In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-10-00232-CR

CHRISTOPHER M. KOPESKI, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 411th District Court
San Jacinto County, Texas
Trial Cause No. 9341

MEMORANDUM OPINION

Pursuant to a plea agreement, Christopher M. Kopeski pleaded no contest to aggravated assault. The trial court placed him on deferred adjudication community supervision for ten years. The State filed a motion to adjudicate guilt, and the trial court conducted a hearing. Finding that Kopeski had violated the terms of his unadjudicated community supervision, the trial court adjudicated his guilt and sentenced him to six years in prison. Kopeski raises three issues on appeal.

PRELIMINARY HEARINGS

The defendant appeared in court on several occasions after the State filed its motion to adjudicate guilt; these appearances occurred before the trial court appointed an attorney for Kopeski, and before the trial court revoked Kopeski's community supervision and adjudicated his guilt. At an April 14, 2008 hearing, the trial judge told Kopeski, "You are here today for an arraignment on this allegation of violating your probation." The trial judge asked Kopeski if he had an attorney, and Kopeski responded "No, sir." The court then stated, "Well, you had some money to make a bond, did you not?" Kopeski stated, "My wife did, yeah. I've got some money in the next two days to pay on my probation." After an initial discussion of his alleged violations, the trial court reset the hearing for April 28, 2008. When Kopeski did not appear for the scheduled April 28 hearing, the trial court forfeited his bond and then reset the hearing to June 23. When Kopeski did not appear on June 23, his bond was again forfeited and an arrest warrant was issued.

The next hearing was held on July 14, 2008. The trial judge asked Kopeski if he had an attorney for the revocation hearing, and Kopeski answered "No, sir." The probation officer stated that "[w]e have a motion to revoke [the community supervision]," and then explained what violations the motion alleged. The trial judge asked Kopeski questions about the alleged violations. Kopeski explained he had a job and he had signed up for the anger management class. The State recommended that Kopeski's

case be reset for 90 days to allow him additional time to complete the anger management class and get "his fees corrected." The trial judge reinstated Kopeski's bond and reset the case to October 27, 2008, to give Kopeski time "to make some improvement."

At the October 27 hearing, Kopeski indicated he had some money to pay on his fees, had just bought a car, and would not have any more problems reporting to his probation officer. The trial court reset the hearing.

On January 5, 2009, the trial judge held what he described as a "status hearing." The probation officer informed the trial court that Kopeski's fees were "$1,640 delinquent." Kopeski explained he had some money to pay some of that amount, and the trial judge indicated that Kopeski should pay the money on the fees. The court reset the hearing for March 16.

At the March 16, 2009 hearing, the probation officer stated Kopeski was there for a "compliance hearing" and explained that he was $1,200 delinquent and had not provided a certificate of completion for the anger management class. Kopeski told the judge that he had completed the class, but did not have the money to pay for the certificate. The prosecutor and the probation officer asked that the case be set for a contested revocation hearing. The trial judge then appointed an attorney to represent Kopeski, and reset the hearing for June 15, 2009.

Kopeski's attorney was present for the remainder of the hearings, including the June 15, 2009 hearing, when Kopeski did not appear. At the March 1, 2010 hearing, the

prosecutor stated that Kopeski was in the Liberty County Jail and would be bench warranted for the next hearing. Another hearing was held on March 29, 2010. Trial counsel informed the trial judge that Kopeski had turned down the State's offer, and the trial judge scheduled the motion-to-adjudicate hearing for April 12, 2010.

ADJUDICATION HEARING

On April 12, the trial court conducted the hearing on the motion to adjudicate. Kopeski and his attorney were present. Two community supervision officers, Kopeski, and Kopeski's wife testified. Koma O'Guin identified Kopeski as a probationer on her case load. She indicated that the alleged community supervision violations were in three categories: failure to report, failure to pay, and failure to complete an anger management class. O'Guin testified that although Kopeski was required to report to her every month, he failed to report in July, August, and September of 2007. He also failed to report his telephone number; failed to pay the $60 per month assessed for restitution, court costs, fines, and court-appointed fees for July, August, and September of 2007, as well as the $40 per month probation fee for those same months; failed to pay a $50 contribution to San Jacinto County Crime Stoppers; and failed to complete an anger management class. O'Guin testified Kopeski was an absconder from July through December 2007 and January through April 2008.

When Kopeski became an absconder again in 2009, he was put on Alex Adams's caseload. Adams testified the Department was recommending revocation of community

supervision, because "[t]here is not much we can do with somebody that does not report to the probation department."

