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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-000683-MR

RICKY WHITLOW — APPELLANT

v.

APPEAL FROM CUMBERLAND CIRCUIT COURT
HONORABLE JAMES G. WEDDLE, JUDGE
ACTION NO. 01-CR-00018

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: JOHNSON, KNOPF AND McANULTY, JUDGES.

JOHNSON, JUDGE: Ricky Whitlow has appealed from an order of the Cumberland Circuit Court revoking his probation and sentencing him to serve five years in prison for complicity to commit burglary in the third degree.[1] Having concluded that Whitlow has not shown that his right to due process was violated or that he was prejudiced by the failure of his probation officer to give him a written copy of the terms of his probation, we affirm.

[1] Kentucky Revised Statutes (KRS) 502.020 and 511.040.

On March 2, 2001, Whitlow was indicted by a Cumberland County grand jury for complicity to commit burglary in the second degree.[2] On July 27, 2001, Whitlow entered a plea of guilty to the amended count of complicity to commit burglary in the third degree pursuant to an agreement with the Commonwealth, which recommended a sentence of five years' imprisonment to be probated for a period of five years. On October 1, 2001, the circuit court sentenced Whitlow consistent with the Commonwealth's recommendation to a suspended term of five years in prison and placed him on probation for a period of five years.

At the time Whitlow was sentenced to probation on the burglary conviction, he was serving a 90-day sentence in the county jail on a prior misdemeanor conviction in Cumberland District Court for disorderly conduct and resisting arrest. Following the felony sentencing, Whitlow's probation officer told him that they would meet to specifically discuss his terms of probation once he was released from jail. While Whitlow was serving the 90-day misdemeanor sentence, he was charged with promoting contraband in the first degree[3] after a large quantity of pills was discovered on his person when he returned from work release. On November 21, 2001, Whitlow entered a guilty plea in

[2] KRS 502.020 and KRS 511.030.

[3] KRS 520.050.

Adair District Court to the amended charge of promoting contraband in the second degree.[4] He was sentenced to 12 months in jail, but he was placed on probation for a period of two years and ordered to serve 30 days consecutive to the sentence he was serving on the misdemeanor conviction out of Cumberland District Court, with the remaining 11 months suspended during the period of probation.

On December 12, 2001, the Commonwealth filed a motion to revoke Whitlow's probation on the felony conviction in Cumberland Circuit Court based on his misdemeanor conviction for promoting contraband in the second degree. On December 21, 2001, the circuit court held the first of several hearings on the motion at which Whitlow stipulated to having been convicted on a plea of guilty to promoting contraband in the second degree, but he challenged the revocation of his probation on the basis that he had never received documentation from or discussed the conditions of probation with his probation officer. His probation officer agreed with this allegation. The trial court continued the hearing for further review of the situation in light of KRS 533.030. On February 1, 2002, the trial court held a second hearing, which likewise was continued for further consideration by the court. On March 1, 2002, the trial court held a third hearing and granted the Commonwealth's motion to

[4] KRS 520.060.

revoke Whitlow's probation stating that it did not believe KRS 533.030 required Whitlow to sign a document listing the terms and conditions of probation.

On March 21, 2002, Whitlow filed a motion to reconsider. The trial court denied the motion and noted that the October 1, 2002, order of probation form had included the requirement that Whitlow not commit another offense. The trial court stated that it believed there had been substantial compliance with KRS 533.030. This appeal followed.

Whitlow's primary challenge to the trial court's ruling involves his claim that he was denied due process. He contends that fairness dictates that a probationer receive an explanation of the terms and conditions of probation in order to allow him an opportunity for rehabilitation. He asserts that probationers have a liberty interest in probation protected by the Fourteenth Amendment to the United States Constitution that includes notice of the terms and conditions of probation prior to having their probation revoked for violating those conditions. Whitlow also stresses the important role of probation officers in assisting and guiding probationers generally and also with respect to the conditions of their probation.

Although we agree with most of the general principles propounded by Whitlow, his due process argument ultimately must

fail under the facts of this case. In Gagnon v. Scarpelli,[5] the Supreme Court recognized that revocation of probation is not part of a criminal prosecution and thus the full panoply of due process protections accorded a defendant in such a proceeding do not apply to a revocation proceeding. However, the Supreme Court held that the conditional loss of freedom embodied in revocation of probation constitutes a deprivation of a defendant's liberty subject to certain limited procedural due process rights. Among those rights is one of fair notice or warning of the conduct that may result in revocation of probation.[6] However, the courts have analyzed the notice requirement differently depending on whether the violation involved criminal activity. For instance, the Court in United States v. Dane,[7] stated:

> As a general matter, formal conditions of probation serve the purpose of giving notice of proscribed activities. But a formal condition is not essential for purposes of notice. Courts have sustained the revocation of probation for criminal activity committed prior to the effective date of the conditions, or where the defendant was not aware of the conditions. In such a case, knowledge of the criminal law is imputed to the probationer, as is an understanding that violation of the law will

[5] 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973). See generally Baumgardner v. Commonwealth, Ky.App., 687 S.W.2d 560 (1985).

