

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-000828-MR

JEREMY CLARK

APPELLANT

v.

APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE T. STEVEN BLAND, JUDGE
ACTION NO. 92-CR-00228

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: COMBS, DYCHE, and GUIDUGLI, JUDGES.

GUIDUGLI, JUDGE: Jeremy Clark (Clark) appeals from an order of the Hardin Circuit Court revoking his probation and sentencing him to serve five years in prison on a conviction for burglary in the second degree. We affirm.

In August 1993, Clark pled guilty to burglary in the second degree (KRS 511.030) pursuant to a plea agreement under which the Commonwealth recommended a sentence of five years and took no position on probation. On October 14, 1993, the trial court sentenced him to five years, but it suspended service of the sentence by placing Clark on probation for a period of five years. The terms of probation included, inter alia, not

committing another offense, avoiding injurious or vicious habits, reporting to the probation officer as directed, and complying with all the rules of the Division of Probation. At the time of sentencing, the trial court authorized transfer of actual supervision of his probation under the Interstate Compact from the Hardin County Division of Probation and Parole to the Probation Office in Brevard County, Florida. The trial judge also set out a bi-yearly periodic review of Clark's compliance status.

In April 1995, the Commonwealth's Attorney filed a motion to revoke Clark's probation based on a supervision report prepared by the Hardin County Division of Probation and Parole. In the report attached to the motion, Probation and Parole Officer Robert Brown stated that on October 20, 1994, Clark had been arrested in Florida on possession of cocaine, possession of drug paraphernalia, and driving without a valid driver's license. Brown also indicated that Clark had pled guilty to the charges and was scheduled for sentencing at a later date. Attached to Officer Brown's report was a Violation Report Form and Affidavit of Violation of Probation from the Florida Probation Office. In the Violation Report Form, Probation Officer Robert Imerese described the facts surrounding Clark's arrest by Florida Police Officer Scott Mostert. Officer Imerese also noted that Clark had failed to notify Florida officials of the drug charges, and he recommended that Kentucky officials pursue revocation of Clark's probation. On June 6, 1995, the trial court issued an arrest

warrant for Clark for violation of probation after he failed to appear for the probation revocation hearing.

In January 1998, Clark was arrested in Florida and transferred to the Hardin County Jail. On March 3, 1998, the trial court conducted a probation revocation hearing. Officer Jeff Grigsby of the Hardin County Division of Probation and Parole testified concerning Clark's conviction in Florida on the charge of possession of cocaine in the third degree. Officer Grigsby also testified that Florida probation officials had notified the Hardin County Probation Office that Clark had absconded from supervision in June 1995. Following the hearing, the trial court issued an order revoking probation based on a finding that Clark had violated the terms of probation by absconding from supervision and receiving a new conviction in Florida while on probation. This appeal followed.

Clark argues that the record does not contain sufficient evidence to support the trial court's factual findings that he violated the terms of probation. He contends that there is no evidence that he absconded from supervision. Clark also maintains that the record does not contain evidence that he committed a crime while on probation, as opposed to having been convicted of a crime while on probation. He asserts that the terms of probation only required that he not commit another offense while on probation.

The trial court has broad discretion to revoke the conditional grant of probation and the appellate court cannot overturn the trial court's revocation decision absent an abuse of

discretion. Tiryung v. Commonwealth, Ky. App., 717 S.W.2d 503, 504 (1986); Hardin v. Commonwealth, Ky., 327 S.W.2d 93 (1959). A probationer may retain his status "only as long as the trial court is satisfied that he has not violated the terms or conditions of the probation." Tiryung, 717 S.W.2d at 504. In addition, a trial court may revoke probation for one or several violations as long as the evidence supports at least one violation. See Messer v. Commonwealth, Ky. App., 754 S.W.2d 872, 873 (1988). The standard of proof necessary to support revocation is proof of a violation of a condition of probation by a preponderance of the evidence. Rasdon v. Commonwealth, Ky. App., 701 S.W.2d 716, 719 (1986); Murphy v. Commonwealth, Ky. App., 551 S.W.2d 838, 840 (1977). Hearsay testimony is admissible and may properly be considered by the trial court in connection with probation revocation. Tiryung, 717 S.W.2d at 504; Rasdon, 701 S.W.2d at 718.

In the case at bar, the Commonwealth introduced various documentary exhibits through the testimony of Probation Officer Grigsby concerning Clark's probation violations. The Conditions of Regular Supervision Form signed by Clark contained several terms and conditions of probation including a prohibition on possession of controlled substances and an obligation to not violate any state laws or ordinances. Officer Grigsby testified that Clark had violated the conditions of probation by being convicted of possession of cocaine in Florida in March 1995. Officer Grigsby also stated that the Hardin County Probation Office had been informed by the Florida Brevard County Probation

Office that Clark had absconded from supervision between June 1995 and January 1998. Even though the Hardin Circuit Court issued a bench warrant in 1995, Clark was not arrested on the warrant in Florida until 1998. The Commonwealth introduced copies of Clark's drug conviction in Florida in 1995. More importantly, the Commonwealth introduced a certified affidavit from Florida Probation Officer Robert Imerese stating that Clark had been arrested on October 20, 1994, for driving without a license, possession of cocaine and possession of drug paraphernalia. During the probation revocation hearing, Clark did not challenge the validity of the conviction or that this constituted a violation of his conditions of probation.

The fact that Clark was convicted of a drug possession offense subsequent to being placed on probation provides prima facie evidence that Clark committed the offense while on probation. The record also contains undisputed evidence that Clark was arrested and charged with the drug offense after being placed on probation. The record clearly includes sufficient evidence by a preponderance that Clark violated the terms and conditions of probation. Cf. Messer v. Commonwealth, supra (sufficient evidence of probation violation based on arrest for burglary). The trial court did not abuse its discretion by revoking Clark's probation.

For the foregoing reasons, we affirm the order of the Hardin Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

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