

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-000307-MR

CHRISTOPHER SHELTON

APPELLANT

v. APPEAL FROM HENDERSON CIRCUIT COURT
HONORABLE STEPHEN A. HAYDEN, JUDGE
ACTION NOS. 06-CR-00089 & 06-CR-00159

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE AND STUMBO, JUDGES; LAMBERT,¹ SENIOR JUDGE.

LAMBERT, SENIOR JUDGE: Christopher Shelton appeals from an order of the Henderson Circuit Court revoking his three-year conditional discharge. He contends that because he did not receive adequate notice of the allegations leading

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.

to revocation, the trial court's order must be vacated and this matter remanded for a new revocation hearing. Upon our review, we affirm.

Facts and Procedural History

Appellant was convicted of two counts of first-degree sexual abuse in July 2006 and sentenced to serve one year in prison on each count after entering an *Alford*² plea of guilty. The victims were his stepdaughters, both of whom were minors. Appellant was released in July 2007 and began serving a mandatory three-year period of conditional discharge pursuant to KRS 532.043.³ Upon his release, Appellant signed and acknowledged the standard conditions of discharge supervision and also the supplemental conditions of supervision for sex offenders with Probation and Parole Officer Lauren Adams.

On October 13, 2008, Officer Adams submitted an affidavit to the circuit court requesting that the court revoke Appellant's conditional discharge due to violations of the terms and conditions of that discharge. The affidavit alleged that Appellant: (1) had contact with one of his victims; (2) admitted to Officer Adams that he had spent thirty minutes at a bar;⁴ and (3) had spent nights at places other than his approved residence, which was a camper at the Willow Creek Campground. Attached to the affidavit was a signed statement from Linda Gibbs,

² *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970).

³ The mandatory period of conditional discharge was subsequently increased to five years by the General Assembly. See KRS 532.043(2); 2006 Ky. Acts ch. 182, sec. 42.

⁴ The trial court did not rely upon evidence concerning this allegation in revoking Appellant's conditional discharge; therefore, we decline to address it any further.

the “life-partner” of Appellant’s mother, Brenda Cook, indicating that Appellant had been seen with his stepdaughters, including one of the victims, on multiple occasions since his release and that he had slept at his wife’s house on at least one occasion. Appellant was arrested and a revocation hearing was held over the course of two days.

At the hearing, Officer Adams testified that she received Gibbs’ signed statement in October 2008 and that she had received numerous reports from Gibbs indicating that Appellant had had contact with his victims. According to Officer Adams, Appellant denied seeing the victims when she would question him about it, but he generally stuttered when doing so even though he did not stutter when he answered other questions. Officer Adams further testified that she spoke with Gibbs and Appellant’s mother on multiple occasions about these allegations and that their stories were consistent with the assertions in Gibbs’ statement. However, Officer Adams also acknowledged that the victims had denied having had any contact with Appellant.

Officer Adams also testified that Appellant had stayed in places other than his approved residence without her permission, which was a violation of the discharge condition that Appellant maintain only one approved residence. Officer Adams indicated that prior to taking a polygraph examination in September 2008, Appellant told the examiner that he stayed at his wife’s home four to six nights per month and that he had stayed with her at an inn in Henderson earlier that month. Officer Adams testified that Appellant was allowed to stay at his wife’s house if he

cleared it with her first and the victims were not there; however, he had not received permission for these stays. Officer Adams also stated her belief that Appellant had not been living in his camper because she could never find him there when she visited, his water was not hooked up, and the camper did not have electricity on at least one occasion when she visited. She also spoke with a woman from the area who indicated that she had never seen anyone at the camper. Officer Adams acknowledged, however, that she only attempted to visit Appellant once every one to three months.

The Commonwealth also called Linda Gibbs as a witness. She testified that she called Officer Adams whenever she saw Appellant with the victims and specifically recounted two incidents where this had occurred. She also testified that she overheard a phone conversation that Appellant and his mother had had in which he told her that he had spent the night with his half-sister in Evansville, Indiana in June or July 2008. Appellant objected to the testimony concerning this incident on the grounds that Gibbs had not made mention of it in her written statement, but the circuit court overruled the objection.

Appellant also testified at the revocation hearing and denied the allegations against him. He indicated that he and Linda Gibbs had a rocky relationship because of the way Gibbs treated his mother and stated his belief that Gibbs was trying to get his discharge revoked out of revenge because Appellant

and his sister⁵ had had Gibbs arrested for assaulting their mother in July 2008. He denied having had any contact with the victims since his release.

As for the residence allegations, Appellant acknowledged staying at his wife's house on one occasion without Officer Adams' permission and staying at the inn with his wife without permission. However, he said that he was unable to get in touch with Officer Adams as to the first incident and explained that he stayed at the inn because of a power outage following a windstorm. Appellant testified that he had had Officer Adams' permission on all other occasions that he had stayed away from home. Appellant also denied telling the polygraph examiner that he stayed at his wife's house four to six times a month; he instead indicated that he told him that he had stayed at her house four to six times since his last polygraph examination. Appellant further testified that he lived in the camper and that he used water tanks and battery packs instead of a water line or electrical hookup. Appellant also denied Gibbs' allegation that he had spend the night with his half-sister in Evansville and stated that he had not asked Officer Adams' permission for such a stay.

