Commonwealth of Kentucky
Supreme Court
No. 2010-SC-123

COMMONWEALTH OF KENTUCKY — **APPELLANT**

v.

Appeal from Hardin Circuit Court
Hon. Janet P. Coleman, Judge
Indictment No. 06-CR-208

RYAN JONES — **APPELLEE**

Brief for Commonwealth

Submitted by,

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CERTIFICATE OF SERVICE

I certify that the record on appeal has been returned to the Clerk of this Court and that a copy of the Brief for Commonwealth has been mailed this 19th day of November, 2010, to Hon. Janet P. Coleman, Judge, Hardin Circuit Court, 120 E. Dixie Avenue, Elizabethtown KY 42701; electronically mailed to Hon. Chris Shaw, Commonwealth's Attorney, 54 Public Square, P.O. Box 1146, Elizabethtown KY 42702-1146; by Messenger Mail to Hon. Shelly R. Fears, Assistant Public Advocate, Department of Public Advocacy, 100 Fair Oaks Lane, Suite 302, Frankfort, Ky. 40601.

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INTRODUCTION

This case comes to the Court on discretionary review of a Court of Appeals' opinion, which holds that the U.S. Constitution requires granting use immunity to a defendant in a probation-revocation hearing. The issue raised on appeal is purely a question of law.

STATEMENT CONCERNING ORAL ARGUMENT

Because resolution of the issue on appeal will have statewide impact, the Commonwealth requests oral argument.

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

The Court of Appeals' opinion accurately sums up the facts of the case. Consequently, the Commonwealth adopts the Court of Appeals' recitation of the facts in its entirety as set forth below:

> The events leading to the probation revocation occurred on March 20, 2008, when Hardin County Probation and Parole Officer Steven Whitley, Jones's probation supervisor, received information from the Radcliff Police Department that witnesses reported seeing Jones shoot a gun near his residence. Officer Whitley, Officer Sullivan McCurdy, and other officers arrived at the residence where they found a male, Justin Valentine, and two females on the front porch. Jones was not at the residence. After Officer McCurdy smelled marijuana, the three were arrested and taken into custody.
>
> Vicki Spencer, appellant's aunt, spoke with the officers and escorted them to the basement of the residence where Jones and Valentine lived. According to Officer Whitley, he observed in plain view marijuana residue on a dresser. A search of the area produced digital scales, fifty dollars in cash, marijuana in plastic bags, a white powdery residue in a gray tray and marijuana in the pockets of clothing.
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> Upon Jones's arrival at the residence, he was arrested and taken into custody. Although Jones denied any knowledge of the drugs, when asked if he could pass a drug test, Jones responded, "No," and admitted that he had smoked marijuana the previous day.
>
> Jones was indicted for possession of a controlled substance. At his probation revocation hearing, Jones sought a continuance on the grounds that the underlying facts that supported the probation revocation were the same used to support the felony indictment. As a consequence, he argued that he could not present a complete defense to the revocation because his testimony could be used against him at his criminal trial. The continuance was denied. Fearing that his testimony would be used against him at his subsequent criminal trial, Jones elected to remain silent. Following the hearing, Jones's probation was revoked.

Slip op. at ***.

ARGUMENT

I.

INTRODUCTION

The Court of Appeals held that "a probationer's testimony at a probation revocation hearing cannot be used substantively against him at a subsequent criminal proceeding arising from the same facts." *Slip op.* at 12. The Court of Appeals' holding is based on its interpretation of the Fifth Amendment and Section Eleven of the Kentucky Constitution. Because "Section Eleven of the Constitution of Kentucky and the Fifth Amendment to the Constitution of the United States are coextensive and provide identical protections against self-incrimination," *Commonwealth v. Cooper,* 899 S.W.2d 75, 78 (Ky. 1995), the issue on appeal is whether Appellee's Fifth Amendment rights were violated because he was not given use-immunity at his probation-revocation hearing.

The Fifth Amendment provides in pertinent part: "No person . . . shall be compelled in any criminal case to be a witness against himself."

Appellee did not testify at the revocation hearing. He was not called as a witness. He was not asked to testify by the trial court. Consequently, the Fifth Amendment privilege against self incrimination is not implicated on its face. Of course, the privilege also applies in certain situations where a person does not testify. Two such situations are applicable here:

1) The government may not automatically inflict substantial penalties on an individual in order to coerce the individual to speak and thereby waive her Fifth Amendment privilege; and

2) The government may not force an individual to sacrifice one constitutional right, *e.g.* the Fifth Amendment right to remain silent, in order to protec another constitutional right, *e.g.* the right to be free from unreasonable searches and seizures.

