

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001041-MR

WOFFARD STEPHEN JENKINS

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE LAURANCE VANMETER, JUDGE
ACTION NO. 98-CR-01272

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING IN PART, VACATING AND REMANDING IN PART

** ** * * * * *

BEFORE: JOHNSON, KNOPF, AND McANULTY, JUDGES.

McANULTY, JUDGE. This is an appeal from a judgment of the Fayette Circuit Court revoking Appellant's probation and sentencing him to ten years' imprisonment. Having reviewed the record, we affirm in part and vacate and remand in part for findings of fact.

On December 1, 1998, the Fayette County Grand Jury returned an indictment charging Woffard Stephen Jenkins (Jenkins) with flagrant non-support and with being a persistent

felony offender, second degree, based on a prior conviction for
flagrant non-support in 1992. On December 18, 1998, Jenkins
entered a plea of guilty to the two charges for which he was
indicted. Jenkins received a sentence of one year for flagrant
non-support enhanced to ten years by the persistent felony
offender conviction. The trial court withheld the judgment
imposing imprisonment and sentenced Jenkins to a period of five
years' probation subject to a number of conditions, including in
relevant part, the following condition:

7. Pay Court ordered child support each
week;

On June 1, 2001, the probation and parole officer
assigned to Jenkins filed an affidavit to revoke Jenkins'
probation after Jenkins failed to pay court-ordered child
support and failed to enter into a court-ordered wage
assignment. Subsequently, the trial court issued an arrest
warrant for Jenkins, and Jenkins was arrested on July 5, 2001.
Ultimately, Jenkins was released from custody the following day
with orders to appear for a probation review on October 4, 2001.

Jenkins appeared at the October 4, 2001, probation
review hearing and a subsequent hearing; however, he failed to
appear at a hearing scheduled for March 28, 2002. Consequently,
another warrant was issued for Jenkins' arrest, and Jenkins was
taken into custody. On April 12, 2002, the trial court held a

hearing to revoke Jenkins' probation for his failure to appear at the March 28, 2002, probation review hearing.

After hearing the evidence, the trial court found that Jenkins violated the terms of his probation by 1) failing to appear for a probation review hearing and 2) failing to pay his court-ordered child support. Accordingly, the trial court revoked probation, precipitating this appeal.

On appeal, Jenkins argues that the trial court erred in failing to consider any alternative forms of punishment before revoking probation. In addition, he states the trial court denied him due process of law by making no specific findings of fact other than the two conclusory findings listed in the preceding paragraph.

The standard of review of a trial court's decision to revoke conditional probation is whether the trial court abused its discretion. See Ridley v. Commonwealth, Ky., 287 S.W.2d 156, 158 (1956). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." Goodyear Tire & Rubber Co. v. Thompson, Ky., 11 S.W.3d 575, 581 (2000).

We first address Jenkins' due process argument. Probation revocation proceedings "must be conducted in accordance with minimum requirements of due process of law."

Rasdon v. Commonwealth, Ky. App., 701 S.W.2d 716, 718 (1986).

In relevant part, KRS 533.050 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;

...

(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.

In addition to the procedure mandated in KRS 533.050, the United States Supreme Court has specified minimal due process requirements involving post-sentencing actions affecting one's liberty. See Morrissey v. Brewer, 408 U.S. 471, 488-89, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972) (parole revocation proceedings). Such additional requirements include (a) disclosure of evidence against the defendant; (b) opportunity to for the defendant to be heard; (c) "the right to confront and cross-examine adverse witnesses"; and (d) a written statement by the factfinder "as to the evidence relied on and reasons for revoking" probation. Id.

In this case, the trial court did not issue any findings of fact, either oral or written, other than its

conclusions that Jenkins violated the terms of his probation by failing to appear for a probation review hearing and failing to pay his court-ordered child support. The absence of the entry of any factual findings by the trial court prevents us from conducting a meaningful review of the matter. As such, we remand this issue to the trial court for factual findings. See Rasdon, 701 S.W.2d at 719 (A trial court's failure to make written findings in support of probation revocation is the type of error that can be "corrected by a remand rather than a total reversal and vacation of the court's decision.").

We move to Jenkins' additional argument that the trial court erred in failing to consider any alternative forms of punishment before revoking probation. In support of this argument, Jenkins relies on KRS 533.030(3) and Bearden v. Georgia, 461 U.S. 660, 103 S. Ct. 2064, 76 L. Ed. 2d 221 (1983), however, we hold that this reliance is misplaced. KRS 533.030(3) specifically applies to nonpayment of restitution, not child support. Moreover, Bearden pertains to a defendant's nonpayment of court-imposed fines and restitution, not child support. See id. at 665. In this case, the trial court was not required to consider alternative forms of punishment before revoking probation for Jenkins' non-payment of child support and failure to appear for a probation review hearing.

For the foregoing reasons, the trial court's revocation of probation is vacated and remanded for factual findings in support of the decision. Further, the judgment is affirmed as to the claimed error pertaining to the trial court's failure to consider alternative forms of punishment.

JOHNSON, JUDGE, CONCURS.

KNOPF, JUDGE, CONCURS IN PART AND DISSENTS IN PART AND FILES SEPARATE OPINION.

KNOPF, JUDGE, CONCURRING IN PART AND DISSENTING IN PART: I fully concur with the majority's conclusion that the trial court was not obligated to consider alternative forms of punishment before revoking Jenkins's probation. However, I disagree with the majority's conclusion that the trial court made inadequate factual findings to support that decision. The trial court conducted a hearing on April 12, 2002, which Jenkins and his counsel attended. After hearing the evidence, the trial court found "that the Defendant has violated the terms of his probation by Failure to appear for Probation Review Hearing; [and] non payment of court ordered child support." Although this finding is somewhat conclusory, it clearly sets out the factual basis for finding that Jenkins had violated the conditions of his probation. Furthermore, the trial court's findings implicitly reject Jenkins's attempted justifications for failing to comply

with these conditions. Consequently, I perceive no need to remand this case for additional factual findings.

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