REL: April 23, 2021

Alabama Court of Criminal Appeals

OCTOBER TERM, 2020-2021

CR-18-0875

Christopher Allen McKinnie

v.

State of Alabama

Appeal from Houston Circuit Court
(CC-10-946.70)

On Return to Remand from Order of May 19, 2020

McCOOL, Judge.

Christopher Allen McKinnie appeals the trial court's revocation of his probation. We affirm.

Facts and Procedural History

It appears that, in 2011, McKinnie was convicted of discharging a gun into an occupied building or vehicle and was sentenced to 20 years, that sentence was split, and he was ordered to serve 4 years in prison followed by 5 years on probation. In May 2019, the State filed a delinquency report alleging that McKinnie had violated the terms and conditions of his probation by committing two new offenses -- first-degree possession of marijuana and possession of drug paraphernalia.

On May 29, 2019, the trial court held a revocation hearing during which McKinnie was represented by counsel. The court heard testimony from McKinnie's probation officer and from the police officer who testified concerning the details of McKinnie's arrest for the new offenses. McKinnie did not present any witnesses at the hearing.

On original submission, this Court held that the trial court's revocation order did not comply with Rule 27.6(f), Ala. R. Crim. P., because it did not state the specific evidence relied on for revoking McKinnie's probation. Thus, we issued an order remanding the case to the trial court with instructions that it enter a written order in which the

court specifically states the evidence relied upon and the reasons for revoking McKinnie's probation. On remand, the trial court complied with our instructions and entered a written order, which states:

> "On May 29, 2019, the Court held a probation revocation hearing in case number CC-2010-946.70. At said hearing, it was alleged that the appellant, Christopher McKinnie, violated the terms and conditions of his probation by being arrested for a new offense of possession of marijuana first degree on April 27,2019 per the testimony of Probation Officer Leslie James who was assigned to supervise the appellant and Officer Caleb B. Gilmore who is an officer with the Dothan Police Department.
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> "Based on the testimony of Officer Gilmore, the Court specifically finds as follows:
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> "On April 27,2019, Officer Gilmore observed a blue 2016 Ford with tag number 38HA329 fail to stop at a stop sign resulting in a traffic stop of said vehicle by Officer Gilmore in the 300 Block of Beulah Street.
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> "Upon making contact with the driver of the vehicle. Officer Gilmore smelled the strong odor of raw marijuana coming from the vehicle. Officer Gilmore called for backup, and, upon arrival of backup Officer Chavis, the occupants of the vehicle were asked to exit the vehicle. Appellant went to the front of the patrol vehicle with Officer Chavis who placed Mr. McKinnie in handcuffs due to his behavior. The driver of the vehicle was believed by Officer Gilmore to be the appellant's nephew, and he cooperated with Officer Gilmore who informed him that he would be searching the vehicle due to the odor of marijuana emitting from the vehicle. Appellant

was sitting in the front passenger seat at the time of the stop. Officer Gilmore found the following items on the front passenger side floorboard about half way under the front passenger seat: (1) a bag with 15 individually wrapped plastic baggies containing green leafy plant material which Officer Gilmore believed to be marijuana based on his training and experience, (2) a black digital scale, and (3) an envelope with different names written on it with different amounts of money with some of them being crossed out. Prior to the appellant exiting the vehicle. Officer Gilmore observed the appellant touching his left front pocket, and upon searching the appellant, he discovered approximately $600 in cash in the appellant's left front pocket. Appellant was arrested for possession of marijuana first degree; however, the driver of the vehicle, who was a juvenile, was not arrested. Prior to arresting the appellant, Officer Gilmore observed him acting nervous, that his breathing was labored and that his carotid artery on the side of his neck was 'almost beating out of his neck.'

"Based on the foregoing, the Court was reasonably satisfied at the probation revocation hearing that the appellant had committed the offense of possession of marijuana first degree and revoked the appellant's probation and ordered that he serve the remainder of his sentence in the penitentiary with credit for any days incarcerated pending revocation.

"Pursuant to order of remand with instructions, the Court hereby adopts the foregoing findings and specifically states that it is the evidence relied upon for the prior order of revocation of appellant's revocation of probation, and that the specific reason for revocation of the appellant's probation was that the Court was then, and still is, reasonably satisfied that

> the appellant committed the new offense of possession of marijuana first degree."

(Supp. C. 7-8.)

The record fully supports the trial court's factual findings as set forth in its order.