The Court of Appeals incorrectly concluded that both of these situations applied here.

II.

APPELLEE WAS NOT AUTOMATICALLY PENALIZED FOR HIS DECISION NOT TO TESTIFY

Appellee was not called to testify. He was not asked to answer any question that might have incriminated him in a subsequent trial on the possession charges against that constituted the violation on which his probation was revoked. Thus, he had no occasion to invoke the privilege in this case. So what is lets is the question of whether "the pressure imposed" on Appellee to testify at the probation-revocation hearing rose "to a level where it is likely to 'compe[l]' a person 'to be a witness against himself.'" *McKune v. Lile,* 536 U.S. 24, 49 (2002) (O'Conner, J., concurring).

The pressure to testify can come from "penalties imposed upon a person as a result of the failure to incriminate himself." *Id.* Some penalties "are so great as to 'compe [l]' such testimony, while others do not rise to that level." *Id.* Penalties that "are capable of coercing incriminating testimony" include:

- Termination of employment. *Uniformed Sanitation Men Ass'n, Inc. v. Commissioner of Sanitation of City of New York*, 392 U.S. 280 (1968):
- Loss of a professional license. *Spevack v. Klein*, 385 U.S. 511(1967);
- Ineligibility to receive government contracts. *Lefkowitz v. Turley*, 414 U.S. 70 (1973); and

- Loss of the right to participate in political associations and to hold public office. *Lefkowitz v. Cunningham*, 431 U.S. 801 (1977).

Id. at 49-50.

Relying on *Minnesota v. Murphy*, 465 U.S. 420 (1984), the Court of Appeals concluded that a probation-revocation hearing creates a penalty situation of the type that is "capable of coercing incriminating testimony." The conclusion is wrong.

Minnesota v. Murphy, 465 U.S. 420 (1984) notes that *automatic* loss of probationary status falls among the type of penalties that are "capable of coercing incriminating testimony." The *Murphy* Court explained:

> There is . . . a substantial basis in our cases for concluding that if the state, either expressly or by implication, *asserts that invocation of the privilege would lead to revocation of probation*, it would have created the classic penalty situation, the failure to assert the privilege would be excused, and the probationer's answers would be deemed compelled and inadmissible in a criminal prosecution.

Id. at 435 (emphasis added).

But we do not have the above situation in this case.

Nothing in this case suggests that the Commonwealth either asserted or implied that Appellee's probation would be *automatically* revoked if he did not testify at the revocation hearing. Rather, the record clearly and plainly demonstrates that the trial court revoked Appellee's probation based solely on its finding that Appellee "failed to abide by the terms and conditions of [his] probation." TR at 140. In turn, this finding was based solely on the evidence presented at the probation. The finding was not based in whole or in part on Appellee's decision not testify at the revocation hearing. So just like at in a criminal trial, Appellee had a Fifth

Amendment privilege not to testify at the revocation hearing, his strategic decision to remain silent at the hearing carried consequences.

"[T]here are circumstances, even at criminal trials, when requiring a defendant to make a difficult strategic choice which necessarily results in relinquishing a constitutional right is both legitimate and, from a self-incrimination standpoint, noncompulsive." *Ryan v. Montana,* 580 F.2d 988, 992 (9th Cir. 1978) (citing *McGautha v. California*, 402 U.S. 183 (1971), vacated on other grounds, 408 U.S. 941 (1972)) . The Court of Appeals was simply wrong when it held that a probationer has the right to testify without consequence at a revocation hearing. The Court of Appeals misapplied *Murphy*. Appellee's probation was not automatically revoked because he refused to testify. This is not a "penalty" case like *Lefkowitz*. This is not a case where the constitution requires granting use immunity to a probationer in a revocation hearing.

III.

