

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-001895-MR

TOMMY PUGH

APPELLANT

v. APPEAL FROM GRAVES CIRCUIT COURT
HONORABLE JOHN T. DAUGHADAY, JUDGE
ACTION NO. 99-CR-00110

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING
** **

BEFORE: DYCHE, GUIDUGLI AND KNOFF, JUDGES.

GUIDUGLI, JUDGE. Tommy Pugh (Pugh) appeals an order of the Graves Circuit Court revoking his conditional discharge status on the grounds that he violated the terms thereof by failing to pay child support as previously ordered. Upon revoking his conditional discharge status, the court imposed the five-year sentence previously entered based upon Pugh's guilty plea to the criminal offense of flagrant non-support in violation of KRS 530.050. We affirm.

In a criminal complaint sworn to by his ex-wife on January 20, 1999, it was alleged that Pugh committed the offense of flagrant non-support when he failed to pay court ordered child

support in the sum of \$164.46 per week. Said support was based upon an order entered in a dissolution proceeding and for the support of his three minor children. The order was effective as of May 14, 1998. At the time of the criminal complaint, it was further alleged that his arrearage was in excess of \$1,000 and that he had left his minor children in destitute circumstances. Based upon a negotiated plea agreement, Pugh pled guilty to the felony non-support charge on August 9, 1999. On November 8, 1999, judgment and sentence was entered sentencing him to five (5) years conditionally discharged for five (5) years with a condition that he pay his current child support plus \$25.62 per week toward the arrearage of \$6,587.90.

On May 30, 2000, the Commonwealth moved to revoke Pugh's "probation" alleging that Pugh had failed to comply with the conditions of his "probation" and that his child support arrearage had increased by an additional \$3,125.56. A hearing was held on the motion on July 31, 2000, at which time the trial court revoked Pugh's conditional discharge and ordered him to serve his five year sentence. This appeal followed.

On appeal, Pugh contends that his due process rights were violated when the Graves Circuit Court failed to conduct a proper evidentiary hearing. Specifically, he alleges he was denied the right to present evidence, to cross-examine witnesses and to make an opening or closing statement. Revocation of a probated or conditionally discharged sentence is governed by KRS 533.050 which states:

- (1) At any time before the discharge of the defendant or the termination of the

sentence of probation or conditional discharge:

- (a) The court may summon the defendant to appear before it or may issue a warrant for his arrest upon a finding of probable cause to believe that he has failed to comply with a condition of the sentence; or
 - (b) A probation officer, or peace officer acting at the direction of a probation officer, who sees the defendant violate the terms of his probation or conditional discharge may arrest the defendant without a warrant.
- (2) The court may not revoke or modify the conditions of a sentence of probation or conditional discharge except after a hearing with defendant represented by counsel and following a written notice of the grounds for revocation or modification.

The standard for a revocation hearing has been set forth in Murphy v. Commonwealth, Ky. App., 557 S.W.2d 838 (1977), which adopted the minimal due process requirements delineated in the United States Supreme Court cases of Morrissey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972) and Gagnon v. Scarpelli, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973). In Murphy, supra, at 849, this Court held:

In support of his position, Murphy relies upon Morrissey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972) and Gagnon v. Scarpelli, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973) which deal with the minimal due process requirements attendant upon revocation of probation. In Morrissey, 408 U.S. 471, 489, 92 S.Ct. 2593, 2604, at 33 L.Ed.2d 484, 499 the criteria was set forth by Chief Justice Burger speaking for the majority. A parolee's constitutional rights are protected when revocation is being considered if (1) a written notice of the

claimed violations of parole are served, (2) a disclosure of the evidence to be used is made, (3) an opportunity is granted to be heard in person, present witnesses and documentary evidence, (4) confrontation and cross-examination of witnesses is afforded (unless a specific finding for good cause is made to the contrary), (5) a neutral and detached hearing body conducts the procedure and (6) a written statement is made by the fact finder(s) as to the evidence relied on and the reasons for revoking parole.

In view of the foregoing standard, we believe Pugh was afforded the minimal due process to which he was entitled. He received written notice approximately two months prior to the revocation hearing. He was present in court and represented by appointed counsel. The court received testimony that the affidavit filed with the written motion was accurate as to the arrearage owed and the fact that Pugh had not made any child support payments since February 18, 2000. Pugh's employer was called as a witness and denied that he had been served with a wage assignment order or that any money had been withheld from Pugh's wages to pay child support. Pugh's only contention was that he believed the employer was at fault for not withholding child support from his salary. The trial court indicated that Pugh would have known if \$190.08 was being withheld from his pay on a weekly basis. Additionally, no payments had been made during the nearly two months between the filing of the motion and the revocation hearing. The trial court asked Pugh if he could pay the arrearage at that time or if his employer would advance him the necessary funds. Pugh answered in the negative. It was then that the trial court ordered Pugh's conditional discharge revoked and remanded him to the custody of the Sheriff. Having

thoroughly reviewed the record and the video tape revocation hearing, we believe Pugh received his constitutional due process rights as set forth in Murphy.

For the foregoing reasons, the order of the Graves Circuit Court revoking Pugh's conditional discharge is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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