

RENDERED: May 7, 2004; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2002-CA-001701-MR

J. L. BROWN

APPELLANT

v. APPEAL FROM FULTON CIRCUIT COURT
HONORABLE WILLIAM LEWIS SHADOAN, JUDGE
ACTION NO. 01-CR-00003

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: JOHNSON, TAYLOR, AND VANMETER, JUDGES.

TAYLOR, JUDGE: J. L. Brown appeals from an order of the Fulton Circuit Court revoking his probation for violating its terms by committing other offenses and failing to comply with the terms of his probation order. The order also imposed the five-year sentence of imprisonment received by Brown in association with his guilty plea to the underlying offense, second-degree possession of a forged instrument. Because Brown failed to properly preserve the issues raised in the appeal, all arguments

are reviewed under the palpable error standard. For the reasons stated below, we affirm.

On January 11, 2001, Brown was indicted on three counts of criminal possession of a forged instrument in the second degree, Kentucky Revised Statutes (KRS) 516.060. The charges were based upon the allegation that on December 26, December 28, and December 29, 2000, Brown cashed forged checks at the Fulton Bank Branch in the amounts of \$50.00, \$60.00, and \$80.00, respectively.

Brown and the Commonwealth initially entered into a plea agreement under which the three possessions of a forged instrument charges would be merged into one count and the Commonwealth would recommend a one year sentence of imprisonment. On April 26, 2001, the trial court entered final judgment and sentencing. The trial court accepted Brown's guilty plea; however, rather than accepting the sentence recommended by the Commonwealth in the plea agreement, the trial court sentenced Brown to five years' imprisonment, probated for a period of five years. Though the trial court imposed a sentence in excess of the sentence provided for in Brown's plea agreement, the trial court did not afford Brown the opportunity to either withdraw his guilty plea or to accept the original one-year sentence provided for in the plea agreement without probation.

Following an allegation by the Department of Corrections Division of Probation and Parole that Brown had violated the terms of his probation, a probation revocation hearing was held on July 11, 2002. Following the hearing, the trial court entered an order revoking Brown's probation and imposing the five-year prison sentence on the underlying felony. This appeal followed.

Brown contends that the trial court violated his due process rights. Specifically, Brown alleges the trial court erroneously proceeded with the probation revocation hearing without proof of notice to Brown of the probation violations, without notice of the hearing date, and without an evidentiary hearing.

As with the remaining issues in this appeal, Brown concedes that this issue was not preserved, and requests that the argument be reviewed pursuant to the palpable error standard contained in Ky. R. Crim. P. (RCr) 10.26.

RCr 10.26 states "[a] palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error." Under Partin v. Commonwealth, Ky., 918 S.W.2d 219, 224 (1996), relief will be

granted only if the reviewing court concludes that "a substantial possibility exists that the result would have been different" absent the error.

It is well established that due process requires a probation revocation proceeding to comply with the requirements set forth in Morrissey v. Brewer, 408 U.S. 471, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972); Gagnon v. Scarpelli, 411 U.S. 778, 93 S. Ct. 1756, 36 L. Ed. 2d 656 (1973). As the United States Supreme Court noted in Gagnon, although there are some differences between probation and parole, there is no constitutionally distinguishable difference between revocation of either. Gagnon, 411 U.S. 778. As such, our analysis remains unchanged irrespective of whether we are considering the revocation of an individual's probation or parole. That is, the procedural rigors of due process have been satisfied so long as the revocation proceeding complies with the requirements first articulated by Morrissey. Robinson v. Commonwealth, Ky. App., 86 S.W.3d 54 (2002).

A probation revocation proceeding "is not a part of a criminal prosecution and thus the full panoply of rights due a defendant in such a proceeding does not apply to [probation] revocations." Morrissey, 408 U.S. at 479. Indeed, criminal judicial proceedings and probation revocation hearings are quite dissimilar in both form and substance. As the United States

Supreme Court has noted, "[r]evocation deprives an individual, not of the absolute liberty to which every citizen is entitled, but only of the conditional liberty properly dependent on observance of special parole restrictions." Id. at 479. If an individual released on probation has failed to abide by the conditions of his release, "the State has an overwhelming interest in being able to return the individual to imprisonment without the burden of a new adversary criminal trial. . . ." Morrissey, 408 U.S. at 483. Although the State has a great interest in reincarcerating those individuals who are unable to meet the conditions of their probation, it may not do so without first affording an individual the minimum requirements of due process. Id.

As articulated by the United States Supreme Court in Morrissey, 408 U.S. at 489, minimum requirements of due process include:

- (a) written notice of the claimed violations of [probation];
- (b) disclosure to the [probationer] of evidence against him;
- (c) opportunity to be heard in person and to present witnesses and documentary evidence;
- (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation);
- (e) a 'neutral and detached' hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers;
- and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking [probation].

