

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-001847-MR

JAMES W. CRUTCHLEO

APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE DOUGLAS M. STEPHENS, JUDGE
ACTION NO. 95-CR-00126

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: BARBER, KNOPF, AND TACKETT, JUDGES.

KNOPF, JUDGE: James W. Crutchleo appeals from an order of the Kenton Circuit Court revoking his probation. After reviewing the record, we affirm.

On January 18, 1994, pursuant to a search warrant, Covington police officers seized, inter alia, several bags of marijuana, \$215.00 cash, two handguns, some pills, and various other items of drug paraphernalia from Crutchleo's apartment. On March 10, 1995, the Kenton County Grand Jury indicted Crutchleo on one felony count of trafficking in marijuana within 1000 yards of a school while in possession of a firearm (KRS 218A.1411, KRS

218A.1421, and KRS 218A.992) (Count I), one felony count of second-degree possession of a controlled substance (hydromorphone) while in possession of a firearm (KRS 218A.1416 and KRS 218A.992) (Count II), and one felony count of third-degree possession of a controlled substance (phentermine) while in possession of a firearm (KRS 218A.1417 and KRS 218A.992) (Count III).

On May 10, 1995, Crutchleo pled guilty to the amended charge of trafficking in marijuana within 1000 yards of a school pursuant to a plea agreement with the Commonwealth. Under the agreement, the Commonwealth moved to dismiss Counts 2 and 3 of the indictment and recommended a sentence of five years to be probated for five years on the trafficking count. On July 24, 1995, the circuit court sentenced Crutchleo consistent with the Commonwealth's recommendation to five years for trafficking in marijuana within 1000 yards of a school, but further sentenced him to probation for a period of five years in lieu of immediate imprisonment. He was placed on active supervision and ordered to comply with the terms and conditions of probation outlined in KRS 533.030 and imposed by the Division of Probation and Parole. The court also specifically imposed as a condition of probation that he not commit any criminal act.

On November 12, 1997, Crutchleo's probation officer submitted an affidavit requesting that an arrest warrant be issued because of Crutchleo's violation of the conditions of probation. More specifically, the officer stated that Crutchleo had been convicted on November 5, 1997, in federal district

court, for possession of a firearm committed on August 5, 1995, and for possession of a sawed-off shotgun committed on August 7, 1995. The circuit court issued the warrant and Crutchleo was arrested the next day. On November 17, 1997, Crutchleo was brought before the circuit court on the charge of violating his probation and he was advised by the judge that he had the right to an attorney to represent him at a hearing at which he could cross-examine witnesses for the Commonwealth and present witnesses on his own behalf. On November 24, 1997, an attorney was appointed to represent Crutchleo.

On December 18, 1997, the circuit court held a conference on the probation revocation charges at which Crutchleo appeared with his counsel. At that time, Crutchleo's attorney stated that appellant was willing to stipulate to the contents of the probation officer's affidavit and did not intend to contest the existence of his federal convictions, but that he wanted to request that his state sentence run concurrently. His attorney agreed that the only real issue was whether the five-year sentence could run concurrently with his federal sentence. Because there was some uncertainty whether the law allowed the trial court to order the state sentence to run concurrently with the federal sentence, the court delayed holding an evidentiary hearing until December 15, 1997.

On December 15, 1997, Crutchleo was present with his attorney for a probation revocation hearing. Crutchleo's attorney stipulated to the violation of his probation because of the existence of the federal convictions. Defense counsel then

argued that Crutchleo would be serving between 48-57 months on his federal sentence and asked the court to allow him to serve his federal sentence first rather than require him immediately to begin serving his state sentence upon revocation. After the Commonwealth responded, defense counsel stated she had no further evidence when questioned by the trial judge. The court then stated that based on the stipulations it would hold that Crutchleo had violated the conditions of probation by committing another crime while on probation. Given the similarity in the original state charges and the federal convictions, both involving firearms, the court decided to revoke Crutchleo's probation immediately, which the court stated rendered any state court ruling on whether the sentence would run concurrently or consecutively with the federal sentence moot. On December 18, 1997, the court entered a written order finding that Crutchleo had violated the conditions of his probation by receiving a new conviction in federal court.

