

SUPREME COURT OF KENTUCKY

Barker v. Commonwealth

379 S.W.3d 116 (Ky. 2012) · Decided September 20, 2012

OPINION

MINTON, J.

Opinion of the Court by Chief Justice MINTON. I. INTRODUCTION. We granted discretionary review of these two probation revocation cases to consider whether the trial court may proceed to hold evidentiary hearings to revoke or modify probation when the grounds for *119revocation or modification are new, unresolved criminal charges against the probationer.

We hold: • The trial court is not required to delay probation revocation or modification hearings awaiting resolution of the criminal charges that arise during the probationary period, reaffirming existing precedent; • When the probationer is faced with probation revocation or modification and a criminal trial based upon the same, conduct that forms the basis of new criminal charges, the probationer's testimony at the probation revocation hearing is protected from use at any later criminal trial in the state courts of Kentucky; • The trial court must advise the probationer that any testimony the probationer gives in probation revocation hearings that relates to the facts underlying the new charges cannot be used as substantive evidence in the trial of the new charges; and • The probationer's testimony at the revocation hearing can be used for impeachment purposes or rebuttal evidence in the trial of the new charges, and the trial court shall so advise the probationer before the probationer testifies at the revocation hearing.

II. BARKER AND JONES, FELONY PROBATIONERS, APPEARED IN CIRCUIT COURT FOR REVOCATION BASED ON NEW CRIMINAL CHARGES. Gerald Barker's felony conviction is based upon his guilty plea to nine counts of fraudulent use of a credit card over \$100, one count of first-degree possession of a controlled substance, and one count of possession of drug paraphernalia. Barker received a sentence of five years' probation.

Before the expiration of the period of probation, the Commonwealth moved to revoke probation because Barker received new criminal charges. Ryan Jones pled guilty to trafficking in a controlled substance in the first-degree (first offense), tampering with physical evidence, possession of marijuana, and possession of drug paraphernalia (first offense) and received a sentence of seven years' imprisonment, probated for five years.

Before the expiration of the period of probation, the Commonwealth moved to revoke probation because Jones received new criminal charges. A. Barker's Probation Revocation. At Barker's probation revocation hearing, his counsel argued that probation revocation proceedings were

premature because Barker merely incurred new charges, not new convictions. But the trial court proceeded to hear and decide the revocation motion.

At the revocation hearing, Barker's assigned probation officer was the only witness called by either side. The officer's testimony recited the contents of a written special supervision report she submitted earlier to alert the trial court of Barker's arrest on new charges, which consisted of four counts of fourth-degree assault.

The source of the officer's information on these assaults was (1) the citation issued to Barker by the Kentucky State Police documenting Barker's arrest on these new charges and (2) a conversation between the officer and Barker's sister, who told the officer that she was afraid of Barker and did not want him to return to the family home. Barker made two arguments opposing revocation: (1) the absence of physical evidence showing conclusively that he violated the conditions of his probation and (2) no probation violation occurred without a *120conviction on the new charges.

The trial court revoked Barker's probation and imposed the seven-year sentence of confinement. The Court of Appeals affirmed the trial court's order. B. Jones's Probation Revocation. Jones's probation officer submitted a special supervision report to the trial court requesting a bench warrant for Jones's arrest and revocation of Jones's probation because of Jones's indictment on new charges of possession of a controlled substance.

Before the probation revocation hearing, Jones's counsel sought postponement, arguing that the same facts asserted as grounds for probation revocation were also the basis for the new indictment. The trial court denied this requested postponement. At the probation revocation hearing, Jones's probation officer testified that he received information from the police that witnesses reported seeing Jones shoot a gun near his residence.

The probation officer accompanied a group of police officers to Jones's aunt's residence where Jones lived. They encountered there a male, Justin Valentine, and two females on the front porch. One of the officers detected an odor of marijuana, and the three individuals were taken into custody. Jones was not there at the time. Jones's aunt admitted the officers into the house and showed them the basement where Valentine and Jones shared living quarters.

Plainly visible on top of a dresser within these quarters were marijuana stems and seeds. A search of the living quarters ensued, yielding digital scales, fifty dollars in cash, marijuana in plastic bags, a white powdery residue on the surface of a tray, and marijuana in the pockets of various articles of clothing. When Jones arrived home, he was immediately taken into custody and questioned about his knowledge of the drugs.

