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ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 2018-2019

CR-17-0959

Billy Dee King

v.

State of Alabama

Appeal from Russell Circuit Court
(CC-16-286.70)

KELLUM, Judge.

The appellant, Billy Dee King, appeals from the circuit court's revocation of his probation. The record indicates that on December 7, 2016, King pleaded guilty to violating the Sex Offender Registration and Notification Act, § 15-20A-1 et

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seq., Ala. Code 1975 ("SORNA"). The circuit court sentenced King to 180 months' imprisonment; that sentence was split and he was ordered to serve 18 months' imprisonment followed by 13 years and 6 months of supervised probation.

On March 13, 2018, King's probation officer filed a delinquency report, alleging that King had violated the terms and conditions of his probation by absconding and that his whereabouts were unknown. Specifically, King's probation officer alleged that King had failed to report to his probation officer in Alabama after he was released from the custody of the Minnesota Department of Corrections where he had served time for a probation violation in Minnesota.

On May 31, 2018, the circuit court conducted a probation-revocation hearing at which King was present and was represented by counsel. At the hearing, Josh McDonald, King's probation officer, testified that when King entered his 2016 guilty plea to the SORNA violation in Alabama, King was being supervised in Alabama for a crime committed in Minnesota. After King served his 18-month sentence in Alabama, King was transferred to Minnesota to serve time for a probation violation. Officer McDonald testified that, pursuant to King's

plea agreement, King was required to report back to Alabama after he was released from jail in Minnesota. Officer McDonald testified that he checked on King's status monthly to verify that King was still incarcerated in Minnesota. Officer McDonald testified that he learned in February 2018 that King had been released from prison in Minnesota. According to Officer McDonald, it was King's responsibility to contact the probation office in Alabama upon completing his period of incarceration in Minnesota. Officer McDonald testified that King did not contact him as required or report back to Alabama.

King testified that he was "broke and homeless" when he was released from incarceration in Minnesota around February 2, 2018. King stated that he reported to the Hennepin County Sheriff's Department in Minnesota after his release "because of [his] situation." (R. 15.) King understood that he was required to register as a sex offender as part of his plea agreement and understood that he was still on supervised probation in Alabama upon his release from incarceration in Minnesota. King testified that he was unaware that he was supposed to communicate with his probation officer in Alabama

or whom to telephone. King admitted that he did not contact the probation office in Alabama after he was released from prison in Minnesota.

At the conclusion of the hearing, the circuit court entered an order in which it revoked King's probation, finding King had absconded based on the evidence presented at the probation-revocation hearing. King filed a timely postjudgment motion in which he argued that the circuit court abused its discretion when it revoked his probation because, he says, the evidence was insufficient to support the circuit court's conclusion that King absconded. King further argued that he was a "technical" violator and, therefore, that the circuit court should have imposed a 45-day "dunk" pursuant to § 15-22-54(e)(1), Ala. Code 1975. The circuit court denied King's motion, finding that King was not qualified for treatment as a technical violator. This appeal followed.

King's sole contention on appeal is that the circuit court erred in revoking his probation because he "never received a copy nor did he sign a written court order of probation setting out the conditions and regulations of his probation as required under Rule 27.1 of the Alabama Rules of

Criminal Procedure." (King's brief, p. 5.) Specifically, King contends that no one contacted him regarding the terms and conditions of his probation and that he never received a written copy of the court's order of probation.

"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).

The record indicates that King raises this issue for the first time on appeal. Although King suggests in his brief on appeal that he raised this issue in his motion to reconsider, a close reading of the motion indicates that King merely summarized evidence presented at the hearing when he stated in his motion that it was "undisputed" that "no probation officer

visited [King] while incarcerated in Alabama and furthermore, he never executed a probation contract with Alabama probation service." (C. 22.) The circuit court's denial of the motion to reconsider on the basis that King was not a technical violator supports the conclusion that the circuit court did not interpret King's argument as one challenging his probation revocation on the basis of a failure to comply with Rule 27.1, Ala. R. Crim. P. Indeed, King appears to concede the preservation issue when he acknowledges in his brief on appeal that he "never specifically raised the issue of Rule 27.1." (King's brief, p. 14.) Because King's claim does not fall within one of the exceptions to the preservation rule, his contention that he did not receive a written order of probation pursuant to Rule 27.1 is not preserved for review on appeal.

