

RENDERED: April 3, 1998; 2:00 p.m.
NOT TO BE PUBLISHED

NO. 96-CA-3064-MR

RODNEY WHITAKER

APPELLANT

v. APPEAL FROM PULASKI CIRCUIT COURT
HONORABLE DANIEL J. VENTERS, JUDGE
ACTION NO. 92-CR-116

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

* * * * *

BEFORE: ABRAMSON, KNOPF, and MILLER, Judges.

ABRAMSON, JUDGE: Rodney Whitaker appeals from revocation of his probated sentence of two years, maintaining that the judge abused his discretion in revoking probation. He also contends that he was deprived of due process because of inadequate notice of the grounds for the revocation. Having reviewed the evidence presented at the revocation hearing and the applicable law, we affirm.

On February 1, 1993, Whitaker entered a guilty plea to cultivating marijuana over five plants, and received a two-year sentence and a \$1,000 fine. On June 3, 1993, the trial court granted Whitaker's motion for shock probation and placed him on

probation for five years. On July 31, 1996, the Commonwealth moved to revoke Whitaker's probation because Whitaker was arrested and charged with cultivating marijuana over five plants, on July 14, 1996. On October 22, 1996, the Commonwealth filed an amended motion to revoke Whitaker's probation, adding to the original motion an allegation that Whitaker had failed a urine test on August 5, 1996, by testing positive for cocaine metabolite.

On October 24, 1996, Whitaker appeared at his probation revocation hearing with counsel. Whitaker's probation officer, Rebecca Light, testified that after Whitaker tested positive for cocaine use, she informed him about the results and placed him in a substance abuse program. Detective Brett Whitaker also testified about Whitaker's arrest for cultivating marijuana. The detective testified that, at the time of the arrest, Whitaker's girlfriend told the detective that the plants did not belong to her and must belong to Whitaker. Whitaker offered evidence that the marijuana plants did not belong to him. His counsel stipulated to the urine test results.

Based upon testimony about both the marijuana arrest and the urine test results, the trial court found probable cause to believe that Whitaker had violated his probation by committing further criminal acts. On November 1, 1996, the trial court revoked Whitaker's probation and ordered reinstatement of his two-year sentence, with credit of 122 days for time served. On November 8, 1996, the court entered an amended order, again revoking Whitaker's probation and imposing a two-year sentence.

The evidence presented at the hearing about the marijuana arrest and the urine test results satisfied the Commonwealth's burden of proof by a preponderance of the evidence that Whitaker failed to abide by the terms of his probation. In Messer v. Commonwealth, Ky. App., 754 S.W.2d 872, 873), 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. Given the evidence adduced, the trial judge here did not abuse his discretion when he ordered Whitaker's probation revoked. Tiryung v. Commonwealth, Ky. App., 717 S.W.2d 503 (1986).

Whitaker also argues that he was deprived of due process because the Commonwealth's amended motion to revoke added the charges about the urine test results only two days before the probation revocation hearing. KRS 533.050(2) and due process require that the defendant be given written notice about the grounds for the proposed revocation. Baumgardner v. Commonwealth, Ky. App., 687 S.W.2d 560 (1985). A defendant must have a reasonable time within which to obtain evidence and otherwise prepare a defense to the charges. See Wells v. Webb, Ky., 511 S.W.2d 214 (1974).

Light's unchallenged testimony showed that Whitaker was aware of the test results for some time preceding the revocation hearing. Additionally, the record does not indicate that the Commonwealth held the August 5, 1996 urine test results in order to obtain some tactical advantage over Whitaker. More significantly, Whitaker neither objected to the admissibility of

the results at the hearing nor sought a continuance in order to prepare a defense to the test results. Indeed, Whitaker's counsel stipulated to the test results. If the additional grounds in the amended motion to revoke presented problems for Whitaker requiring additional preparation time, he could have sought a continuance. This issue cannot be raised for the first time on appeal. See West v. Commonwealth, Ky., 780 S.W.2d 600 (1989).

For the foregoing reasons, the Pulaski Circuit Court's order revoking Whitaker's probation is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT

Paula Fitzgerald
Louisville, KY

BRIEF FOR APPELLEE

A. B. Chandler III
Attorney General

Kate Quinn
Assistant Attorney General
Frankfort, KY