

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-001292-MR

DANNY GILMORE

APPELLANT

v. APPEAL FROM PULASKI CIRCUIT COURT
HONORABLE WILLIAM T. CAIN, JUDGE
INDICTMENT NO. 97-CR-00051

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING
** **

BEFORE: DYCHE, GUIDUGLI, AND MILLER, JUDGES.

DYCHE, JUDGE: Danny Gilmore appeals from an order of the Pulaski Circuit Court revoking his probation and imposing a two-year sentence of imprisonment for his conviction of possession of a controlled substance, first degree. He argues that the conditions the court determined that he violated were not actually conditions of his probation and asks us to reverse the order of the trial court. We decline to do so and affirm.

Gilmore was indicted on April 23, 1997, for trafficking in a controlled substance, first degree. He later entered a guilty plea to the amended charge and appeared on December 22,

1997, for sentencing. He was sentenced to two years' imprisonment, but that sentence was suspended and he was placed on supervised probation for a period of five years. As conditions of his probation, Gilmore was to, among other things, refrain from the use of any alcohol or drugs unless prescribed by a doctor; comply with rules of the probation and parole office; refrain from further violations of the law; and avoid persons or places of disreputable or harmful character.

On January 28, 1999, Gilmore's probation officer filed an affidavit to modify probation with the court. According to the affidavit, Gilmore had a positive drug test for marijuana on January 26, 1999, admitted to the officer that he had been using crack cocaine daily for several months, and had been arrested on January 24, 1999, and charged with assault in the fourth degree, terroristic threatening, and disorderly conduct. The affidavit requested that the court modify Gilmore's probation to include completion of an in-patient drug treatment program. The Commonwealth filed a motion to revoke Gilmore's probation, citing the same incidents included in the probation officer's report and also requesting the suggested modification.

The trial court denied the motion to revoke Gilmore's probation on March 16, 1999. Although there is no record of a hearing on that date, the parties acknowledge that there was an informal "hearing" at which the court reached an agreement with Gilmore that he would complete the in-patient substance abuse program.

On May 6, 1999, Gilmore's probation officer filed a second affidavit, this time requesting that Gilmore's probation be revoked. The affidavit stated that Gilmore failed to complete the program; that he had been charged with three counts of complicity to commit wanton endangerment in the first degree; that he had a firearm in his possession on April 19, 1999; and that he had failed to report his arrest to the probation officer within three days. The Commonwealth filed a second motion to revoke Gilmore's probation which was granted, and which is the subject of this appeal.

Gilmore admitted that he was in an automobile with several individuals on April 19 and that one of those individuals fired shots into a passing automobile, but he denied having possession of a firearm. In defense of his failure to complete the substance abuse program, he claimed that he did not think he was required to attend the full thirty days of the program. The trial court stated the following at the conclusion of the revocation hearing:

On March 16th of this year I entered an order dismissing all warrants for his arrest for probation violation in response to the Commonwealth's motion to revoke probation on March [sic] 17th. Mr. Gilmore admitted to the officer that he had used daily crack cocaine over the two months before that. An agreement was reached with Mr. Gilmore in open court in which he was to go and complete the substance abuse program at Crossroads. . . . He does not complete it, does not notify Mr. Burton. . . . If this were the first time, that would be one thing, but this is the second time. . . . He has violated the conditions of his probation and accordingly, I am going to revoke him.

Appellate review of an order revoking probation "is limited to a determination of whether, after a hearing, the trial court abused its discretion in revoking the appellant's parole." Tiryung v. Commonwealth, Ky. App., 717 S.W.2d 503, 504 (1986). Gilmore acknowledged in the revocation hearing that he knew as a result of his first court appearance for probation revocation that he was required to complete the program. He stated that those who completed the program received a certificate, and admitted that he did not get a certificate. The trial judge heard this testimony and determined that revocation was appropriate.

Aside from the matter of the substance abuse program, the trial court had ample grounds to revoke Gilmore's probation on either occasion for other reasons. In the four months following his plea of guilty on this charge, he was arrested on two separate occasions. The Commonwealth does not need to obtain a conviction in order to accomplish revocation of probation. Myers v. Commonwealth, Ky. App., 836 S.W.2d 431 (1992); Tiryung, supra. The trial court exhibited great restraint in its initial decision not to revoke Gilmore. It was not an abuse of that same discretion for the court to revoke Gilmore's probation at the second hearing, for as the court found, "[h]e has violated the conditions of his probation."

The judgment of the Pulaski Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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