

## The problem of probation

### Laws meant to shrink prison numbers often result in repeat offenders in Ky.

By Lindsey Erdody, Published: August 10, 2013 7:21PM

When Jessie Mullins stood before Franklin Circuit Judge Thomas Wingate for sentencing in January, Wingate told him this was his “last chance” and granted him probation for three years.

Less than a month later, a Franklin County grand jury indicted Mullins on new charges, and he was back in court for arraignment.

Mullins pleaded guilty to the new charges in June with a deal that offered probation with a 10-year sentence hanging over his head.

Mullins was released from jail, but before he could return to court for his sentencing, he was arrested for violating the terms of his probation.

Prosecutors and judges admit it’s frustrating to give someone a chance to change and watch them break the law again. But they’re bound to offer probation in the majority of cases because of legislation passed two years ago.

Four others were sentenced to probation with Mullins during motion hour that day in January.

“We’ll be sitting there going — six months — no, he won’t last six months. I’ll take four,” Commonwealth’s Attorney Larry Cleveland said. “We can almost establish a betting pool for some of these people.”

#### It’s the law

Prosecutors don’t oppose the decision in many cases because they know the defendants are going to get probation. They have to.

“It’s one of those things that I don’t like, but I just have to hold my nose and deal with,” Cleveland said.

House Bill 463, or the Public Safety and Offender Accountability Act, which was passed unanimously in the Senate and had one dissenting vote in the House, took effect in June 2011.

The bill set out to reduce Kentucky’s high prison population by more than 3,000 inmates during a 10-year period to save an estimated \$422 million.

The bill requires granting probation to more first-time, nonviolent felony offenders and lessens the penalties for drug possession charges.

Kentucky’s inmate population was 22,783 in June 2011 when the law took effect.

“Which would make the prison population about the fourth largest city in Kentucky,” Franklin Circuit Judge Phillip Shepherd said.

Last month, the inmate population was down to 19,636, but it was only the third month in which it was lower than 21,000, according to reports by the Department of Corrections.

One way the bill aimed to lower the prison population was by essentially requiring judges to grant probation for first-time offenders convicted of class D felonies.

“If we’re following the law that is set by the Legislature, we are supposed to probate anytime we can,” Wingate said. “A lot of people don’t really understand that we’re following the law.”

Wingate and Shepherd estimated 90 percent of the crime is classified as class D felonies, which is why so many of their cases result in probation.

“I guess the bottom line is that if it is their first offense, we’re going to give them somewhat of a chance, especially if it’s a D felony,” Wingate said.

#### Probation benefits

Class D felony offenders sentenced to jail don’t get transferred to state prisons. Instead, they serve their time in county jails and receive parole quickly.

Nonviolent offenders sentenced to five years incarceration — the highest penalty for class D felonies — are eligible for parole after one year.



“Here’s sort of my take on it — who would you rather be monitoring someone, an elected official in your community or someone from Barren County who’s on the parole board?” Wingate said. “It’s easy for me to send you to prison. It’s just an order. It’s much more difficult to monitor probation.”

Shepherd said by the time someone is indicted, pleads guilty and is sentenced, usually a year has elapsed and they’re out on the streets with little or no supervision.

“We think they’re going to get better supervision on probation than they will if we sentence them to prison and they get paroled after a short period and come back out with virtually no oversight,” Shepherd said.

### **Violating the terms**

After a defendant is sentenced, a case is essentially closed, but sometimes Cleveland keeps the file out.

“We might as well not even put the file in the closed file bin because we’re going to be pulling it out to file a motion to revoke probation,” Cleveland said.

He receives notices from probation officers on a daily basis explaining how defendants violated the terms and conditions of probation.

While the prison population appears to be dropping, the number of probation violations seems to be increasing.

In 2010, there were 156 revocation motions filed in Franklin Circuit Court. The number rose to 181 in 2011 and 184 in 2012. As of Aug. 9, 176 motions have been filed in 2013.

The requirements for probation can vary, but generally include being law abiding, staying drug and alcohol free, maintaining a job or attending school full time, reporting to a probation officer and paying court costs and any restitution.

Five years is the longest probation sentence possible.

Chris Copenhaver, probation and parole supervisor for District 12, which includes Franklin County, said the three most frequent violations are positive drug screens, picking up new charges and failure to report.

Copenhaver said there are probably one to two violations each day in Franklin County.

The violations tend to happen more frequently at the beginning of probation, when people are still adjusting, he said.

“A lot of them have made lifelong mistakes so it’s a lifelong cycle,” Copenhaver said. “You’re going to have some missteps that come up.”

Cleveland said the two most common violations he sees are shoplifting and drug usage.

For certain violations, like testing positive for marijuana, Cleveland said he tells the probation officer to talk to the defendant and test him again next month. If he tests positive again, Cleveland will attempt to revoke probation.

“What this is all about is controlling behavior,” Cleveland said. “Some people you can control their behavior better with probation. ... Other people, the only way you can control their behavior is put them in jail.”

### **Other problems**

Granting most defendants probation may be lowering the prison costs, but it’s causing other issues.

