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# ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 2018-2019

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CR-17-0634

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Bobby Joe Allen

v.

State of Alabama

Appeal from Limestone Circuit Court  
(CC-16-752.70; CC-17-176.70; CC-17-381.70)

McCOOL, Judge.

Bobby Joe Allen appeals from the Limestone Circuit Court's revocation of his community-corrections sentence and his probation. On November 1, 2017, Allen pleaded guilty to the possession of a controlled substance in Case No. CC-17-

CR-17-0634

381, to third-degree possession of a forged instrument in Case No. CC-17-176, and to first-degree theft of property in Case No. CC-16-752. Allen was sentenced to 36 months' imprisonment, 54 months' imprisonment, and 96 months' imprisonment, respectively. Each sentence was split and Allen was ordered to serve 180 days in community corrections, followed by 24 months of supervised probation, for each conviction, to be served concurrently.

On January 15, 2018, the State filed a petition to revoke Allen's community-corrections sentences for violating the conditions of his community-corrections sentences when he was arrested for new criminal charges of second-degree assault, resisting arrest, and disorderly conduct. On February 21, 2018, the State filed a second motion to revoke Allen's community-corrections sentences, alleging that Allen had committed the new offenses of possession of a controlled substance, possession of drug paraphernalia, and attempting to elude. A revocation hearing was set for March 7, 2018. Following a hearing on the matter, the circuit court revoked Allen's community-corrections sentences and his probation. The

CR-17-0634

circuit court entered a written revocation order on March 7, 2018.

On March 29, 2018, Allen filed a pro se notice of appeal. On April 10, 2018, Allen, through appointed appellate counsel, filed a "Motion for New Trial," i.e., a motion for new revocation hearing, in which Allen argued that the evidence presented at the hearing was insufficient to support, to a reasonable satisfaction, the conclusion that he had violated his probation; that his community-corrections sentences and his probation had been revoked based solely on hearsay testimony; that the sentence imposed exceeds the maximum permitted by law; that a full revocation of his community-corrections sentence and his probation was unduly excessive; that the court failed to comply with the minimum due-process requirements of Rules 27.5 and 27.6, Ala. R. Crim. P., and § 15-18-175(d)(3)b., Ala. Code 1975; and that his due-process protections guaranteed under the 6th and 14th Amendments to the United States Constitution had been violated. (C. 52-53.) Allen subsequently withdrew his motion for a new trial.

On appeal, Allen argues that the circuit court's revocation of his community-corrections sentence and his

probation was improper because, he says, the court failed to hold a meaningful hearing in violation of his due-process rights. Allen also alleges that the circuit court's revocation was improper because, he says, the court relied solely on hearsay evidence of Allen's alleged new offenses. The State contends that Allen waived his right to a formal hearing by admitting the violations against him and that the court's revocation was based on sufficient evidence because Allen admitted to violating his community-corrections sentence.

We first note that the revocation of a sentence served under a community-corrections program is generally treated the same as a revocation of probation. See § 15-18-175(d)(3)b., Ala. Code 1975; Richardson v. State, 911 So. 2d 1114 (Ala. Crim. App. 2004) (treating the revocation of a community-corrections sentence as a probation revocation).

"The general rules of preservation apply in probation-revocation proceedings. Puckett v. State, 680 So. 2d 980 (Ala. Crim. App. 1996). This Court has recognized three exceptions to the preservation requirement in probation-revocation proceedings: (1) that there be an adequate written or oral order of revocation, McCoo v. State, 921 So. 2d 450 (Ala. 2005); (2) that a revocation hearing actually be held; and (3) that the trial court advise the defendant of his or her right to request an attorney. Croshon v. State, 966 So. 2d 293 (Ala. Crim. App. 2007). Our Supreme Court recognized a

fourth exception to the preservation requirement that allows a defendant to raise for the first time on appeal the allegation that the circuit court erred in failing to appoint counsel to represent the defendant during probation-revocation proceedings. See Ex parte Dean, 57 So. 3d 169, 174 (Ala. 2010)."

Singleton v. State, 114 So. 3d 868, 870 (Ala. Crim. App. 2012).

