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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-001522-MR

RAYMONT PERSLEY — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE A.C. MCKAY CHAUVIN, JUDGE
ACTION NO. 11-CR-002033

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: ACREE, COMBS, AND D. LAMBERT, JUDGES.

ACREE, JUDGE: Raymont Persley appeals the Jefferson Circuit Court's September 4, 2015 order removing him from pretrial diversion and sentencing him to one year's imprisonment. After careful review, we find the revocation "hearing" flawed, depriving Persley of due process. Accordingly, we vacate the circuit court's order and remand for additional proceedings consistent with this Opinion.

In 2011, Persley pleaded guilty to first-degree promoting contraband and trafficking in marijuana, less than eight ounces, second offense. The circuit court sentenced him to one year's imprisonment for each offense, to be served concurrently, diverted for five years, and subject to numerous conditions, including that Persley "[r]emain on good behavior and refrain from further violation of the law in any respect."

In June 2012, the circuit court received a "special supervision report" advising the court that Persley had violated the conditions of his probation by testing positive for marijuana. The circuit court sentenced him to serve four days in jail.

In January 2013, the Commonwealth filed a motion to revoke Persley's diversion. It claimed Persley had recently been arrested for violating an EPO[1]/DVO[2] and failed to timely report the arrest to his probation officer. The circuit court remanded the Commonwealth's motion and sentenced Persley to serve one day in jail.

In June 2013, the Commonwealth filed another motion to revoke Persley's diversion on grounds that Persley had again been arrested for violating a DVO. The circuit court again remanded the Commonwealth's motion.

[1] Emergency Protective Order.
[2] Domestic Violence Order.

On June 15, 2015, the circuit court entered an order stating, "This matter comes before the Court on information provided by the Division of Probation and Parole in a Special Supervision report dated June 3, 2015, advising the Court that [Persley] had violated the court-ordered conditions of his pretrial diversion." (R. 51). The "special supervision report" consisted of an email from Persley's probation and parole officer directly to the circuit court, stating:

> Mr. Persley had an EPO filed against him. It's already been in front of the judge and is just scheduled for a review on 12-1-15, so I'm not sure the validity of it. Below is the narrative. CourtNet does call it an "Unserved EPO." Just let me know what you want me to do since it's not actually a new charge.

(R. 55). The email then detailed the complaining witness's narrative statement.[3] There is no indication that Persley or the Commonwealth received the email. The Commonwealth did not file a motion to revoke Persley's diversion. Instead, the circuit court issued a criminal summons directing Persley to appear for a hearing on June 22, 2015.

Neither Persley nor the Commonwealth appeared at the June 22, 2015 hearing. The circuit court issued a bench warrant for Persley's arrest. Persley appeared the next day, with counsel, and the matter was continued for a hearing on July 24, 2015. The circuit court directed the Commonwealth to petition the complaining EPO/DVO witness.

[3] The complaining witness was Persley's ex-girlfriend.

Persley, with counsel, and the Commonwealth, appeared at the July 2015 hearing to determine if Persley should be permitted to remain in the diversion program. The Commonwealth informed the court it had been unable to locate the complaining witness in the EPO/DVO matter. The circuit court stated it would "pull" the family court file, and passed the hearing to August 2015. The circuit court also notified counsel that Persley had an outstanding bench warrant based on a new felony flagrant nonsupport charge. Persley was taken into custody.

The parties again appeared before the circuit court on August 13, 2015. The Commonwealth stated it did not have much to offer at this point to prove a violation and it was not in a position to present any evidence that day. Persley informed the circuit court the EPO/DVO matter had been resolved and that he had been ordered to attend Batterers' Intervention classes, but the flagrant non-support charge was still pending. The circuit court stated it would examine the family court file related to the EPO/DVO and again passed the hearing.

A final hearing was held on September 3, 2015. The circuit court stated it had reviewed the family court file, which indicated there was an EPO, then a DVO, coupled with the requirement that Persley attend Batterers' Intervention classes, which he had failed to do. Persley disputed the circuit court's characterization, explaining he had attended batterers' intervention classes, but had to stop when he was arrested on the nonsupport warrant and subsequently had to be

re-referred to the program. The circuit court then stated that, based on its review of the family court file, of which it was taking judicial notice, that Persley had violated the terms of his diversion in the manner alleged. Persley's counsel objected, noting there had not yet been an evidentiary hearing, the Commonwealth had produced no adverse witnesses subject to cross-examination, and he was not privy to the contents of the family court file. The following exchange occurred:

