

RENDERED: AUGUST 4, 2006; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2005-CA-001114-MR

JOHN D. BROWN

APPELLANT

v. APPEAL FROM PIKE CIRCUIT COURT
HONORABLE STEVEN D. COMBS, JUDGE
ACTION NO. 04-CR-00106

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: COMBS, CHIEF JUDGE; TAYLOR, JUDGE; MILLER,¹ SPECIAL JUDGE.

COMBS, CHIEF JUDGE: John Brown appeals from an order of the Pike Circuit Court revoking his probation and sentencing him to five-years' imprisonment. Brown argues that the trial court abused its discretion in finding that he used or was under the influence either of a controlled substance or of alcohol while on probation. Brown contends that he possessed valid prescriptions for all of the controlled substances which he had ingested and that the Commonwealth failed to prove that he had

¹ Retired Judge John D. Miller, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

taken more than a therapeutic amount of medication. We disagree and affirm the trial court.

In January 2005, Brown pled guilty to one count of possession of a firearm by a convicted felon. He agreed to that plea in exchange for the Commonwealth's recommendation of a five-year probated sentence. Brown was to remain in custody until final sentencing. On February 21, 2005, the trial court entered a final judgment convicting Brown of the offense and probating his five-year sentence for a period of five years. The conditions of his probation included that he undergo substance abuse treatment, that he comply with the rules of the Department of Probation and Parole, and that he refrain from violating the law in any way. Brown reported to his probation officer, Tom Witt, on March 2, 2005. Six days later, Witt received a distress call from Brown's mother, who said that he was acting crazy and that he seemed to be under the influence of drugs.

Accompanied by a state trooper, Witt decided to make a supervisory visit to Brown's house. When they arrived, Brown had locked everyone out of the house. His mother was next door at her grand-daughter's house. Brown's daughter agreed to let Witt and the officer into Brown's house so that they could check on him. Brown was unconscious and was lying on the floor between the bed and a nightstand. Unable to wake him, Witt and

the trooper lifted Brown onto the bed. When he finally regained consciousness, he was very disoriented and asked for a cigarette. Brown removed a Dramamine bottle from his pocket. The bottle contained four and one-half clonazepam pills, two phenobarbital pills, and one promethazine pill. He was unable to produce prescriptions or pill bottles for any of these drugs. Witt and the trooper searched the house and failed to discover bottles or prescriptions for the pills in Brown's possession.

The Commonwealth then filed a motion to revoke Brown's probation on the basis of his possession and use of controlled substances. A probation revocation hearing was held on March 25, 2005. Witt testified for the Commonwealth, and Brown presented no witnesses. Brown contended that he had valid prescriptions for the controlled substances that he had taken and that, therefore, his probation should not be revoked. The Commonwealth claimed that Brown had taken more than a therapeutic dose of the substances prescribed to him. The court revoked his probation on the ground that he was abusing controlled substances.

The Commonwealth filed a motion to amend its original motion to revoke to include Brown's being under the influence of controlled substances and failing to cooperate with a probation officer. Brown objected and contended that the Commonwealth's failure to give him adequate notice violated his due process

rights. In order to resolve the notice issue, the trial court continued the revocation hearing to April 22, 2005. After hearing additional arguments at the second hearing, the trial court revoked Brown's probation. This appeal followed.

Brown argues that the Commonwealth produced insufficient evidence to revoke his probation, contending that he had prescriptions for all of the medications that he had taken and that the Commonwealth failed to prove that he had taken them inappropriately. Probation revocation hearings require minimal due process rather than the full range of constitutional rights afforded a defendant at trial. Robinson v. Commonwealth, 86 S.W.3d 54 (Ky. App. 2002). "Revocation proceedings do not require proof beyond a reasonable doubt but merely proof of an occurrence by a preponderance of the evidence." Rasdon v. Commonwealth, 701 S.W.2d 716, 719 (Ky. App. 1986). The standard of review for a probation revocation proceeding is whether the trial court abused its discretion. Tiryung v. Commonwealth, 717 S.W.2d 503 (Ky. App. 1986).

At his probation revocation hearing, Witt testified that he had been supervising Brown since February 18, 2005. Witt explained the conditions of probation to Brown, including the requirement that Brown refrain from being under the influence of controlled substances. Although Brown's pre-sentence investigation report listed phenobarbital as one of his

medications, Witt's record contained no mention that Brown was taking methadone for seizures. During their visit of March 2, Brown failed to inform Witt that he would be filling prescriptions for methadone and clonazepam five days later. As a condition of his probation, Brown was required to show Witt either the medicine bottle or the prescription. Brown never showed Witt a prescription for the phenobarbitol; he did furnish prescriptions for the methadone and clonazepam -- but on the day of the revocation hearing rather than at the March 2 probation visitation.

On March 8th, Brown's mother called Witt asking for help because Brown was shouting at her. She stated that he was acting crazy and seemed drugged. Brown was found unconscious on the floor and was initially unresponsive. Witt stated that he first thought Brown was dead. He also expressed an opinion that Brown might have been under the influence of controlled substances. Brown had filled his prescriptions on March 7th, the day before this incident. When Witt examined the medication, he found less than a regular daily dosage of the pills left. At the detention center, Brown tested positive for barbiturates (phenobarbitol) and methadone.

During the hearing, Brown contended that his probation should not be revoked because he had valid prescriptions for the substances. Since he did not fill the prescriptions for

methadone and clonazepam until after his March 2 meeting with Witt, he claimed that he had no duty to show Witt the prescriptions until his next reporting date in April. He also alleged that Witt told him that he did not need to present a prescription for his phenobarbital since it was listed in the pre-sentence investigation report. While the Commonwealth acknowledged that the prescriptions were valid, it argued that Brown took the pills in greater quantities than prescribed. Brown contended in response that there was no evidence that he had more than the therapeutic levels of the drugs in his system. The trial court initially revoked his probation for abusing controlled substances, withholding its final ruling until after a second revocation hearing on April 22.

At his second revocation hearing, Brown argued that the Commonwealth failed to prove he had been unresponsive due to drug use, suggesting that he might have had a seizure. Since he was transported to jail rather than to a hospital, Brown claimed that he must not have been as severely under the influence as Witt believed. The trial court observed that Brown had been on probation for only two weeks when his mother contacted his probation officer for help, that he was found unconscious, and that he was carrying prescribed medications in the wrong bottle. On April 29, 2005, the trial court entered the order revoking Brown's probation, stating that he failed "to refrain from the

use and influence of controlled substances and/or alcohol" on March 8th. The evidence supporting the trial court's findings recited Brown's lack of consciousness when found by Witt, his inability to be roused, and the fact that there remained less than a daily dosage of medication on the day after he filled his prescriptions. Brown's unsupported claim of a seizure disorder and his belief that he was more alert than as reported by his probation officer fail to overcome the trial court's ruling -- a ruling that was supported by a preponderance of the evidence.

The judgment of the Pike Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Samuel N. Potter
Assistant Public Advocate
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

Courtney J. Hightower
Assistant Attorney general
Frankfort, Kentucky