In the instant case, Allen failed to raise his claim alleging that the proceeding held on March 7, 2018, was not a proper revocation hearing until he filed an untimely motion for a new trial. However, the claim falls within one of the exceptions to the general rules of preservation and can be raised for the first time on appeal. A similar argument was raised in D.L.B. v. State, 941 So. 2d 324 (Ala Crim App. 2006). In D.L.B., the following occurred:

"A revocation hearing was scheduled for June 28, 2005; the hearing was reset for July 6, 2005. When the arresting officers did not appear for the July 6 hearing, the hearing was reset yet again, this time for July 13, 2005. A brief hearing was held on July 13, 2005. Present before the court were D.L.B. and his counsel, the prosecuting attorney, and one of the arresting officers. After hearing argument from the prosecutor and defense counsel, the circuit court revoked D.L.B.'s probation. No testimony was taken at the hearing, after the State conceded that the officer present for the hearing could not 'actually place the drugs' and that the other arresting officer--the one who actually found the drugs--was on vacation. The court noted that it was

revoking D.L.B.'s probation based on the State's representation. (R. 6). The court advised defense counsel: 'Mr. Byrd, if you want to file a reconsideration and ask for a hearing, I will certainly reconsider. But as far as I am concerned, [D.L.B.] stays with the State at this point. He is in custody.' (R. 6-7.) Defense counsel acknowledged the court's action, stating: 'For the record, Judge, I renew my position that you can't do this [revoke D.L.B.'s probation] without a hearing. The State has had two tries at the hearing and they're not going forward with the evidence, just representations.' (R. 7.)

"The court noted in its revocation order that since beginning his probation, D.L.B. had been arrested for unlawful possession of a controlled substance and for distribution of a controlled substance. The court stated that it was 'reasonably satisfied from said evidence that [D.L.B.] did violate the terms and conditions of his probation by committing the violations set out above.' (C. 10.) This appeal followed.

"D.L.B. argues that the circuit court erroneously revoked his probation without first conducting a revocation hearing. Specifically, D.L.B. argues that the July 13, 2005, hearing, at which no witnesses testified and no evidence was presented, is insufficient to comply with the requirements of § 15-22-54, Ala. Code 1975. We agree.

"In Hollins v. State, 737 So. 2d 1056, 1057 (Ala. Crim. App. 1998), this Court held:

"'Section 15-22-54, Ala. Code 1975, requires a hearing as a prerequisite to the revocation of probation. This statutory requirement is mandatory and jurisdictional. Story v. State, 572 So. 2d 510 (Ala. Crim. App. 1990). Additionally,

the appellant was denied his constitutional right to due process by the revocation of his probation without a hearing. The minimal due process to be accorded a probationer before his probation can be revoked includes written notice of the claimed violations of probation, disclosure to the probationer of the evidence against him, an opportunity to be heard in person and to present witnesses and documentary evidence, the right to confront and to cross-examine adverse witnesses, a neutral and detached hearing body such as a traditional parole board, and a written statement by the factfinders as to the evidence relied on and the reasons for revoking probation. Rule 27.5 and 27.6, Ala. R. Crim. P. See Armstrong v. State, 294 Ala. 100, 312 So. 2d 620 (1975); Hernandez v. State, 673 So. 2d 477 (Ala. Crim. App. 1995).'

"Quoted with approval in Young v. State, 889 So.2d 55, 56 (Ala. Crim. App. 2004); Zackery v. State, 832 So.2d 672, 673 (Ala. Crim. App. 2001); Phillips v. State, 755 So.2d 63, 65 (Ala. Crim. App. 1999).

"Although the July 13, 2005, hearing purported to be a probation-revocation hearing, the court announced that it was revoking D.L.B.'s probation without hearing testimony from any State's witnesses and without allowing D.L.B. an opportunity to be heard. Because the circuit court revoked D.L.B.'s probation based on the representations of the prosecutor, rather than on evidence presented to the court in the form of witness testimony or other legal evidence, D.L.B. was denied the right to a hearing where he could be heard and present witnesses and documentary evidence and where he could confront and cross-examine adverse witnesses. Also, defense counsel's comments indicate that he was not aware of one of the grounds for revocation

cited by the court in its written order, namely D.L.B.'s July 7, 2005, arrest and subsequent indictment for distribution of cocaine. Finally, the record does not indicate that D.L.B. waived his right to a revocation hearing pursuant to Rule 27.5(b), Ala. R.Crim. P. Indeed, counsel made it clear on several occasions that D.L.B. wished to have a formal revocation hearing."

941 So.2d at 325-26.

In the present case, this Court cannot say that Allen was afforded the requisite due process during his revocation hearing. The record indicates that the circuit court began the revocation hearing by reminding Allen of the claimed violations of his community-corrections sentences and of the State's request that his full sentences be imposed. The following then transpired:

"THE COURT: Do you admit or deny that -- well, do you wish to say anything, Mr. Allen? I'll address you first, please?

"[Allen:] Yes, I do.

"THE COURT: Go ahead, please.

"[Allen:] First off, the impression when I pled guilty to these sentences that I was supposed to be up under Community Corrections for thirty days. Then I start my twenty-four months unsupervised -- supervised probation with the State.

"Okay. When I went to report to Nathan over there -- actually it was Mike Hardaway, said that I was still up under the Community Corrections for the

fact that the days get -- my jail credit did not get turned in and it only showed two days jail credit. So that's why I was still reporting to Community Corrections.