While the Morrissey factors are not an exhaustive list, they do establish a floor upon which the State is able to construct its own due process requirements. However, such a process is not meant to become a second criminal prosecution. Indeed, "the process should be flexible enough to consider evidence. . . that would not be admissible in an adversary criminal trial." Morrissey, 408 U.S. at 489.

Because Brown's first argument concerns procedural due process issues and is to be reviewed under the palpable error standard, we first review the background of events, following Brown's being placed on probation on April 26, 2001.

In association with the probation order, various terms and conditions were placed upon Brown, including that he successfully complete "drug court"; he not commit additional criminal offenses; he complete 100 hours of community service; and he report to his probation officer as directed.

While Brown initially made required drug court appearances, his adherence to the program quickly declined. The drug court docket entries related to his June 8, 2001, appearance noted that he had missed all three of his initial urine tests, that he had failed to complete his entry level homework, and that he had no explanation for failing to complete these procedures. The docket entries also noted that it was

clearly explained to Brown that there should be no further infractions of drug court procedures; however, the June 29, 2001, drug court docket sheet notes that Brown had missed drug tests on June 21, June 22, and June 27, 2001.

On July 6, 2001, Brown failed to appear in drug court and a warrant was issued for his arrest. On October 12, 2001, an "Order of Termination from Drug Court" was entered by the drug court. The order references a certification of violations executed by the drug court treatment coordinator which cites as violations that Brown had absconded from the program, Brown had missed urine tests, Brown had missed supervision, and Brown had missed group counseling. On January 10, 2002, the warrant was served on Brown. The January 11, 2002, drug court docket entries reflect that Brown successfully showed cause for his failure to make the required appearances and was released from custody. Brown was able to show that he did not make the required appearances because of his hospitalization for diabetes.

On January 29, 2002, a second order of termination from drug court was entered. The certificate of violations referenced Brown's failure to comply with the terms of the program due to his arrest for flagrant non-support in the sum of \$16,000.00.

On May 1, 2002, the Division of Probation and Parole issued a special supervision report and warrant request. The warrant request stated as follows:

J. L. Brown was sentenced to five years, probated five years on April 26, 2001. A special condition of his probation was that he attend and complete Drug Court. Mr. Brown was accepted for Drug Court but failed to show up on May 11, 2001.

Mr. Brown did complete Fuller Treatment Center during May 2001 and then went to the Freidman Center in Paducah, Ky. According to Mona Hoyle, Treatment Supervisor, Mr. Brown completed treatment at the Freidman Center. Mr. Brown has never contacted the Fulton Probation & Parole Office and had not been supervised by any probation officer.

Mr. Brown absconded Drug Court and probation supervision. Mr. Brown works for Easter Seals in Paducah and they have an address on him, but refuse to give it to anyone. Mr. Brown is living in Paducah somewhere. He was arrested on January 10, 2002 for Failure to Appear on a Flagrant Non-Support case in which he owes \$16,000.

Mr. Brown has not followed any of his conditions of probation and it does not appear he will in the future.

Based on Mr. Brown's actions, it is requested that a warrant be issued and Mr. Brown be held until a Revocation Hearing can be held.

On July 11, 2002, the Department of Corrections Division of Probation and Parole issued a Notice of Preliminary Hearing for revocation of Brown's probation. The alleged violations were identified as follows:

1. Absconding probation supervision. Has never reported to any probation officer since his release on probation of 4-26-2001.
2. Failure to complete community service work as directed.
3. Failure to comply with treatment program for substance abuse as directed. Was terminated from Drug Court on 10-12-2001. Was given second chance and was terminated again on 01-29-02.
4. Failure to report arrest within 72 hrs. to probation officer. Was arrested January 10, 2002 for Flagrant Non-Support.

The notice also included a section explaining to Brown his rights and responsibilities in the revocation process. Brown signed the notice stating that he understood the charges against him and his rights and responsibilities.

On July 11, 2002, the probation revocation hearing was held. Brown appeared and was represented by counsel. The trial court read the charges as set out by the probation officer and inquired of Brown why, based upon the charges, his probation should not be revoked. In rebuttal to the Division of Probation and Parole's position that probation should be revoked, counsel stated that Brown had completed a drug treatment program. The trial court questioned Brown regarding the remaining allegations, and Brown was unable to explain why he had not abided by those conditions. Brown alleged that he did not know about the community service requirements and that he had not

reported to his probation officer because he was waiting to be contacted by the officer. Brown conceded that he had been arrested for flagrant non-support. Based upon the discussion at the bench, and without an evidentiary hearing, the trial court revoked Brown's probation and imposed the five-year prison term.

In summary, the record discloses that Brown received notice of the hearing and the allegations against him. The Notice of Preliminary Hearing filed by the Probation and Parole Officer discloses both the allegations and the date of the hearing. Brown signed the notice. Brown and counsel were given ample opportunity to present arguments in opposition to probation revocation.