He denied any knowledge of the drugs. But he stated that he could not pass a drug test because he smoked marijuana the previous day. The indictment followed. Jones elected to remain silent at the

probation revocation hearing. But he did attempt a defense by presenting testimony from witnesses, including his aunt and Valentine. At the close of the hearing, the trial court made oral findings, appearing on video record, that Jones violated the conditions of probation.

Later, the trial court issued a written order revoking Jones's probation. Holding that Jones was entitled to limited immunity in later prosecution for any testimony he might give in the revocation hearing, the Court of Appeals reversed the trial court's revocation order and remanded the case to the trial court for further proceedings consistent with the holding of the Court of Appeals.

III. PROBATION REVOCATION PROCEEDINGS BASED ON NEW FELONY CHARGES. On review in this Court, Barker argues that the trial court improperly considered his arrest on new felony charges as the sole basis for revoking his probation because he had not been convicted on those new felony charges. Jones claims the trial court erred by failing to postpone his probation revocation hearing until after the resolution of his new charges.

Additionally, Jones argues that the timing of his probation revocation hearing erroneously forced him to choose between asserting his right against self-incrimination on the new felony charge and presenting a complete and meaningful defense to probation revocation. *121We disagree with Barker and Jones that the trial courts were compelled to postpone the probation revocation hearings until after resolution of the pending criminal charges.

Although Jones argues that the Fifth Amendment to the United States Constitution and Section 11 of the Kentucky Constitution protect probationers at their probation revocation hearings, we decline to resolve these cases on constitutional grounds. Instead, we conclude that adopting an exclusionary rule would serve the interest of maintaining supervisory power over the probationer while allowing the probationer to present a defense to probation revocation.

So, in Barker's case, we affirm the opinion of the Court of Appeals because, under the circumstances, the fact that the trial court did not inform Barker that he could testify at his own probation revocation hearing with limited immunity did not affect his substantial rights or result in a manifest injustice.

In Jones's case, we also affirm the Court of Appeals on different grounds and remand Jones's case to the trial court for proceedings consistent with this opinion. A. Due Process Requirements Applicable to Probation Revocation Hearings.

The Fifth Amendment to the United States Constitution provides that no person shall "be deprived of life, liberty, or property, without due process of law...." And this Amendment is applicable to our state through the Fourteenth Amendment 1 and Section 2 of the Kentucky Constitution.

In *Morrissey v. Brewer*,² the United States Supreme Court considered whether due process was required in parole revocation hearings and determined that "revocation of parole is not part of a

criminal prosecution and thus the full panoply of rights due to a defendant in [a criminal] proceeding does not apply to parole revocations.”³ But because parole revocation hearings deprive an individual of a conditional liberty interest, the Court was compelled to determine what level of process was due in parole revocation hearings.⁴ In *Morrissey*, the Court held that the minimum requirements of due process in a parole revocation included: • Written notice of the alleged parole ■violations, • Disclosure of the evidence against the parolee, • An opportunity to be heard in person and to present witnesses and evidence, • The right to confront and cross-examine adverse witnesses, • A neutral hearing body, and • A written statement of fact describing the evidence relied on and reasons for revocation.⁵ Shortly after *Morrissey*, the U.S. Supreme Court decided *Gagnon v. Scarpelli*.⁶ In *Gagnon*, the Court considered due process requirements in the context of probation revocations and determined that a [probation revocation, like parole revocation, is not a stage of. a criminal prosecution, but does result in a loss of liberty.

Accordingly, we hold that a probationer, like a parolee, is entitled to *122a preliminary and a final revocation hearing, under the conditions specified in *Morrissey*.⁷ Kentucky precedent has recognized that the minimum level of due process described in parole revocation proceedings in *Morrissey* applied equally to probation revocations through *Gagnon* and must be afforded to probationers in Kentucky.⁸ B. When the Underlying Facts Constitute the Basis of a Probation Revocation Hearing and a New Criminal Charge, the Trial Court is not Required to Postpone the Probation Revocation Hearing Until After Resolution of the Criminal Case.

In *Barker’s* case, the Court of Appeals relied on *Tiryung v. Commonwealth*⁹ to affirm the trial court’s decision to proceed with probation revocation. In *Tiryung*, the probationer argued that the trial court erred by revoking his probation for committing an offense of which he was not yet convicted.¹⁰ But the Court of Appeals held that [i]t is clear in this Commonwealth that probation is a privilege rather than a right.

