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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000921-MR

FELICIA R. WILLIAMS — APPELLANT

v.

APPEAL FROM NELSON CIRCUIT COURT
HONORABLE CHARLES C. SIMMS III, JUDGE
ACTION NO. 06-CR-00100

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KELLER AND THOMPSON, JUDGES; GRAVES,[1] SENIOR JUDGE.

KELLER, JUDGE: Felicia R. Williams has appealed from the Nelson Circuit Court's order revoking her probation. We affirm.

On September 7, 2006, the circuit court convicted Williams of Possession of a Controlled Substance in the First Degree (cocaine) pursuant to KRS 218A.1415. Williams opted to enter a guilty plea, and the circuit court imposed a four-year sentence, which was probated for five years with several conditions. In the Order of Probation, the circuit court checked the following terms and conditions to which Williams was subject:

[1] Senior Judge John W. Graves sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Avoid injurious or vicious habits, including, but not limited to, abuse of alcohol, drugs and other substances;
Good behavior and no substantial violations of the law;

Support dependants and meet other family obligations;

Report to probation officer as directed;

Comply with all requirements and requests of probation officer, including random alcohol/drug testing;

Comply with all financial obligations imposed through Final Judgment of Conviction;

Other: No drug-related offenses;

Other: Drug/alcohol assessment and follow through on recommended treatment.

The month after Williams was probated, her Probation and Parole officer, Julian Taylor, filed a Special Supervision Report dated October 16, 2006. In the report, Officer Taylor stated that Williams had tested positive for marijuana in a drug screen performed that day, and that she had signed an admission form in which she admitted to using marijuana on September 23, 2006. The circuit court entered a Rule on October 25, 2006, and scheduled a hearing for November 2, 2006, to allow Williams to show cause why her probated sentence should not be revoked. A short hearing was eventually held on January 4, 2007. Williams' current Probation and Parole officer, Cyann Herron, testified that since Officer Taylor had filed his report, Williams had again tested positive for marijuana and signed an admission form admitting to having used marijuana in December 2006. She referred Williams to South Central Drug and Alcohol Counseling Services, where Williams could obtain counseling from Steve Shore. Rather than ruling on the revocation issue, the circuit court ordered Williams to continue with her treatment and to not use any drugs. The circuit court indicated that her probation would be revoked if she tested positive for marijuana again, and scheduled a review for March.

The matter came before the circuit court for review on March 22, 2007. At that time, Officer Herron testified that Williams had obtained employment as a painter and that she was continuing with her treatment. However, Officer Herron also testified that several of Williams' drug tests were "dilute" (abnormal) or positive. A few days before the March hearing date, Officer Herron performed a drug test on Williams, which was diluted. The day of the hearing, Officer Herron performed a "stick" test at 10:00 a.m., which was negative for all drugs except for marijuana, which was questionable. The "stick" test was repeated two hours later, and was definitely positive for marijuana. Officer Herron attributed the negative or questionable results to the clear urine Williams produced. She indicated that for the second "stick" test, Williams' urine had color, and at that time tested positive for marijuana. Williams testified that she had not used marijuana since December 2006, but had been around people who had been smoking marijuana since that time. The circuit court, as before, did not rule on the revocation issue at that time. Instead, the circuit court ordered Williams into custody and ordered that a lab test be performed. If the test result was positive, the circuit court stated that Williams' probation would be revoked.

On April 5, 2007, the circuit court reviewed Williams' case, and was informed by Williams' attorney that she had committed a violation while in jail (Williams had in her possession an envelope containing cigarettes and matches.) Although the latest lab test was negative for drugs, the circuit court nevertheless decided to revoke Williams' probation based upon her two previous positive drug tests and admissions. The circuit court also mentioned that Williams had produced several abnormal, diluted samples in past drug screenings. An order memorializing this ruling was entered on April 9, 2007, in a pre-printed, fill-in-the-blank form order. In the order, the circuit court indicated that the proof introduced at the hearings established she violated two terms of

her probation, namely her failure to comply with the requirements and requests of her probation officer and her abuse of drugs and/or alcohol. This appeal followed.

On appeal, Williams contends that her due process rights were violated by the circuit court's failure to specify the grounds for revocation and the evidence it relied on in making its decision. She argues that the written statement that she violated her probation was merely conclusory and that the basis for her revocation was not apparent from the record. The Commonwealth argues that the circuit court's written order along with its oral statements recorded on videotape were sufficient to meet due process requirements.

