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Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-001500-MR

ERIN HESS — APPELLANT

v.

APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE JULIE REINHARDT WARD, JUDGE
ACTION NO. 14-CR-00865

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: CLAYTON, CHIEF JUDGE; KRAMER AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Erin Hess brings this appeal from the Campbell Circuit Court's Order entered September 13, 2016, revoking her probation. For the following reasons, we vacate and remand.

Pursuant to a guilty plea, Hess was sentenced in January 2015 to two-years' imprisonment for possession of a controlled substance in the first degree,

with that sentence to be probated for three years.[1] In August 2016, Kentucky Probation and Parole Officer Chad McDonald filed a report which recommended Hess's probation be revoked for absconding from supervision. McDonald's recommendation was based upon an affidavit by an unnamed probation officer from Ohio, where Hess resided. The report noted that unnamed citizens had complained about Hess using drugs, whereupon the probation officer and a police officer went to Hess's last known address. No one answered the door, so the probation officer left a business card in the door and walked around the apartment building. When the probation officer returned about five minutes later the business card was gone. The probation officer called Hess's cell phone and left a message instructing Hess to contact him/her immediately. Hess did not contact the probation officer. Approximately ten days later, the officer left another message on Hess's voicemail directing her to report to the officer in two days. Hess did not report, after which the officer filed an affidavit asserting that Hess had absconded.

On September 7, 2016, the Campbell Circuit Court conducted a probation revocation hearing at which Hess appeared. At the hearing, Officer McDonald was the only witness and he testified in accordance with the Ohio report since he had no personal knowledge of the allegations. The trial court found that Hess had absconded from supervision and revoked her probation. The trial court

[1] Erin Hess also was convicted of two related misdemeanors.

expressly stated it believed findings regarding Hess being unable to be appropriately managed in the community and being a significant risk to the community were not required in absconsion cases.[2] Hess then filed this appeal.

Before we may address the merits of the revocation, we must resolve the Commonwealth's antecedent arguments. According to the Commonwealth, while this appeal was pending Hess was granted parole, from which she has absconded. The Commonwealth thus argues: a) this appeal should be dismissed under the fugitive disentitlement doctrine, or b) the appeal should be dismissed as moot since Hess was granted parole.

We may quickly reject the Commonwealth's assertion that this appeal is moot simply because Hess was granted parole. The Kentucky Supreme Court has refused to adopt the Commonwealth's mootness theory. *See Hunt v. Commonwealth*, 326 S.W.3d 437, 439 n.1 (Ky. 2010) ("We note that, as of the time of oral argument, Hunt had been released on parole. However, we do not believe that this [probation revocation] case is moot, as parole remains a sufficient restraint to confer jurisdiction. The disposition of this case on remand could also

[2] *See* Kentucky Revised Statutes (KRS) 439.3106(1) ("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[.]").

affect Hunt's terms and conditions of release, as well as his official records.") (citation omitted).

The Commonwealth's request for the invocation of the fugitive disentitlement doctrine may not be so easily resolved. "The fugitive disentitlement doctrine permits a court to dismiss an appeal, if the appellant is a fugitive while the matter is pending." 4 C.J.S. *Appeal and Error* § 269 (2018). The United States Supreme Court has endorsed the doctrine. *See, e.g.*, *Molinaro v. New Jersey*, 396 U.S. 365 (1970). Specifically, the Court held:

> No persuasive reason exists why this Court should proceed to adjudicate the merits of a criminal case after the convicted defendant who has sought review escapes from the restraints placed upon him pursuant to the conviction. While such an escape does not strip the case of its character as an adjudicable case or controversy, we believe it disentitles the defendant to call upon the resources of the Court for determination of his claims.

Id. at 366. In our most recent published opinion on the topic, we quoted that language from *Molinaro* to support invoking the doctrine. *Lemaster v. Commonwealth*, 399 S.W.3d 34, 35 (Ky. App. 2013).

Hess argues that her alleged absconsion should not be considered by this Court because it was not considered by the trial court. *See, e.g., Triplett v. Commonwealth*, 439 S.W.2d 944, 945 (Ky. 1969) ("This is not a court of original jurisdiction. New material not considered by the trial court is not admissible and should not be considered by us."). However, the trial court could not have

considered Hess's alleged flight because Hess was not granted parole until after this appeal was filed.

Even if we assume, *arguendo*, that we may take notice pursuant to Kentucky Rule of Evidence (KRE) 201[3] of official documents alleging Hess has absconded from parole, we nonetheless conclude that the fugitive disentitlement doctrine should not apply. First, application of the doctrine is "always discretionary." *Ortega-Rodriguez v. United States*, 507 U.S. 234, 250 n. 23 (1993). Second, the Supreme Court has held that application of the doctrine should be limited to situations where there is "some connection between a defendant's fugitive status and the appellate process." *Id.* at 244. In this case, Hess participated in the trial court revocation process which is the subject of this appeal, meaning the issues before us are not directly related to her alleged subsequent absconsion. Third, this case is materially distinguishable from *Lemaster* because the appellant in that case had never reported to his probation officer and did not appear in circuit court, whereas in this case, Hess participated in the revocation process.