One may retain his status as a probationer only as long as the trial court is satisfied that he has not violated the terms or conditions of the probation. It is not necessary that the Commonwealth obtain a conviction in order to accomplish revocation of probation.¹¹ We agree with the holding in *Tiryung*. Probation has dual goals, protection of the public and rehabilitation of the offender.¹² The competing principles of due process for the probationer, efficiency for the criminal justice system, and protection for the public become highlighted when the state seeks to revoke probation.¹³ As stated in *Brown v. Commonwealth*,¹⁴ and reiterated in *Tiryung*, probation is a privilege by which the trial court restores conditional liberty to the probationer.¹⁵ Public safety demands quick and efficient procedures to restrict the liberty of a failing probationer.¹⁶ But because the probationer has received conditional liberty through the grant of probation, due process safeguards intercede to ensure that liberty is not unfairly taken away.¹⁷ A probation

revocation hearing provides the process through which trial courts balance these conflicting concerns.

In Kentucky, the probation revocation process is addressed by statute. KRS 533.050 provides, in pertinent part, that “the court may not revoke or modify the conditions of a sentence of probation... except after a hearing with defendant represented by counsel and following a written notice of the grounds for revocation or modification.” But this statute does not control the timing of the probation revocation hearing.

So, for guidance *123on timing, we turn to KRS 583.030, which governs conditions of probation and conditional discharge. KRS 533.030(1) states that “[t]he court shall provide as an explicit condition of every sentence to probation or conditional discharge that the defendant not commit another offense during the period for which the sentence remains subject to revocation.” The accompanying 1974 Kentucky Crime Commission/LRC Commentary notes, “The last sentence of subsection (1) is added so that there can exist no doubt but that commission of another offense while probation or conditional discharge exists is reason for revocation of such a sentence.”¹⁸ Notably, the Commentary refers to the “commission of another offense” but not the charge or conviction of another offense.

To sustain a criminal conviction requires proof beyond a reasonable doubt. By contrast, “[probation revocation requires proof by a preponderance of the evidence that a violation has occurred.”¹⁹ Because of the lower burden of proof required to revoke probation, a trial court could revoke probation before a jury convicts the probationer by finding him guilty beyond a reasonable doubt on identical facts.

And a trial court could properly revoke probation on less evidence than is required for a jury to convict. Consequently, we hold that *Tir-yung* remains good law. An individual’s probation may be revoked any time before the expiration of the probationary period when the trial court is satisfied by a preponderance of the evidence presented in a revocation hearing that the probationer violated a condition of probation.

Although new charges may form the basis for revocation proceedings, a conviction on those charges is not necessary in order to revoke probation. C. If a Probationer Chooses to Testify at a Probation Revocation Hearing Before a Criminal Trial on the Same Facts, the Probationer is Entitled to Protection From his Testimony Being Used as Substantive Evidence at Trial.

In *Morrissey*, the United States Supreme Court confirmed the probationer’s right to be heard to promote intelligent and fair revocation decisions and to encourage rehabilitation by treating probationers with basic fairness.²⁰ And basic fairness demands that a defendant must not be forced to forfeit one constitutional right to preserve another constitutional right.²¹ But the Court in *Morrissey* also emphasized that probation revocation hearings are not criminal proceedings.

These revocation proceedings must be flexible in contrast to the formality typically associated with criminal prosecutions.²² So a flexible revocation process that preserves basic fairness for probationers in post-conviction proceedings is the preferred result. Both Barker and Jones claim the fact that their probation revocation hearings occurred before the trial of their related criminal charges impermissibly forced them to choose between self-incrimination and presenting a complete defense.

The Court of Appeals panel that considered this issue in Jones's case held that basic fairness entitles a probationer to some Fifth Amendment protections in a probation revocation hearing in which the grounds for revocation are the same substantive facts as those of a new criminal charge.

Although we do not reach the determinative constitutional issue as did the Court of Appeals, we do find that probationers who choose to testify at the revocation hearing are entitled to a modified privilege against self-incrimination in the form of an exclusionary rule. 1.

The Fifth Amendment in Post-Conviction Proceedings. The Fifth Amendment of the United States Constitution, applicable to Kentucky through the Fourteenth Amendment and Section 11 of the Kentucky Constitution, describe the right against self-incrimination. But this is not an absolute right.

