

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-001325-MR

JAMES A. HINES

APPELLANT

v. APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE LEONARD L. KOPOWSKI, JUDGE
ACTION NO. 97-CR-00354

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: GUDGEL, CHIEF JUDGE; HUDDLESTON AND KNOPF, JUDGES.

KNOPF, JUDGE: James A. Hines appeals from an order of the Campbell Circuit Court revoking his probation on a conviction for theft by deception under \$300.00. We affirm.

In July 1997, Hines issued a check payable to Deborah Guthrie in the amount of \$4,000.00 to cover a business obligation. When Guthrie attempted to cash the check, the bank refused to honor it because of insufficient funds in the account. In September 1997, Guthrie swore out a criminal complaint alleging Hines had committed theft by deception by intentionally passing a bad check.

In November 1997, the Campbell County Grand Jury indicted Hines on one felony count of theft by deception over \$300.00 (KRS 514.040) for issuing the \$4,000.00 check to Guthrie knowing it would not be honored. Following plea negotiations with the prosecutor's office, Hines entered a plea of guilty to an amended charge of theft by deception under \$300.00, a Class A misdemeanor, on December 12, 1997. At the guilty plea hearing, the Commonwealth's Attorney moved to amend the indictment based on the condition that full restitution was made and on the belief that Hines had already made full restitution to the victim. Under the plea agreement, the Commonwealth recommended a sentence of "12 months probated for 2 years and restitution." At the hearing, Hines stated under oath that he had given Guthrie a cashier's check for \$4,020.00 in restitution. The trial court accepted the recommendation of the Commonwealth and immediately sentenced Hines to serve twelve months in jail for theft by deception under \$300.00 and placed Hines on unsupervised probation for a period of two years.

After performing an investigation shortly after the sentencing hearing, the prosecutor's office discovered that Hines had not given Guthrie a cashier's check, and in fact, had not given her any money in restitution. On December 16, 1997, the Commonwealth's Attorney filed a motion to revoke Hines's probation because "he committed perjury during the sentencing proceedings. . . ." On May 8, 1998, the trial court conducted a hearing on the revocation motion at which Hines appeared with counsel.

At the hearing, the prosecutor requested revocation because Hines's statements at the sentencing hearing concerning his payment of restitution had been false. Hines's attorney argued that probation could not be revoked because the false testimony Hines provided occurred prior to the trial court's sentencing order officially placing him on probation; therefore, he maintained that Hines had not committed an offense or violated a condition of probation, while on probation. The trial court held that restitution was a condition of probation and Hines had violated that term of probation. He also held that Hines had made false statements to the court at the sentencing hearing and found him in contempt for that act. The judge revoked Hines's probation and ordered him to serve six months in jail for criminal contempt to run concurrently with the reinstated twelve-month jail sentence on the conviction for theft by deception under \$300.00. This appeal followed.

Hines argues on appeal that the trial court's revocation of his probation violated Kentucky statutory law. He asserts that the granting of probation is governed by KRS 533.020(1), which provides:

When a person who has been convicted of an offense or who has entered a plea of guilty to an offense is not sentenced to imprisonment, the court shall place him on probation if he is in need of the supervision, guidance, assistance, or direction that the probation service can provide. Conditions of probation shall be imposed as provided in KRS 533.030, but the court may modify or enlarge the conditions or, if the defendant commits an additional offense or violates a condition, revoke the sentence at any time prior to the expiration or termination of the period of probation.

Hines contends that the trial court did not make the payment of restitution a condition of probation because the trial court believed restitution had already been paid. He states that under KRS 533.050, a trial court may revoke probation only for failure to comply with a condition of probation. See KRS 533.050(a) ("The Court may summon the defendant to appear before it or may issue a warrant for his arrest upon a finding of probable cause to believe that he has failed to comply with a condition of his sentence."); KRS 533.020(1) (court may revoke sentence at any time prior to the expiration or termination of the period of conditional discharge "if the defendant commits an additional offense or violates a condition of the conditional discharge").

First, we believe the trial court properly found that the payment of restitution was a condition or term of probation. The payment of restitution in the amount of \$4,000.00 clearly was a condition of the plea bargain agreement with the Commonwealth. The prosecutor stated that his recommendation that Hines be sentenced to a probated sentence of twelve months on a misdemeanor was predicated in part on the fact that Hines had agreed to pay restitution. In the space provided for the prosecutor's recommendation on the document entitled Commonwealth's Offer on a Plea of Guilty, the prosecutor wrote, "12 months probated for 2 years & restitution." Both Hines and his attorney told the judge at the guilty plea/sentencing hearing that Hines had agreed to pay restitution. When the trial court approved the plea agreement, it also accepted the condition of

restitution as part of the granting of unsupervised probation.¹
See, e.g., Polk v. Commonwealth, Ky. App., 622 S.W.2d 223
(1981) (restitution included as condition of probation based on
acceptance of plea agreement).