Kopeski testified at the hearing. He explained he had trouble paying his fees because he was having trouble with his legs and with the prostheses for his legs. He draws $580 each month for disability. He stated he did not have the money to pay the phone bill, and that was why he did not report a phone number. Kopeski testified he completed the anger management class. At the time of the hearing, Kopeski was currently serving a sentence for another offense, which occurred before he was placed on deferred adjudication for the instant offense. He indicated he had been in custody continuously since January 14, 2010, but that he had a good job waiting for him upon his release from jail. He stated he failed to report to the probation officer, because he did not have a car or a ride after the hurricane.

The trial court found Kopeski violated five conditions of his community supervision order and sentenced him to six years in prison.

RIGHT TO COUNSEL

In issue one, Kopeski argues he was entitled to counsel on April 14, 2008, when the motion to adjudicate was first presented, but the trial court did not appoint counsel until March 19, 2009. Kopeski contends that even though he did not have counsel at these earlier court appearances, the trial court nonetheless accepted testimony from him and

"instructed the State to verify the testimony."[1] Kopeski also contends the trial court instructed him "to continue functioning as if on community supervision while [he was] unrepresented by counsel."

The United States Constitution, the Texas Constitution, and the Code of Criminal Procedure provide that an accused in criminal prosecutions shall have the right of assistance of counsel for his defense. *See* U.S. Const. amend. VI, Tex. Const. art. I, § 10, Tex. Code Crim. Proc. Ann. arts. 1.05 (West 2005), 1.051(c) (West Supp. 2010). The Sixth Amendment right to counsel attaches only at or after the initiation of adversary judicial proceedings against the defendant, or, as it has also been stated, at all critical stages of the criminal proceeding. *See U.S. v. Gouveia*, 467 U.S. 180, 187-89, 104 S.Ct. 2292, 81 L.Ed.2d 146 (1984); *Green v. State*, 872 S.W.2d 717, 719 (Tex. Crim. App. 1994). The Texas Code of Criminal Procedure provides a right to counsel for revocation proceedings. *See* Tex. Code Crim. Proc. Ann. art. 42.12, §§ 5(b), 21(d) (West Supp. 2010); *Hatten v. State*, 71 S.W.3d 332, 333 & n.1 (Tex. Crim. App. 2002) (citing *Ruedas v. State*, 586 S.W.2d 520 (Tex. Crim. App. 1979)).

[1]Kopeski also appears to argue that because trial counsel was not appointed until after these hearings, his trial counsel must have been unprepared when he was appointed. Trial counsel did not indicate he was unprepared and the record does not support the allegation of ineffectiveness of the counsel when appointed. On this record, we cannot conclude that counsel was ineffective. *See Jackson v. State*, 877 S.W.2d 768, 772 (Tex. Crim. App. 1994) (Baird, J., concurring); *Ryan v. State*, 937 S.W.2d 93, 98 (Tex. App.—Beaumont 1996, pet. ref'd).

"[I]t is essential that no criminal defendant be subjected to formal adversarial judicial proceedings without a lawyer unless there is a basis for concluding that he knowingly, voluntarily, and intelligently relinquished or abandoned his right to the assistance of counsel." *Oliver v. State*, 872 S.W.2d 713, 715 (Tex. Crim. App. 1994). "[S]uch a conclusion cannot rationally be reached on the basis only of a failure to request that a lawyer be appointed." *Id*. A criminal defendant's appearance in court without counsel necessitates an examination by the trial judge to assure that the defendant is actually aware of his right to retain an attorney and to discover whether he intends to do so. *Id*. at 716.

A proceeding is a "critical stage" if "'the accused required aid in coping with legal problems or assistance in meeting his adversary.'" *Green*, 872 S.W.2d at 720 (quoting *United States v. Ash*, 413 U.S. 300, 313, 93 S.Ct. 2568, 37 L.Ed.2d 619 (1973)). No bright line rule exists as to whether a specific stage of a criminal proceeding constitutes a critical stage. *Hidalgo v. State*, 983 S.W.2d 746, 752 (Tex. Crim. App. 1999) (citing *Gouveia*, 467 U.S. at 187-89); *State v. Frye*, 897 S.W.2d 324, 327-28 (Tex. Crim. App. 1995)). The reviewing court scrutinizes the pretrial event with a view to ascertaining whether the presence of counsel was necessary to assure fairness and the effective assistance of counsel at trial. *Green*, 872 S.W.2d at 720-21.