The right is protected before and at trial.²³ And Fifth Amendment privileges do not apply to nontestimonial evidence or voluntary statements.²⁴ The right against self-incrimination provides two types of protection in criminal proceedings: (1) a defendant cannot be compelled to testify, and (2) the factfinder cannot draw adverse inferences by the defendant's refusal to testify.²⁵ The United States Supreme Court decision that remains the starting point for consideration of Fifth Amendment privileges in post-conviction proceedings is *Minnesota v. Murphy*.²⁶ In *Murphy*, the defendant, Murphy, received probation for a sex-related offense; and a condition of probation was that he be truthful with his probation officer in all matters.²⁷ During the course of a sexual offender treatment program, Murphy admitted to committing rape and murder several years earlier.²⁸ His counselor relayed this information to Murphy's probation officer.²⁹ And, in a meeting with his probation officer, Murphy admitted he committed the rape and murder, for which he was later convicted.³⁰ On appeal, Murphy claimed that he was forced to make his admission in violation of his right against self-incrimination.³¹ In *Murphy*, the U.S. Supreme Court held that a probationer does not lose his Fifth Amendment privilege against self-incrimination because he has been convicted of an offense; but a state may compel a probationer to appear and be truthful in all matters that affect his probationary status.³² The Court also held that a Fifth Amendment violation could occur in situations in which the probation officer threatens the imposition of a "substantial penalty" for refusal to answer incriminating questions, even if the probationer did not assert his Fifth Amendment privilege.³³ The *Murphy* Court stated: A state may require a

probationer to appear and discuss matters that affect his probationary status; such a requirement, without more, does not give rise to a self-executing privilege.

The result may be different if the questions put to the probationer, however relevant to his probationary status, call for answers that would incriminate him in a pending or later criminal prosecution. There is thus 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.³⁴ As recently as *Gamble v. Commonwealth*,³⁵ Kentucky courts have had the occasion to consider Fifth Amendment rights in relation to probation revocation hearings.

Reaffirming the decision in *Childers v. Commonwealth*,³⁶ the *Gamble* court stated that there was "no right to assert a Fifth Amendment privilege against self-incrimination in [a] probation revocation hearing in response to questions concerning why [the probationer] had not paid past due child support."³⁷ At the time, *Gamble* was not charged with an additional crime for failing to make child support payments.

So the hearing in *Gamble* focused on whether the defendant was no longer in compliance with the conditions of his conditional discharge by failing to pay child support, an act of omission, which did not immediately implicate his right against self-incrimination in a pending criminal case.

The *Gamble* court went on to quote *State v. Cass*,³⁸ which stated: We [...] conclude that a probationer is not entitled to the [F]ifth [A]mendment right against self-incrimination as afforded to a defendant in a criminal trial.

However, a probationer is protected by the [F]ifth [A]mendment from answering any questions where those answers could be used against him or her in any subsequent criminal proceedings.³⁹ While we agree that a probationer is afforded some protections when the charges against him form the basis for probation revocation and new criminal charges, we do not need to determine whether the Fifth Amendment right against self-incrimination extends to this situation.

2. The Court's Supervisory Powers. There is a federal circuit split about what is required by the federal constitution when a parolee or probationer faces revocation for actions that also form the basis for new charges.⁴⁰ But, recently, courts have chosen to resolve this matter in another way by exercising the supervisory power of the courts. Read in conjunction, Sections 110, 115, and 116 of the Kentucky Constitution extend to the Supreme Court of Kentucky supervisory powers over the judicial branch.

And, on this particular issue, "[t]he question before us should not be limited to whether the [Fifth Amendment] so requires; we should decide whether the proper performance of the supervisory authority entrusted to us by the Kentucky Constitution so requires." ⁴¹ A probationer who chooses

to testify at his probation revocation hearing exposes himself to revelations of evidence that could be used in a later criminal prosecution.

A truthful answer or tendered explanation by a probationer at a revocation hearing might make him more vulnerable in the later trial. But by choosing not to be heard at the revocation hearing, the probationer loses the ability to defend himself or mitigate the penalty before the trial court considering modifying or revoking probation. Without qualified protections, the probationer confronts a considerable dilemma, a decision between remaining silent and presenting a defense to revocation.⁴² The Alaska Supreme Court considered this issue under similar circumstances.

