

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-002574-MR

LOCKHART RANKIN, JR.

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE THOMAS J. KNOFF, JUDGE
CIVIL ACTION NO. 94-CR-0753

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

** ** * * * * *

BEFORE: HUDDLESTON, KNOX and MILLER, Judges.

HUDDLESTON, Judge. Lockhart Rankin appeals from an order revoking his probation and reinstating the five-year sentence that had been imposed after he pled guilty in 1994 to Possession of a Controlled Substance (marijuana).

Rankin was initially charged with Trafficking in a Controlled Substance. With the assistance of his attorney, he entered into a plea agreement pursuant to which he pled guilty to the lesser offense of possession of marijuana. His five-year sentence on that charge was suspended and he was placed on probation on condition that, among other things, he not commit another offense, receive drug counseling and submit to random drug testing.

On November 21, 1995, Probation and Parole Officer Rochelle Douglas filed a Special Supervision Report, informing the

circuit court that Rankin had been arrested on November 13, 1995, and charged with Trafficking in a Controlled Substance. On December 11, 1995, a bench warrant was issued for Rankin's arrest for violating the terms of his probation. Officer Douglas filed a second report with the court on January 19, 1996, requesting a revocation hearing as a result of Rankin's failure to report as instructed and failure to keep his appointment for substance abuse assessment. The Commonwealth moved to revoke Rankin's probation on January 30, 1996. Officer Douglas filed yet a third report with the court on March 17, 1997, noting Rankin's failure to report a change of address, his absconding from probation supervision and his failure to report his arrest of February 2, 1997, for probation violation. The Commonwealth amended its probation revocation motion to add the grounds specified in Officer Douglas's third report.

Rankin's revocation hearing was initially scheduled for September 19, 1997. However, on September 18, 1997, Rankin appeared in court with counsel for the revocation hearing. Rankin now claims he was not personally served with notice of the change in date of his revocation hearing. Rankin is correct in asserting that personal notice to him of the revocation hearing is a due process requirement. Keith v. Commonwealth, Ky. App., 689 S.W.2d 613 (1977), and Ky. Rev. Stat. (KRS) 533.050. However, the defense of insufficiency of service is waived if it is not brought to the circuit court's attention by motion or pleading. Ky. R. Civ. Proc. (CR) 12.08(1); Messer v. Commonwealth, Ky. App., 754 S.W.2d 872 (1988). A review of the videotape of the revocation hearing

reveals that Rankin neither said nor did anything to alert the court to any irregularity in the proceeding.

Rankin further contends that since he was not served with personal notice that his hearing had been moved up one day, he was prejudiced by not being able to summon Officer Douglas as a witness to testify on his behalf. Rankin does not indicate to what Officer Douglas may have testified and in what manner such testimony may have advanced his cause. Considering that Officer Douglas had been responsible for filing with the circuit court three Special Supervision Reports concerning Rankin's violation of his terms of probation, it is difficult to envision Officer Douglas commending Rankin for his incorrigible behavior. In any event, if Rankin wanted a continuance because of the absence of a material witness, he was required to proceed in accordance with Ky. R. Crim. Proc. (RCr) 9.04.

Finally, Rankin contends that he received ineffective assistance of counsel during his revocation hearing. It has been consistently held that the issue of ineffective assistance of counsel must first be raised at the trial level by means of a post-trial motion for it to be considered on appeal. Wilson v. Commonwealth, Ky., 601 S.W.2d 280, 284. Since Rankin has not filed such a motion, the issue is not ripe for appellate review.

Finally, Rankin asserts that prior to his revocation hearing, he had attempted to replace counsel of record¹ with new counsel. Rankin states that he was interested in engaging new

¹ This was the same counsel who had represented Rankin in the proceedings during 1994 when he pled guilty to Possession of a Controlled Substance and received a probated sentence.

counsel after his attorney stated that he felt Rankin would not prevail at the upcoming revocation hearing. Rankin claims he released counsel on September 5, 1997, and discussed the revocation hearing with another attorney who agreed to represent him once his fee was paid. Subsequently, Rankin and his attorney, who Rankin claims he had released, appeared at the September 18, 1997, revocation hearing. At the hearing, Rankin made no effort to alert the trial court to his desire to discharge his attorney and retain other counsel. Furthermore, Rankin provides no affidavit or other evidence to support of this ground for relief. This Court will not consider matters stated in briefs unsupported by the record. Ford v. Commonwealth, Ky., 472 S.W.2d 261 (1971).

For the foregoing reasons, the order revoking Rankin's probation is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Mr. Lockhart Rankin, Pro se
Beattyville, Kentucky

BRIEF FOR APPELLEE:

A. B. Chandler III
Attorney General of Kentucky

Dana M. Todd
Assistant Attorney General
Frankfort, Kentucky