Prosecutors have lost an important threat — prison.

“It weakens our bargaining position in negotiating plea agreements because if these people know that they’re going to get probation, you don’t have that as a bargaining card at all,” Cleveland said.

This also results in upsetting victims in nonviolent cases, Cleveland said.

While he understands the distinction between violent and nonviolent criminals, victims don’t.

The people who lost their life savings from a bank account or who have an older relative who was taken advantage of don’t want to see the perpetrators probated.

“I try to explain to them the financial costs of sending someone to prison,” Cleveland said. “And then they call me a son of a b---- and hang up on me. Usually it’s lazy, good for nothing, son of a b---- and then they hang up on me ... Once or twice they’ve invited me to have a sexual encounter with myself.”

Cleveland said HB 463 might be saving money in prison costs, but it’s not benefiting the community.

“It’s the Legislature saying public safety be damned,” Cleveland said. “You’re releasing more criminals back on the streets to commit more

crimes.”

### **Returning for revocation**

Michael Stewart stood with his public defender as she argued to keep him out of jail.

He was sentenced March 22 to three years probation and was on the verge of being revoked by May.

Assistant Commonwealth’s Attorney Emily Wilkey claimed he didn’t report to his officer.

“He just does what he wants,” Wilkey said in court.

“Your top priority needs to be to comply with probation,” Shepherd told Stewart. “You’re obviously not doing that.”

When probation violations are brought to the court’s attention, the judges have several options.

Instead of denying or granting the motion to revoke, they could send the defendant to drug court or a drug treatment center, increase the number of drug screens or sentence them to a sanction in jail.

Revoking probation is the last resort.

Shepherd ordered Stewart to spend the weekend in jail instead of revoking him.

Sometimes the alternative action is successful, but sometimes the defendant messes up again — Stewart was back two weeks later because he allegedly lied about his employment.

Using another option, Shepherd sent him to drug court.

Every Friday morning, Wingate and Shepherd listen to about 10 revocation hearings.

Probation officers testify about the violations and make recommendations.

Sometimes officials are at the end of their rope.

“There are some people you just kind of sit there and go, ‘I’m done with them,’” Cleveland said. “Send them to the penitentiary. I’ve had enough.”

Other times, they’re just trying to scare someone enough to get them back on track.

“I wanted to get (their) attention, get (them) into drug treatment and straighten (them) out,” Cleveland said. “I don’t want to see them revoked.”

The judges say they rely on the reports from Cleveland and the officers to make their decisions.

“We expect Larry, if he thinks the person is dangerous in the community and needs to be locked up, to make that recommendation,” Shepherd said.

### **Throwing in the towel**

By May 3, Thomas Blankenship had been in court at least eight times on motions to revoke his probation in three cases.

In October, Shepherd told Blankenship he was on thin ice when he admitted to smoking marijuana after completing a drug treatment program.

His drug problems persisted and his public defender fought to send him back to treatment in January.

He returned to a drug treatment center, but didn’t stay long.

On April 12, Cleveland told the court Blankenship left rehab and there were three active bench warrants out for his arrest.

When Blankenship appeared before Shepherd at the beginning of May, he had new charges pending.

The judges say the most common reason they revoke probation is for picking up new charges.

“That’s the hardest part of the job. It really is just trying to determine if someone is worthy of being left in the community,” Wingate said.

Shepherd revoked Blankenship’s probation and he is in prison, expected to serve until 2019.

“It’s frustrating sometimes because you’re giving them the tools,” Wingate said. “We don’t know 100 percent that this person that we’re probating is not going to commit another offense because many times they do and at that time we will send them to prison.”

### **Finding a solution**

There isn't a simple solution to get people to comply with probation but one thing that officials agreed on is the need for more probation officers.

"We do not have enough probation officers," Cleveland said. "They've got more people to deal with than they can deal with."

There are about four probation officers assigned to Franklin County, and in the spring about 700 people were under supervision. That's a ratio of 175 people per officer.

"We need to be putting more money into our probation and parole officers," Shepherd said. "We need to increase the number of them and we need to increase their pay."

Another helpful tool officials agreed upon was changing the way drug abuse is treated.

"It's a substance abuse epidemic and until we deal with that as a public, we're never going to make a dent in the criminal justice system" Shepherd said.

With such a large portion of crime involving drugs — the judges estimated 80 to 90 percent of their cases involve substance abuse in some way — there's almost always a waiting list to get people enrolled.

"The comprehensive care system is in crisis. They're overwhelmed and unable to provide the broad scale drug and alcohol rehabilitation that would meet the need here," Shepherd said.

Even with additional drug treatment centers, the violations might not decrease given the high number of repeat offenders.

"The problem is you keep having these repeat offenders, and they never go anywhere," Cleveland said. "It's probation. It's a never-ending problem."

### **Motions to revoke probation**

Motions in 2013 by month:

January: 28

February: 27

March: 16

April: 21

May: 29

June: 35

July: 15

Aug. 1-9: 4

2013 total: 175

Motions by year:

2009: 192

2010: 156

2011: 181

2012: 184

*Source: Franklin Circuit Court*