Due process requires that a defendant receive "fair notice" of the conditions and terms of probation before his probation or suspended sentence can be revoked for violation of a condition. See, e.g., United States v. Twitty, 44 F.3d 410, 412-13 (6th Cir. 1995); United States v. Gallo, 20 F.3d 7, 11 (1st Cir. 1994). See also Razor v. Commonwealth, Ky. App., 960 S.W.2d 472 (1997). Hines admits that the payment of restitution was not explicitly listed in the trial court's judgment because the judge believed Hines had already paid the victim the full amount of restitution at the time of the sentencing hearing. Hines cannot and does not proclaim that he did not have fair notice that the payment of restitution was a significant component of his request for and the trial court's decision to grant probation. Hines was fully aware of his obligation to make restitution. Under the circumstances of this case, Hines cannot legitimately claim that restitution was not a condition of his probation even though it was not explicitly included in the judgment. Cf. Razor, supra (even if defendant was not aware of condition of probation at initial sentencing, he was aware of the required condition within a few days thereafter).

¹See also KRS 533.030(3) which states that "the trial court shall order the defendant to make restitution in addition to any other penalty provided for the commission of the offense" when imposing a sentence of probation or conditional discharge and the victim has suffered monetary damage. (Emphasis added).

In addition, the trial court's action was justified under the "fraud on the court" principle. It is well-established that a court has authority to set aside or modify a judgment obtained by fraud based on its inherent supervisory power. Hazel-Atlas Glass Co. v. Hartford Empire Co., 322 U.S. 238, 244-45, 64 S. Ct. 997, 1000-01, 88 L. Ed. 2d 1250 (1944); Chambers v. NASCO, Inc., 501 U.S. 32, 44, 111 S. Ct. 2123, 2132, 115 L. Ed. 2d 27 (1991). See also Rasnick v. Rasnick, Ky. App., 982 S.W.2d 218 (1998) (discussing fraud affecting the proceedings under CR 60.02(d)).

In Potter v. Eli Lilly and Co., Ky., 926 S.W.2d 449, 453 (1996), the Kentucky Supreme Court recognized that a court has inherent powers, not governed by statute or rule, "to manage its own affairs so as to achieve the orderly and expeditious, accurate and truthful disposition of causes and cases." The Court stated:

It is obvious that along with the inherent power to set aside or correct the judgment after the time permitted by rule has expired, is the inherent power to conduct an independent investigation when there is a reasonable basis to believe that there is a possible lack of accuracy or truth in the original judgment. . . .

* * * *

The inherent authority of the court goes beyond actual fraud. It encompasses bad faith conduct, abuse of judicial process, any deception of the court and lack of candor to the court. Our system depends on the adversarial presentation of evidence. Even the slightest accommodation of deceit or a lack of candor in any material respect quickly erodes the validity of the process.

Id. at 454 (citation omitted). The court's authority to correct judgments obtained by fraud applies to criminal, as well as to civil cases. United States v. Bishop, 774 F.2d 771, 774 n.5 (7th Cir. 1985); State v. Carvajal, 147 Ariz. 307, 309, 709 P.2d 1366, 1369 (1985).

Although an issue of first impression in Kentucky, several courts have recognized a trial court's authority to revoke a defendant's probation under its inherent supervisory powers based on fraud on the court. See, e.g., Trueblood Longknife v. United States, 381 F.2d 17 (9th Cir. 1967), cert. denied, 390 U.S. 926, 88 S. Ct. 859, 19 L. Ed. 2d 987 (1968); United States v. Torrez-Flores, 624 F.2d 776 (1980); United States v. Twitty, 44 F.3d 410 (6th Cir. 1995); United States v. Gray, 708 F. Supp. 458 (D. Mass. 1989); Johns v. State, 223 Ga. App. 553, 479 S.E.2d 388 (1996). The grant of probation is considered a special privilege or act of grace extended to a defendant for his welfare and the welfare of society. Ridley v. Commonwealth, Ky., 287 S.W.2d 156 (1956); Tiryung v. Commonwealth, Ky. App., 717 S.W.2d 503 (1986). A trial court has discretion in deciding whether to grant probation or conditional discharge after considering the nature and circumstances of the crime, and the history, character, and condition of the defendant. See KRS 533.010. The court necessarily must be provided with complete and accurate information in order properly to exercise its discretion. A defendant who intentionally supplies materially inaccurate or misleading information to the judge at sentencing and perpetrates a fraud on the court is

subject to having his probation revoked. "Deceit, untruthfulness and deception at the time of the sentencing are always grounds for revoking a suspended sentence." Cottrell v. Commonwealth, 12 Va. App. 570, 574, 405 S.E.2d 438, 441 (1991). Fraud on the court is a recognized exception to the requirement that a court may revoke probation only for conduct occurring subsequent to sentencing. See id.; State v. Darrin, 325 N.W.2d 110 (Iowa 1982); Andrews v. State, 11 Kan. App. 2d 322, 720 P.2d 227 (1986); State v. Lumley, 25 Kan. App. 2d 366, 963 P.2d 1238 (1998); Bryce v. Commonwealth, 13 Va. App. 589, 414 S.E.2d 417 (1992).