[6] See Douglas v. Buder, 412 U.S. 430, 93 S. Ct. 2199, 37 L.Ed.2d 52 (1973); United States v. Twitty, 44 F.3d 410, 412 (6th Cir. 1995); and United States v. Gallo, 20 F.3d 7, 11, (1st Cir. 1994).

[7] 570 F.2d 840 (9th Cir. 1978).

> lead to the revocation of probation. On the other hand, where the proscribed acts are not criminal, due process mandates that the petitioner cannot be subjected to a forfeiture of his liberty for those acts unless he is given prior fair warning [citations omitted].[8]

Whitlow engaged in the criminal activity that culminated in a conviction for promoting contraband after he had been sentenced and placed on probation for the burglary conviction. Knowledge of the criminal law and notice that violation of the law could result in revocation of his probation is imputed to Whitlow, so actual notice and explanation of that condition of probation by the probation officer was not necessary prior to revocation based on that condition. Accordingly, the trial court did not violate Whitlow's due process rights by revoking his probation even if he did not receive a written copy of the conditions of probation.

In addition to his due process argument, Whitlow contends that the trial court's revocation order must be

[8] Id. at 843-44. See also United States v. Simmons, 812 F.2d 561, 565 (9th Cir. 1987); and State v. Budgett, 146 N.H. 135, 138, 769 A.2d 351, 353 (2001)("It would be illogical and unreasonable to conclude that a defendant, who has been granted conditional liberty, needs to be given an express warning that if he commits a crime, he will lose the privilege of that liberty. '[A] condition of a suspended sentence that a person may not commit a [crime], is so basic and fundamental that any reasonable person would be aware of such condition'"). State v. Lewis, 58 Conn.App. 153, 752 A.2d 1144 (2000)(condition not to commit another crime inherent in every order of probation).

reversed based on KRS 533.030(5).[9] KRS 533.030 deals with several aspects involving the conditions of probation; and Subsection (5) states: "When a defendant is sentenced to probation or conditional discharge, he shall be given a written statement explicitly setting forth the conditions under which he is being released." Whitlow also cites to KRS 439.480(2), which provides that as part of the duties of probation officers, they shall "[f]urnish to each person released under their supervision a written statement of the conditions of probation or parole and instruct him regarding the conditions[.]"

The fundamental rule of statutory construction is that courts are to ascertain and construe statutes so as to give effect to the intent of the Legislature.[10] A court must consider the purpose for the statute, the reason and spirit of the statute, and the mischief intended to be remedied.[11] The policy and purpose of a statute must be considered in determining the meaning of the language and intent of the Legislature.[12] Each section of a statute should be construed in accord with the

[9] When Whitlow was sentenced, the provision now appearing at KRS 583.030(5) was at KRS 533.030(6).

[10] Hale v. Combs, Ky., 30 S.W.3d 146, 151 (2000); Commonwealth v. Harrelson, Ky., 14 S.W.3d 541, 546 (2000).

[11] Barker v. Commonwealth, Ky.App., 32 S.W.3d 515, 516-17 (2000); Gurnee v. Lexington Fayette Urban County Government, Ky.App., 6 S.W.3d 852, 856 (1999).

[12] See Kentucky Industrial Utility Customers, Inc. v. Kentucky Utilities Co., Ky., 983 S.W.2d 493, 500 (1998); and Democratic Party of Kentucky v. Graham, Ky., 976 S.W.2d 423, 429 (1998).

statute as a whole.[13] A review of KRS 533.030 as a whole indicates that Whitlow's reliance on that statute is misplaced. Although Subsection (5) states a defendant shall be given a written statement of conditions, Subsection (1) states:

> The conditions of probation and conditional discharge shall be such as the court, in its discretion, deems reasonably necessary to insure that the defendant will lead a law-abiding life or to assist him to do so. The court shall provide as an explicit condition of every sentence to probation or conditional discharge that the defendant not commit another offense during the period for which the sentence remains subject to revocation.