> **Court:** I find Mr. Persley has violated the conditions of his pretrial diversion in the manner alleged.
>
> **Defense Counsel**: Oh, I'm confused. Are we having a hearing today?
>
> **Court**: Um, I thought we had it.
>
> **Defense Counsel**: No, there was never a hearing.
>
> **Court**: Do you want to put on witnesses? Do you want to call anybody?
>
> **Defense Counsel**: There are no witnesses for the Commonwealth today, Judge.
>
> **Court**: Ok, I'm going to find based on my review of the family court record that Mr. Persley has violated the conditions of his [pretrial diversion] in the manner alleged. . . .
>
> **Defense Counsel**: I'm going to object to there being any finding whatsoever. My client is entitled under due process rights and the United States constitution and *Hunt v. Commonwealth* for there to be witnesses presented against him – adverse witnesses – at a revocation hearing.

Court: Find that in the Constitution. Find the part where it says there is supposed to be a witness. Find that.

Defense Counsel: Judge, in *Hunt v. Commonwealth*, 326 S.W.3d 437, from 2010, "[in] a probation revocation hearing there are certain statutory requirements, which include [the] opportunity to be heard in person, [to] present witnesses and document evidence, and the right to confront and cross examine adverse witnesses."

Court: Right. Does that say you get to have a witness or you get to confront and cross-examine one if there is one?

Defense Counsel: If there is one I'm entitled to examine him.

Court: Is there a witness here?

Defense Counsel: There isn't.

Court: Do you want to call one?

Defense Counsel: The Commonwealth has the burden, Judge.

Court: They do not. There is no burden of proof. [The standard is] preponderance of the evidence and in the statute - the Commonwealth is not even involved in the statute. We can have this debate or we can have this discussion about Mr. Persley. What do you want to do?

Defense Counsel: Judge, you are asking me an impossible question. My client is entitled to a hearing.

Court: This is his hearing, sir. Do you want to be heard?

Defense Counsel: Yes, judge, I want to be heard.

Court: Ok, fire away.

. . . .

> **Court**: the only difference between now and the previous times is I have obtained the official court records which contain the sanction against him for having done what he did that led to the EPO/DVO. So that's where we are. And there's nothing to talk about in terms of witnesses because that is an official court record of which I have taken judicial notice. So if there is anything else to discuss we can do it, but what I am asking you to discuss is what do you think the appropriate sanction is for someone who has been found to have violated the conditions of his pretrial diversion in the manner alleged. That's what I suggest you address.

By order entered September 4, 2015, the circuit court voided Persley's further participation in the pretrial diversion program and sentenced him to one year's imprisonment. It stated, in relevant part:

> The parties having been offered the opportunity to put on proof, the Court having taken judicial notice of the contents of the Jefferson Circuit (Family) Court Case No. 15-C-501290, being otherwise sufficiently advised;
>
> **THE COURT FINDS**, for the reasons stated on the record and incorporated herein by reference, as follows:
>
> > 1. [Persley] has violated the conditions of his pretrial diversion in the manner alleged;
> >
> > 2. [Persley's] failure to comply with the conditions of his supervision constitutes a significant risk to the community at large;
> >
> > 3. Viewing [Persley's] most recent violations in the context of his overall performance while under supervision (to include his having: used marijuana; caused

> an EPO/DVO to be issued against him; been convicted of violating the aforementioned EPO/DVO; failed to complete his Batterers Intervention Program classes as ordered by the Family Court; failed to secure employment; failed to support his dependents; been arrested and charged with flagrant non-support; failed to report his new arrest to his probation officer; lied to his probation officer; and utterly failed to accept responsibility for his conduct) [Persley] cannot be appropriately managed in the community.

(R. 64-65). From this order, Persley appealed.

Persley contends the circuit court failed to hold a proper hearing before removing him from the diversion program. He argues the revocation process was wholly deficient and constitutionally flawed because the September 3, 2015 "hearing" was conducted in a manner that offered him nothing more that the trappings of due process. We agree.

Generally, the review standard in probation or diversion revocation matters is whether the circuit court abused its discretion. *Commonwealth v. Andrews*, 448 S.W.3d 773, 780 (Ky. 2014). But "[t]his is not a typical case in which we are asked to determine whether the record supports a conclusion that [diversion] was properly [revoked]." *Commonwealth v. Goff*, 472 S.W.3d 181, 189 (Ky. 2015). Instead, the issue before us is whether the revocation "procedure used

by the trial court was legally sufficient." *Id.* This is purely a legal question, and our review is *de novo*. *Id.*

Persley argues the circuit court violated his statutory and constitutional due process rights when it: (i) refused to hold a proper hearing before removing him from the pretrial diversion program; (ii) inappropriately took judicial notice of the family court file; and (3) failed to give him written notice of the alleged probation violations. He acknowledges only the first argument is properly preserved; he asks for palpable error review for the latter two. RCr[4] 10.26.[5]

Generally, KRS[6] 533.256(2) identifies the standard courts must apply when addressing a defendant's failure to comply with or complete the conditions of diversion. It provides that "[i]n making a determination as to whether or not a pretrial diversion agreement should be voided, the court shall use the same criteria as for the revocation of probation, and the defendant shall have the same rights as he or she would if probation revocation was sought." *Id.* We thus turn our attention to KRS 533.050(2), the probation revocation statute.

