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Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-000753-MR

AUSTIN SALLEY — APPELLANT

v.

APPEAL FROM PERRY CIRCUIT COURT
HONORABLE ALISON C. WELLS, JUDGE
ACTION NO. 16-CR-00151

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: GOODWINE, LAMBERT, AND MAZE, JUDGES.

MAZE, JUDGE: Austin Salley appeals from the Perry Circuit Court's final judgment and sentence of imprisonment following the court's order revoking his probation. Because the trial court failed to provide Salley a revocation hearing comporting with due process, we reverse and remand for a new revocation hearing.

On October 3, 2016, Salley was indicted by the Perry County grand jury on one count of manufacturing methamphetamine[1] and being a second-degree persistent felony offender (PFO).[2] Salley subsequently negotiated a guilty plea with the Commonwealth and agreed to a sentence of nineteen years' imprisonment, probated for three years. He also agreed to enter and complete drug court as a condition of his probation. For its part, the Commonwealth agreed to dismiss the PFO charge. The trial court accepted the guilty plea and entered its judgment and sentence consistent with the plea on June 5, 2017.

Unfortunately, Salley appeared to have difficulty complying with the conditions of his probation. About one week after judgment, the trial court received an unsigned, unsworn "Affidavit of Violations" form purportedly from Gracie Dillon, the program supervisor for the Perry County drug court. The document alleged Salley had admitted using Suboxone, Neurontin, and alcohol. The trial court held a hearing on June 14, 2017, in which Salley admitted to using these substances. The trial court gave him a sanction of seven days in jail and required him to restart his drug court program phase. A few weeks later, a second, unsworn "Affidavit of Violations" document from Ms. Dillon alleged Salley had

[1] Kentucky Revised Statute (KRS) 218A.1432. "Manufacture of methamphetamine is a Class B felony for the first offense and a Class A felony for a second or subsequent offense." KRS 218A.1432(2).

[2] KRS 532.080.

failed to submit to drug testing on July 7, 2017. The trial court issued a probation violation warrant for Salley's arrest, but he had absconded from supervision. Consequently, the trial judge, in her position as judge of the drug court, terminated Salley from the drug court program on September 6, 2017.

Salley was arrested several months later on the outstanding bench warrant. On February 21, 2018, the trial court entered an order for Salley to appear at a probation revocation hearing on March 1, 2018. This hearing began with Salley's arraignment on a new indictment. The trial court then recited Salley's alleged history on probation: Salley had a seven-day sanction, he was released, he failed to test on July 7, 2017, and he subsequently absconded. The Commonwealth agreed with the court's recitation. The trial court then asked if the defense had stipulated to these events. Defense counsel did *not* stipulate, but instead conferred with the Commonwealth and with Salley before requesting a continuance; defense counsel informed the court that he and the Commonwealth would attempt to negotiate a resolution to all pending charges. The trial court granted the continuance, ordering a "status and revocation hearing" set for April 5, 2018.

Somewhat puzzlingly, the trial court engaged in factfinding *after* the March 1, 2018 hearing but *before* the assigned revocation hearing date of April 5, 2018. First, the trial court issued an order on March 5, 2018, finding Salley had violated the terms of his probation by failing to drug test, absconding, and being

terminated from drug court. The court's order then stated the April 5, 2018 hearing would be a "revocation sentencing."

Next, in a status hearing held March 29, 2018, the trial court reinforced the factfinding set forth in the March 5, 2018 order. At one point, the trial court informed defense counsel, "I've already made a finding that he failed to drug test, absconded, and was terminated from Perry County drug court." Defense counsel said he did not remember stipulating to those facts, at which point the Commonwealth asserted that if the trial court made a finding, "a stipulation is kind of moot." The trial court then stated it had "made a finding based on the record." Defense counsel asked for a hearing date, once again insisting he did not remember making a stipulation, and the trial court replied it had made a finding at the last hearing. The Commonwealth argued it was too late for the defense to request a motion to reconsider and asked for a hearing exclusively on the matter of punishment. The trial court then set Salley's revocation hearing for April 5, 2018, as scheduled.