"Now, Brian over here, filed a petition to revoke probation from Nathan on the 22nd that I'm not on probation because it hasn't even started.

"Now, when I plead guilty to all this, I plead guilty to a hundred and eighty days suspended, split, credit and I was supposed to do thirty days Community Corrections and then go to supervised probation.

"THE COURT: Let me explain something to you. What we are here about today is not really about -- if you think you're entitled to jail credit there is a mechanism to establish that or to get that cleared up, but what we're here about today is that while on probation the State alleges that you were arrested in Limestone County on February the 21st of this year for possession of a controlled substance, possession of drug paraphernalia and attempting to elude. And that that conduct and being arrested for those things violates your probation. And so that's really what I'm looking at.

"[Allen:] I understand that. But if it's the probation that hasn't expired yet how did I violate it? It's Community Corrections, that's what I'm --

"THE COURT: A split sentence you are on probation. It is split but you are on probation for the rest of the sentence.

"[Allen:] Community Corrections --

"THE COURT: I'm not going to argue with you. I'll hear from you, but I'm telling you on a split sentence, if you violate it I can change any aspect of it, I can revoke the whole thing, I can impose

the whole sentence. A split is just basically a gift to see -- but when you are on Community Corrections you are in the prison system. You're just not in that prison system, but Community Corrections in prison, it's just local.

"All right. Anything else?

"[Defense counsel:] No, sir.

"[Allen:] Yeah, I got something else to say. I'd like to fire him today. He called my fiancée a bitch back there.

"THE COURT: Well, sir --

"[Allen:] You can do what you want to do, but I'm saying I'm not going to have him here representing me.

"THE COURT: Let me just say for the record, we've had Mr. Allen multiple times. Mr. Allen does not know how to conduct himself in court.

"[Allen:] Yes, I do, yes I do.

"THE COURT: You are fixing to be held in contempt.

"[Allen:] That's cool. I'm cool with that.

"THE COURT: Your sentence is invoked and you are revoked.

"(WHEREUPON, MR. ALLEN BEGAN SCREAMING AND YELLING.)

"THE COURT: Get him out of my courtroom, please."

"(WHEREUPON, THE DEFENDANT WAS REMOVED FROM THE COURTROOM, AT WHICH TIME THE FOLLOWING PROCEEDINGS WERE HAD AND DONE.)

"THE COURT: For the benefit of the record, the Court is reasonably satisfied that he's violated the terms

of his probation, his split sentence, by being arrested on February 21st, 2018 for possession of a controlled substance and possession of drug paraphernalia and attempting to elude.

"And he further violated the terms of his probation by not avoiding persons or places of disreputable conduct or character.

"So the sentences are imposed. Probation is revoked in each of those."

(R. 4-8.)

Contrary to the State's assertion on appeal, Allen did not clearly admit to the alleged violations of his community-corrections sentences. The circuit court also does not state that its findings were based on an admission by Allen to the charged violations. Although Allen was provided written notice of the claimed violations of his community-corrections sentence, the record does not indicate that the State presented any evidence at the hearing to support its contention that Allen had violated his community-corrections sentences. The court stated in its written order that "the evidence relied on by [the] Court was: 1. State's Exhibit 1" and "2. The defendant was arrested in Limestone County on February 21, 2018 for Possession of Controlled Substance, Possession of Drug Paraphernalia and Attempting to Elude which

violates the rules that were set for him on this Program." (C. 68.) However, our review of the record from the March 7, 2018, proceeding reveals that the State failed to introduce any exhibits, witness testimony, or any other legal evidence during the hearing. Further, despite the circuit court's vague statement in its written order noting the defendant's alleged arrest for the new offenses, nothing in the record provides this Court with any indication of what specific evidence of Allen's alleged new arrests the court is referencing in support of its findings. Thus, our review of the record indicates that this proceeding did not constitute the meaningful hearing to which Allen was entitled. See Reese, 97 So. 3d 184, 189 (Ala. Crim. App. 2012).

Accordingly, we must reverse the circuit court's judgment revoking the appellant's community-corrections sentences and his probation and remand this case for the circuit court to conduct a new revocation hearing. We caution the circuit court, in conducting the revocation hearing, we caution the circuit court to comply with the due-process requirements set forth in Gagnon v. Scarpelli, 411 U.S. 778 (1973); Morrissey v. Brewer, 408 U.S. 471 (1972); McCoo v. State, 921 So. 2d 450

CR-17-0634

(Ala. 2005); Armstrong v. State, 294 Ala. 100, 312 So. 2d 620 (1975); and Rule 27, Ala. R.Crim. P. In view of the above, we pretermitt as unnecessary a discussion of any remaining issues raised on appeal.

REVERSED AND REMANDED WITH INSTRUCTIONS.

Windom, P.J., and Kellum, Cole, and Minor, JJ., concur.