In *McCracken v. Corey*,⁴³ the defendant parolee was arrested and charged with being a felon in possession of firearms. Under the circumstances, this both violated Alaska law and the conditions of parole.⁴⁴ And his revocation hearing was scheduled before his trial on the new charges.⁴⁵ The defendant parolee made a constitutional argument that it was impermissible to make him choose between presenting a complete defense and his right against self-incrimination.⁴⁶ But the *McCracken* court chose to avoid the constitutional question and, instead, relied on its inherent supervisory powers to address the issue.⁴⁷ The Alaska court determined that: *1271.

Upon timely objection, a parolee facing revocation and a criminal trial based on the same conduct will be able to present evidence or testimony at the revocation hearing, which will be inadmissible at subsequent criminal proceedings;⁴⁸ and 2. A parolee must be advised prior to the revocation proceedings that any evidence or testimony offered by him at the hearing may not be admitted in the subsequent criminal proceedings.⁴⁹ Consequently, the *McCracken* court adopted what is commonly known as the “use immunity” or “derivative use immunity” rule.⁵⁰ The supervisory powers approach most commonly employs a version of the “use” or “derivative use” immunity rule and has been adopted by several other state courts.⁵¹ And because we believe this approach aids in the proper administration of justice, we employ the Court’s supervisory powers to provide limited protections to probationers at revocation hearings.

In recognizing a constitutional right against self-incrimination at a revocation hearing, the Florida Supreme Court has considered the same issue and held that a probationer, upon a specific request and at periodic intervals, may be required to identify himself and provide all necessary information for his supervision including the place of his residence and his employment.

He may also be required to confirm or deny his location at a particular place at a particular time, to explain his noncriminal conduct, and to permit the search of his person and quarters by the supervisor. Failure to do so may itself be grounds for revocation [of] probation. His agreement to accept the terms of probation effectively waives his Fifth Amendment privilege with regard to this information.

There would be no practical means to properly supervise an individual on probation without a requirement that the probationer respond to directions and requests for information from the probation supervisor. On the other hand, the Fifth Amendment privilege against self-incrimination must be applicable to specific conduct and circumstances concerning a separate criminal offense.⁵² Although we do not share the Florida Supreme Court's view that the probationer's testimony is protected by the federal constitution, we believe this statement describes an appropriate exclusionary rule that protects against self-incrimination in post-conviction proceedings.⁵³ This rule best balances the interests involved and "will ensure that a court retains a great deal of supervisory capacity over a probationer, while ensuring that no probationer will be compelled to give evidence from his own mouth that can be used in any way to prosecute him for a criminal offense."⁵⁴ In accord with our reading of *Murphy* and our interpretation of Section 11 of the Kentucky Constitution,⁵⁵ probationers are required to answer all reasonable questions related to compliance with the conditions of probation that do not tend to incriminate them in a future criminal prosecution.

The judicial rule we adopt today protects probationers who testify at revocation hearings when their testimony relates to new crimes. And the trial court hearing the probation revocation must advise probationers that any testimony related to new crimes given during a revocation hearing cannot be substantively used in a future criminal proceeding.⁵⁶ But the trial court hearing the probation revocation motion should advise the probationer that the same testimony could be used in the later trial for impeachment or rebuttal in certain circumstances.⁵⁷ 3.

Rule-Based Protection Applied to Barker and Jones. Barker requested that the revoking court postpone his probation revocation hearing until after resolution of the new criminal charges. But Barker did not specifically request immunity or attempt to invoke his right against self-incrimination. So we review this matter for palpable error.⁵⁸ Before his probation revocation hearing, Barker made outbursts regarding the conditions of his probation.

He spoke over counsel, interjecting, "I'm totally confused. I have no idea what I am supposed to have done. I haven't seen any kind of paperwork or anything. No one has told me anything. I don't know what I'm supposed to have done." When the trial court responded that the special supervision report was self-explanatory and that the probation revocation hearing would begin, Barker exclaimed, "Oh, that thing with my family?"

I was shot seven times. I was shot with an air rifle. I was trying to protect my family members." The Kentucky State Police report indicated that Barker had been drinking and struck four members of his family⁵⁹ before he fled the scene. Barker offered no witness testimony, did not request immunity to testify at his probation revocation hearing, and appeared to be unaware of what was occurring at the hearing.