APPELLEE WAS NOT FORCED TO SACRIFICE ONE CONSTITUTIONAL RIGHT FOR ANOTHER

Under certain circumstances, it is unconstitutional to force a person to sacrifice one constitutional right in order to preserve another. *Simmons v. U.S.*, 390 U.S. 377, 394 (1968). In *Simmons*, the appellant elected to testify at a suppression hearing in order to establish standing to challenge the constitutionality of a search of a suitcase. *Id.* at 390. The appellant lost the suppression motion and his testimony at the suppression hearing was used against him at trial. *Id.* at 391. The *Simmons* Court described the appellant's dilemma as a Hobson's choice in which he was "obliged either to give up what he believed, with advice of counsel, to be a valid Fourth Amendment claim or, in legal effect, to waive his Fifth Amendment privilege against

self-incrimination." *Id.* at 394. The Court held that, under the circumstances of the case, it was "intolerable that one constitutional right should have to be surrendered in order to assert another." *Id.* Consequently, *Simmons* holds that "when a defendant testifies in support of a motion to suppress evidence on Fourth Amendment grounds, his testimony may not thereafter be admitted against him at trial on the issue of guilt unless he makes no objection." *Id.* at 395.

Simmons creates use immunity for defendants who testify during a suppression motion. Relying on *Simmons*, this Court's predecessor court held that Kentucky defendants are likewise entitled to use immunity for testimony in suppression hearings. *Shull v. Commonwealth*, 475 S.W.2d 469, 472 (Ky. 1971). The Court of Appeals incorrectly concluded that Appellee faced a similar choice between constitutional rights in his probation-revocation hearing.

Because a probation-revocation hearing is not a stage of the criminal prosecution, a probationer is not entitled to the full panoply of rights afforded a criminal defendant. *Gagnon v. Scarpelli*, 411 U.S. 778, 782 (1973), Nonetheless, a probationer maintains some constitutional rights in a probation-revocation hearing. In particular, a probation has the right to procedural due process. *Id.*. This due-process right includes the "opportunity to be heard in person and to present witnesses and documentary evidence." *Id.* at 786. Based on Appellee's right to be heard at the revocation hearing, the Court of Appeals concluded that "[t]he rights afforded through due process cannot be exercised at the expense of an equally important right, the right to be free from self-incrimination." *Slip op.* at 4-5. This conclusion misstates the constitutional rights at stake in the revocation hearing and fails to take into account the actual "choice" Appellee faced at his probation hearing.

A. Conditional Liberty

The right to procedural due process arises in a probation revocation hearing because revocation affects a constitutionally-protected liberty interest. *See Morrissey v. Brewer*, 408 U.S. 471, 480 (1972). But this liberty interest is "not the absolute liberty to which every citizen is entitled, but only [a] *conditional* liberty properly dependent on the observance of special [probation] restrictions." *Id.* (emphasis added). So at stake in a revocation hearing is a conditional liberty interest that is simply not on par with the Fourth Amendment rights at issue in *Simmons* and *Shull*. Indeed, there is no constitutional right to probation. Rather, "[p]robation, like parole, is purely a matter of legislative grace." *Commonwealth v. Vincent*, 70 S.W.3d 422, 425 (Ky. 2002). Thus, at the revocation hearing, Appellee was not forced to sacrifice one constitutional right, *i.e.* his Fifth Amendment right, in order to preserve equally important constitutional right. Moreover, Appellee did not have the same sort of Hobson's choice between rights that the appellants had in *Simmons* and *Shull*.

B. No Hobson's Choice in the Revocation Hearing

In a probation-revocation hearing the Commonwealth has the burden of proving a probation violation,[1] whereas in "[a] suppression hearing . . . the moving party [has] the burden of establishing the evidence was secured by an unlawful search." *LaFollette v. Commonwealth*, 915 S.W.2d 747, 749 (Ky. 1996). So in *Simmons*, the appellant had the burden of proving a Fourth Amendment violation including proving that he standing to challenge the search of the

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[1] *Radson v. Commonwealth*, 701 S.W.2d 716, 718-19 (Ky. App. 1986) (holding that minimal requirements of due process apply to probation-revocation hearings and that "[r]evocation proceedings [require] proof of an occurrence by a preponderance of the evidence").

suitcase. But in the revocation hearing, the Commonwealth had the burden of proving that Appellee violated the conditions of his probation. Consequently, Appellee was in no way *forced* to testify in order to preserve his probationary status. Rather, he faced the difficult, strategic choice of whether the testify in order to rebut the Commonwealth's evidence against him at the risk of making a statement that might be used against him at a subsequent criminal trial. And just like in a criminal trial, if he had decided to testify, that decision would have waived his Fifth Amendment privilege. *See Sherley v. Commonwealth,* 889 S.W.2d 794, 798 (Ky. 1994) (holding that "[o]nce the defendant decides to speak to police officers or testify in open court, he waives his Fifth Amendment privilege"). The Court of Appeals erred in holding that putting Appellee to this choice violated his Fifth Amendment rights.

