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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-001173-MR

CLIFFTON EARL HUNT — APPELLANT

v.

APPEAL FROM ESTILL CIRCUIT COURT
HONORABLE THOMAS P. JONES, JUDGE
ACTION NO. 10-CR-00057

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, MAZE AND NICKELL, JUDGES.

MAZE, JUDGE: Cliffton Earl Hunt appeals from an Estill Circuit Court order[1] revoking his probation. He argues that the trial court relied on impermissible hearsay and failed to comply with Kentucky Revised Statutes (KRS) 439.3106.

[1] Neither of the orders of the trial court, the first revoking probation and the second addressing Hunt's motion to reconsider, were attached to the appellant's brief. These omissions are in violation of Kentucky Rules of Civil Procedure (CR) 76.12(4)(vii).

Hunt was indicted for second-degree assault; he subsequently entered a guilty plea pursuant to *Alford v. North Carolina*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1977) [2] to an amended charge of assault under extreme emotional disturbance. He received a total sentence of five years, probated for five years. As a condition of his probation, he was to have no contact with drugs or alcohol. About eighteen months later, the trial court issued a bench warrant for Hunt's arrest after being advised by Hunt's probation officer that he had tested positive for using Suboxone,[3] and had admitted to using the drug daily without a valid prescription. Hunt stipulated only to the failed drug test, and requested the court to allow him to present evidence as to why his probation should not be revoked.

At the revocation hearing, Hunt asked the court to consider graduated sanctions as an alternative to full revocation of probation. The trial judge told Hunt that he would speak with his probation officer, and agreed to consider graduated sanctions after reviewing his past conduct.

The trial court subsequently entered an order revoking Hunt's probation. According to the order, the probation officer had informed the court that Hunt admitted that he took Suboxone which he purchased on the streets on a daily basis for five years, that he had never been tested for Suboxone or questioned about his use of the drug until recently, and that he only obtained a prescription for

[2] A defendant entering a plea of guilty under *Alford* refuses to admit guilt but acknowledges that the Commonwealth can present sufficient evidence to support a conviction. An Alford plea "is a guilty plea in all material respects." *United States v. Tunning*, 69 F.3d 107, 111 (6th Cir. 1995).

[3] According to the appellant's brief, Suboxone is a medication used to treat opiate addiction.

Suboxone after his positive test. The trial court took judicial notice that one of the normal conditions of supervision was that a defendant on probation shall not use or possess narcotics or controlled substances that are not prescribed by a licensed physician. The trial court reviewed Hunt's record, which showed that he had been previously convicted of aggravated assault in the fourth degree – spouse abuse; two counts of unlawful imprisonment in the first degree; assault in the third degree – police/probation officer; two counts of assault in the fourth degree – domestic violence; and assault in the first degree. The trial court observed that although Hunt had numerous violent charges in his history, he had no charges between 2006 and 2010, and that the probation officer had advised the court that Hunt had voluntarily enrolled in anger management classes. The court acknowledged that it had agreed to consider graduated sanctions, even though graduated sanctions were not part of the original conditions of his probation, but concluded that there was a substantial risk that Hunt would commit another violation during any extended period of probation.

Hunt filed a motion to reconsider, which argued that he had stipulated to a failed drug test only, and that the trial court's finding that he had regularly used drugs without a prescription for a long period of time was based on evidence that was not provided at the hearing, namely, the statements of the probation officer made to the court after the hearing.

The trial court entered an order addressing the motion, which noted that the allegation that Hunt continued to use drugs without a prescription on a daily basis

was actually contained in the order for a bench warrant which was read to him upon his arraignment, and that several references were made to those allegations throughout the hearing. The trial court further pointed out that at the hearing, it had decided to revoke Hunt's probation, but then agreed to consider graduated sanctions after reviewing his past conduct and speaking with his probation officer. The trial court order stated that

> [e]ven though the Defendant was not subject to graduated sanctions pursuant to the Judgment and Sentence on Plea of Guilty, things could only have gotten better or stayed the same for him, as he had already received the full 5-year sentence. Therefore, there was no harm in asking for graduated sanctions, but since the news was not favorable to the Defendant, he now seeks to scrutinize the procedure to which he had no objection on May 25, 2012.

The court noted that Hunt should have raised his objection and stated that he wanted to cross-examine the probation officer, rather than "waiting for good news and then objecting to the bad news." Finally, the order stated that the trial court was nonetheless willing to conduct a hearing to allow Hunt to cross-examine the probation officer. Apparently, Hunt did not take the court up on this offer. This appeal followed.

As a preliminary matter, we address the Commonwealth's argument that this appeal is moot because Hunt was granted shock probation on August 31, 2012, after this appeal was filed. We agree with Hunt that under *Bowlin v. Commonwealth*, 357 S.W.3d 561 (Ky. App. 2012), he is entitled to a review of his probation revocation because the Commonwealth could again move to revoke his

shock probation for reasons such as his positive drug test. These circumstances meet the exception to the mootness doctrine which is that "a court will review even a moot case if the issues involved in the case are capable of repetition, yet evading review." *Bowlin*, 357 S.W.3d at 565 (internal citations and quotation marks omitted.)

