

RENDERED: SEPTEMBER 27, 2002; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-002660-MR

BARRY FEESE

APPELLANT

v. APPEAL FROM LINCOLN CIRCUIT COURT
HONORABLE WILLIAM T. CAIN, JUDGE
ACTION NO. 97-CR-00026

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING
** ** * * * * *

BEFORE: COMBS, JOHNSON AND SCHRODER, JUDGES.

JOHNSON, JUDGE: Barry Feese has appealed from an order entered by the Lincoln Circuit Court on September 27, 2000, which found that he had violated the terms of his probation by failing to complete a substance abuse counseling program, revoked his sentence of probation, and sentenced him to prison for a term of three years. Having concluded that the trial court did not abuse its discretion, we affirm.

On July 25, 1997, a Lincoln County grand jury indicted Feese for the offense of marijuana cultivation of five or more

plants,¹ a Class D felony. On June 16, 1998, Feese, by and through counsel, filed a motion to enter a guilty plea based on the offer by the Commonwealth to recommend a three-year prison sentence. On August 28, 1998, the trial court accepted Feese's guilty plea and ordered that a presentence investigation report be presented to the court prior to final sentencing. On December 18, 1998, the trial court sentenced Feese to three years in prison and noted that "probation or conditional discharge would unduly depreciate the seriousness of the defendant's crime."

On March 22, 1999, after serving 136² days in jail, Feese filed a motion for shock probation. The trial court granted Feese's motion on March 29, 1999, subject to the following conditions:

1. The defendant is to obtain drug counseling;
2. Submit to random drug and alcohol tests at his expense;
3. Pay any supervision fees;
4. Submit proof for the next six (6) months that he has been helping in the care of his son;³
5. Not commit any other offenses; [and]
6. Abide by necessary and appropriate conditions of probation as determined by

¹Kentucky Revised Statutes (KRS) 218A.1423.

²Feese had served 56 days in custody prior to sentencing.

³A letter from Sandy Lane, RN, was attached to the motion for shock probation and contained in the record. That letter states that Feese's son, Barry Jr., "has a diagnosis of leukemia and requires an intense amount of care."

the Court or the Probation Officer.

Subsequently, on January 21, 2000, the Commonwealth filed a motion to revoke Feese's probation, stating as grounds that on July 7, 1999, Feese tested positive for cocaine, and on December 17, 1999, after being arrested on September 11, 1999, he was convicted in Marion District Court for the offenses of reckless driving and resisting arrest. Instead of revoking Feese's probation as requested by the Commonwealth, the trial court by an order entered on March 3, 2000, amended Feese's probation "to include the condition that he attend and successfully complete the [substance abuse] program at Shepherd's House" in Lexington, Kentucky.

On August 16, 2000, the Commonwealth again filed a motion to revoke Feese's probation because he was terminated from Shepherd's House on May 10, 2000, for non-compliance with the program. A hearing was held on the matter on September 22, 2000. The Commonwealth presented the testimony of only one witness, Paul Barrett, Feese's probation officer. Feese testified on his own behalf, and called as a witness his employer, Cynthia Hungate. The direct examination of Feese included the following:

Ms. Mead⁴: Why were you terminated from
Shepherd's House?

Feese: Well, it was my understanding that
I could do volunteer work, and I
was volunteering at the VA. It was
a full-time job, and they didn't
agree with it and were discussing
it and they insulted me a few

⁴An Assistant Public Advocate representing Feese.

times, and I said something smart back to them, and that was the end of it.

Ms. Mead: And then you were terminated?

Feese: Yeah.

Ms. Mead: So they had an objection to you performing volunteer service work at the VA Hospital, is that right?

Feese: Yes.

Ms. Mead: Did they tell you what their objection was to that?

Feese: They were giving me some house restrictions and stuff, and I just told them that . . . I didn't think it was right because other people were allowed to do volunteer work.

Ms. Mead: Basically they were telling you at the Shepherd's House that you had to be restricted to the house.

Feese: At some degree.

Ms. Mead: More than others?

Feese: Right, more than other clients.

Upon cross-examination, Feese gave the following testimony:

Mr. Day⁵: Mr. Feese, did you understand that your condition of probation was amended to include, and I quote, "That . . . you attend and successfully complete the program at Shepherd's House."

Feese: Yes I did, and I really wanted to complete it, and when they wanted to throw me out I tried to get into other places. I made calls and I

⁵An Assistant Commonwealth's Attorney representing the Commonwealth.

asked Mr. Barrett but he wasn't in agreement to that.

Mr. Day: The reason that you did not complete [the program] was because of at least appearing angry and maybe using some profanity towards some of the persons that worked there. Would that be fair to say?