Under the circumstances, because the trial court accepted Officer McGuire's testimony as credible and Barker made no real effort to put on a defense, we cannot say that the fact that the trial court did not inform him that he' could testify at his own probation revocation hearing with limited immunity affected his substantial rights or resulted in a manifest injustice.

Accordingly, we affirm the decision of the Court of Appeals. Jones requested and was denied immunity for testimony before the revoking court. So we affirm the decision of the Court of Appeals 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." This matter is remanded for further proceedings consistent with the opinion.

D. The Trial Court did not Violate Barker's Due Process Rights by Relying on Hearsay Testimony at Barker's Revocation Hearing or in its Finding of Facts Supporting Revocation. 1. Hearsay Evidence. Barker claims that he was prevented from effectively cross-examining the Commonwealth's witness against him because the testimony against him was hearsay.

As previously stated, probation revocation hearings are not criminal proceedings but flexible hearings that accept matters into evidence otherwise inadmissible in a criminal prosecution.⁶⁰ Kentucky courts have held that the decisions in *Morrissey* and *Gagnon* "did not intend to foreclose the admission of hearsay evidence at these informal types of hearings and there is no absolute right to confront witnesses...."⁶¹ In Barker's case, the hearsay evidence presented against Barker was a Uniform Citation from the Kentucky State Police that described alleged assaults Barker committed against his family.

Barker's probation officer was not present at the time of his arrest but read the citation at his probation revocation hearing.¹³⁰ Officer McGuire also testified that she spoke to Barker's sister about the incident.⁶² Barker cross-examined Officer McGuire but did not call any witnesses or set forth a defense to the charge.

Because hearsay evidence is acceptable at probation revocation hearings and Barker did not present a defense, the revoking court did not err when it revoked Barker's probation based on Officer McGuire's testimony. 2. Findings of Fact. Barker claims his due process rights were violated when the trial court did not provide a sufficient written statement detailing the evidence relied on and reasons for revoking probation.

He further requests that this Court reconsider its holding in *Commonwealth v. Alleman*,⁶³ We decline to revisit our holding in *Alleman* and find no error in the revoking court's written order. Due process requires that the factfinder issue a written statement detailing the evidence relied on and reason for revoking probation.⁶⁴ And KRS 533.050(2) states that "the court may not revoke or modify the conditions of a sentence of probation... except after a hearing with defendant represented by counsel and following a written notice of the grounds for revocation or

modification.” After a hearing, at which Barker was represented by counsel, the trial court made oral findings that he violated the terms of his probation and returned him to imprisonment.

These oral findings are recorded on the videotape of the revocation proceedings in open court. The trial court’s written findings followed, saying: This matter is now before the Court on motion of the Commonwealth to revoke the Defendant’s probation on grounds of violation of the terms of probation by arrest for assault in the 4th degree four (4) counts.

The Defendant appeared in Court with counsel, and the Court having heard testimony and being sufficiently advised from the record, finds that the Defendant has violated the conditions of his probation. The written findings state that the testimony at the hearing led to a conclusion that Barker violated his probation. These written findings are sparse. But the trial court’s recorded oral findings state, “The fact he had been drinking and he assaulted four family members... would be a violation of the conditions of his probation.

For that reason, the court finds that he has violated the conditions of his probation.” In *Alleman*, this Court held that oral findings and reasons for revocation stated at the conclusion of the hearing by the trial court from the bench satisfy due process rights when they are sufficiently reliable for a reviewing court to determine the justifications for revocation.⁶⁵ Based on the record and the revoking court’s conclusions from the bench, it is clear that Barker’s probation was revoked for consuming alcohol and assaulting his family members — clear violations of his probation conditions.

The written findings, coupled with the oral findings of the trial court, satisfied the demands of due process. IV. CONCLUSION. For the foregoing reasons, the decisions of the Court of Appeals are hereby affirmed in both cases. *131All sitting. ABRAMSON, NOBLE, and VENTERS, JJ., concur. CUNNINGHAM, J., concurs in result only by separate opinion in which SCHRODER and SCOTT, JJ., join..

