

Commonwealth of Kentucky
Court of Appeals

NO. 2007-CA-002043-MR

DARREN M. MARTIN

APPELLANT

v. APPEAL FROM GREENUP CIRCUIT COURT
HONORABLE LEWIS D. NICHOLLS, JUDGE
ACTION NO. 05-CR-00041

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CAPERTON AND STUMBO, JUDGES; BUCKINGHAM,¹ SENIOR JUDGE.

STUMBO, JUDGE: Darren M. Martin appeals from an order of the Greenup Circuit Court revoking Martin's probation for failure to report to his probation officer. Martin argues that the circuit court abused its discretion by failing to

¹ Senior Judge David W. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

properly take into account that he could not find his probation office because the office had moved and his probation officer had changed. He also contends that the court improperly allowed proof to be introduced at the revocation hearing of which Martin had not received prior notice. For the reasons stated below, we affirm the order on appeal.

On January 12, 2006, Martin entered a plea of guilty in Greenup Circuit Court on three counts of Wanton Endangerment in the first-degree. He was sentenced to two years on each count to run concurrently, after which the sentence was probated. The terms of the probation required Martin to report to his probation officer on an ongoing basis.

Sometime thereafter, Martin moved to Florida and authorities in that state assumed responsibility for monitoring his probation. On April 26, 2006, he tested positive for marijuana use. Martin returned to Kentucky, and his probation monitoring was transferred back to Kentucky authorities.

On June 28, 2006, the Commonwealth moved to revoke Martin's probation based on the positive marijuana test in Florida. After taking proof, the Greenup Circuit Court amended Martin's order of probation to include substance abuse counseling, anger management and three weekly narcotics anonymous meetings.

On June 1, 2007, the Commonwealth filed another motion to revoke Martin's probation. As a basis for this motion, the Commonwealth claimed that Martin violated his probation by failing to report to his probation officer since

returning to Kentucky. When Martin failed to appear for the motion, a bench warrant was issued and he was returned to custody.

On September 20, 2007, the circuit court conducted a hearing on the motion. Probation Officer Buskirk testified that Martin had not made contact with him since Martin returned from Florida. He also testified that he had spoken with Martin's mother, who stated to him that she would tell Martin to report to his probation officer.

Martin's mother was in the courtroom, and was asked to testify. She stated that Martin told her he was trying to get things "in order" before turning himself in to probation and parole authorities. Martin then testified, stating that he thought Officer Spillman was his probation officer, and that he did not know how to contact probation officials because the office had been relocated.

After considering the proof, the circuit court rendered an order on September 25, 2007, revoking Martin's probation. The court found in relevant part that Martin failed to report to probation authorities in violation of the terms of his probation order. The order stated that the "testimony with the most probative value supports the position of the Commonwealth that the Defendant knew or should have known when and how to contact the Office of Probation and Parole in order to report on a timely basis." The order revoked Martin's probation and remanded him to the custody of the Department of Corrections to serve the remainder of his sentence. This appeal followed.

Martin raises two claims of error. He first argues that the circuit court abused its discretion by “ignoring” certain aspects of the evidence to his detriment. Specifically, he contends that the court erred in failing to give proper weight to Martin’s testimony that the Kentucky probation office moved while he was in Florida, rendering it difficult or impossible for him to find upon his return. He also stated that he had been looking for the wrong probation officer. He maintains that there was insufficient evidence to support the conclusion that he knew or should have known how to find his probation officer, and that no good purpose is served by returning him to custody merely because he was unable to find his probation office. In sum, he seeks an order reversing the order on appeal and reinstating his probation.

We have closely examined the record and the law, and find no error on this issue. It is uncontroverted that Martin was subject to an order compelling him to - among other things - report to his probation officer on a regular and ongoing basis. It is further uncontroverted that he did not do so. The question for our consideration on this issue, then, is whether the circuit court abused its discretion in attributing more weight and credibility to the evidence that his failure to report was not justified, than to the evidence tendered by Martin that he was unable to locate his probation office and/or probation officer. We must answer that question in the negative.

KRS 533.030 states that,

(1) The conditions of probation and conditional discharge shall be such as the court, in its discretion, deems reasonably necessary to insure that the defendant will lead a law-abiding life or to assist him to do so. The court shall provide as an explicit condition of every sentence to probation or conditional discharge that the defendant not commit another offense during the period for which the sentence remains subject to revocation.