[4] Kentucky Rules of Criminal Procedure.
[5] "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." RCr 10.26.
[6] Kentucky Revised Statute.

KRS 533.050(2) reads: "Except as provided in KRS 439.3108, 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." The statute "dictates *two events must occur before* a [diverted] sentence is modified or revoked: a *hearing* must be held during which the defendant is represented by counsel; and, the defendant must receive—in writing—the grounds alleged in support of [revocation]." *Goff*, 472 S.W.3d at 189. Neither occurred in this case.

We discern nothing in the record indicating that Persley received *written* notice of the grounds for revocation. The Commonwealth claims he most certainly did receive notice, as the special supervision report was made a part of the court file and Persley was not unaware of the basis for the removal proceedings. Simply including the document identifying the diversioner's alleged violations in the court record is insufficient to satisfy KRS 533.050(2) and the concept is at odds with due process. While in this case the basis for removal slowly became clear over several court hearings, the statute requires the defendant receive *written* notice of the alleged violations. KRS 533.050(2); *Goff*, 472 S.W.3d at 189. No such written notice was ever provided to Persley.

Let us be clear. This is not a case in which a copy of the special supervision report was provided to the defendant. Nor is it even a case in which

the Commonwealth filed a motion to revoke stating the alleged violations and served on the defendant or his counsel. All that exists here is an email to the circuit court – and the court alone – identifying alleged violations and, based on this, the circuit court ordered Persley to appear. This can hardly be said to satisfy KRS 533.050(2)'s requirement that a defendant receive *written* notice of the grounds for revocation. *Id.*

Second, we are not convinced the hearing conducted by the circuit court "constituted the *hearing* envisioned by KRS 533.050(2)." *Goff*, 472 S.W.3d at 190. It is true, of course, that "[p]robation revocation proceedings are not part of the original criminal prosecution, and are thus more informal and require less proof than a criminal trial." *Hunt v. Commonwealth*, 326 S.W.3d 437, 439 (Ky. 2010). For example, the Kentucky Rules of Evidence do not apply and hearsay is admissible. *Id.* But despite these relaxed standards, the hearing must still comport with minimum due process requirements. *Rasdon v.* Commonwealth, 701 S.W.2d 716, 718 (Ky. App. 1986). These requirements include:

> (a) written notice of the claimed violations 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.

Hunt, 326 S.W.3d at 439 (quoting *Gagnon v. Scarpelli*, 411 U.S. 778, 786, 93 S. Ct. 1756, 1762, 36 L. Ed. 2d 656 (1973)); *Morrissey v. Brewer*, 408 U.S. 471, 489, 92 S. Ct. 2593, 2604, 33 L. Ed. 2d 484 (1972); KRS 533.256(2).

The hearing in this case violated Persley's due process rights. We have already discussed the first deficiency – Persley's failure to receive written notice of the claimed violations. But there were several others.

First, Persley was denied the right to confront and cross-examine adverse witnesses. "Implicit in the right to confront and cross-examine is an assumption that adverse witnesses will be under oath, and subject to formal cross-examination." *Hunt*, 326 S.W.3d at 439. In this case, the Commonwealth never called or questioned any witnesses. Rather, the circuit court simply took judicial notice of an associated family court case. This constituted the sole basis for, and all the evidence supporting, the circuit court's revocation decision. Because there were no witnesses, Persley had no opportunity to question them. "Due process requires that alleged violations be established through sworn testimony, with the opportunity for cross-examination by the probationer." *Id.*

That is not to say that a circuit court is prohibited from also taking judicial notice of an official court record. But the judicial notice that occurred in this case was also flawed. Without notice to the parties, the circuit court simply

declared it was taking judicial notice of the family court "official court record." This causes us concern.

"KRE[7] 201(b) allows for judicial notice of official court records." *Commonwealth v. Carman,* 455 S.W.3d 916, 921 n.5 (Ky. 2015). This is so because "[t]he records of a court are not subject to reasonable dispute." *Lambert v. Lambert*, 475 S.W.3d 646, 653 (Ky. App. 2015); KRE 201(b) ("A judicially noticed fact must be one not subject to reasonable dispute[.]"). But the rule is not without limits.