Based on the foregoing, the judgment of the circuit court is affirmed.

AFFIRMED.

Windom, P.J., and McCool and Minor, JJ., concur. Cole, J., dissents, with opinion.

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COLE, Judge, dissenting.

Billy Dee King appeals the circuit court's decision revoking his probation and imposing the remainder of his original 180-month sentence. Although several arguments were made in the circuit court, the only issue raised by King on appeal is that his probation should not have been revoked because he was not properly advised of the conditions of his probation. It appears undisputed that King did not sign an order of probation outlining the conditions of his probation, but this Court affirms the circuit court's decision revoking King's probation, holding that this issue was not preserved for appellate review. I respectfully dissent because the record reflects that the circuit court was sufficiently informed of King's argument that he had not been notified of the conditions of probation.

The record reflects that King did not sign an order of probation when he entered a guilty plea and was sentenced to 180 months' imprisonment, which sentence was split and King was ordered to serve 18 months in the Russell County jail, followed by 13 years and 6 months of probation. After serving his split sentence, King was taken directly to Minnesota to

complete serving a sentence in that state. He remained in the custody of the State of Minnesota from approximately October 2017 until January 30, 2018 or February 2, 2018. According to King, he was broke and homeless when he was released from incarceration in Minnesota. He testified that his "case manager" in Minnesota told him, because of his "situation," to "report to the Hennepin County Sheriff's Department once a week." (R. 14, 15). The majority opinion outlines most of the facts relevant to this appeal; however, a summary of additional testimony and parts of the record on appeal that relate to the question of whether this issue was properly preserved for appellate review is also needed.

At the revocation hearing, Officer Josh McDonald of the State of Alabama Board of Pardons and Parole testified that King was supposed to report to the Russell County probation office as a condition of his probation and as a condition of his plea agreement. (R. 5, 6.) Officer McDonald testified that any probationer he supervises does not "sign some sort of contract of probation or something of that nature ... until [the probationer] comes in and meets with us to begin his probation." (R. 9.) This testimony made it clear that King

did not sign any form outlining the conditions of his probation before being transported to Minnesota, even though King was in custody of Russell County for more than 18 months following his guilty plea. McDonald also testified that the plea agreement "recommends" that King be placed on "supervised probation," but the agreement is not a part of the record on appeal. Officer McDonald agreed that King "did make contact with a local sheriff's office for Anoka County, Minnesota, where he registered" after his release from custody, but McDonald testified that King's registration as a sex offender in Minnesota had "[n]othing to do with his probation in Russell County, Alabama." (R. 13.)

King testified that after he entered a guilty plea in Alabama "nobody [came] down and [told him] that, you know, that once you get released, you're to report back to Alabama. Minnesota D.O.C. just came and got me." (R. 15-16.) Although he knew he was on probation, King stated: "To my understanding that everything was, like, I was doing the right thing up there. I didn't understand that I was still doing Alabama like that." (R. 16.) When asked on cross-examination if he knew he was supposed to communicate with the local probation

office in Alabama, King told the trial court: "I didn't. I didn't know none of that. I didn't know because nobody ever come and talk to me." (R. 20.) When asked about Officer McDonald's testimony that King could have telephoned the probation office, King testified that he "didn't know who to call. Didn't nobody ever come and see me that told me that he was my probation officer or nothing." (R. 21.) He went on to inform the circuit court that he "didn't know" that it was his "responsibility to contact the probation office in the county where [he] was sentenced." (R. 21.) Clearly, King's lack of notice of the requirement that he report to the probation office was raised at the revocation hearing.