We review a trial court's decision to revoke probation for an abuse of discretion. *Tiryung v. Commonwealth*, 717 S.W.2d 503, 504 (Ky. App. 1986). "The test for abuse of discretion is whether 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). KRS 533.050(2) provides that "the court may not revoke or modify the conditions of a sentence of probation or conditional discharge except after a hearing with defendant represented by counsel and following a written notice of the grounds for revocation or modification." "Probation revocation is not dependent upon a probationer's conviction of a criminal offense. Instead, the Commonwealth need only prove by a preponderance of the evidence that a probationer has violated the terms of probation." *Miller v. Commonwealth*, 329 S.W.3d 358, 359-60 (Ky. App. 2010) (internal citations and quotation marks omitted). "Generally, a trial court's decision revoking probation is not an abuse of discretion if there is evidence to support at least one probation violation." *Lucas v. Commonwealth*, 258 S.W.3d 806, 807-808 (Ky. App. 2008) (internal citation omitted).

Hunt argues that the trial court's findings were inadequate to satisfy the demands of due process because they relied on out-of-court statements by his probation officer. Hunt notes that the statements were provided off the record, and claims he was not provided with a chance to cross-examine the probation officer. Probation revocation hearings "must be conducted in accordance with minimum requirements of due process of law." *Rasdon v. Commonwealth*, 701 S.W.2d 716, 718 (Ky.App.1986) (citing *Gagnon v. Scarpelli*, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973)). "[P]robation revocation hearings are not criminal proceedings but flexible hearings that accept matters into evidence otherwise inadmissible in a criminal prosecution." *Barker v. Commonwealth*, 379 S.W.3d 116, 129 (Ky. 2012) (citing *Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972)). Kentucky courts have held that hearsay evidence is admissible in "these informal types of hearings and there is no absolute right to confront witnesses[.]" *Id*. More importantly, Hunt agreed to allow the court to speak to his probation officer off the record as part of the court's agreement to consider graduated sanctions before entering a written order revoking probation. Moreover, when Hunt filed his motion to reconsider, objecting to the probation officer's statements, the trial court offered to schedule a hearing at which the probation officer could be cross-examined by Hunt. Thus, Hunt initially agreed to allow the court to speak to the probation officer off the record and then declined an opportunity to cross-examine the probation officer. Under these circumstances, he cannot object to the trial court's reliance on the probation officer's comments.

Hunt further argues that the trial court erred in relying on the probation officer's statements regarding his prolonged use of Suboxone without a prescription in deciding not to impose graduated sanctions because he was not given adequate notice of these allegations in the notice of the probation revocation proceedings. He relies on *Rasdon v. Commonwealth*, 701 S.W.2d 716 (Ky. App. 1986), in which a panel of this Court held that inadequate notice of allegations supporting a motion to revoke conditional discharge was reversible error. In this case, however, the court stated that it did not rely heavily on the probation officer's out-of-court statements in deciding to revoke probation, only in deciding not to impose graduated sanctions.

Hunt argues, nonetheless, that he was entitled to graduated sanctions under the terms of KRS 439.3106. That statute, which was passed in 2011, states as follows:

> Supervised individuals shall be subject to:
>
> > (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.

KRS 439.3106.

Hunt argues that there was an absence of any evidence that he posed a risk to prior victims or the community at large, and that the statute therefore required the court to impose sanctions other than revocation and incarceration. He points out that he was seeking treatment for his Suboxone use, had voluntarily entered an anger management program, was assessed for drug treatment and was progressing steadily. He contends that because the mandate of section (1) of the statute was not met, it was imperative that the trial court fashion a sanction that did not involve revocation or any jail time.

Although Hunt claims that his arguments relating to this statute are preserved, our review of the record indicates that his counsel asked only that the trial court consider graduated sanctions. At no time did she allude specifically to the terms of section (1) of the statute, or request the court to consider that section. The trial court's order cited specifically only to KRS 439.551, which directs the Department of Corrections to promulgate administrative regulations creating a system of graduated sanctions.

Consequently, we may only review this claim relating to KRS 439.3106 for palpable error pursuant to RCr (Kentucky Rules of Criminal Procedure) 10.26, which provides:

> A palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error.

In any event, the trial court complied with the statute insofar as it considered and rejected the possibility of alternative sanctions to revocation. The order revoking probation stated that the court simply could not ignore five years of admitted purchase and daily consumption of illegal drugs which overlapped with the entire period of probation thus far. "The trial court determined that there was not any other sanction short of revocation and incarceration that would be appropriate." *Southwood v. Commonwealth*, 372 S.W.3d 882, 885 (Ky. App. 2012). This determination that revocation was the only appropriate course was a matter well within the discretion of the trial court, and does not rise to the level of manifest injustice required for reversal under RCr 10.26.

The order revoking probation is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Jason A. Hart
Assistant Public Advocate
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Courtney J. Hightower
Assistant Attorney General
Frankfort, Kentucky