This provision in essence makes absence of the commission of another offense a condition of probation as a matter of law. In construing these two subsections, we refer to the Commentary,[14] which states with respect to the writing requirement the following: "Most of the persons caught up in the criminal process are relatively uneducated and there exists a substantial risk that conditions of their release might be misunderstood. That risk can be minimized by requiring a written statement of conditions." With respect to the subsequent criminal violation condition, the Commentary states that "[t]he last sentence of subsection (1) is added so that there can exist no doubt but that commission of another offense while probation or

[13] Combs v. Hubb Coal Corp., Ky., 934 S.W.2d 250, 252-53 (1996); Aubrey v. Office of the Attorney General, Ky.App., 994 S.W.2d 516, 520 (1998).

[14] See KRS 500.100 (Commentary may be used as aid in construing Penal Code).

conditional discharge exists is reason for revocation of such a sentence."

We believe that Subsection (5) was intended to avoid prejudice to a defendant concerning the terms of probation due to lack of notice and does not create a standard which would prohibit revocation of probation for failure to furnish a written statement of conditions where the defendant has actual notice. KRS 533.030 does not contain a remedy or penalty for violation of Subsection (5). However, given the policy and purpose of KRS 533.030, we hold that a defendant may have his sentence of probation revoked for commission of a criminal offense during his term of probation even if he did not receive a written statement of the conditions of probation.[15]

[15] Although there are no Kentucky cases on point, the federal courts have held that under federal law similar to Kentucky's statutes, a trial court is not automatically precluded from revoking a defendant's probation for failure to provide a written statement of conditions. 18 U.S.C. § 3583(f) states the trial court "shall" direct that the probation officer provide the defendant with a written statement setting forth all the conditions of the supervised release. 18 U.S.C. § 3583(d) states the court "shall" order as an explicit condition of supervised release that the defendant not commit another crime during the term of supervision. 18 U.S.C. § 3603(l) directs that a probation officer, as part of his duties, "shall" provide a probationer a written statement clearly setting forth all the conditions of supervised release. In United States v. Felix, 994 F.2d 550, 551 (8th Cir. 1993), the Court stated, "Because the ultimate goal is notice and guidance for the defendant, we decline to impose a rule that failure to order or to provide a written statement automatically results in the inability of the sentencing court to revoke supervised release based on a violation of one of the conditions." In United States v. Ortega-Brito, 311 F.3d 1136, 1138 (9th Cir. 2002), the Court agreed with the First and Eighth Circuits that "where a releasee received actual notice of the conditions of his supervised release, a failure to provide written notice of those conditions will not automatically invalidate the revocation of his release based upon a violation of such conditions." See also United States v. Ramos-Santiago, 925 F.2d 15 (1st Cir. 1991); United States v. Johnson, 763 F. Supp. 900 (W.D. Tex. 1991).

It is undisputed that during the term of Whitlow's probation for the burglary conviction, he both committed and was convicted of the offense of promoting contraband in the second degree. The record for the burglary conviction contains a written Order of Probation/Conditional Discharge document and the Judgment and Sentence on Plea of Guilty document both dated October 1, 2001, the same date as the sentencing hearing. Both documents were entered by the trial court on October 8, 2001. The Order of Probation contains a list of conditions that includes the provision, "Not commit another offense." It is signed by the trial judge but not by the defendant, Whitlow. The trial judge stated in the December 21, 2001, hearing that he usually reviews the Order of Probation with the defendant at the sentencing hearing. Unfortunately, the appellate record does not contain a transcript or videotape of the sentencing hearing; however, the appellant generally bears the burden of ensuring the completeness of the record and an appellate court must assume that the omitted record supports the decision of the trial court.[16] Indeed, Whitlow has not claimed that he did not receive actual notice of the probation conditions orally at the

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In addition, courts in Connecticut and Indiana have construed their statutes, which are similar to the Kentucky statutes, as directory, rather than mandatory, and applied a harmless error analysis for probation revocation where a defendant did not receive a written statement of the conditions of probation. See State v. Martinez, 55 Conn.App. 622, 731 A.2d 721 (1999); Seals v. State, Ind.App. 700 N.E.2d 1189 (1998).

[16] See Gillum v. Commonwealth, Ky., 925 S.W.2d 189, 190 (1995); and Commonwealth v. Thompson, Ky., 697 S.W.2d 143, 145 (1985).

time of sentencing, only that he did not receive a written statement of the conditions from either the court or his probation officer. In conclusion, we do not believe the technical violation of KRS 533.030(5) precluded the trial court from revoking Whitlow's sentence of probation absent prejudice by a lack of notice, which Whitlow has not shown.

For the foregoing reasons, the order of the Cumberland Circuit Court is affirmed.

ALL CONCUR.

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