Although counsel did not argue the lack of notice in his final request that King's probation be continued, the circuit court's oral pronouncement that King's probation would be revoked clearly acknowledged that the lack of notice was an issue. The circuit court stated:

"Mr. King, if you were a 19-year-old guy who had never been in any trouble, never been through any of this before, I could believe that you didn't know that you had to report necessarily, but the fact that you've had involvement with Russell County before, the fact that you've had all the involvement with Minnesota before, it's my opinion that you

knew, and you willfully chose not to make contact with the probation office."

(R. 26.) If the circuit court did not know that King's lack of knowledge and lack of notification was an issue, then that court would not have needed to justify why revocation was appropriate even when all parties seemed to agree that King was not given formal notification.

In addition to these excerpts from the revocation hearing, King's counsel also raised this issue in his "Motion for Reconsideration/New Trial." (C. 22-24.) This Court has noted that issues related to an individual's probation revocation can be raised and preserved in a motion to reconsider. See Attaway v. State, 854 So. 2d 1211, 1213 (Ala. Crim. App. 2002) (holding that because Attaway did not challenge the sufficiency of the evidence in his motion to reconsider the issue was not preserved for appellate review); Johnson v. State, 845 So. 2d 834, 835 (Ala. Crim. App. 2001) (holding that, with limited exceptions, issues not raised in a motion to reconsider are not preserved for appellate review). In his "Motion for Reconsideration/New Trial," King asserted:

"It is undisputed that according to the testimony presented that [King] was never released from the custody of the authorities while in Alabama and no probation officer visited him while incarcerated in Alabama furthermore, he never executed a probation contract with Alabama probation service."

(C. 22.) Although the majority correctly asserts that the circuit court did not address this lack of a "probation contract" in its order denying King's motion for reconsideration, the court below was still on notice of this ground asserted in King's motion. Although King never expressly objected on the ground that an "Order of Probation" was never completed, and did not expressly mention Rule 27.1, Ala. R. Crim. P., below, King did inform the circuit court that he was never given a "probation contract" or other written notice requiring him to report to the Russell County probation office.

The majority also correctly states that King admits on appeal that he "never specifically raised the issue of Rule 27.1 and Rule 27.6(e)," Ala. R. Crim. P. (King's brief, p. 14), but this admission does not appear to be an admission that this issue was not preserved for appellate review. King's brief goes on to point out that the notification "issues were addressed through testimony of Officer McDonald

and [King]" and were raised in the motion to reconsider. (King's brief, p. 14, 15.)

Whether an individual's probation can be revoked without the probationer receiving written notification of the conditions of probation is controlled by Rules 27.1 and 27.6(e), Ala. R. Crim. P., and the caselaw interpreting those rules. Rule 27.1 states, in part:

"The probation officer shall issue instructions to the probationer that are consistent with the conditions and regulations imposed by the court and that are necessary for the implementation of these conditions and regulations. All conditions of probation must be incorporated into a court's written order of probation, and a copy thereof must be given to the probationer. In addition, the court or probation officer shall explain to the probationer the purpose and scope of the imposed conditions and regulations and the consequences of probationer's violation of those conditions and regulation."

Rule 27.6(e) states that "[p]robation shall not be revoked for violation of a condition or regulation if the probationer had not received a written copy of the condition or regulation." Although the majority correctly notes that this issue is subject to procedural default if it is not sufficiently raised at the trial level, the only exception to this notification rule is that probation can be revoked for the commission of a

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new offense even without the probationer receiving written notification because "refraining from further criminal offenses is an implied condition of probation." Croshon v. State, 966 So. 2d 293, 295 (Ala. Crim. App. 2007).

This Court recently addressed the same notification issue in Grice v. State, [Ms. CR-17-0864, Nov. 16, 2018] ___ So. 3d ___ (Ala. Crim. App. 2018). In that case, Grice's probation was revoked when she failed to report to the probation office and failed to make the required payments. Although her attorney was served with a copy of the order of probation outlining the conditions of probation, it did not appear that Grice was ever served with a copy of those conditions. Like King, Grice also had to serve a sentence in a different jurisdiction in addition to the sentence she had to serve in Alabama before being placed on probation. Grice asserted that she would have complied with the conditions of probation if she had been aware of those conditions, and she stated that she "thought because her federal and state sentences were to run concurrently that she 'was doing it all together.'" Grice, ___ So. 3d at ___ . This Court held that

"Rule 27.1 was designed to prevent precisely the type of misunderstanding that occurred here.

