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# Commonwealth of Kentucky

# Court of Appeals

NO. 2008-CA-001312-MR

GERALD BARKER — APPELLANT

APPEAL FROM GRAVES CIRCUIT COURT
v. HONORABLE TIMOTHY C. STARK, JUDGE
ACTION NO. 03-CR-00175

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: NICKELL AND VANMETER, JUDGES; LAMBERT,[1] SENIOR JUDGE.

VANMETER, JUDGE: Gerald Barker appeals from an order of the Graves Circuit Court revoking his probation. For the following reasons, we affirm.

In 2004, Barker pled guilty to nine counts of fraudulent use of a credit card over $100, one count of first-degree possession of a controlled substance

[1] Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

(cocaine), and one count of possession of drug paraphernalia. The trial court sentenced him to five years' imprisonment, probated for five years. The conditions of his probation mandated that Barker must "not commit another offense[.]"

In 2008, this matter came before the trial court on the Commonwealth's motion to revoke Barker's probation as a result of his arrest for four counts of fourth-degree assault. Barker appeared before the court with counsel for a probation revocation hearing, during which the court heard the testimony of Barker's probation officer. The probation officer testified that she received information that Barker had been arrested for four counts of fourth-degree assault, the victims of which were his entire family, and that Barker incurred the assault charges while on probation, in violation of the condition to not incur any new charges. The probation officer verified that she was relying on information contained in a uniform citation issued by the Kentucky State Police, as well as a conversation with Barker's sister, who was present when the alleged assault occurred. The probation officer acknowledged that a trial on the assault charges had not yet taken place, and that the court had not heard Barker's version of the events. Thereafter, Barker argued to the court that since he had not been convicted of assault, the conditions of probation had not been violated and probation revocation was premature. However, he offered no rebuttal testimony at the hearing. Ultimately, the court entered an order revoking Barker's probation for "violation of the terms of probation by arrest for assault 4th degree four (4) counts" and directed him to serve the remainder of his sentence.

On appeal, Barker contends that the trial court violated his due process rights by revoking his probation. In particular, he avers that the unproven charges of assault provided insufficient grounds for revocation of his probation, that the court improperly considered hearsay testimony at the probation revocation hearing, and that the court failed to make written findings. We disagree.

Kentucky law requires trial courts to condition any grant of probation upon the defendant not committing "another offense" during the period of probation. KRS 533.030(1) provides: "The court shall provide as an explicit condition of every sentence to probation or conditional discharge that the defendant not commit another offense during the period for which the sentence remains subject to revocation." Thus, "in this Commonwealth . . . probation is a privilege rather than a right." *Tiryung v. Commonwealth*, 717 S.W.2d 503, 504 (Ky.App. 1986). "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." *Id*; KRS 533.030.

Probation revocation hearings "must be conducted in accordance with minimum requirements of due process of law." *Rasdon v. Commonwealth*, 701 S.W.2d 716, 718 (Ky.App. 1986) (citing *Gagnon v. Scarpelli*, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973)). KRS 533.050(2) provides: "The court may not revoke or modify the conditions of a sentence of probation or conditional discharge except after a hearing with defendant represented by counsel and following a written notice of the grounds for revocation or modification."

"Probation revocation is not dependent upon a probationer's conviction of a criminal offense." *Commonwealth v. Lopez*, 292 S.W.3d 878, 881 (Ky. 2009) (citing *Tiryung*, 717 S.W.2d at 504). "Instead, the Commonwealth need only prove by a preponderance of the evidence that a probationer has violated the terms of probation." *Lopez*, 292 S.W.3d at 881 (citing *Rasdon*, 701 S.W.2d at 719). The appellate standard of review of a decision to revoke a defendant's probation is whether the trial court abused its discretion. *See Lopez, 292* S.W.3d at 881.

