

RENDERED: January 30, 1998; 10:00 a.m.  
NOT TO BE PUBLISHED

NO. 96-CA-0804-MR

JAMES W. FISHER, III

APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE MARY NOBLE, JUDGE  
ACTION NO. 94-CR-27

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

\* \* \* \* \*

BEFORE: ABRAMSON, COMBS, and GARDNER, Judges.

ABRAMSON, JUDGE: Appellant James W. Fisher, III appeals from revocation of his probated sentence of seven years. He maintains that he was deprived of a neutral and detached judge to determine whether his probation should be revoked, that the trial judge abused her discretion in deciding to revoke his probation when he had complied with the conditions of probation to the extent that he was able, and that his counsel during the revocation proceedings was ineffective. Having reviewed the evidence presented at the revocation hearing and the applicable law, we affirm.

On March 11, 1994, Fisher entered a guilty plea to an

amended charge of second-degree robbery and first-degree promoting contraband. Although the probation officer recommended against granting probation to Fisher, the trial judge sentenced him to seven years on the robbery charge and one year for promoting contraband, with the sentences to run concurrently. She then placed Fisher on probation with a number of conditions, including completion of a substance abuse program within six months, restitution to the robbery victim, no use of alcohol or drugs, and six-months' service in the Fayette County Detention Center.

The trial judge overruled Fisher's motion for shock probation on July 20, 1994. She also denied his motion to modify the terms of probation on August 17, 1994. Following Fisher's twelve-month and thirty-day concurrent sentences for subsequent convictions on wanton endangerment and operating a vehicle on a suspended license, on April 17, 1995, the Office of Probation and Parole sought to modify his probationary terms. Instead of revoking his probation, however, the trial judge ordered him to apply for drug treatment after his release from his misdemeanor sentences.

Again, on February 9, 1996, Fisher's probation officer filed an affidavit with the court seeking to revoke his probation for, among other reasons, failure to report to him and failure to enter an in-house drug treatment facility, both of which were conditions of Fisher's probation. On March 1, 1996, Fisher's counsel stipulated probable cause. The revocation hearing was held on March 8, 1996.

On the issue of Fisher's failure to report, Probation Officer Cecil L. Mobley testified at the hearing that the last official appointment kept by Fisher with the probation office was October 17, 1995. Mobley did not see Fisher between the April 17, 1995, court date and November 1995, at which time he visited Fisher at home after he had received a gunshot wound. At that time Fisher told Mobley that he was scheduled to return to the hospital for further care, but Mobley later learned that Fisher never returned to the hospital. Although Fisher visited the probation officer on February 9, 1996, he failed to keep a February 12, 1996 appointment with Mobley.

Regarding the condition that Fisher enroll in an in-house drug treatment facility, Mobley testified that he visited Fisher at the Hope Center. They discussed Fisher's enrollment in an in-house treatment center in Cincinnati. Following Fisher's statement that his grandfather would provide the money for that treatment, Mobley obtained a Court Order for Fisher to enroll there. When Mobley went to the in-house treatment facility to see Fisher, he learned that Fisher had never enrolled there. During Fisher's testimony at the hearing, he did not deny either failing to complete a drug treatment program or failing to report to his probation officer or treatment center as ordered.

At the conclusion of the hearing, Mobley answered in the negative when the trial judge asked whether he believed that Fisher could be supervised. The trial judge agreed with the officer's evaluation, finding that Fisher had not taken advantage of the rehabilitation opportunities offered to him. She then

revoked Fisher's probation. The trial court's March 11, 1996 Order Revoking Probation states that Fisher violated his probation by failing to report and failing to enroll in a treatment program.

Fisher contends first that he was deprived of a neutral and detached judge at his probation revocation proceeding. Citing several instances when the trial judge expressed concern about Fisher's disrespect toward the court, he argues that she "expressed an obvious dislike toward" him throughout the proceedings. Fisher's argument fails for two reasons. First, when Fisher supposedly sensed the judge's "dislike," he had the opportunity to challenge the court's continued presence in his case. However, not once during the proceedings against him did Fisher seek recusal of the trial judge by pursuing the statutory remedies provided in KRS 26A.015 or KRS 26A.020.

Second, the facts of the case belie any genuine concern about the trial judge's "dislike" of Fisher. Initially, in March 1994, she placed Fisher on probation, choosing to look at his potential for successful probation and ignoring the probation officer's recommendation against probation for Fisher. Even after Fisher was convicted of two misdemeanors in early 1995, the trial judge modified his probation instead of revoking his probation. Fisher also claims that the trial judge had prejudged his case prior to the revocation hearing. At the preliminary probable cause hearing one week before the revocation hearing, the trial judge stated that "it is a fact" that Fisher did not report to the drug center when he was ordered. In doing so, she

was merely responding to Fisher's stipulation of probable cause and his admission earlier in the hearing that he had not reported as ordered.

Fisher's second contention is that the trial judge abused her discretion when she revoked Fisher's probation after the March 8, 1996 hearing, because he had complied with the conditions of probation to the extent that he was able. The testimony at the hearing was conflicting about whether Fisher, due to his gunshot wound, was able to enroll in the Cincinnati drug treatment facility at the time that Mobley had arranged for his admission. Even if the Commonwealth failed to prove Fisher's violation by a preponderance of the evidence on this violation, Fisher's repeated failure to report to his probation officer was proved by a preponderance of the evidence. In Messer v. Commonwealth, Ky. App., 754 S.W.2d 872 (1988), the Court stated that whether a revocation is based upon one violation or more is not important as long as the evidence supports at least one violation. The trial judge here did not abuse her discretion when she ordered Fisher's probation revoked. See Tiryung v. Commonwealth, Ky. App., 717 S.W.2d 503 (1986) (appellate court review limited to whether trial court abused discretion in revoking probation).

Fisher's third argument is that he was deprived of effective assistance of counsel at his probation revocation hearing due to his counsel's alleged lack of preparation. By statute, a defendant is entitled to counsel during probation revocation proceedings. KRS 533.050(2). However, the issue of

ineffective assistance of counsel cannot be considered on appeal unless it has already been raised by a post-hearing motion. See White v. Commonwealth, Ky. App., 695 S.W.2d 438 (1985).

Following revocation, the proper method for challenging counsel's effectiveness is by a motion to vacate pursuant to RCr 11.42.

See e.g., Wright v. Commonwealth, Ky. App., 953 S.W.2d 611 (1997); MacLaughlin v. Commonwealth, Ky. App., 717 S.W.2d 506 (1986).

For the foregoing reasons, the Fayette Circuit Court's order revoking Fisher's probation is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Sally Wasielewski  
Fayette County Legal Aid, Inc.  
Lexington, Kentucky

BRIEF FOR APPELLEE:

A. B. Chandler III  
Attorney General

Elizabeth A. Myerscough  
Assistant Attorney General  
Frankfort, Kentucky