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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000397-MR

TIMOTHY JOHN ANGLIN

APPELLANT

v. APPEAL FROM MADISON CIRCUIT COURT
HONORABLE JULIA HYLTON ADAMS, JUDGE
ACTION NO. 01-CR-00048

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: BARBER, HENRY, AND JOHNSON, JUDGES.

JOHNSON, JUDGE: Timothy John Anglin has appealed from the January 23, 2004, order of the Madison Circuit Court which revoked his conditional discharge. Having concluded the trial court did not abuse its discretion by revoking Anglin's conditional discharge, we affirm.

Anglin was indicted by a Madison County grand jury on March 29, 2001, for two counts of sexual abuse in the first

degree¹ for the abuse of a three-year-old girl. Anglin entered a plea of guilty and on September 19, 2001, the trial court entered a final judgment sentencing him to prison for one year on each conviction of sexual abuse in the first degree, to run consecutively, for a total sentence of two years. Pursuant to KRS 532.043, Anglin was also sentenced to an additional three-year period of conditional discharge, under the following conditions:

1. Submit to fingerprinting and photographing within 48 hours upon sentencing;
2. Register as a sex offender for life;
3. To complete Sex Offender Treatment;
4. He shall reside in a setting where there are no minor children;
5. He shall hold no employment that places him in contact with or control over minors;
6. He shall have no contact with any minors without the supervision of an approved adult chaperone who is fully informed of his offenses and behavioral rules;
7. He shall not date, live with, or otherwise align himself with any woman with minor children without the express prior approval of his therapist and community supervision agent;
8. He shall not enter the family residence/property at any time without

¹ Kentucky Revised Statutes (KRS) 510.110.

the express prior approval of his therapist and community supervision agent;

9. He shall not become involved as a supervisor, instructor, leader, or participant in any youth oriented organizations;
10. He shall pay the Department of Public Advocacy fee of \$52.50 within 6 months after discharge.

After serving his two-year sentence, Anglin was released from prison on June 20, 2003. He signed a Condition of Supervision, which among other things, prohibited him from possessing any alcoholic beverage. On January 7, 2004, the Commonwealth filed a motion to set aside Anglin's three-year conditional discharge because he failed to comply with the terms and conditions of the order. A hearing was held on the Commonwealth's motion on January 22, 2004. Lynn Estes, Anglin's probation and parole officer during the time of the alleged violations, testified² that on January 2, 2004, he was contacted by the Richmond Police Department, who were attempting to locate Anglin in connection with another charge. Estes stated that Anglin's last known address was in Berea and that Anglin was scheduled to check in with him later that day. The police

² It is unclear from the record the exact date Estes began supervising Anglin as his probation and parole officer. However, the record does indicate that at the time Anglin was absent from his first appointment with Kevin Conlee, he was under the supervision of Mark Davidson, a probation and parole officer. At the time of his second absence from treatment with Conlee, Anglin was under the supervision of Estes.

officer informed Estes that he suspected Anglin was living in a hotel in Richmond instead of Berea. Later that day, Anglin called Estes and informed him that he could not make his scheduled appointment. During the conversation, Estes asked Anglin about his residence. Anglin first denied living in the hotel in Richmond, but then admitted he was living there. When Anglin reported at his rescheduled meeting with Estes on January 7, 2004, Estes and a Richmond police officer took Anglin to the hotel room for a home visit. The hotel manager told Estes that Anglin had been living in the hotel since September 24, 2003, and that Anglin's mother paid the rent. According to Estes, January 2, 2004, was the first time he had knowledge of Anglin's change of residence.

During the home visit, four cans of beer were discovered in the refrigerator of Anglin's hotel room. Possession of alcohol is a violation of the terms of Anglin's conditional discharge. Estes also stated that a black trash bag of children's clothing was discovered in Anglin's hotel room. Apparently, these items were held as possible evidence in connection with other charges.

Estes testified that Anglin failed to attend two sessions of sex offender treatment, conducted by Kevin Conlee, the social services clinician. The Commonwealth presented two letters, dated October 3, 2003, and November 7, 2003, from

Conlee to Anglin's probation officers, Mark Davidson³ and Estes. These letters indicated that Anglin "[d]id not attend his/her scheduled appointment for an individual session [and] . . . did not [c]all." The first letter, dated October 3, 2003, further stated, "I can terminate on one more unexcused absence."