In Salley's probation revocation hearing on April 5, 2018, the trial court recited the facts it had declared in its March 5, 2018 order, then asked if findings were already made in this case. Defense counsel said the court had not made findings, but the Commonwealth countered that the trial court had found Salley to have violated his probation. Defense counsel asserted he had asked for a

hearing. The trial court then referenced its findings of March 5, 2018, stating that today was for sentencing. Defense counsel argued once again that they had not stipulated to these facts. The trial court replied that it could make a finding without a stipulation, then stated, "I have made that finding, we're here for sentencing. Call your first witness." Defense counsel did not have witnesses but objected to the trial court's finding because the Commonwealth presented no evidence. Defense counsel then argued in favor of mitigation, stating Salley had become fearful as a result of his positive drug test and absconded as a result of this fear. The Commonwealth argued Salley could have gotten a lesser sanction if he had not absconded. In revoking his probation, the trial court found Salley was a danger to himself and others and he could not be managed in the community. On April 9, 2018, the trial court entered its written judgment on the probation revocation and sentenced Salley to nineteen years' imprisonment. This appeal followed.

Before getting into the merits of the appeal, the Commonwealth presents us with a threshold question as to whether this case is moot. The Commonwealth asserts Salley no longer qualifies for drug court because he was indicted and convicted on other offenses following his expulsion from drug court, and these later offenses designated him as a violent offender. The Commonwealth reasons that, because drug court was a condition of his probation and drug court

will not accept violent offenders, Salley cannot satisfy the conditions of probation. "The general rule is . . . that where, pending an appeal, an event occurs which makes a determination of the question unnecessary or which would render the judgment that might be pronounced ineffectual, the appeal should be dismissed." *Morgan v. Getter*, 441 S.W.3d 94, 99 (Ky. 2014) (citations and internal quotation marks omitted).

We decline to entertain the Commonwealth's mootness argument for two separate reasons. First, the Commonwealth does not cite to any portion of the record containing these subsequent indictments and convictions; instead, the Commonwealth attaches them as appendices to its brief. "Matters not disclosed by the record cannot be considered on appeal." *Ray v. Ashland Oil, Inc.*, 389 S.W.3d 140, 145 (Ky. App. 2012) (quoting *Montgomery v. Koch*, 251 S.W.2d 235, 237 (Ky. 1952)). Second, even if we considered the indictments, it would not result in the case becoming moot. In a very recent case, the Kentucky Supreme Court held "the general rule [on mootness] has a 'public interest' exception[]" and applied this exception to consider due process concerns involving parole revocation. *Jones v. Bailey*, 576 S.W.3d 128, 135 (Ky. 2019).

> "The public interest exception allows a court to consider an otherwise moot case when (1) the question presented is of a public nature; (2) there is a need for an authoritative determination for the future guidance of public officers; and (3) there is a likelihood of future recurrence of the question."

Id. (quoting *Morgan*, 441 S.W.3d at 102). Because Salley's argument on appeal concerns the due process behind his probation revocation, the factors behind the "public interest" exception in *Bailey* apply to this case as well. Based on these considerations, we will proceed to the merits.

"A decision to revoke probation is reviewed for an abuse of discretion." *Commonwealth v. Andrews*, 448 S.W.3d 773, 780 (Ky. 2014) (citation omitted). "Under our abuse of discretion standard of review, we will disturb a ruling only upon finding that 'the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.'" *Id*. (quoting *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999)).

In his sole issue on appeal, Salley argues the trial court failed to hold a revocation hearing complying with due process. We agree. In a pair of landmark cases, the United States Supreme Court has held parolees and probationers "have a protected liberty interest in the conditional freedom offered by parole [and probation] and the state could not take away that freedom without affording the offender appropriate procedural safeguards." *Bailey*, 576 S.W.3d at 136 (citing *Morrissey v. Brewer*, 408 U.S. 471, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972) (rights of parolees); *Gagnon v. Scarpelli*, 411 U.S. 778, 93 S. Ct. 1756, 36 L. Ed. 2d 656 (1973) (applying *Morrissey* to probationers)). "Although the State has a great interest in reincarcerating those individuals who are unable to meet the conditions

of their probation, it may not do so without first affording an individual the minimum requirements of due process." *A.C. v. Commonwealth*, 314 S.W.3d 319, 328 (Ky. App. 2010) (quoting *Robinson v. Commonwealth*, 86 S.W.3d 54, 56 (Ky. App. 2002)). Minimum due process for probation revocation includes the following:

> (a) written notice of the claimed violations of [probation]; (b) disclosure to the [probationer] 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 [probation].