Here, in accordance with KRS 533.050(2), the court gave notice of, and conducted, a probation revocation hearing, at which Barker and his counsel were present and were afforded an opportunity to cross-examine Barker's probation officer, as well as to present rebuttal testimony. Barker was also provided written notice, in the court's order revoking his probation, of the grounds for revocation. Specifically, the order states that Barker's probation is revoked on grounds of "violation of the terms of probation by arrest for assault 4th degree four (4) counts." Having reviewed the record, we cannot say the trial court abused its discretion by reaching this conclusion.[2]

Barker contends further that the court's consideration of hearsay testimony at the probation revocation hearing violated his due process rights. However, a panel of this court addressed this issue in *Marshall v. Commonwealth*,

[2] We acknowledge the concerns raised by the dissenting opinion and if we were sitting as the trial court we may have waited until the underlying charges were adjudicated. However, because Kentucky caselaw permits the trial court to proceed as it did, we cannot conclude that the trial court abused its discretion.

638 S.W.2d 288 (Ky.App. 1982), and held that the admission of hearsay evidence at the defendant's probation revocation hearing did not violate due process. In so ruling, the court recognized that the due process rights afforded to a defendant in a parole revocation hearing, as set forth in *Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972), also apply to probation revocation hearings. *See Marshall,* 638 S.W.2d at 289 (citing *Scarpelli*, 411 U.S. 778, 93 S.Ct. 1756 (the reasoning of *Morrissey* applies to probation revocation proceedings)). The court in *Marshall* held that hearsay evidence is admissible at probation revocation hearings "especially when the reliability of the witnesses . . . can be easily ascertained." *Marshall*, 638 S.W.2d at 289. In this case, the court was in a position to ascertain the reliability of the probation officer's testimony, as described above. Reliance on said testimony in finding that Barker had violated the conditions of his probation did not violate Barker's due process rights and was not an abuse of the court's discretion.

Finally, Barker asserts that the court violated his due process rights by failing to make written findings. While "[f]indings are a prerequisite to any unfavorable decision and are a minimal requirement of due process of law[,]" *Rasdon*, 701 S.W.2d at 719, in this case, the court's written order revoking Barker's probation sufficiently discloses its findings so as to satisfy due process. The order specifically states that Barker "appeared in Court with counsel, and the Court having heard testimony and being sufficiently advised from the record, finds that the Defendant [Barker] has violated the conditions of probation" by "arrest for

assault 4th degree four (4) counts." Thus, Barker's assertion that the court's written findings are insufficient lacks merit.

The order of the Graves Circuit Court is affirmed.

NICKELL, JUDGE, CONCURS AND FILES SEPARATE OPINION.

LAMBERT, SENIOR JUDGE, DISSENTS AND FILES SEPARATE OPINION.

NICKELL, JUDGE, CONCURRING: I recognize and respect the minority's well-reasoned opinion that the trial court denied Appellant due process in revoking his probation. However, I am convinced the majority opinion reflects prevailing Kentucky law and am not persuaded that the trial court's action amounted to a denial of constitutional rights. Because the trial court did not abuse its discretion, *see Lopez* and *Tiryung*, I concur with the equally well-articulated majority opinion.

LAMBERT, SENIOR JUDGE, DISSENTING: A look beneath the surface of the artfully drafted majority opinion reveals an appalling lack of due process in this case. Perhaps the majority opinion reflects prevailing Kentucky law, but it fails to satisfy due process as articulated by the Supreme Court of the United States. *Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972); *Gagnon v. Scarpelli*, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973).

Although Appellant had a substantial history of contact with the criminal justice system,[3] what brought him before the court for revocation of his probation were misdemeanor charges of assault in the fourth degree brought by members of his own family. Following these charges, but before any adjudication of the merits, Appellant's probation officer sought probation revocation. At the revocation hearing defense counsel requested postponement until the underlying charges were adjudicated. That request was denied. The only witness to testify was Appellant's probation officer and her testimony disclosed that her information was based solely upon information from others. In its brief, the Commonwealth summarized the probation officer's testimony as follows:

> The Commonwealth called Appellant's probation and parole officer, Robin McGuire to testify. Officer McGuire testified that she received information that on May 29, 2008, Appellant had been arrested for attacking his entire family. Officer McGuire explained the information that she received concerning the charges and Appellant's arrest came from a Uniform Citation issued during Appellant's arrest. Officer McGuire then discussed the details set forth above concerning the Appellant's attack on his family members.