The record prior to counsel's appointment indicates the hearing was re-set on each occasion. We cannot say that anything that occurred at the defendant's prior appearances

require the aid of counsel to cope with any legal problem or assist in meeting the prosecutorial adversary. There was no plea of "true" or "not true" taken from Kopeski, no sworn testimony received, no community supervision revoked, and no guilt adjudicated. The record reveals that the trial judge and Kopeski discussed Kopeski's problems with reporting to the probation department, delinquency in paying fees, and attendance at the anger management class, but the trial court did not consider the State's motion and adjudicate guilt until April 12, 2010. When the case required a hearing where incarceration could result, trial counsel was appointed. We overrule issue one.

DUE PROCESS

In issue two, Kopeski argues that his due process rights were violated when, after the trial court repeatedly reset the hearing and gave Kopeski opportunities to improve his situation, the trial judge later, without allegations from the State of any new infractions by Kopenski, granted the State's motion and adjudicated Kopeski's guilt on the same grounds as alleged in the motion to adjudicate. Relying on *Rogers v. State*, Kopeski contends that the trial court was without authority to subsequently revoke his community supervision "without notice of further pleadings of violations that occurred after the probation was reinstated." *See Rogers v. State*, 640 S.W.2d 248 (Tex. Crim. App. 1981).

In *Rogers*, the trial court held a hearing on the motion-to-revoke. *Id*. at 248-49. Rogers and his counsel were present. *Id*. Immediately before the hearing, Rogers signed a stipulation of evidence and confessed to all six of the violations contained in the State's

motion to revoke. *Id*. at 249. After engaging in a colloquy with the defendant, the trial judge gave Rogers "sixty days just to straighten up, and if you don't, you're finished." *Id*. At the next hearing, without hearing any evidence, the trial court revoked the defendant's probation on the basis of the six violations Rogers previously stipulated to as "true." *Id*. The trial court imposed sentence. *Id*. The Court of Criminal Appeals stated that "due process mandates another determination that the probationer has breached the conditions of probation *after* he has been returned to probation (or that there is newly discovered evidence of a previous violation which was not known at the time of the first revocation hearing)." *Id*. at 263 (op. on rehearing). "And this new determination must occur at another revocation hearing for which the probationer has been served with a new motion to revoke giving him proper notice as required by due process." *Id*.

At the preliminary hearings here, no testimony was given. Kopeski did not plead "true" or "not true" to the alleged violations of the community supervision and did not stipulate to any evidence. The trial court did not revoke his community supervision or adjudicate guilt at the preliminary hearings. The motion to adjudicate hearing did not occur until over a year after the trial court appointed counsel for Kopeski.

After stating the legal principles regarding revocation in *Rogers*, the Court of Criminal Appeals held that Rogers could not complain on appeal of the failure of the trial court to hold the hearing when he did not preserve error in the trial court by making a due process objection, "either at the time the judge continue[d] the hearing and/or probation,

or at the time of actual revocation or at the time of sentencing." *Id*. at 263-64. As in *Rogers*, Kopeski's counsel did not make any objections to the procedures used by the trial judge at the hearing on the motion to adjudicate. *Id*. at 264-65. Even if Kopeski's issue had merit, the complaint was waived. *See id*. at 265. Issue two is overruled.

EVIDENCE OF VIOLATIONS

In issue three, Kopeski argues the trial court abused its discretion in finding he had violated the terms and conditions of his community supervision. Kopeski contends the State did not establish that he had the ability to pay the fines and fees.

In a revocation proceeding, the State has the burden of proving a violation by a preponderance of the evidence. *Cobb v. State*, 851 S.W.2d 871, 873 (Tex. Crim. App. 1993). We review the revocation order under an abuse of discretion standard. *Rickels v. State*, 202 S.W.3d 759, 763 (Tex. Crim. App. 2006). Proof of a single violation of the conditions of community supervision is sufficient to support a revocation order. *See Moore v. State*, 605 S.W.2d 924, 926 (Tex. Crim. App. 1980).

In addition to the probation officer's testimony regarding failure to report, Kopeski admitted he did not always report. The State proved by a preponderance of the evidence that he violated a condition of his community supervision order. The trial court did not abuse its discretion in granting the State's motion to adjudicate and adjudicating Kopeski's guilt. We overrule issue three.

The judgment of the trial court is affirmed.

AFFIRMED.

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DAVID GAULTNEY
Justice

Submitted on April 13, 2011
Opinion Delivered August 10, 2011
Do Not Publish

Before McKeithen, C.J., Gaultney and Horton, JJ.