U.S. CONST, amend. XIV, § 1.. 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972).. Id. at 480, 92 S.Ct. 2593.. Id. at 480-83, 92 S.Ct. 2593.. Id. at 488-89, 92 S.Ct. 2593.. 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973).. Id. at 782, 93 S.Ct. 1756 (citation omitted).. *Childers v. Commonwealth*, 593 S.W.2d 80, 81 (Ky.App.1979).. 717 S.W.2d 503 (Ky.App.1986)..

Id.. Id. at 504.. *Griffin v. Wisconsin*, 483 U.S. 868, 885, 107 S.Ct. 3164, 97 L.Ed.2d 709 (1987).. Daniel F. Piar, A Uniform Code of Procedure for Revoking Probation, 31 Am.J.Crim.L. 117, 119 (2003).. 564 S.W.2d 21 (Ky.App.1977).. Id. at 23; *Tiryung*, 717 S.W.2d at 504.. Piar, A Uniform Code Of Procedure For Revoking Probation, 31 Am.J.Crim.L. at 119.. Id.. KRS 533.030 was originally House Bill 232, the Penal Code.

House Bill 232 was introduced in the 1974 session of the General Assembly; and the proposed § 285(1) contained the exact wording of the current version, KRS 533.030(1). When the General

Assembly passed HB 232, § 285(1) was renumbered as § 287(1). But no amendments were adopted, and the wording remained the same.. *Hunt v. Commonwealth*, 326 S.W.3d 437 (Ky.2010) (citing *Rasdon v. Commonwealth*, 701 S.W.2d 716, 719 (Ky.App.1986))..

408 U.S. at 484, 92 S.Ct. 2593. Here we refer to probationers. Although *Morrissey* analyzed due process in relation to parolees, the reasoning and analysis from *Monissey* was incorporated into *Gagnon*, 411 U.S. 778, 93 S.Ct. 1756, and applied to probationers.. *Simmons v. United States*, 390 U.S. 377, 393-94, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968); see also *Shull v. Commonwealth*, 475 S.W.2d 469, 471-72 (Ky.1971)..

Morrissey, 408 U.S. at 489, 92 S.Ct. 2593.. *Miranda v. Arizona*, 384 U.S. 436, 460-61, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).. See, e.g., *Oregon v. Elstad*, 470 U.S. 298, 304-05, 105 S.Ct. 1285, 84 L.Ed.2d 222 (1985).. *Griffin v. California*, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965).. 465 U.S. 420, 104 S.Ct. 1136, 79 L.Ed.2d 409 (1984).. *Id.* at 422, 104 S.Ct.

1136.. *Id.* at 423, 104 S.Ct. 1136.. *Id.* *Id.* at 424, 104 S.Ct. 1136.. *Id.* at 425, 104 S.Ct. 1136.. 465 U.S. 420, 426-27, 104 S.Ct. 1136, 79 L.Ed.2d 409 (1984). The Court also held that the probationer must assert the privilege and that the probation officer is not required to give Miranda warnings when asking the probationer questions.. *Id.* at 434-35, 104 S.Ct.

1136.. *Id.* at 435, 104 S.Ct. 1136.. 293 S.W.3d 406 (Ky.App.2009). 593 S.W.2d 80 (Ky.App.1979).. 293 S.W.3d at 411.. 635 N.E.2d 225 (Ind.App.1994);. 293 S.W.3d at 410 (citing *Cass*, 635 N.E.2d at 226-27).. *Melson v. Sard*, 402 F.2d 653 (D.C.Cir.1968), holds that any self-incriminating statements made at a parole revocation hearing may not be used affirmatively against a defendant in the subsequent criminal proceedings.

And. *Ryan v. Montana*, 580 F.2d 988 (9th Cir.1978), holds that a state is not required, under the federal constitution, to grant immunity from the use of the probationer's testimony at a probation revocation hearing.. *Commonwealth v. Hubbard*, 111 S.W.2d 882, 885 (Ky.1989) (5-2 decision) (J. Leibson dissenting).. A similar conflict exists when a defendant chooses to present expert testimony relating to a mental disease or defect.

Under Kentucky Rules of Criminal Procedure (RCr) 7.24(3)(B)(ii), when the defendant makes this choice, the court may order the defendant to submit to a mental examination. Truthful answers at the mental examination may make him more vulnerable at trial.

To protect against such a consequence, the rule provides that the defendant's statements are not admissible into evidence against the defendant in any criminal proceeding.. 612 P.2d 990 (Alaska 1980).. *Id.* at 992-93.. *Id.* at 993.. *Id.* *Id.* at 998.