(2) When imposing a sentence of probation or conditional discharge, the court may, in addition to any other reasonable condition, require that the defendant: . . .

(i) Report to the probation officer as directed

A defendant has no right to probation. A panel of this Court has previously stated that,

It is clear in this Commonwealth that probation is a privilege rather than a right. *Brown v. Commonwealth*, Ky. App., 564 S.W.2d 21 (1977). One may retain his status as a probationer only as long as the trial court is satisfied that he has not violated the terms or conditions of the probation. KRS 533.030; *United States v. Markovich*, 348 F.2d 238 (2nd Cir.1965). It is not necessary that the Commonwealth obtain a conviction in order to accomplish revocation of probation. Our review is limited to a determination of whether, after a hearing, the trial court abused its discretion in revoking the appellant's parole.

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

Evidence was adduced that Martin knew the terms of his probation, that those terms included mandatory reporting to his probation officer, and that his liberty depended on his compliance with those terms. Testimony was also offered by Martin's own mother that he wanted to get his affairs in order before contacting his probation officer. Martin's proof consisted of his testimony that - for a period

of approximately six months - he was unable to find the probation office. He further stated that his employment prevented him from conducting a thorough search for the probation office.

The circuit court, as fact finder, is in the best position to judge the weight and credibility of the evidence. CR 52.01; *Croft v. Croft* 240 S.W.3d 651, 655 (Ky. App. 2007), citing *Bickel v. Bickel*, 95 S.W.3d 925 (Ky. 2002).

Consequently, an appellate court may not substitute its judgment for that of the trial court absent clear error. *Id.* We have no basis for finding that the Greenup Circuit Court clearly erred in attributing more weight to the Commonwealth's evidence than to Martin's. Ultimately, Martin was responsible for finding and reporting to his probation officer, and the circuit court properly so found.

Martin also argues that he was denied due process of law because his hearing was not conducted by a neutral and detached hearing body. Citing *Baumgardner v. Commonwealth*, 687 S.W.2d 560 (Ky. App. 1985), Martin contends that the circuit court improperly relied on his positive marijuana test in Florida in revoking his probation even though "the probation officer was not focusing on that matter." We find no error on this issue. In *Baumgardner*, the trial judge issued a revocation order, *sua sponte*, immediately after the conclusion of a criminal proceeding. He did so without conducting a separate hearing or otherwise gathering additional evidence in support of the revocation. On appeal, a panel of this Court found that the hearing body, i.e., the trial judge, was not detached and neutral based on the manner in which the revocation occurred.

In the matter at bar, the facts are quite different. Unlike *Baumgardner*, Martin's probation revocation proceeding was not conducted immediately after a criminal conviction, by the same judge who had just conducted the criminal proceeding, and without reliance on additional evidence. Rather, Martin's revocation proceeding was conducted some 19 months after the entry of his guilty plea. It was conducted by the Honorable Robert B. Conley, Circuit Judge, who did not preside at the prior proceeding. Also, evidence was adduced at the proceeding by both Martin and the Commonwealth on the issue at bar. When the record is viewed in its totality, we are not persuaded that Martin was denied the detached and neutral hearing body to which he was entitled.

Finally, Martin claims that the circuit court improperly relied on evidence of the positive drug test in Florida because this evidence "was not provided in advance to appellant in the affidavit to revoke his probation." Martin directs our attention to *Murphy v. Commonwealth*, 551 S.W.2d 838 (Ky. App. 1977) in support of his claim that said failure constitutes a basis for reversing the revocation order.

In *Murphy*, a panel of this Court reversed a revocation order upon finding that Murphy ". . . was not served with notice that a hearing would be held for the purpose of determining whether there was probable cause to believe that he had violated his terms of probation" *Id.* at 841. That is to say, Murphy received *no* notice of the revocation proceeding. The facts at bar are dissimilar, as it is uncontroverted that Martin - who had the benefit of counsel - received notice

of the time, place and purpose of the revocation hearing and was afforded ample opportunity to present evidence. *Murphy* is distinguishable, and accordingly we find no error.

For the foregoing reasons, we affirm the order of the Greenup Circuit Court.

ALL CONCUR.

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