Following the hearing, the circuit court revoked Appellant's conditional discharge based on the testimony from Officer Adams and Gibbs. The circuit court specifically found that Appellant had failed to maintain a residence at the address given to his probation officer. The circuit court noted that Officer Adams had visited Appellant's camper on several occasions and had never found

⁵ Appellant's sister also testified at the revocation hearing and reiterated Appellant's testimony about his troubled relationship with Gibbs.

Appellant there and that Appellant did not connect the trailer for power or water. The circuit court further noted that Gibbs' testimony regarding the alleged night that Appellant spent in Evansville bolstered the Commonwealth's argument that Appellant had changed his residence without approval. The circuit court also found that Appellant had violated the terms of his conditional discharge by having contact with his victims. This appeal timely followed.

Analysis

On appeal, Appellant argues that he was denied due process at his revocation hearing because he did not receive adequate notice of all of the allegations against him. Therefore – he asserts – a new revocation hearing is required. He specifically contends that he should have received written notice prior to the hearing about Gibbs' allegation that he had spent a night in Evansville without his probation officer's permission.

In considering this argument, our concern is whether the revocation proceeding herein complied with the minimal due process requirements set forth by the United States Supreme Court in *Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972), and *Gagnon v. Scarpelli*, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973). *See Robinson v. Commonwealth*, 86 S.W.3d 54, 56 (Ky. App. 2002); *Rasdon v. Commonwealth*, 701 S.W.2d 716, 718 (Ky. App. 1986). A revocation proceeding “is not a part of a criminal prosecution and thus the full panoply of rights due a defendant in such a proceeding does not apply to parole revocations.” *Morrissey*, 408 U.S. at 480, 92 S.Ct. at 2600. However, a

defendant is still entitled to written notice of the claimed violations of his conditional discharge and disclosure of the evidence against him. *Id.*, 408 U.S. at 489, 92 S.Ct. at 2604; *Robinson*, 86 S.W.3d at 56. KRS 533.050(2) similarly provides that “[t]he 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.”

In support of his position, Appellant argues that *Rasdon v. Commonwealth, supra*, is directly on point. The defendant in *Rasdon* was charged with sodomy and robbery of a woman identified by witnesses as a “street-wise Louisville prostitute” while on conditional discharge. The Commonwealth subsequently notified the defendant that it would seek to revoke the discharge based upon his “violation of the conditions of conditional discharge, especially” his re-arrest and the existence of probable cause for those offenses. *Rasdon*, 701 S.W.2d at 717. However, after hearing evidence regarding these matters, the trial court – somewhat oddly – revoked the defendant’s conditional discharge based solely upon its finding that the defendant had failed to “avoid persons or places of disreputable or harmful character.” *Id.* at 718. While this was one of the conditions of the defendant’s release, it was not one of the written grounds provided by the Commonwealth in its revocation notice to the defendant.

We held that a new revocation hearing was merited under these circumstances because the trial court “erroneously revoked [the defendant’s]

conditional discharge for a reason other than one contained in the notice of the hearing.” *Id.* at 717. We noted: “Even if we accept the fact that the avoidance of disreputable characters was one of the conditions for Rasdon’s conditional discharge, we can only conclude that he was not given notice that this would be one of the grounds for violation and revocation.” *Id.* at 719. We further held that despite its general reference to violations of the defendant’s discharge terms, the written notice in question “applies only to a rearrest and probable cause to believe that he had committed a new crime. If other specific violations existed, they should have been stated in some manner to notify him of the charges he would be required to defend.” *Id.* at 717.

The case before us is distinguishable from *Rasdon*, however, because the discharge revocation in that case was based solely upon a ground that had not been included in the notice of revocation – the defendant’s failure to “avoid persons or places of disreputable or harmful character.” *Id.* at 718. The trial court in that case did not even consider the defendant’s rearrest or the existence of probable cause that he had committed another crime as bases for its decision even though the evidence likely would have supported them. *See id.* at 719. Thus, the offenses for which the defendant was given written notice played no role in the trial court’s revocation decision, making a new hearing clearly necessary.

In contrast, the circuit court here revoked Appellant’s conditional discharge on two grounds – that he had had contact with his victims and that he had changed his residence without approval. Appellant has alleged no procedural

irregularities with respect to the improper-contact charge, and the circuit court could have revoked Appellant's conditional discharge solely on this basis.⁶ *See Lucas v. Commonwealth*, 258 S.W.3d 806, 807-08 (Ky. App. 2008) ("Generally, a trial court's decision revoking probation is not an abuse of discretion if there is evidence to support at least one probation violation."). Moreover, there was considerable evidence presented other than the testimony relating to the Evansville incident to support the circuit court's finding that Appellant had failed to maintain a residence at the appropriate address. However, even assuming that the notice given to Appellant was inadequate as to the residence charge because of the "new" contention that he had spent the night with his half-sister in Evansville, we believe that any such error in this regard was harmless since he was provided with adequate written notice of another independent ground for revocation of his conditional discharge. Although it would have been preferable for the notice provided by the Commonwealth to have contained this specific factual allegation, we believe that Appellant's minimal due process rights were satisfied here. To hold otherwise would serve nothing more than to put form over substance.

Conclusion

For the foregoing reasons, the order of the Henderson Circuit Court revoking Appellant's conditional discharge is affirmed.

ALL CONCUR.

⁶ We also note that Appellant has failed to challenge the substantive validity of the trial court's decision. In any event, we do not believe that an abuse of discretion occurred in that respect. *See Tiryung v. Commonwealth*, 717 S.W.2d 503, 504 (Ky. App. 1986).

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