Upon this testimony alone, the trial court concluded the nine-minute probation revocation hearing with the following statement:

> I decide these cases on hearsay evidence and I have hearsay, first-hand hearsay, but hearsay nonetheless, to the fact that he had been drinking and he assaulted four family members. That would be a violation of the conditions of his probation. For that reason the court

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[3] Appellant was convicted in 2004 of nine counts of fraudulent use of a credit card over $100, one count of possession of a controlled substance in the first degree, cocaine, and one count of possession of drug paraphernalia.

> finds that he has violated the conditions of his probation. His probation is revoked and he is remanded to the Department of Corrections to serve out the remainder of his sentence.

At the outset, it should be observed that when a probation revocation for violation of the law occurs before adjudication of the underlying charge, the defendant is faced with the dilemma of standing mute and preserving his privilege against self-incrimination or testifying and waiving the privilege. Thus, even a denial of the charges or a plea of self-defense will be, in most cases, unavailable to the defendant in the pre-adjudication probation revocation proceeding.

The use of hearsay evidence during a probation revocation proceeding is particularly pernicious. The only witness to testify against Appellant was his probation officer, one who had no direct knowledge of the facts. As such, Appellant had no right of meaningful cross-examination. There was no opportunity to test the truth of the evidence presented as the probation officer could only repeat what others had told her.

In *Gagnon* the Supreme Court of the United States declared that in probation revocation, minimum requirements of due process include "the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation)." 411 U.S. at 786, 93 S.Ct. at 1762. The Court explained its view as follows:

> [D]ue process requires that the [factual] difference be resolved before revocation becomes final. Both the probationer or parolee and the State have interests in the accurate finding of fact and the informed use of

> discretion – the probationer or parolee to insure that his liberty is not unjustifiably taken away and the State to make certain that it is neither unnecessarily interrupting a successful effort at rehabilitation nor imprudently prejudicing the safety of the community.

*Id.,* 411 U.S. at 785, 93 S.Ct. at 1761. As Appellant was denied his confrontation rights, this proceeding failed to meet federal due process standards.

Though perhaps not amounting to a denial of constitutional rights, it is disturbing that the probation revocation hearing took place before adjudication of the fourth-degree assault charges; that the revocation hearing was so brief; and that the trial court failed to make written findings of fact. Probation revocation should not be a cut-and-dried summary proceeding that merely doffs its hat to procedural due process.

> We see, therefore, that the liberty of a parolee [probationer], although indeterminate, includes many of the core values of unqualified liberty and its termination inflicts a 'grievous loss' on the parolee [probationer] and often on others. It is hardly useful any longer to try to deal with this problem in terms of whether the parolee's [probationer's] liberty is a 'right' or a 'privilege.' By whatever name, the liberty is valuable and must be seen as within the protection of the Fourteenth Amendment. Its termination calls for some orderly process, however informal.

*Morrissey*, 408 U.S. at 482, 93 S.Ct. at 2601.

There is generally no great sympathy for persons who have committed felonies, are then granted probation and thereafter violate the terms of probation. I express no such sympathy here. It is true, however, that standard probation terms and the terms required of Appellant would put a deacon to the test. For one

convicted of a crime with the culture from which felony convicts emerge, the task is particularly onerous.

In circumstances where violation of any one or more of the multiple conditions of probation will suffice to revoke probation and send a defendant to prison, it is fundamental that due process rights be fully observed. Courts should require more than pre-conviction hearsay statements from a misdemeanor complainant and double hearsay contained in a police report. Unless there is some compelling reason to do otherwise, probation revocation for commission of a criminal offense should be postponed until guilt is established. And at a minimum, trial courts should make findings of fact as to their view of the evidence presented, if for no other reason than to permit meaningful appellate review.

For the foregoing reasons, I respectfully dissent.

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