In United States v. Bishop, 774 F.2d 771, 776 (7th Cir. 1985), the court explained the rationale for applying the "fraud on the court" principle in probation revocation situations:

The entire American system of justice is based upon the honesty and truth of its participants; that is why all witnesses are required to take an oath to tell "the whole truth and nothing but the truth" before testifying. Thus, the defendant's action in intentionally deceiving the court strikes at the very heart and foundation of the American system of justice. If a defendant, such as Bishop, intentionally commits a fraud upon the court by providing the court with erroneous information that the court relies upon in determining the length of the sentence, he certainly must bear the consequences of his fraudulent and deceitful actions.

Several courts have applied the fraud on the court principle to authorize probation revocation for a defendant's misleading actions with respect to restitution. For instance, in Commonwealth v. Meyer, 169 Pa. Super 40, 82 A.2d 298 (1951), Meyer told the trial court at sentencing that he had arranged to

pay restitution to the victim as evidenced by a note given to the prosecutor. After Meyer failed to honor the note, the trial court revoked his probation. The appellate court agreed with the trial court's holding that Meyer had committed fraud by misrepresenting his intention to make restitution. "Fraudulent representations which induce a probation order are grounds for its revocation and the imposing of sentence, just as much as acts of a defendant subsequent to the order in violation of his parole." Id. at 44-45, 82 A.2d at 301.

Similarly, in State v. Carvajal, 147 Ariz. 307, 709 P.2d 1366 (1985), Carvajal agreed to transfer a motorcycle to the victims of a theft as partial payment toward restitution; however, he had sold the motorcycle to a third party approximately a month prior to the sentencing hearing. After learning the motorcycle had been sold, the prosecutor filed a motion to revoke probation. The trial court revoked Carvajal's probation because he had perpetrated a fraud on the court by misrepresenting that the motorcycle was available to give to the victims as partial restitution. In affirming the trial court, the appellate court held "that where the defendant makes a fraudulent misrepresentation to a court, which the court accepts and relies upon in granting a suspended sentence and probation, the court may later declare the sentence void." Id. at 310, 709 P.2d at 1370.

Finally, in United States v. Kendis, 883 F.2d 209 (3d Cir. 1989), Kendis pled guilty to bank fraud for unlawfully converting his client's money while acting as an attorney. As

part of the guilty plea agreement, Kendis paid the victim's restitution prior to final sentencing. The trial court sentenced him to serve five years but ordered that he be placed on probation following service of a six-month term of incarceration. Approximately one month after Kendis had been released and while he was on probation, the government moved to revoke probation because he had improperly used funds entrusted to him by other clients in order to pay the restitution. In affirming the trial court's revocation of probation based on fraud on the court, the appellate court held that Kendis had relied heavily on his act of having paid restitution to persuade the trial court to grant him probation, and that his failure to reveal that he had paid the restitution with his client's money constituted fraud on the court. Id. at 210.

In the case sub judice, Hines agreed to pay restitution in the amount of \$4,000.00 to the victim as part of the plea agreement. Hines testified under oath at the sentencing hearing that he had given the victim a cashier's check for \$4,020.00 the morning of the hearing. Hines also testified that he had provided a Xerox copy of the cashier's check with the victim's signature on it to the prosecutor. At the revocation hearing, the prosecutor stated that upon investigation, he discovered that Hines had not given the victim a cashier's check, but rather that he had obtained a \$20.00 cashier's check and altered it to make it appear to have been issued for \$4,020.00, and that he had forged the victim's signature on the check. Hines did not dispute any of these facts. The trial judge found that Hines had

misled the court and had provided false information at the sentencing hearing when he held Hines in contempt. We believe the record supports the revocation of Hines's probation based on fraud on the court. See generally Cooksey Brothers Disposal Co., Inc. v. Boyd Co., Ky. App., 973 S.W.2d 64, 70 n.3 (1997) (appellate court may affirm trial court for reasons different than stated in its judgment), cert. denied, ___ U.S. ___, 119 S. Ct. 338, 142 L. Ed. 2d 279 (1998); Kentucky Farm Bureau Mut. Ins. Co. v. Gray., Ky. App., 814 S.W.2d 928, 930 (1991) (appellate court may affirm trial court for any reason sustainable by the record).

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

ALL CONCUR.

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