[3] Kentucky Rules of Evidence 201(b)(2) permits judicial notice to be taken of a fact that is "not subject to reasonable dispute" because it is "[c]apable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." We have held that "[a] court may properly take judicial notice of public records and government documents, including public records and government documents available from reliable sources on the internet." *Polley v. Allen*, 132 S.W.3d 223, 226 (Ky. App. 2004).

Finally, and most crucially, application of the fugitive disentitlement doctrine here would deprive Hess of her constitutional right to seek redress on appeal. Section 115 of the Kentucky Constitution provides that, other than limited exceptions not germane to this appeal, "[i]n all cases, civil and criminal, there shall be allowed as a matter of right at least one appeal to another court." The interplay between Section 115, which became effective in 1976, and the fugitive disentitlement doctrine is an apparent matter of first impression as it was not discussed in *Lemaster*. *Lemaster,* 399 S.W.3d 34.

The right to an appeal may be waived,[4] but Hess has not facially done so, and we do not generally presume the silent, implicit waiver of a fundamental constitutional right. *See, e.g.*, *Commonwealth v. Simmons*, 394 S.W.3d 903, 914 (Ky. 2013). Moreover, we cannot turn to the federal courts for guidance because there is no counterpart right to appeal under the United States Constitution. *See, e.g., Abney v. United States*, 431 U.S. 651, 656 (1977) ("First, it is well settled that there is no constitutional right to an appeal."). Indeed, Kentucky cases regarding the fugitive disentitlement doctrine issued prior to 1976 (when Section 115 became

[4] *See, e.g., Simms v. Commonwealth*, 354 S.W.3d 141 (Ky. App. 2011).

effective) are of minimal value because the right to appeal in Kentucky state courts was not constitutionally guaranteed until Section 115 became effective.[5]

The choice between honoring a defendant's constitutional rights and applying a discretionary doctrine to deprive the defendant of that right is not a difficult one. We therefore join at least two of our sister courts in holding that the fugitive disentitlement doctrine yields to the constitutional right to file one appeal, absent a valid waiver thereof. *See, e.g., City of Seattle v. Klein*, 166 P.3d 1149, 1156 (Wash. 2007) ("The right to appeal is guaranteed by Washington Constitution article I, section 22, and the importance of this right has been reiterated in numerous cases by this court. The FDD [fugitive disentitlement doctrine] cannot deprive someone of his or her constitutionally guaranteed right to appeal, even if applied after the appeal has been filed.") (citations omitted); *Mascarenas v. State*, 612 P.2d 1317, 1318 (New Mex. 1980).

We now address the substantive issue of whether Hess's revocation was proper. We review a trial court's decision to revoke probation for an abuse of discretion, and "we will not hold a trial court to have abused its discretion unless its decision cannot be located within the range of permissible decisions allowed by

[5] *See, e.g., Blankenship v. Commonwealth*, 554 S.W.2d 898, 900 (Ky. App. 1977) ("Under Section 115 of the Kentucky Constitution, every defendant in a criminal case is allowed one appeal as a matter of right. However, Section 115 did not become effective until January 1, 1976. When the judgment sentencing Blankenship was entered on May 16, 1975, there was no constitutional right of appeal in criminal cases.") (citation omitted).

a correct application of the facts to the law." *McClure v. Commonwealth*, 457 S.W.3d 728, 730 (Ky. App. 2015) (citation omitted).

Hess offered nothing to contradict the testimony that, at a minimum, she failed to respond/report to her Ohio probation officer as directed. Thus, the trial court's conclusion that Hess violated her probation was not an abuse of discretion. However, the trial court's revocation of Hess's parole without considering the factors of KRS 439.3106 requires us to vacate and remand.

In *Commonwealth v. Andrews*, 448 S.W.3d 773, 780 (Ky. 2014), the Kentucky Supreme Court held that "KRS 439.3106(1) requires trial courts to consider whether a probationer's failure to abide by a condition of supervision constitutes a significant risk to prior victims or the community at large, and whether the probationer cannot be managed in the community before probation may be revoked." Based on *Andrews*, we have held that "the General Assembly intended the task of considering and making findings regarding the two factors of KRS 439.3106(1) to serve as the analytical precursor to a trial court's ultimate decision: whether revocation or a lesser sanction is appropriate." *McClure*, 457 S.W.3d at 732. In short, a trial court must consider and make findings that comport with KRS 439.3106(1). *Blankenship v. Commonwealth*, 494 S.W.3d 506, 509 (Ky. App. 2015); *see also McClure*, 457 S.W.3d 728.

The trial court erred by stating that KRS 439.3106 need not be considered by trial courts when revocation proceedings stem from absconding supervision. Simply put, there is no such exception. *Andrews* only held that absconding supervision meant that a probation officer did not have discretion to impose graduated sanctions in lieu of submitting the matter to the trial court. *See Andrews*, 448 S.W.3d at 778 ("*Certain violations, such as absconding or receiving a new felony conviction, require* ***the probation officer*** *to submit the matter to the trial court without the possibility of imposing graduated sanctions*. Otherwise, the probation officer, having considered the circumstances surrounding the probationer and the violation, must make a determination as to whether graduated sanctions are appropriate.") (footnote and citation omitted) (emphasis added). Because the trial court failed to make the requisite statutory findings, we must vacate and remand.

For the foregoing reasons, the revocation order entered by the Campbell Circuit Court on September 13, 2016, is vacated, and the matter is remanded for proceedings consistent with this opinion.

ALL CONCUR.

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