shall provide as an explicit condition of every sentence to probation or conditional discharge that the defendant not commit another offense during the period for which the sentence remains subject to revocation.” The accompanying 1974 Kentucky Crime Commission/LRC Commentary notes, “The last sentence of subsection (1) is added so that there can exist no doubt but that commission of another offense while probation or conditional discharge exists is reason for revocation of such a sentence.” Notably, the Commentary refers to the “*commission* of another offense” but not the *charge* or *conviction* of another offense.

To sustain a criminal conviction requires proof *beyond a reasonable doubt*. By contrast, “[p]robation revocation requires proof by a preponderance of the evidence that a violation has occurred.” Because of the lower burden of proof required to revoke probation, a trial court could revoke probation before a jury convicts the probationer by finding him guilty beyond a reasonable doubt on identical facts. And a trial court could properly revoke probation on less evidence than is required for a jury to convict.

Barker, 379 S.W.3d at 122 -123 (footnotes and citations omitted).

The fact that Prescott was not convicted of the charge that led to the revocation of his probation is immaterial. The above quoted statutes allow for the revocation of probation due to the alleged commission of a new offense without a conviction. In the case at hand, the evidence produced at the probation revocation hearing was sufficient to support the revocation. This issue has been previously appealed and is the law-of-the-case; therefore, we are bound by it. *Inman v. Inman*, 648 S.W.2d 847 (Ky. 1982).

Based on the foregoing, we affirm the judgment of the trial court.

ALL CONCUR.

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