The court observed that cases like the one before it generally fell into two analytical lines: (1) penalty cases, in which the assertion of the privilege against self-incrimination resulted in the

automatic loss of a tangible benefit; and (2) surrender cases, in which one must surrender a constitutional right for the exercise, thereby creating an impermissible choice.

After analyzing relevant case law on the two lines of cases, the court concluded that "there is no clear standard for determining what choices constitute *127a penalty for the assertion of a constitutional right as opposed to a mere tactical decision." Id. at 995.. McCracken, 612 P.2d at 998.. Id.. Id. at 997.. State v. Begins, 147 Vt. 295, 514 A.2d 719 (1986); State v. Boyd, 128 Ariz. 381, 625 P.2d 970 (Ariz.Ct.App.1981); People v. Rocha, 86 Mich.App.

497, 272 N.W.2d 699 (1978); State v. Hass, 268 N.W.2d 456 (N.D.1978); State v. DeLomba, 117 R.I. 673, 370 A.2d 1273 (1977); State v. Evans, 77 Wis.2d 225, 252 N.W.2d 664 (1977); People v. Coleman, 13 Cal.3d 867, 120 Cal.Rptr. 384, 533 P.2d 1024 (1975).. State v. Heath, 343 So.2d 13, 16 (Fla.1977)..

The dissent cites several federal cases for the proposition that "courts cannot confer immunity upon a witness on their own initiative." But these cases merely prohibit trial courts from offering immunity to defendants on an ad hoc basis. United States v. D'Apice, 664 F.2d 75 (5th Cir.1981) (holding that the trial court erroneously granted the defendant immunity over the prosecutor's objection because "the district court had no independent authority to bestow use immunity on [the defendant]"); United States v. Davis, 623 F.2d *128188, 192 (1st Cir.1980) (holding that "[t]he trial court has no power to grant immunity to a witness whose testimony the defendant may wish to offer and the Government cannot be forced to grant such immunity"); United States v. Smith, 542 F.2d 711, 715 (7th Cir.1976) (holding that a district court cannot "direct the government to seek use immunity in order to secure testimony which the defense deems relevant"); Thompson v. Garrison, 516 F.2d 986, 988 (4th Cir.1975) (holding that "[a] district judge is not authorized to initiate immunity"); and In re Corrugated Container Antitrust Litigation, 644 F.2d 70, 79 (2d Cir.1981) (holding that "[t]o prevent prosecutions from being unnecessarily hampered, district courts should not compel witnesses to respond to questions other than ones concerning specific subjects that actually were touched upon by questions appearing in the transcript of the immunized testimony").

Here, we are adopting an exclusionary rule that applies across the board to all probationers who testify at their probation revocation hearing.. Piar, A Uniform Code of Procedure for Revoking Probation, 31 Am.J.Crim.L. at 153.. "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)..

As a side note, we observe that this judicial rule is only binding on the state courts of the Commonwealth. In accordance with Section 109 of the Kentucky Constitution, we are a unified court system. Consequently, rules made by this Court are binding on all state courts.

However, testimony or evidence offered at a revocation hearing related to new charges in federal court or foreign jurisdictions will not necessarily receive the same protections.. The instruction of this Court in *Grady v. Commonwealth* was applied to suppression hearings but tends to be informative under the facts before us, "[W]e find it pertinent to point out that Appellant may testify in his own behalf at a suppression hearing without waiving the privilege against self-incrimination.

Furthermore, testimony at a suppression hearing may be confined on cross-examination to the scope of the direct examination. And while his testimony may be used later for impeachment purposes, it may not otherwise be used against him unless he fails to object." 325 S.W.3d 333 n. 3 (Ky.2010) (citations omitted).. "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." RCr 10.26..

There were visible injuries on several members of the family.. *Morrissey*, 408 U.S. at 480 and 489, 92 S.Ct. 2593.. *Marshall v. Commonwealth*, 638 S.W.2d 288, 289 (Ky.App.1982).. Officer McGuire testified that Barker's sister told her she was afraid for her life, and Barker was not welcome to return to their home.. 306 S.W.3d 484 (Ky.2010).. *Morrissey*, 408 U.S. at 489, 92 S.Ct.

2593.. 306 S.W.3d at 484.