Additionally, at the very end of the revocation hearing, immediately after the trial court indicated that it was going to revoke McKinnie's probation, McKinnie stated: "This is bullshit." In response, the trial court stated: "Excuse me? You just got five more days for contempt of Court." (R. 28.) The court also issued a written order, which stated:

> "Due to defendant's use of profanity after conclusion of the probation revocation hearing, to wit: 'this is bullshit' defendant is found in direct criminal contempt of court and is ordered to serve five days in the Houston County jail upon completing the remainder of the sentence originally imposed herein. Costs of said finding of contempt are assessed against the defendant."

(C. 13.)

Discussion

On appeal, McKinnie first argues that the evidence was insufficient to support the revocation of his probation. Specifically, McKinnie alleges

that "there was insufficient evidence presented at his probation revocation hearing to connect him to the items seized from under the seat of his Aunt's vehicle." McKinnie's brief, at 14. McKinnie also argues that the circuit court abused its discretion in finding McKinnie in contempt. However, McKinnie did not raise either of these issues in the trial court; thus, he did not preserve these issues for our review.

" '[T]he general rules of preservation apply to probation revocation hearings' " and " 'issues not presented to the trial court are waived on appeal.' " Attaway v. State, 854 So. 2d 1211, 1213 (Ala. Crim. App. 2002) (quoting Owens v. State, 728 So. 2d 673, 680 (Ala. Crim. App. 1998)). There are four exceptions to the general rule that a defendant waives for appeal issues not presented to the circuit court: (1) the requirement that there be an "adequate written order of revocation"; (2) "the requirement that a revocation hearing actually be held"; (3) the requirement that the circuit court must advise a defendant of her right to request an attorney to represent her during the probation-revocation proceedings; and (4) the requirement that the circuit appoint an attorney to represent an indigent defendant during the probation-revocation hearing. Attaway, 854 So. 2d

at 1213; see also Mead v. State, 271 So. 3d 860, 862-63 (Ala. Crim. App. 2018). "[T]he sufficiency of the evidence is not one of the exceptions to the preservation requirement in probation-revocation proceedings." K.W.J. v. State, 905 So. 2d 17, 19 (Ala. Crim. App. 2004). In Harris v. State, 781 So. 2d 356, 357 (Ala. Crim. App. 2000), this Court stated that there was no indication that "Harris moved for a judgment of acquittal challenging the sufficiency of the evidence or that he made a post-revocation motion challenging the sufficiency of the evidence; therefore, Harris's contention that the evidence was insufficient to revoke his probation is not preserved for our review."

In the present case, McKinnie failed to raise his sufficiency-of-the-evidence claim in the trial court, and this claim does not fall within one of the recognized exceptions to the preservation requirement. Thus, this claim is not preserved for appellate review.

Also, McKinnie failed to raise any objection to the trial court's finding of contempt. In Brown v. State, 701 So. 2d 314 (Ala. Crim. App. 1997), this Court stated:

"Three of Brown's arguments on appeal arise from an incident in which he was found to be in contempt of court during trial for failing to reveal the identity of another individual. (R. 219–22.) The court sentenced Brown to three months in jail and raised his bond from $1,500 to $100,000 as a result of the contempt citation. Brown argues that: (1) the trial judge erred in that he became an advocate for the State; (2) the trial judge erred in citing him for contempt in the presence of the jury; and (3) the trial judge improperly revoked the conditions of his release by raising his bond without a hearing, without proper notice, and without an opportunity to defend. None of these objections were raised at trial.

> " 'Review on appeal is limited to a consideration of questions properly raised in the trial court. Knox v. State, 38 Ala. App. 482, 87 So. 2d 671 (1956); Handley v. State, 214 Ala. 172, 106 So. 692 (1926). Matters not objected to in the trial court cannot be considered for the first time on appeal since review on appeal is limited to those matters on which rulings are invoked at nisi prius. Daniels v. State, 53 Ala. App. 666, 303 So. 2d 166 (1974); Shiver v. State, 49 Ala. App. 615, 274 So. 2d 644 (1973); Cooper v. State, Ala. App., 331 So. 2d 752, cert. denied, Ala., 331 So. 2d 759 (1976).'

"Harris v. State, 347 So. 2d 1363, 1367 (Ala. Cr. App. 1977), cert. denied, 347 So. 2d 1368 (emphasis in original). None of these arguments regarding the trial court's contempt citation have been preserved for our review."

701 So. 2d at 316.

Therefore, the general rules of preservation apply to issues concerning findings of contempt, and such issues that are not presented to the trial court are waived on appeal. But see Byrd v. State, 10 So. 3d 624 (Ala. Crim. App. 2008) (plurality opinion) (recognizing an exception to the general preservation requirements in a case involving constructive contempt when "any objection [the defendant] made to the finding of contempt would have been unavailing and futile"). Because McKinnie failed to raise any objection to the trial court's finding of contempt, this issue is not preserved for appellate review.

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

AFFIRMED.

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