

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-000481-MR

CHRISTOPHER BRIGHT

APPELLANT

v.

APPEAL FROM GRAVES CIRCUIT COURT
HONORABLE TIMOTHY C. STARK, JUDGE
ACTION NO. 04-CR-00191

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: NICKELL, STUMBO, AND WINE, JUDGES.

NICKELL, JUDGE: Christopher Bright appeals from an order of the Graves Circuit Court revoking his conditional discharge and imposing a five-year sentence for flagrant nonsupport. After reviewing the record, the briefs, and the law, we affirm.

On February 15, 2005, Bright pled guilty to a single count of violating KRS¹ 530.050, flagrant non-support, pertaining to two of his five children. He was sentenced to five years' imprisonment, conditionally discharged for five years. A condition of release was that he remain current on his monthly child support obligation of \$201.80 and that he pay an additional \$137.02 each month to reduce an arrearage of \$8,221.47.

On October 4, 2005, the Commonwealth moved to revoke the conditional discharge stating in an affidavit that Bright's arrearage had grown to \$10,205.43 and his last payment of \$64.34 was made on April 5, 2005. The motion to revoke was denied.

The Commonwealth filed a second motion to revoke on June 23, 2006. By this time Bright's arrearage had increased to \$12,236.26 and he had made no payments since April 5, 2005. The motion was denied.

On March 1, 2007, the Commonwealth filed a third motion to revoke. The Commonwealth stated Bright's arrearage had grown to \$13,816.32 and he had made one payment of \$38.64 on January 20, 2007.

At a revocation hearing on February 11, 2008, the trial court found from the bench that Bright had willfully and intentionally refused to comply with the terms of his release. The court noted that in just three years, the original arrearage of \$8,221.47 had nearly doubled to \$15,189.07 and Bright had received "several chances" to comply with the terms of the conditional discharge, but no

¹ Kentucky Revised Statutes.

payment had been made in more than six months. Because Bright appeared “able-bodied and apparently able to work,” the court stated it had no option but to find “a wilful refusal to make his child support payment,” revoke the conditional discharge and order Bright to serve the remainder of his original five-year sentence. Two days later, on February 13, 2008, the court entered a written order revoking Bright’s conditional discharge and stating in relevant part,

[t]he Court having heard testimony and being sufficiently advised from the record, finds that [Bright] has violated the conditions of his conditional discharge.

On March 6, 2008, Bright filed a notice of appeal to this Court. We affirm.

Bright’s first allegation of error is that the trial court’s order did not satisfy the minimum due process requirements for parole revocation as announced in *Morrissey v. Brewer*, 408 U.S. 471, 488-89, 92 S.Ct. 2593, 2604, 33 L.Ed.2d 484 (1972), or for probation revocation as explained in *Gagnon v. Scarpelli*, 411 U.S. 778, 786, 93 S.Ct. 1756, 1761-62, 36 L.Ed.2d 656 (1973). Both *Morrissey* and *Gagnon* require a *written* statement of the evidence on which the revocation is based and a statement of the reasons for the revocation. In *Commonwealth v. Alleman*, --- S.W.3d ---, 2010 WL 997402 (Ky. 2010), our Supreme Court recently held “a recorded oral recitation by the trial court of findings and reasons for revocation, if otherwise sufficient, satisfies applicable due process requirements.” *Id.* at *2. Thus, the absence of written findings and reasons is not fatal.

In *Alleman*, the Supreme Court saw no due process violation where at the conclusion of a probation revocation hearing the court stated on the record,

I think it is reasonable to go ahead and revoke for the Hardin County time given that he had absconded from supervision for a significant period of time.

According to the *Alleman* opinion, the trial court's written revocation order stated, "Defendant has violated his/her terms of probation . . . but provided no other facts or reasons for revoking probation." *Id.*

At the conclusion of the evidence in Bright's revocation hearing, the court stated on the record that it found Bright was both able-bodied and able to work; that he had willfully refused to pay child support; that his arrearage had nearly doubled rather than decreased; that the court had given Bright numerous chances to comply with the terms of his conditional discharge but no payment had been made in six months; and therefore the court had no alternative but to revoke the conditional discharge and remand Bright to custody. When comparing the court's findings and rationale for revocation in *Alleman* with those in the case *sub judice*, we must conclude no due process violation occurred. While the court's findings and rationale were not reduced to writing, they were in fact spread upon the videotaped record and available for our review. In light of the holding in *Alleman*, there is no basis for reversal.

Furthermore, the same accusation was leveled against the same trial court in *Gamble v. Commonwealth*, 293 S.W.3d 406, 412 (Ky. App. 2009). The orders entered in both cases were identical. Having affirmed the sufficiency of the court's written order in *Gamble*, we have no reason not to follow suit in this case.

Bright's second complaint is that the court violated his right to due process by not requiring the Commonwealth to prove he wilfully refused to pay child support and by failing to consider alternatives to incarceration. Again, the same contention was raised in *Gamble* and we affirmed.

As explained in *Gamble*,

in probation revocation proceedings, the Commonwealth has a burden to prove by a preponderance of the evidence that the defendant violated the conditions of his or her probation. *Murphy v. Commonwealth*, 551 S.W.2d 838, 841 (Ky. App. 1977). The Commonwealth met its burden in this regard by submitting evidence that Gamble had violated the conditions of his probation by not paying his child support as had been ordered.

Id. at 411. The same is true of the case *sub judice*. Therefore, there is no basis for reversal.

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

ALL CONCUR.

BRIEFS FOR APPELLANT:

Kathleen Schmidt
Assistant Public Advocate
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

David W. Barr
Assistant Attorney General
Frankfort, Kentucky