First, while "[a] court may take judicial notice, whether requested or not" by a party, KRE 201(c), "KRE 201(e) requires a court to give the parties notice of its intention to take judicial notice of any matter and 'an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed.'" *S.R. v. J.N.*, 307 S.W.3d 631, 637 (Ky. App. 2010) (quoting KRE 201(e)). No such notice or opportunity was offered to Persley in this case. And while a formal objection was not raised by Persley at the September 2015 hearing, a careful review of the record reveals Persley was clearly uneasy with the circuit court's unannounced decision to take judicial notice of the family court record.

Second, while it is appropriate to take judicial notice of court orders, "which are reasonably certain and typically not subject to dispute," it is

[7] Kentucky Rules of Evidence.

inappropriate to take judicial notice of *evidence* offered in another case. *S.R.*, 307 S.W.3d at 637; *Johnson v. Commonwealth*, 12 S.W.3d 258, 263 (Ky. 1999) (courts "cannot adopt by judicial notice the evidence introduced in [one] case for the purpose of proving a similar proposition in another case").

> Evidence introduced in an adversary proceeding—and not stipulated to by the parties or reduced to a finding by the court—is by its nature subject to dispute. Unless the circuit court ruled on the truth or falsity of that evidence in the prior proceedings, thereby making it a judicially noticeable finding of fact, then that evidence cannot be judicially noticed.

S.R., 307 S.W.3d at 637. The problem here lies with the ambiguity of the circuit court's judicial notice. At the September 2015 hearing, it declared it was taking judicial notice of the official family court record. In its subsequent order, it states it took judicial notice "of the contents of Jefferson Circuit (Family) Court Case No. 15-C-501290." It is not evident that the circuit court limited its judicial notice to the family court's order and adjudicated facts. Persley expresses particular concern that the circuit court inappropriately took judicial notice of testimony offered during the EPO/DVO proceedings, including the complaining witnesses' narrative in support of the EPO/DVO. Although the court could take judicial notice that such evidence was presented, it could not take judicial notice that it was true. Like Persley, we are unable to determine the facts the circuit court judicially noticed.

In addition, it appears the circuit court improperly shifted the burden of proof. "Probation revocation requires proof by a preponderance of the evidence that a violation has occurred." *Hunt*, 326 S.W.3d at 440 (citation omitted). We find disturbing the circuit court's comments that, because the Commonwealth is not mentioned in the revocation statute, it bore no burden of proof and played little role, if any, in the revocation process. "While the standard of proof is lower for probation revocation than for the original criminal proceeding, the *Commonwealth* is still required to prove its case." *Id.* (emphasis added); *Goff*, 472 S.W.3d at 191 ("Kentucky courts have long placed the burden on the Commonwealth" to prove the diversioner violated the terms of his diversion).

Finally, we find suspect the "written statement by the factfinder[] as to the evidence relied on and reasons for revoking" diversion. *Hunt*, 326 S.W.3d at 439 (citation omitted). The circuit court's September 4, 2015 order is certainly detailed, identifying the "evidence" it believed made Persley unsuited to be managed in the community, such as Persley's alleged failure to secure employment, failure to support his family, lying to his probation officer, using marijuana, and "utterly fail[ing] to accept responsibility for his conduct." (R. 65). But it is unclear whence the circuit court derived this evidence. Again, the circuit court heard no witnesses, no testimony was taken, no evidence offered, and little argument was permitted. While some of this "evidence" is contained in the circuit

court record, some of it is not. The "evidence" against Persley was not disclosed to him, and he was not given the opportunity to challenge it. *See Hunt*, 326 S.W.3d at 439 (due process requires "disclosure to the [diversioner] of evidence against him" and the opportunity to confront adverse witnesses and to present witnesses and documentary evidence).

When we examine the diversion revocation proceedings as a whole, we are convinced Persley was not afforded meaningful and adequate due process of law. That conclusion requires that we vacate the circuit court's order revoking. If the Commonwealth elects to seek to remove Persley from the diversion program on remand, we direct the circuit court to ensure Persley receives written notice of the grounds for revocation and to hold an evidentiary hearing at which the Commonwealth is required to prove, by a preponderance of the evidence, through sworn testimony, that Persley violated the conditions of his diversion. Nothing in this opinion shall be construed as prohibiting the circuit court from also taking judicial notice of the orders and adjudicated facts found in the family court's file, provided that notice fully complies with KRE 201.

CONCLUSION

For the foregoing reasons, the Jefferson Circuit Court's September 4, 2015 order revoking probation is VACATED and REMANDED for additional proceedings.

ALL CONCUR.

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