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Commonwealth of Kentucky
Court of Appeals

NO. 2016-CA-000671-MR

DRAKARUS JONES

APPELLANT

v. APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE KELLY MARK EASTON, JUDGE
ACTION NO. 15-CR-00565

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * ** * **

BEFORE: KRAMER, CHIEF JUDGE; ACREE AND JONES, JUDGES.

KRAMER, CHIEF JUDGE: Drakarus Jones appeals the Hardin Circuit Court's order voiding his pretrial diversion. After a careful review of the record, we reverse and remand for a new pretrial diversion revocation hearing because the circuit court committed palpable error in denying Jones his due process rights during the hearing.

I. FACTUAL AND PROCEDURAL BACKGROUND

An information was filed against Jones accusing him of receiving a stolen firearm in violation of KRS¹ 514.110. The Commonwealth provided an offer in exchange for Jones's guilty plea. The offer stated that if Jones entered a guilty plea, the Commonwealth would recommend a sentence of three years on the charge and pretrial diversion for five years. Jones moved to enter a guilty plea in accord with the Commonwealth's offer. He also moved for pretrial diversion.

The circuit court accepted Jones's guilty plea and granted Jones's motion for pretrial diversion. The pretrial diversion was ordered to last five years, and the conditions of diversion included requirements for Jones to "obey all rules and regulations imposed by Probation [and] Parole" and to "not commit another offense during the period of the Pretrial Diversion." The order granting pretrial diversion was entered on November 13, 2015.

On January 29, 2016, a Probation and Parole Officer finalized a Violation of Supervision Report regarding Jones. The report stated that Jones had failed to report on his January 13, 2016 report date. It further alleged that almost two weeks later, the Probation and Parole Officer left a voicemail for Jones to report on January 27, 2016, but Jones failed to do so. A home visit was conducted the following day to Jones's last known residence, but nobody was home, so a door tag was left instructing Jones to report to Probation and Parole on January 29, 2016 at 8:00 am, which Jones failed to do. The Commonwealth then filed a motion to

¹ Kentucky Revised Statute.

void pretrial diversion based upon the violations specified in the Violation of Supervision Report.

Jones was ultimately found in Oregon. He was brought back to Kentucky, where a pretrial diversion revocation hearing was held. Jones waived his right to counsel at the hearing. Following the hearing, the circuit court entered an order finding that Jones had “knowingly, voluntarily and intelligently waived the right to counsel and formal hearing as stated on the record.” The court also found that Jones “failed to abide by the terms and conditions of pretrial diversion by committing the following violations: leaving [the] state without permission – absconding.” The court stated in its order that the court had “considered the requirements of KRS 439.3106 and [found]: such violation(s) constitute a significant risk to prior victims of the Defendant or the community at large (including the Defendant) and [Jones] cannot be appropriately managed in the community.” The circuit court further concluded that Jones’s “history of failures to appear with [his] knowing decision to leave [the] state [without] permission – with gun charges as underlying charges – [leads to the conclusion that he is a] danger to [the] public [with] non-compliance.” Consequently, the court voided his pretrial diversion and scheduled a sentencing hearing. The court subsequently entered its judgment and sentenced Jones to three years of imprisonment.

Jones now appeals, contending that: (a) he was not sufficiently advised of his rights in order to make a knowing, intelligent, and voluntary waiver of his right to counsel at the hearing where his pretrial diversion was voided; and

(b) the circuit court's findings do not support its conclusion that Jones was a risk to the victims or to the community.

II. ANALYSIS

A. WAIVER OF RIGHT TO COUNSEL

Jones first alleges that he was not sufficiently advised of his rights in order for him to make a knowing, intelligent, and voluntary waiver of his right to counsel at the pretrial diversion revocation hearing. He acknowledges that this claim is not preserved for appellate review, but he asks this Court to review it for palpable error pursuant to RCr² 10.26.

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 resulted from the error.

For an error to be palpable, it “must be so grave in nature that if it were uncorrected, it would seriously affect the fairness of the proceedings.” *Brewer v. Commonwealth*, 206 S.W.3d 343, 349 (Ky. 2006). Manifest injustice results from a “defect in the proceeding [that is] shocking or jurisprudentially intolerable.” *Martin v. Commonwealth*, 207 S.W.3d 1, 4 (Ky. 2006).

Pursuant to KRS 533.256(2), “[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.” Further,

² Kentucky Rule of Criminal Procedure.

KRS 533.050(2) provides: “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.”

Regarding the hearing that is required by KRS 533.050(2), in order

to pass constitutional muster, the hearing must comport with minimum due process requirements which have long been identified as:

(a) written notice of the claimed violations of parole; (b) disclosure to the 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 such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole.

Commonwealth v. Goff, 472 S.W.3d 181, 190 (Ky. App. 2015) (quoting *Morrissey v. Brewer*, 408 U.S. 471, 488-89, 92 S.Ct. 2593, 2604, 33 L.Ed.2d 484 (1972)).