IV.

OTHER JURISDICTIONS

As noted by the Court of Appeals, there is a split of authority on the issue presented in this case. The Court of Appeals relied on *Melson v. Sard*, 402 F.2d 653, 655 (D.C.Cir. 1968); *Tinch v. Henderson*, 430 F.Supp. 964, 969 (M.D.Tenn.1977); *People v. Rocha*, 272 N.W.2d 699, 706 (1978); *Avant v. Clifford*, 341 A.2d 629, 653-57(1975) (requiring use immunity in the context of a prison disciplinary hearing); *State v. DeLomba*, 370 A.2d 1273, 1276 (1977); *State v. Evans*, 252 N.W.2d 664, 668-69 (1977); and *People v. Coleman,* 533 P.2d 1024, 1042 (Cal. 1975). But other than *Melson*, none of these cases were decided on a constitutional basis. Rather, all of the state-court cases that the Court of Appeals relied on were decided under the particular state court's "supervisory powers." *Dail v. State*, 438, 610 P.2d 1193, 1194 (Nev. 1980). Of those courts addressing the constitutional argument, almost all have

rejected *Melson's* application of the Fifth Amendment to require use immunity for a defendant who testifies at a probation or parole hearing. *See e.g. Flint v. Mullen*, 499 F.2d 100 (1 Cir. 1974); *Ryan v. Montana*, 580 F.2d 988 (9th Cir. 1978); *Lynott v. Story*, 929 F.2d 228 (6th Cir. 1991). The latter line of cases represents the more reasoned approach, with *Ryan* containing the best discussion of the issue.

A. *Ryan v. Montana*

The *Ryan* Court began its discussion of the issue with the basic and simple premise that "[a]bsent compulsion, it is not unconstitutional for the state to secure a conviction by using a statement made by the accused." *Ryan*, 580 F.2d at 990. The Court then went into a brief examination of the meaning of "compulsion." The Court looked to *Lefkowitz v. Cunningham,* 431 U.S. 801 (1977) for guidance on the question because it is fairly analogous to the type of compulsion alleged by the defendant in the case (and by Appellee in this case). As explained above, *Lefkowitz* is a "penalty case" and holds that "the government cannot penalize the assertion of the constitutional privilege against compelled self-incrimination by imposing sanctions to compel testimony which has not been immunized." *Id.* at 806.

In concluding that there was no compulsion within the meaning of *Cunningham* in the Montana revocation hearing at issue in the case before it, the *Ryan* Court explained:

> The probation revocation and sentencing procedures used by Montana do not involve the kind or degree of compulsion which the Court found inherent in the *Cunningham* situation. **The *Cunningham* Court confined its holding to situations where "refusal to waive the Fifth Amendment privilege leads automatically and without more to imposition of sanctions."** . . . . On this basis the Court distinguished *Baxter v. Palmigiano*, 425 U.S. 308, 96 S.Ct. 1551, 47 L.Ed.2d 810 (1976), where it was held permissible to draw a negative inference from a prisoner's refusal

> to testify in a prison disciplinary hearing, even though he was not entitled to immunity from use of his testimony or its fruits at a subsequent criminal trial. *Id.* at 317-19, 96 S.Ct. 1551. As in *Baxter*, Ryan's decision whether or not to testify was a strategic choice. **No sanction followed automatically from his exercise of the privilege to remain silent.** Rather, the absence of exculpatory information which Ryan might have furnished if he had decided to testify "was only one of a number of factors" which might figure in the probation revocation and sentencing determinations. . . . Indeed, Ryan was under even less disadvantage in deciding to withhold his testimony than was the petitioner in *Baxter*, since it is not contended that an inference of guilt was or could have been drawn from Ryan's silence at the probation revocation hearing.

Ryan, 580 F.2d at 991(emphasis added).

As shown in the sections above, the same factors that were determinative in *Ryan* are also present here. So just like in *Ryan, Flint v. Mullen*, and *Lynott v. Story*, use immunity is not constitutionally required in a Kentucky probation-revocation hearing.

CONCLUSION

The Court of Appeals erred in holding that Appellee's constitutional rights were violated when the trial court failed to advised Appellee that any testimony he gave at the hearing could not be used against him in a subsequent proceeding. The Court should join the majority of jurisdictions that hold that use immunity in probation-revocation hearings is not constitutionally

required. Therefore, the Court should REVERSE the Court of Appeals and AFFIRM the ruling on the trial court revoking Appellee's probation.

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