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TO BE PUBLISHED

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2007-CA-001320-MR

RANDY MARSHALL

APPELLANT

v. APPEAL FROM GRAVES CIRCUIT COURT  
HONORABLE TIMOTHY C. STARK, SENIOR JUDGE  
ACTION NO. 04-CR-00187

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
VACATING AND REMANDING

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BEFORE: CLAYTON, MOORE, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Randy Marshall brings this appeal from a June 6, 2007, order of the Graves Circuit Court revoking Marshall's conditional discharge upon the offense of flagrant nonsupport. We vacate and remand.

In April 2005, Marshall pleaded guilty to the offense of flagrant nonsupport. Kentucky Revised Statutes 530.050. The circuit court sentenced

Marshall to three-years' imprisonment but conditionally discharged the sentence provided Marshall timely pay previously ordered child support and pay specified additional sums to retire the accumulated arrearage.

In April 2007, the Commonwealth filed a motion to revoke Marshall's conditional discharge. The Commonwealth maintained that Marshall violated his conditional discharge by failing to pay child support and, in fact, had not made a payment since November 2005.

A hearing was held on the Commonwealth's motion to revoke where Marshall argued and testified that he lacked the ability to pay the ordered child support. Following the hearing, the circuit court revoked Marshall's conditional discharge and ordered that he be imprisoned for the remainder of his sentence. This appeal follows.

Marshall initially argues:

The trial court violated Randy Marshall's constitutional rights under the due process clause of the Fourteenth Amendment of the United States Constitution, and under Sections One, Two and Eleven of the Kentucky Constitution when it refused to examine possible alternative punishments to imprisonment and denied Randy his freedom even though he did not willfully refuse to pay his child support.

Marshall's Brief at 5. In particular, Marshall maintains that he "was too poor to pay his support obligation" and that the circuit court erroneously failed to consider alternative forms of punishment other than imprisonment. Marshall contends that the circuit court was required to "inquire into the reasons why the defendant was

unable to pay” before revoking probation or conditional discharge. In support thereof, Marshall cites this Court to *Clayborn v. Commonwealth*, 701 S.W.2d 413 (Ky.App. 1985) and *Bearden v. Georgia*, 461 U.S. 660, 103 S.Ct. 2064, 76 L.Ed.2d 221 (1983). For the reasons hereinafter elucidated, we reject Marshall’s argument.

The Court of Appeals’ standard of review of a circuit court’s decision to revoke probation or conditional discharge is whether the circuit court abused its discretion. *Ridley v. Com.*, 287 S.W.2d 156 (Ky. 1956). An abuse of discretion occurs when the “decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” *Miller v. Eldridge*, 146 S.W.3d 909, 914 (Ky. 2004)(quoting *Goodyear Tire & Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000)).

Marshall’s reliance upon *Clayborn*, 701 S.W.2d 413 and *Bearden*, 461 U.S. 660 is misplaced. Both cases involved revocation proceedings for failure to pay a fine or restitution required as a condition of probation. In *Clayborn* and *Bearden*, it was held:

[I]n revocation proceedings for failure to pay a fine or restitution, a sentencing court must inquire into the reasons for the failure to pay. If the probationer willfully refused to pay or failed to make sufficient bona fide efforts legally to acquire the resources to pay, the court may revoke probation and sentence the defendant to imprisonment within the authorized range of its sentencing authority. If the probationer could not pay despite sufficient bona fide efforts to acquire the resources to do so, the court must consider alternate measures of punishment other than imprisonment. Only

if alternate measures are not adequate to meet the State's interests in punishment and deterrence may the court imprison a probationer who has made sufficient bona fide efforts to pay. . . .

*Bearden*, 461 U.S. at 672-673; *Clayborn*, 701 S.W.2d at 415.

*Clayborn* and *Bearden* pertain to nonpayment of fines and restitution; by contrast, the case *sub judice* pertains to nonpayment of child support. *See id.* The distinction is pivotal. There is simply no legal authority requiring the circuit court to consider alternative forms of punishment when revoking probation or conditional discharge for failure to pay child support. As such, we do not believe the circuit court erroneously failed to consider alternative forms of punishment when revoking Marshall's conditional discharge.

Marshall also argues that the circuit court's order revoking conditional discharge did not contain findings of fact and, thus, violated his constitutional due process rights.

It is clear that a probation revocation proceeding must conform to the minimum requirements of due process of law. *Rasdon v. Com.*, 701 S.W.2d 716 (Ky.App. 1986). The United States Supreme Court has set forth the minimal due process requirements applicable to a probation revocation proceeding:

(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.

*Morrissey v. Brewer*, 408 U.S. 471, 489, 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).

The June 6, 2007, order revoking Marshall's conditional discharge consisted of four paragraphs and read:

On **April 19, 2005**, this Court entered its Judgment and Sentence upon [Marshall's] plea of guilty to **Flagrant Non-Support**, and fixed [Marshall's] punishment at **Three (3) years** in the penitentiary and conditionally discharged said sentence **for Five (5) years**.

This matter is now before the Court on motion of the Commonwealth to revoke [Marshall's] conditional discharge on grounds of violation of the terms of conditional discharge by his failure to keep current in his child support payments and his failure to pay additional payments on his arrearage which were conditions of his conditional discharge.

[Marshall] appeared in Court with counsel, and the Court having heard testimony and being sufficiently advised from the record, now **GRANTS** the Commonwealth's motion and hereby **REVOKES** [Marshall's] conditional discharge for violations as set forth above. It is hereby **ORDERED** that the remainder of [Marshall's] sentence shall be served in an institution under the control of the Kentucky Corrections Cabinet.

It is **FURTHER ORDERED** that [Marshall] is entitled to **-0-** days additional jail credit.

A review of the June 6, 2007, order reveals that the circuit court failed to make findings of fact specifying the evidence relied upon to support its decision to

revoke Marshall's conditional discharge. We are not in a position nor are we permitted as an appellate court to make assumptions regarding the evidence and factual predicate relied upon by the circuit court in rendering its decision in this case. A written statement delineating the evidence and reasons supporting revocation are constitutionally mandated. *Morrissey*, 408 U.S. 471; *Gagnon*, 411 U.S. 778. As the June 6, 2007, order failed to include a written statement delineating the evidence relied upon for revocation, we remand for the circuit court to make factual findings to support its decision to revoke Marshall's conditional discharge. As such, we conclude that the circuit court abused its discretion by failing to delineate findings of fact to support its revocation of Marshall's conditional discharge.

For the foregoing reasons, the order of the Graves Circuit Court is vacated and this cause is remanded for proceedings not inconsistent with this opinion.

MOORE, JUDGE, CONCURS.

CLAYTON, JUDGE, CONCURS IN RESULT ONLY.

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