The *Goff* Court noted that “Kentucky courts appl[y] the same minimum due process rights in the context of a probation revocation hearing.” *Id.* (citation omitted). Thus, pursuant to KRS 533.256(2), these same due process rights apply in the context of a pretrial diversion revocation hearing.

Jones contends that he did not make a knowing, intelligent, and voluntary waiver of his right to counsel at the hearing. This Court has held that “[a] revocation hearing, unlike a guilty plea, is not a stage of a criminal proceeding. The protections pursuant to *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969) or *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) are not required.” *Burke v. Commonwealth*, 342 S.W.3d 296, 298 (Ky. App. 2011). However, as noted above, certain minimal due process requirements must have been met for the hearing to pass constitutional muster. We now turn to review what occurred at Jones’s pretrial diversion revocation hearing.

In his appellate brief, Jones states that he told the circuit court at the beginning of the hearing that “he was arrested on February 16 in Oregon,” to which the court responded that “it took a while for [Jones] to be processed in Kentucky.” In his brief, Jones then quotes the discussion he had with the circuit court about the waiver of his right to counsel as follows:

[Jones]: “Can I tell you about that, though?”

[Court]: “Yeah, but let me tell you this first because it might change your mind on whether you want to say something.”

[Jones]: “Alright.”

[Court]: “Okay, so let me explain what’s going on. Now is the Commonwealth asking, asking me to void this diversion and proceed to sentencing?”

[Commonwealth]: [Indicates yes].

[Court]: “Okay. You have a right to have a hearing about this. At that hearing, I’d listen to every, you know, information from them and from you about what happened: did you abscond, what were you doing in another state, or whatever, and I would have to decide whether you absconded from supervision or not. If I think you did, then I have to make another decision: am I going to void this diversion and go ahead and do a sentencing hearing or not. Now, you do have a right to have this hearing I’m talking about, and you have the right to have the assistance of an attorney so that you don’t have to make your own arguments.”

[Jones]: “Yes sir.”

[Court]: “Okay. If you can’t afford to hire an attorney, I’ll appoint one to represent you to have this hearing where you can tell me everything you want me to know about what happened.”

[Jones]: “I can tell you now.”

[Court]: “You can if you want. I’m just saying you’re waiving your right to have a lawyer and everything. If you want to tell me, you can.”

[Jones]: “Yes sir. I can tell you now. You know, I mean I ain’t got time for me, making this hard on me, you know what I mean, instead of coming back before the court.”

[Court]: “Alright. So I, I will set, okay, that you have waived your right to have a, a lawyer assist you in that and that’s fine. Ah, what do you want me to know about this?”

Upon reviewing the video recording of the pretrial diversion revocation hearing, it is apparent that Jones correctly quoted the discussion between himself and the court at the hearing. It is also apparent from reviewing

the recording of the entire hearing that the circuit court did not give Jones the opportunity to present witnesses and documentary evidence on his own behalf or to cross-examine adverse witnesses (such as the Probation and Parole Officer), as he alleges in his appellate brief. Consequently, regardless of whether Jones was entitled to waive his right to counsel at the pretrial diversion revocation hearing or whether he properly did so if he was so entitled, the hearing still did not comport with the minimal due process requirements set forth in *Morrissey*, 408 U.S. at 488-89, 92 S.Ct. at 2604, and discussed in *Goff*, 472 S.W.3d at 190.

We must now determine if the circuit court's error amounted to palpable error. "A palpable error is one resulting in 'manifest injustice,' *i.e.*[.] a probability of a different result *or error* so fundamental as to threaten a defendant's entitlement to due process of law." *Hunt v. Commonwealth*, 326 S.W.3d 437, 440 (Ky. 2010) (internal quotation marks and citation omitted). In *Hunt*, the Kentucky Supreme Court noted that "had Hunt's revocation hearing complied with the requirements of due process, Hunt's probation likely would have still been revoked." *Id.* Regardless, the Supreme Court held that

the circuit court's failure to comply with the minimum requirements of due process is exactly the type of error to which the 'manifest injustice' standard of RCr 10.26 was meant to apply. We have no difficulty concluding that the error in this case was an error so fundamental as to threaten a defendant's entitlement to due process of law.

Id. (internal quotation marks and citation omitted).

Pursuant to the reasoning in *Hunt*, the circuit court’s error in failing to conduct Jones’s pretrial diversion revocation hearing in a manner to comply with the minimal requirements of due process qualifies as a palpable error. This is because the error was “an error so fundamental as to threaten [the] defendant’s entitlement to due process of law.” *Id.* (Internal quotation marks and citation omitted). Consequently, we reverse for a new pretrial diversion revocation hearing.

B. RISK TO VICTIMS OR THE COMMUNITY

Jones also contends that the circuit court’s findings do not support its conclusion that he was a risk to his victims or to the community. However, because we have already determined that Jones is entitled to a new pretrial diversion revocation hearing, we decline to review this claim because it is moot.

Accordingly, the order of the Hardin Circuit Court is reversed. This case is remanded for a new pretrial diversion revocation hearing.

ALL CONCUR.

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