While we agree that Brown was entitled to the full range of due process protections identified in Morrissey, he was substantially accorded those rights in the course of the probation revocation proceeding. Indeed, Brown made no objection to the revocation proceedings, nor did he request an evidentiary hearing. Brown does not now identify any witnesses, evidence, and testimony he would have presented in the event of a full evidentiary hearing which could have changed the outcome of the case. Further, Brown offers no compelling rebuttal to the allegation that he violated the conditions of his probation as alleged by the Division of Probation and Parole.

Our review of this issue is pursuant to the palpable error standard in RCr 10.26. Even if Brown had been given additional advance notice of the allegations and the date of the hearing, and had a full evidentiary hearing been held, Brown had clearly violated conditions of his probation. Accordingly, we are not persuaded that there is a reasonable possibility that the result would have been different.

Next, Brown contends that the trial court erred in "speaking for Mr. Brown in entering a plea of guilty and without a determination that Brown wished to plead guilty or that the plea was made knowingly and voluntarily."

The premise of this allegation is unsupported by the record, and, on the whole, is confusing. Based upon our review of the probation revocation hearing, the trial court did not enter a "guilty plea" on behalf of Brown. Rather, the trial court confronted Brown and his counsel with the allegations presented by the Division of Probation and Parole and gave them the opportunity to show cause why, in light of the allegations, probation should not be revoked. The trial court did not purport to enter a "guilty plea" on behalf of Brown. To the contrary, the trial court gave Brown the opportunity to rebut the allegations.

Again, this issue is unpreserved, and we review it under the palpable error standard. We do not believe a manifest injustice occurred with regard to this issue.

Finally, Brown contends that the trial court was "without jurisdiction" to sentence him. When the trial court rejected the initial plea bargain between Brown and the Commonwealth, the trial court failed to advise Brown of his right to withdraw his guilty plea pursuant to RCr 8.10. Brown argues that each failure violated RCr 8.10 and deprived the trial court of jurisdiction.

At the outset of the April 26, 2001, sentencing hearing, defense counsel raised the issue of probation. The trial judge then acknowledged that the plea agreement provided for a one-year sentence of imprisonment, but stated that, when he grants probation on a one-year recommendation from the Commonwealth, he imposes a five-year sentence of imprisonment with a five-year probation period. The trial court further stated that this should make no difference as long as Brown abides by the probation requirements. Defense counsel then gave a similar explanation to Brown. At no time during the sentencing hearing did the trial court afford Brown the opportunity to either withdraw his plea agreement as a result of the greater sentence or to reject the higher sentence and accept

the original one-year sentence pursuant to the plea bargain without the benefit of probation.

RCr 8.10 provides as follows:

At any time before judgment the court may permit the plea of guilty or guilty but mentally ill, to be withdrawn and a plea of not guilty substituted.

If the court rejects the plea agreement, the court shall, on the record, inform the parties of this fact, advise the defendant personally in open court or, on a showing of good cause, in camera, that the court is not bound by the plea agreement, afford the defendant the opportunity to then withdraw the plea, and advise the defendant that if the defendant persists in that guilty plea the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement.

The court can defer accepting or rejecting the plea agreement until there has been an opportunity to consider the presentence report.

If the trial court chooses to reject a plea agreement, it must inform the defendant of its decision and allow defendant to withdraw his guilty plea if he so chooses. Kennedy v. Commonwealth, Ky. App., 962 S.W.2d 880 (1997).

Based upon the video record of the sentencing hearing, Brown was not notified of his right to withdraw his plea. However, we disagree with Brown that this violation of RCr 8.10 deprived the trial court of jurisdiction. The sentencing court which imposed probation retains jurisdiction over the case

during the period of probation. KRS 533.020; Commonwealth v. Griffin, Ky., 942 S.W.2d 289 (1997).

Although, Brown was not afforded the opportunity to withdraw his guilty plea pursuant to RCr 8.10, we are of the opinion that a remedy for this allegation of error is not available in this appeal. "The structure provided in Kentucky for attacking the final judgment of a trial court in a criminal case is not haphazard and overlapping, but is organized and complete. That structure is set out in the rules related to direct appeals, in RCr 11.42, and *thereafter* in [Ky. R. Civ. P.] CR 60.02." Gross v. Commonwealth, Ky., 648 S.W.2d 853, 856 (1983). This is a direct appeal from an order revoking Brown's probation. Brown may properly raise issues relating to the probation revocation proceeding, but he may not raise issues relating to the April 26, 2001, judgment and sentence. As such, we decline to reach the merits of this issue.

For the foregoing reasons, we affirm the judgment of the Fulton Circuit Court.

ALL CONCUR.

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