STANDARD OF REVIEW

Our standard of review in an appeal from an order revoking probation "is limited to a determination of whether, after a hearing, the trial court abused its discretion in revoking the appellant's [probation]." *Tiryung v. Commonwealth*, 717 S.W.2d 503, 504 (Ky. App. 1986). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

ANALYSIS

The sole issue on appeal is whether the circuit court erred in failing to specify its findings supporting revocation in writing, thereby depriving Williams of her due process rights. Despite the Commonwealth's assertion that this issue was not preserved for appeal, we shall nevertheless address the merits of this appeal.

The United States Supreme Court set forth the due process protections necessary in parole revocation hearings in *Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972). The minimum requirements include:

> (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.

Id. at 489. The following year, the Supreme Court held that the *Morrissey* minimum requirements also applied to probationers. *Gagnon v. Scarpelli*, 411 U.S. 778, 782, 93 S.Ct. 1756, 1760, 36 L.Ed.2 656 (1973). The Supreme Court again addressed this issue as related to probation revocation in *Black v. Romano*, 471 U.S. 606, 611-12, 105 S.Ct. 2254, 2258, 85 L.Ed.2d 636 (1985):

> Thus the final revocation of probation must be preceded by a hearing, although the factfinding body need not be composed of judges or lawyers. The probationer is entitled to written notice of the claimed violations of his probation; disclosure of the evidence against him; an opportunity to be heard in person and to present witnesses and documentary evidence; a neutral hearing body; and a written statement by the factfinder as to the evidence relied on and the reasons for revoking probation. The probationer is also entitled to cross-examine adverse witnesses, unless the hearing body specifically finds good cause for not allowing confrontation. Finally, the probationer has a right to the assistance of counsel in some circumstances. [Citations omitted.]

Regarding the requirement of a written statement, *Black* provides: "The written statement required by *Gagnon* and *Morrissey* helps insure accurate factfinding with respect to any alleged violation and provides an adequate basis for review to determine if the decision rests on permissible grounds supported by the evidence." *Id*. at 613-14.

In Kentucky, courts have followed the holdings of both *Morrissey* and *Gagnon*. In *Rasdon v. Commonwealth*, 701 S.W.2d 716 (Ky. App. 1986), this Court addressed a situation where the trial court made oral findings, which were in the hearing transcript, but did not make any written findings. After recognizing that "[f]indings are a

prerequisite to any unfavorable decision and are a minimal requirement of due process of law[,]" the Court stated in dicta that the issue "is one of questionable merit, because the court's findings were transcribed and included as a part of the transcript of hearing. Furthermore, it is the type of error which could be corrected by a remand rather than a total reversal and vacation of the court's decision." *Id*. at 719.

In addition to Kentucky law, we have also examined several federal cases that have addressed this issue. In *United States v. Barth*, 899 F.2d 199, 201-02 (2nd Cir. 1990), the Second Circuit Court of Appeals held:

> We see no reason why transcribed oral findings cannot satisfy the written statement requirement of *Morrissey*, at least where, as here, we possess a record that is sufficiently complete to allow the parties and us to determine "the evidence relied on and the reasons for revoking probation." *Black*, 471 U.S. at 612, 105 S.Ct. at 2258. . . . We agree with the Seventh Circuit that "these goals are satisfied when the oral findings in the transcript enable a reviewing court to determine the basis of the judge's decision to revoke probation." *Id*. [at 613-14]; see also *Morishita* [*v. Morris*], 702 F.2d [207,] 210 [(10th Cir. 1983)]. Of course, we might rule differently were we faced with "general conclusory reasons by the district court for revoking probation," [*United States v.*] *Lacey*, 648 F.2d [441,] 445 [(5th Cir. Unit A 1981)], or with a record from which we were "unable to determine the basis of the district court's decision to revoke probation." [*United States v.*] *Smith*, 767 F.2d [521,] 524 [(8th Cir. 1985)]. But absent such situations, to demand that a district court turn its transcribed oral findings into a written order seems to us unduly formalistic.

The Fourth Circuit Court of Appeals reached the same decision in *United States v. Copley*, 978 F.2d 829, 831 (4th Cir. 1992):

> In our view, however, as in the view of several of our sister circuits, a transcribed oral finding can serve as a "written statement" for due process purposes when the transcript and record compiled before the trial judge enable the reviewing court to determine the basis of the trial court's decision.