Although not appearing in the circuit court record, at some time in May 1999, Crutchleo submitted a motion for concurrent sentencing. On May 26, 1999, the Commonwealth filed a response in opposition to the motion maintaining that under KRS 533.060(2) and KRS 532.115, Crutchleo was not eligible for concurrent sentencing. The trial court summarily denied the motion for concurrent sentencing.

On August 12, 1999, Crutchleo filed a notice with this Court appealing the circuit court's November 1997 order revoking his probation that was deemed deficient but was treated as a

motion for belated appeal. This Court issued an order returning the case to the circuit court for an evidentiary hearing on whether Crutchleo had waived his right to appeal the November 1997 order. On November 15, 1999, the trial court conducted a hearing on Crutchleo's proffered reasons for the belated appeal. Based on the testimony of Crutchleo and his former attorney, and the record of the prior proceedings, the court found that Crutchleo had not been advised by that court or his attorney of his right to appeal the probation revocation order. On December 20, 1999, this Court granted Crutchleo's motion for belated appeal.

Crutchleo argues on appeal that his right to procedural due process was violated during the probation revocation hearing. More specifically, he asserts that he was not allowed to testify at the hearing and was not advised that he could present mitigating evidence to support an argument that any violation of the probation conditions did not warrant revocation. See, e.g., United States v. Dodson, 25 F.3d 385 (6th Cir. 1994). In fact, Crutchleo alleges that he was prohibited from testifying on his own behalf.

A review of the record clearly refutes Crutchleo's allegations. Although the procedural protections are more limited than with a criminal prosecution, the minimum due process procedures required for probation revocation include: (1) written notice of the claimed violations; (2) disclosure of the evidence against the probationer; (3) an opportunity to be heard in person and present witnesses and documentary evidence; (4) a right to

confront and cross-examine witnesses absent good cause to the contrary; (5) a neutral and detached decision maker; and (6) a written statement by the fact finder of the evidence relied upon and the reasons for revoking probation. See Gagnon v. Scarpelli, 411 U.S. 778, 93 S. Ct. 1756, 36 L. Ed. 2d 656 (1973); Baumgardner v. Commonwealth, Ky. App., 687 S.W.2d 560 (1985); KRS 533.050(2).

When Crutchleo first appeared before the trial court on the probation revocation warrant, the judge specifically advised him that he had the right to present witnesses on his behalf at a hearing. He was present in the courtroom with his attorney at the November 24, 1997, conference, and the December 18, 1997, revocation hearing. On both occasions, defense counsel stated that Crutchleo did not challenge the existence of the federal convictions. She also stated at the hearing that the federal conviction for possession of a sawed-off shotgun involved his mere possession as a participant in the sale of the firearm, rather than possession for possible personal use. Crutchleo had an opportunity to testify at the hearing had he wanted to do so, and there is no indication that he was prevented from testifying personally or presenting witnesses or evidence in mitigation. The probation revocation hearing satisfied the pertinent procedural requirements. Crutchleo has not shown that he was deprived of any constitutional due process rights.¹

¹ We note that Crutchleo also has not presented any evidence or testimony that he would have introduced at the hearing that would have affected the trial court's decision. Thus, he has not shown how he was harmed by being deprived of a
(continued...)

For the foregoing reasons, we affirm the order of the
Kenton Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

James W. Crutchleo, *Pro Se*
Lexington, Kentucky

BRIEF FOR APPELLEE:

Albert B. Chandler III
Attorney General

Elizabeth A. Heilman
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Frankfort, Kentucky

¹(...continued)
procedural due process right.