RENDERED: March 19, 1999; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-000968-MR

MARK ANTHONY COHRON — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE F. KENNETH CONLIFFE, JUDGE
ACTION NO. 91-CR-002143

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING
** ** ** ** **

BEFORE: DYCHE, EMBERTON AND MILLER, JUDGES.

EMBERTON, JUDGE: This appeal centers upon the revocation of the probation granted Mark Cohron from an enhanced sentence of ten years' imprisonment based upon his guilty plea to the offenses of third-degree burglary and of being a persistent felon in the first degree. Cohron predicates his claim of due process deprivations upon the technical grounds of lack of notice of the revocation hearing and denial of an opportunity to review and controvert the contents of his presentence investigation report. We affirm.

Cohron was indicted with a co-defendant on charges of third-degree burglary and of being a first-degree persistent

felony offender in connection with the theft of twenty pairs of athletic shoes and two leather coats from a department store. At the time of this August 1991, burglary Cohron was on probation from two separate sentences stemming from charges of third-degree burglary, theft by unlawful taking over $100 and receiving stolen property over $100. On March 2, 1992, Cohron plead guilty to charges for the August 1991, offense and was sentenced to five years' on the burglary III charge, enhanced to ten years' imprisonment by virtue of the PFO I count. The plea agreement recited the Cohron was ineligible for probation because of his PFO status under Kentucky Revised Statute (KRS) 532.080. The guilty plea was accepted and formal sentencing set for May 6, 1992.

After Cohron failed to appear for sentencing, a bench warrant was issued and he was subsequently arrested. At a rescheduled sentencing hearing on July 20, 1992, Cohron moved to withdraw his guilty plea and the matter was passed to August 26, 1992, for sentencing. On that date, the motion to withdraw the plea was denied and Cohron was sentenced in accordance with the agreement.

Cohron subsequently filed a Ky. R. Civ. P. (CR) 60.02 motion for post-conviction relief relying upon a then recently published case, Corman v. Commonwealth, Ky. App., 822 S.W.2d 421 (1991), to support his contention that it was error to conclude at the time of his plea agreement that because of his status as a persistent felony offender he was not eligible for probation. By order dated January 29, 1996, the trial judge granted Cohron's

motion, set aside the sentence entered on August 26, 1992, and scheduled resentencing for February 21, 1996. As evidenced by the video record, the trial judge on that date probated Cohron's sentence for a period of five years subject to compliance with specific conditions orally imposed. Although it is clear from the order entered on January 29, 1996, and the video record of the resentencing on February 21, 1996, that the trial judge vacated Cohron's original ten-year sentence and entered a five-year period of probation subject to specified conditions, the record does not disclose entry of a new written judgment of sentence to replace the vacated original sentence.

By order of February 28, 1996, the trial judge denied a motion by the Commonwealth to revoke Cohron's probation as evidenced by an order setting out the following conditions of probation:

> 1. Defendant has violated the conditions of his probation; however, in lieu of revocation at this time shall continue under the original conditions of probation.
>
> 2. Defendant shall seek and maintain employment.
>
> 3. Defendant shall not become involved in any illegal actions or become involved in any substance abuse actions.
>
> 4. Defendant shall upon finding employment pay the supervision fee.
>
> 5. Defendant shall pay the $40.00 fee for use of the Public Defender's Office.

The Commonwealth moved to revoke Cohron's probation on December 26, 1996, and again on January 15, 1997, following Cohron's failure to appear at the first hearing. The second

motion added supplemental grounds for revocation. Of the numerous violations alleged in the Commonwealth's motions, three were convictions for crimes committed while on probation, a guilty plea to alcohol intoxication in Grayson District Court, a guilty plea to attempted theft by unlawful taking over $300 and a guilty plea to disorderly conduct. A supervision report supporting the Commonwealth's motion indicated that two additional charges were pending against Cohron, one of which contained charges on three counts of wanton endangerment, resisting arrest and two counts of unlawful transactions with a minor. The other pending charges were driving under the influence, reckless driving, disregarding a traffic control device and speeding. As noted by the trial judge at the hearing conducted on Mary 7, 1997, the latter charges stemmed from an incident in which Louisville police officers observed Cohron driving at 100 miles per hour in a 35 mile per hour zone. The report also contained numerous incidents of failing to cooperate with required supervision, one of the terms of his probation. At the March 7 hearing, counsel for Cohron and the Commonwealth informed the trial judge that they had discovered that no formal document had been entered resentencing Cohron after his CR 60.02 motion had been granted. The trial judge thereafter reiterated the sentence which had been imposed on the video record on February 21, 1996, revoked the probation which had been granted on that date, and thereafter, entered formal documents to that effect on March 28, 1997. This appeal followed.

Cohron argues in this forum that he was denied his right to procedural due process in that: (1) neither he nor his counsel were aware that a revocation hearing was going to be conducted on March 7, 1997; and (2) the sentencing hearing conducted on that date did not comply with the requirements of RCR 11.02 or KRS 532.050. We disagree.

The fallacy in Cohron's contention with respect to lack of notice of the revocation is that the record clearly reflects the fact that Cohron did have notice of the revocation hearing. After a bench warrant issued and he was arrested for failure to appear at the first scheduled revocation hearing, Cohron was specifically informed that the case would be continued for a couple of weeks "on the hearing to revoke" to allow him to consult with appointed counsel. No one had as yet discovered that no written document had been entered evidencing Cohron's sentence imposed on February 21, 1996. The lack of a judgment of sentence in the written record was first brought to the trial judge's attention at the revocation hearing scheduled for March 7, 1997.

More important, however, we view the revocation procedure utilized by the trial judge to have afforded Cohron all the due process to which he was entitled. Like the Commonwealth, we believe that the three convictions based upon pleas of guilty are more than adequate support for the trial judge's decision to revoke Cohron's probation and are not susceptible to mitigating evidence or proof by witnesses. Gagnon v. Scarpelli, 411 U.S.

778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973). Cohron does not contest the validity of these convictions.

Furthermore, Cohron received written notice of the grounds for revocation as required by KRS 532.050(2), and appeared with counsel on the scheduled date of March 7, 1997. Similarly, we believe that the trial court's order of February 28, 1996, is sufficient to satisfy any requirements that Cohron be given written notice of the conditions of probation. Based upon these factors and our review of the video and written record of the trial court, we are firmly convinced that Cohron received all of the procedural due process to which he was entitled under the statutes and case law. Rasdon v. Commonwealth, Ky. App., 701 S.W.2d 716 (1986).

Next, Cohron argues that the trial judge violated the requirements of KRS 532.050 in failing to obtain and review a presentence investigation report prior to imposing sentence. Again, we disagree.

In the video transcript of the resentencing on February 21, 1996, the trial judge noted that a presentence investigation report was not required because Cohron had been incarcerated since his initial sentencing. When Judge Conliffe, on March 7, 1997, reiterated the sentence imposed on February 21 for the purpose of placing it in the written record, he properly noted that a PSI report had been prepared and considered in the initial sentencing and that only an error of law brought to light by the CR 60.02 motion necessitated the second sentencing. We are convinced that no violation of statute nor deprivation of due

process occurred on these facts. On the contrary, review of the record satisfies this court that Judge Conliffe's treatment of Cohron in every way comported with principles of due process. We will not disturb his decision solely on the basis of a technical error in failing to enter a written document restating the sentence plainly imposed on the record at the time the original sentence was set aside.

The judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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