

Commonwealth Of Kentucky

Court of Appeals

NO. 2007-CA-000252-MR

JEFFREY M. STEWART

APPELLANT

v. APPEAL FROM MUHLENBERG CIRCUIT COURT
HONORABLE DAVID H. JERNIGAN, JUDGE
ACTION NO. 05-CR-00184 & 05-CR-00185

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: CAPERTON AND VANMETER, JUDGES; KNOPF,¹ SENIOR JUDGE.

VANMETER, JUDGE: Jeffrey M. Stewart appeals from the Muhlenberg Circuit Court's order revoking his probation and reinstating his sentence. For the following reasons, we affirm.

Stewart was indicted in August 2005 of three counts of first-degree trafficking in a controlled substance (methamphetamine) and two counts of being a second-degree persistent felony offender (PFO). In exchange for his guilty plea, the Commonwealth recommended that the PFO counts be dismissed, and Stewart be

¹ Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

sentenced to ten years' imprisonment on each of the three trafficking charges, to be served concurrently. The circuit court, the Honorable David H. Jernigan presiding, sentenced Stewart accordingly.

In April 2006, Judge Jernigan ordered that Stewart "be released immediately from incarceration on shock probation for a period of five years" upon several conditions, including that Stewart have no further violations of the law, and that he enter and complete the Muhlenberg County Drug Court program. Seven months later, in November 2006, Judge Jernigan ordered that Stewart be terminated from the drug court program since he violated its terms. He further scheduled a probation revocation hearing and ordered that Stewart be incarcerated pending further orders of the court.

At a hearing on the matter, a probation and parole officer testified that while participating in drug court, Stewart tested positive on one occasion for opiates, and on another occasion for methamphetamine. The officer testified further that Stewart had been terminated from drug court, and he recommended that Stewart's probation be revoked. Stewart argued against the revocation of his probation, asserting that his positive drug screen for opiates occurred after he took an opiate-containing drug which was prescribed to him following back surgery, and that he had not been afforded the opportunity to participate in a treatment program.²

Judge Jernigan held that Stewart's use of methamphetamine, as well as his failure to enter and complete drug court, both constituted grounds for terminating his probation. Ultimately, Judge Jernigan revoked Stewart's probation and reinstated his sentence. This appeal followed.

² The officer testified that Stewart had been unable to participate in the treatment program because he tested positive for methamphetamine and was terminated from drug court before he was scheduled to attend the treatment program.

In essence, Stewart argues first that his right to counsel was violated when he was terminated from drug court without the presence of counsel. However, in *Dunson v. Commonwealth*, 57 S.W.3d 847, 850 (Ky.App. 2001), this court held that drug court “is not a ‘court’ in the jurisprudence sense; it is a drug treatment program administered by the court system.” Further, one’s termination from a drug court treatment program is not “subject to due process protections any more than his participation in a private drug treatment program would have been[.]” *Id.* Thus, Dunson’s due process rights were not violated when he was unrepresented by counsel when he was terminated from drug court but was represented at his probation revocation hearing, where he was permitted to “cross-examine the drug treatment program’s coordinator, to present his side of the case, and to argue that he should not have been terminated from Drug Court.” *Id.* Here, as in *Dunson*, Stewart was not denied a constitutional right to counsel when he was unrepresented at the time of his termination from drug court but represented at his probation revocation hearing.³

Next, Stewart argues that Judge Jernigan erred by failing to recuse from the probation revocation proceedings since he also presided over Stewart’s drug court. Stewart concedes that he did not raise this issue below but argues that the judge’s failure to recuse *sua sponte* resulted in palpable error.⁴ We disagree.

³ We note that *Dunson* acknowledges *Gagnon v. Scarpelli*, 411 U.S. 778, 790, 93 S.Ct. 1756, 1763, 36 L.Ed.2d 656 (1973), which held that there is no absolute right to appointed counsel at a probation revocation hearing.

⁴ Kentucky Rules of Criminal Procedure (RCr) 10.26 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.”

Stewart argues that the following portions of KRS 26A.015(2), requiring a judge to recuse from certain proceedings, are relevant here:

(2) Any justice or judge of the Court of Justice or master commissioner shall disqualify himself in any proceeding:

(a) Where he has . . . personal knowledge of disputed evidentiary facts concerning the proceedings . . . ;

. . . .

(d) Where he . . .

. . . .

4. Is to the knowledge of the judge or master commissioner likely to be a material witness in the proceeding.

(e) Where he has knowledge of any other circumstances in which his impartiality might reasonably be questioned.

The issue at Stewart’s probation revocation hearing was precisely that—whether his probation should be revoked—and not whether he had properly been terminated from drug court, as the drug court had already made that determination.⁵ As to whether Stewart’s probation should be revoked, it was undisputed that Stewart tested positive for opiates at a time when he had a prescription for the opiate-containing Lortab, that he tested positive for methamphetamine, and that he was terminated from drug court. As such, it was essentially undisputed that Stewart violated the terms of his probation. Thus, regardless of whether Judge Jernigan indicated, when issuing his oral ruling, that there had been “other problems” with Stewart in drug court, there is no indication that Judge Jernigan had any “personal knowledge of disputed evidentiary facts concerning the

⁵ We do not intend to suggest that a judge who presides over a probation revocation proceeding is prohibited from considering the reasons for a defendant’s termination from drug court.

proceedings,” or that he was “likely to be a material witness in the proceeding.” KRS 26A.015(2)(a) and (d)4.

Further, no reasonable basis exists for questioning Judge Jernigan’s impartiality simply because he presided over both Stewart’s drug court proceedings and his probation revocation proceedings. As the United States Supreme Court has explained, “[i]t has long been regarded as normal and proper for a judge to sit in the same case upon its remand, and to sit in successive trials involving the same defendant.” *Liteky v. United States*, 510 U.S. 540, 551, 114 S.Ct. 1147, 1155, 127 L.Ed.2d 474 (1994). The same rationale applies here, where Judge Jernigan presided over both of Stewart’s proceedings.

We recognize that although the circuit court rather than the Commonwealth originated the probation revocation proceedings once Stewart was terminated from drug court, this procedure was in keeping with Kentucky’s Administrative Procedures of the Court of Justice (AP), which provide in Part XIII(I), § 11(1) that after a drug court judge issues a notice terminating a participant from drug court, “the case shall be referred back to the appropriate circuit or district court for further proceedings.” Moreover, “[t]he receiving judge shall schedule the case for a hearing on a criminal motion docket for further proceedings.” AP Part XIII(I), § 11(3).

The Muhlenberg Circuit Court’s order is affirmed.

ALL CONCUR.

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