In *United States v. Gilbert*, 990 F.2d 916, 917 (6th Cir. 1993), the Sixth Circuit Court of Appeals held that the district court's delivery of its findings and ruling from the bench was sufficient to constitute a "written statement":

> The Federal District Courts are courts of record since all hearings are transcribed verbatim; to require a judge to copy or paraphrase the transcript of his findings in the wake of a revocation hearing would elevate form over substance and do absolutely nothing to further secure the rights of those on supervised release.

Finally, in *United States v. Copeland*, 20 F.3d 412, 414-15 (11th Cir. 1994), the Eleventh Circuit Court of Appeals held:

> [O]ral findings, if recorded or transcribed, can satisfy the requirements of *Morrissey* when those findings create a record sufficiently complete to advise the parties and the reviewing court of the reasons for the revocation of supervised release and the evidence the decision maker relied upon. . . .
>
> When a district court has stated in the record its reasons for revoking the defendant's supervised release, and those statements are recorded and can be transcribed, we see no reason to demand that the district court turn its oral findings into a written order. Such a requirement would be "unduly formalistic." . . . Although written findings are preferable for the reasons the Supreme Court stated, when a district court's oral findings satisfy those requirements, and are preserved, we will not require that the court duplicate its findings on paper.

In her brief, Williams hinges her argument on a reported Indiana case, *Medicus v. State*, 664 N.E.2d 1163 (Ind. 1996). We have reviewed that decision, and agree with the Commonwealth that it is factually dissimilar to the present case. In *Medicus*, the defendant, on the same day he was released on probation, was arrested for public intoxication. As officers attempted to arrest him, the defendant became combative, screamed profanities at and threatened to kill the officers. At the probation revocation hearing, the trial court found that the defendant had violated the terms of his probation and stated: "'[T]he Court's going to find that the defendant has violated his

terms of probation. Any (inaudible) violation of the term of good and lawful behavior.'" *Id*. at 1164. That statement constituted the only explanation, either orally or in writing, of the trial court's decision to revoke. Citing *Morrissey*, the Supreme Court of Indiana stated:

> Due process requires that the reasons for revoking probation be clearly and plainly stated by the sentencing judge not merely to give appellant notice of the revocation, but also to facilitate meaningful appellate review.

Id. Based upon the record before it, the court held:

> In the present case, the trial court's statement at appellant's revocation hearing does not satisfy Morrissey's written statement requirement and fails to serve its purposes. It recites none of the facts surrounding the violation and therefore gives neither guidance into the trial judge's reasons for revoking appellant's probation nor the evidence used in making the decision. In short, the statement is simply too cursory to be helpful.

Id. at 1165. In the present case, the circuit court stated during the revocation hearing that it was revoking Williams' probation based upon the two positive drug tests, her prior admissions that she had used marijuana, as well as several diluted urine samples she had produced. Furthermore, the order indicated two bases for the circuit court's decision. Because *Medicus* is not factually similar to the instant case, we decline Williams' request that we rely upon this non-binding authority or deem it persuasive.

We have also examined the unreported decision of this Court cited by the Commonwealth in support of its position, which is factually similar to the case at bar. In *Dipietro v. Commonwealth*, 2006 WL 335987 (Ky. App. February 3, 2006), this Court held that although the trial court's written order revoking probation did not contain any findings of fact, the court did make adequate oral findings at the hearing. Thus, Dipietro's due process rights were protected and the oral findings provided sufficient material to allow for appellate review.

Returning to the case presently before us, we hold that the circuit court's oral statements at the revocation hearing, coupled with the listed reasons for revocation in the order, are sufficient to meet the written findings requirement of *Morrissey*. The record is sufficient for due process purposes to permit the parties and this Court to ascertain the basis of the circuit court's decision. Furthermore, we hold that the circuit court did not abuse its discretion in revoking Williams' probation based upon her earlier positive drug tests and admissions that she had in fact used marijuana. One of the specific conditions of her probation was that she avoid drug abuse, which by her own admission she violated on at least two occasions. We perceive no confusion in the circuit court's ultimate decision to revoke for its stated reasons, despite its earlier decisions to continue the revocation proceedings with knowledge of the prior positive drug tests and admissions.

For the foregoing reasons, the order of the Nelson Circuit Court revoking Williams' probation is affirmed.

ALL CONCUR.

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