Anglin did not testify at the revocation hearing. Following Estes's testimony, the trial court determined that Anglin had violated the terms of his conditional release. In a handwritten order, entered on January 23, 2004, the trial court revoked Anglin's conditional discharge "[i]n order to protect the public[.]" The trial court found that Anglin had violated the terms of his conditional discharge when he failed to attend sex offender treatment as directed, changed his residence without permission, and falsely reported his residential address to an officer. This appeal followed.

Anglin claims the trial court erred in revoking his conditional discharge because he was denied due process at the hearing. Anglin contends that due to Conlee and Davidson being absent from the hearing, he was denied his right to confront adverse witnesses. Anglin argues that the introduction of the letters from Conlee regarding his absences constituted impermissible hearsay because Conlee and Davidson were not available for cross-examination.

³ Davidson was Anglin's probation and parole officer prior to Estes.

Our review of the trial court's decision to revoke Anglin's conditional discharge is limited to determining whether it abused its discretion.⁴ The Commonwealth is required to prove the grounds for revocation by a preponderance of the evidence.⁵ With regard to parole revocation proceedings, the United States Supreme Court, in Morrissey v. Brewer,⁶ stated, "[w]hat is needed is an informal hearing structured to assure that the finding of a parole violation will be based on verified facts and that the exercise of discretion will be informed by an accurate knowledge of the parolee's behavior."

Under KRS 533.050(2),⁷ a court may revoke or modify a conditional discharge following a hearing where the defendant is represented by counsel and after a written notice of the grounds for revocation has been given. A revocation hearing must be conducted in accordance with minimum requirements of due process

⁴ Tiryung v. Commonwealth, 717 S.W.2d 503, 504 (Ky.App. 1986).

⁵ Rasdon v. Commonwealth, 701 S.W.2d 716, 719 (Ky.App. 1986) (citing Murphy v. Commonwealth, 551 S.W.2d 838, 841 (Ky.App. 1977)).

⁶ 408 U.S. 471, 484, 92 S.Ct. 2593, 2602, 33 L.Ed.2d 484 (1972).

⁷ KRS 533.050(2) states:

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.

of law;⁸ however, the formal rules of evidence do not apply.⁹ A revocation hearing must be flexible enough to consider evidence such as letters, affidavits and other material that would not be admissible in an adversarial criminal trial.¹⁰ Moreover, in a revocation hearing, there is no absolute right to confront witnesses, especially when the witnesses' reliability can be easily ascertained.¹¹ Conditional discharge is comparable to probation in that it is a privilege, not a right. A defendant

⁸ Morrissey, 408 U.S. at 489, lists the following minimum requirements of due process:

- (a) written notice of the claimed violations of parole;
- (b) disclosure to the parolee 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 parole.

⁹ Kentucky Rules of Evidence (KRE) 1101(d)(5), states:

- (d) Rules inapplicable. The rules (other than with respect to privileges) do not apply in the following situations:
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- (5) Miscellaneous proceedings. Proceedings for extradition or rendition; preliminary hearings in criminal cases; sentencing by a judge; granting or revoking probation; issuance of warrants for arrest, criminal summonses, and search warrants; and proceedings with respect to release on bail or otherwise.

(See also Childers v. Commonwealth, 593 S.W.2d 80, 81 (Ky.App. 1979); and United States v. Farmer, 512 F.2d 160 (6th Cir. 1975)).

¹⁰ Marshall v. Commonwealth, 638 S.W.2d 288, 289 (Ky.App. 1982)(quoting Gagnon v. Scarpelli, 411 U.S. 778, 782, 93 S.Ct 1756, 1760, 36 L.Ed.2d 656 (1973)).

¹¹ Marshall, 638 S.W.2d at 289.

may retain his status as a conditional dischargee or a probationer provided the court does not find that the defendant violated the conditions of his discharge or probation.¹²

The letters from Conlee, reporting Anglin's unexcused absences from his mandatory sex offender treatment, were included as a part of Anglin's file which was retained by his probation and parole officer, Estes. Estes testified at the hearing, therefore, Anglin was afforded the opportunity to cross-examine him. Under the due process standards required for a revocation proceeding, the letters from Conlee to Davidson and Estes concerning Anglin's absences from sex-offender treatment were admissible despite their element of hearsay. Thus, the trial court did not abuse its discretion by allowing the correspondence from Conlee to be admitted into evidence.

Having concluded that the trial court in revoking Anglin's conditional discharge did not deny Anglin his right to due process, the order of the Madison Circuit Court is affirmed.

ALL CONCUR.

¹² Tiryung, 717 S.W.2d at 504 (quoting Brown v. Commonwealth, 564 S.W.2d 21 (Ky.App. 1977)).

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