Feese: Something like that.

Mr. Day: The reason for you becoming angry and using profanity was that they wouldn't change the conditions to meet what you wanted to do.

Feese: No, basically they were talking to me and one just kept continually insulting me about not being willing to work. That I should live in a homeless shelter if I didn't want to work

Mr. Day: They did not want you to be gone off the grounds as much as you wanted to be gone. That was the number one problem, correct?

Feese: Yeah.

Mr. Day: They wouldn't let you go do volunteer work.

Feese: They were going to let me do volunteer work.

Mr. Day: But not as much as you wanted to?

Feese: Right.

Barrett testified that he did not recall Feese asking to be placed into a different program.

Ms. Mead: [A]nd did [Feese] contact you requesting that he be referred to a different substance abuse program?

Mr. Barrett:
That I don't recall.

Ms. Mead: You don't recall if he contacted you?

Mr. Barrett:

No. Well, he did call me, but I don't recall him requesting another program.

Ms. Mead: Has he asked you since he has been meeting with you that he be referred to another program?

Mr. Barrett:

Initially this was a condition of probation. Then I filed a motion to revoke him, and I did not see any point in reassigning any additional treatment since I had already filed the motion.

. . .

Ms. Mead: But he did speak to you about going to a different substance abuse program. You just didn't see the point.

Mr. Barrett:

He was specifically ordered to this program [emphasis added].

Ms. Mead: But he did ask to attend a different program.

Mr. Barrett:

Possibly, I can't say. It has been awhile.

Hungate testified that she hired Feese at the end of May 2000 to work for her construction company. Feese had already been promoted to the position of supervisor and Hungate testified that he was an asset to the company. She further stated that Feese was always on time for work and gave "150%" every day.

After hearing the evidence, the trial court ruled as follows:

The letter from Shepherd's House says during an individual counseling session while discussing some behavioral issues with his primary therapist Mr. Feese said he would like to contact his probation officer and be referred to a different substance abuse treatment program. At this time it was clear that Mr. Feese was no longer interested in substance abuse treatment at the Shepherd's House. This issue was discussed further with the director of the Shepherd's House program at which time Mr. Feese appeared to become angry and raising his voice and stating that the psychology of the program was bullshit. At this time the client was informed of his dischargement at the Shepherd's House program and was asked to leave the grounds. Client would not leave as requested and the police were called to escort him from the grounds. It is apparent that he does not like restrictions of any kind. After he was discharged I think it was very telling that he was asked to leave the grounds and he would not and it was required for the police to come and get him. Now, he brings in his employer, and I am sure he is doing a good job. When he was here in jail he was doing a good job over here. There are all sorts of letters. It says he is working in Kingsport, Tennessee. He is out of state. He is not suppose to be out of the state while he is on probation unless he has permission. He just doesn't follow anything. He has had his chances.

. . .

Mr. Feese just will not follow the rules as laid down. He has violated the terms that the Court imposed on him for his second violation of probation.

The trial court ordered that Feese's probation be revoked and that the three-year prison sentence be imposed. This appeal followed.

We are limited in our review of the trial court's decision to revoke Feese's probation to determining whether the

trial court abused its discretion.⁶ In Tiryung, this Court stated:

It is clear in this Commonwealth that probation is a privilege rather than a right. Brown v. Commonwealth, Ky.App., 564 S.W.2d 21 (1977). 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.⁷

In order to revoke probation, the Commonwealth must prove a violation of one of the conditions of probation by a preponderance of the evidence.⁸ Our review of the record reveals that the Commonwealth certainly presented sufficient evidence to satisfy that requirement.

In the case sub judice, it is undisputed that Feese violated the terms of his probation on two separate occasions, albeit that the first order of probation was amended to allow Feese to undergo and "successfully complete" the substance abuse counseling program at Shepherd's House. The order amended the terms of Feese's probation and a new condition was placed on his probation. Feese simply failed to complete the program at Shepherd's House as required, and thus, he failed to comply with the terms of the trial court's amended probation order. Feese's display of anger and offensive behavior toward the staff at

⁶Tiryung v. Commonwealth, Ky.App., 717 S.W.2d 503, 504 (1986).

⁷Id.

⁸Ransdon v. Commonwealth, Ky.App., 701 S.W.2d 716 (1986).

Shepherd's House certainly provided Shepherd's House with justifiable cause for terminating him from its substance abuse program. Clearly, there were sufficient grounds for the trial court to find that Feese had violated the terms of his probation, and the revocation of his probation was not an abuse of discretion.

For the foregoing reasons, the order of the Lincoln Circuit Court is affirmed.

ALL CONCUR.

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