Providing Grice with a copy of the written probation order would have cured Grice's lack of understanding that she had obligations under the state sentence in addition to the obligations under her federal sentence."

Id. at _____. Because Grice was not provided a written copy of her conditions of probation, this Court reversed the trial court's decision revoking her probation and remanded the case. As in Grice, providing King a written copy of an order of probation, and having him sign the conditions, would have assured that King knew he must report to the probation office in Alabama rather than reporting only to authorities in Minnesota.

Because it appears undisputed that written notice of the conditions of probation is required with technical violations such as the one committed by King, the only issue that must be resolved is whether King sufficiently brought this issue to lower court's attention. As noted above, there was substantial testimony that during his extended stay in the Russell County jail no one came to notify King that he was required to report to the probation office. Although his motion for reconsideration did not specifically mention the notice requirement in Rule 27.1, the motion did state that "no

probation officer visited him while incarcerated" and that he "never executed a probation contract." (C. 22.) On multiple occasions this Court has referred to a "probation contract" when addressing the issue of compliance with Rule 27.6 and the issue of revocation of probation. See Davis v. State, 855 So. 2d 1142, 1146 (Ala. Crim. App. 2003) (citing Stanley v. State, 579 So. 2d 19, 20 (Ala. Crim. App. 1990)); Puckett v. State, 680 So. 2d 980, 983 (Ala. Crim. App. 1996); Woodberry v. State, 625 So. 2d 1159, 1162 (Ala. Crim. App. 1993) (citing Salter v. State, 470 So. 2d 1360, 1362 (Ala. Crim. App. 1985)); Miller v. State, 611 So. 2d 434, (Ala. Crim. App. 1992); Taylor v. State, 600 So. 2d 1080, 1081 (Ala. Crim. App. 1992). King's assertion that he never executed a "probation contract" notified the circuit court that lack of written notice of the terms of probation was one of King's grounds for requesting reconsideration of the order revoking his probation.

To adequately preserve an issue for appellate review, the objection or argument must have been "sufficiently specific" to "put the trial court on notice of the substance of the alleged error and thereby provide[] that court an opportunity

to correct it." Ex parte R.D.W., 773 So. 2d 426, 428 (Ala. 2000). This Court has rarely required counsel to cite a specific rule, statute, or case to preserve an issue for appellate review because the court has "'always looked to substance over form.'" D.E.R. v. State 254 So. 3d 242, 248 (Ala. Crim. App. 2017) (quoting Southern Sash Sales & Supply Co. v. Wiley, 631 So. 2d 968, 971 (Ala. 1994)). Furthermore, this Court has held that no "magic words" are required in stating an objection as long as the trial court is informed of the "'legal basis of the objection.'" Cameron v. State, 615 So. 2d 121, 124 (Ala. Crim. App. 1992) (citations omitted). See also Nash v. State, 229 So. 3d 1112, 1113 (Ala. Crim. App. 2017) (noting that "magic words" are not required to preserve an issue for appellate review).

Although King could have been more specific in the grounds stated at the revocation hearing and in his motion for reconsideration, the primary issue addressed through testimony at the hearing was whether King received notice of the conditions of probation, in particular, the condition that he was required to report to the probation office in Alabama. Although counsel's request for relief at the end of the

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revocation hearing was more of a plea for mercy because King was indigent, homeless, and had been recently released in Minnesota rather than in Alabama, testimony at the hearing sufficiently notified the circuit court that the lack of notice was a primary issue raised by King. This testimony, coupled with counsel's motion to reconsider outlining the probation officer's failure to meet with King and the failure to execute a "probation contract," was, in my opinion, sufficient to preserve this issue for appellate review. Therefore, I respectfully dissent.