

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 1999-CA-000708-MR

RONALD C. BLAKEMORE

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE STEPHEN P. RYAN, JUDGE  
ACTION NO. 93-CR-01571

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING  
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BEFORE: COMBS, HUDDLESTON, and SCHRODER, Judges.

COMBS, JUDGE: Appellant Ronald C. Blakemore (Blakemore) appeals from a July 1, 1998, order of the Jefferson Circuit Court revoking his probation. After carefully reviewing the record, we affirm.

On July 20, 1995, Blakemore was convicted on three counts of Trafficking in a Controlled Substance in the First Degree and was sentenced to seven-years' imprisonment. However, the trial court withheld imposition of this sentence and placed Blakemore on five-years' probation.

On April 12, 1996, the Commonwealth moved to revoke Blakemore's probation. He had been arrested and charged with

Possession of a Handgun by a Convicted Felon and failed to report this arrest within seventy-two (72) hours. On September 30, 1996, the Commonwealth supplemented its motion to revoke with additional violations, including: (1) a positive testing for cocaine on August 30, 1996; (2) leaving Jefferson County without permission; and (3) twice failing to report to his probation officer. The Commonwealth filed additional supplements to its motion to revoke on May 19, 1997, and August 15, 1997--each time citing additional positive drug tests. On October 3, 1997, a probation report was entered into the record showing that Blakemore had tested positive for cocaine on four more occasions and that he had been convicted on a misdemeanor charge of Loitering for Purposes of Gambling.

On October 9, 1997, a hearing was held in Jefferson Circuit Court on the Commonwealth's motion to revoke Blakemore's probation. At that hearing, Blakemore stipulated that he had violated his probation by testing positive for cocaine on eight (8) separate occasions, by being convicted of loitering, and by failing to complete payment for drug classes. The circuit court ruled that Blakemore had violated the terms and conditions of his probation and indicated that while it would sign an order revoking his probation, it would not enter the revocation order but would instead transfer Blakemore to Jefferson County Drug Court under the supervision of Judge Henry Weber. Judge Weber would have the authority to enter the order at any time for any reason, including a failure to comply with any programs recommended by drug court personnel. Blakemore's attorney said

that he understood and made no objections. The circuit court's written order stated that Blakemore would remain on probation and be placed in Judge Weber's drug court. It was added that the drug court could revoke his probation at any time it deemed appropriate.

On March 25, 1998, an order was entered in the drug court stating that Blakemore had failed to appear. A bench warrant was issued for his arrest, and he was sentenced to serve ten (10) days. On April 30, 1998, another order was entered in the drug court stating that Blakemore had again failed to appear. Another warrant was issued, and he was again given ten (10) days to serve. The second warrant mentioned "probaton (sic) revocation." On June 4, 1998, Blakemore was brought before the circuit court and was sentenced to serve ten (10) days once again. Additionally, he was transferred back to drug court and was told that Judge Weber would decide if he should remain there or not. The court added that in the event that Judge Weber decided to expel him from drug court, Blakemore would be transferred back to circuit court for another hearing and that he would then need his attorney.

On June 30, 1998, the drug court entered an order stating that Blakemore had failed to meet its requirements and transferring him back to the Jefferson Circuit Court for further proceedings. On July 1, 1998, Blakemore and his attorney appeared in court for a probation revocation hearing. Blakemore admitted that he was discharged from drug court because of the numerous occasions on which he had failed to appear and

acknowledged that the court was within its rights to revoke his probation at any time. The court subsequently entered a judgment to revoke Blakemore's probation, and he was sentenced to seven-years' imprisonment. This appeal followed.

Blakemore's primary contention on appeal is that he was provided insufficient notice of the conditions of his probation and his alleged probation violations. We do not agree. The case of Messer v. Commonwealth, Ky. App., 754 S.W.2d 872 (1988), is dispositive of the issues presented here. In Messer, this Court stated:

(T)he purpose of service upon the party is to make that person aware of the proceedings instituted or about to be initiated against him or her. It seems clear that the purpose for the rule disappears or has been satisfied when the party appears with knowledge of the proceedings and participates or is given an opportunity to participate, does not even give the trial court the opportunity to correct any defect in the notice and only complains after his probation has been revoked and the case is on appeal.

Messer, supra at 874.

Blakemore appeared with his attorney at the hearings of both October 9, 1997, and July 1, 1998; he gave every indication that he fully understood the proceedings. At the first hearing, he stipulated that he had violated his probation by testing positive on eight (8) separate occasions for cocaine and by being convicted of a misdemeanor. At the second hearing he admitted that he had been transferred from drug court because he had twice failed to appear and agreed that the circuit court was within its rights to revoke his probation. Blakemore cannot argue now that he did not understand the terms of his probation or why it was

being revoked. Such a contention directly contravenes the representations he made during his revocation hearings. "(T)hese grounds, being different from those asserted in the court below, are not properly preserved for appellate review." Shelton v. Commonwealth, Ky. App., 992 S.W.2d 849, 852 (1998), citing Daugherty v. Commonwealth, Ky., 572 S.W.2d 861, 863 (1978).

Additionally, at no time before this appeal did Blakemore make any objections on the basis of improper notice or a lack of awareness of the grounds for revocation. CR 12.08(1)--made applicable by RCr 13.04--states:

A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process *is waived* (a) if omitted from a motion in the circumstances described in Rule 12.07, or (b) if it is neither made by motion under Rule 12 nor included in a responsive pleading or an amendment thereof permitted by Rule 15.01 to be made as a matter of course.  
(Emphasis added)

If Blakemore had had any legitimate concerns about notice, the trial court should have been notified and given the opportunity to deal with them accordingly. "An appellate court will not consider a theory unless it has been raised before the trial court and that court has been given an opportunity to consider the merits of the theory." Shelton, supra at 852.

We affirm the order of the Jefferson Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Tera M. Rehmel  
Louisville, KY

BRIEF FOR APPELLEE:

Albert B. Chandler III  
Attorney General of Kentucky

Todd D. Ferguson  
Assistant Attorney General  
Frankfort, KY