Id. (quoting *Robinson*, 86 S.W.3d at 56).

There are a number of troubling aspects of the trial court's procedure revoking Salley's probation. First, none of the hearings leading up to revocation contained *any* offer of proof by the Commonwealth. In a revocation hearing, the burden is on the Commonwealth to prove a probation violation by a preponderance of the evidence; the burden is *not* "on the defendant to show cause why his probation should not be revoked." *Bailey*, 576 S.W.3d at 146 (citing *Hunt v. Commonwealth*, 326 S.W.3d 437, 440 (Ky. 2010)). "[O]ur Supreme Court has stated '[d]ue process requires that alleged violations be established through sworn

testimony, with the opportunity for cross-examination by the probationer.'" *Commonwealth v. Goff*, 472 S.W.3d 181, 190 (Ky. App. 2015) (quoting *Hunt*, 326 S.W.3d at 439-40).

Instead, the trial court shouldered the Commonwealth's obligation and recited allegations as established facts in its March 5, 2018 order, without any stipulation by the defense as to their veracity. An appellate court defers to factual findings of the trial court unless those findings are clearly erroneous. Kentucky Rule of Civil Procedure (CR) 52.01. Clearly erroneous findings are those which are unsupported by substantial evidence. *Jones v. Livesay*, 551 S.W.3d 47, 50-51 (Ky. App. 2018); *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003). Here, there was no substantial evidence supporting the March 5, 2018 order; the trial court only had allegations which it assumed to be true prior to the hearing. Therefore, the findings contained within the March 5, 2018 order were clearly erroneous.

Aside from the Commonwealth's complete abdication of its role in setting forth proof, a second troubling aspect of the revocation process, related to the first, involves the nature of the evidence the trial court relied upon to make its findings. The facts in this case were largely derived from the trial court's receipt of unsworn documents from a drug court official. There was no testimony from a probation officer or other official in open court. A trial court violates due process when it allows an unsworn probation officer to inform the trial court of purported

violations because doing so infringes on the probationer's right to confront and cross-examine adverse witnesses. *Hunt*, 326 S.W.3d at 439-40.

The Commonwealth argues the trial court could take judicial notice of its own records and rulings, pursuant to Kentucky Rule of Evidence (KRE) 201. However, under this same rule, "[a] judicially noticed fact must be one not subject to reasonable dispute[.]" KRE 201(b). Here, the trial court took notice of its factual findings in the March 5, 2018 order to revoke Salley's probation, but the March 5, 2018 order was itself an inappropriate exercise in factfinding on disputed matters prior to the receipt of evidence in an actual hearing. *See Meece v. Commonwealth*, 348 S.W.3d 627, 693 (Ky. 2011) (citations and internal quotation marks omitted) ("Of course, there is some stringency in the application of KRE 201, because accepting disputed factual propositions about a case not tested in the crucible of trial is a sharp departure from standard practice."). Judicial notice was not appropriate under these circumstances.

In sum, the Commonwealth presented no evidence to support revocation, and the trial court's March 5, 2018 order contained findings based on allegations and without the benefit of sworn testimony and cross-examination. All of the trial court's subsequent rulings were premised on this faulty order. This rendered the outcome of the April 5, 2018 revocation hearing a foregone

conclusion inconsistent with the demands of due process. We must therefore reverse the trial court's judgment and remand for a new revocation hearing.

We pause here to acknowledge a new revocation hearing may very well also result in revocation. Salley has been accused of drug use and the commission of serious crimes during his probation period, and we do not countenance such behaviors, should they be proven accurate. Nevertheless, a probationer's due process rights must be observed prior to revocation.

For the foregoing reasons, we reverse the judgment and sentence of the Perry Circuit Court on the probation violation, entered April 9, 2018, and remand for a revocation hearing consistent with this opinion.

ALL CONCUR.

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