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Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000330-MR

CLEATUS L. MARNEY, JR. APPELLANT

v. APPEAL FROM FULTON CIRCUIT COURT
HONORABLE TIMOTHY C. STARK, SPECIAL JUDGE
ACTION NO. 02-CR-00141

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
AFFIRMING

** ** ** ** **

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

STUMBO, JUDGE: Cleatus L. Marney, Jr. appeals from a Final Judgment and Revocation of Probation of the Fulton Circuit Court. Marney was convicted on one count of failure to comply with sex offender registration and was found to have violated his probation. Marney contends that his due process rights were violated when the court failed to give a written statement of the evidence relied on

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

and the reasons for revoking his probation. For the reasons stated below, we affirm the judgment on appeal.

On September 26, 2002, the Fulton County grand jury indicted Marney on one count of Failure to Register as a Sex Offender. The indictment alleged that Marney failed to complete a sex offender registration form and submit it to the proper law enforcement entity as required by statute after he relocated from another state to Kentucky. After several continuances, Marney entered a plea of guilty on September 23, 2004. On January 13, 2005, the circuit court rendered a Judgment and Sentence on Plea of Guilty accepting Marney's guilty plea and sentencing him to five years in prison. As part of the judgment, Marney's sentence was probated for five years and Marney was ordered to register as a sex offender.

On January 13, 2006, an arrest warrant was issued alleging that Marney violated the terms of his probation by absconding from supervision, failing to report as directed, failing to complete community service and failing to maintain employment. On April 17, 2006, he was released from custody by order of the Fulton Circuit Court for the apparent purpose of receiving a medical examination in Cape Girardeau, Missouri, by Dr. Anthony Zoffuto. An order rendered on May 15, 2006, extended Marney's probation for an additional five years. The record does not reveal any resolution of the January 13, 2006, allegation of probation violation.

On December 4, 2006, Marney's probation officer alleged that Marney violated the terms of his probation by testing positive for cocaine use on

three occasions between September and October, 2006, and failing to attend an outpatient substance-abuse treatment facility as directed. A hearing on the matter was conducted in Fulton Circuit Court, whereupon the court rendered a Final Judgment and Revocation of Probation on December 19, 2006, which "adjudged . . . that the defendant is guilty of the crimes of . . . Failure to Comply with Sex Offender Registration . . . [and] Probation Violation." The judgment revoked Marney's probation and sentenced him to five years in prison (apparently, though not expressly, requiring Marney to serve the original five-year sentence imposed on January 13, 2005). This appeal followed.

Marney now argues that the circuit court violated the minimal due process requirements to which he is entitled when it revoked his probation. Specifically, he contends that his due process rights were violated when the circuit court failed to produce a written statement of the evidence relied upon and the reasons for revoking his probation. Citing Kentucky Revised Statutes (KRS) 533.050(2) and *Morrisey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972), Marney claims that he was entitled to "written notice of the grounds for revocation or modification." He claims that he received no such notice and that the court's written statement is merely conclusory. In sum, he requests an order reversing his revocation and remanding the matter for a new hearing.[2]

[2] Both parties have cited unpublished opinions. We have not considered these cases in light of the fact that unpublished opinions shall never be cited or used as authority. Kentucky Rules of Civil Procedure 76.28(4).

We have closely examined Marney's argument and find no basis for reversing the revocation order. We must first note that Marney's claim of error is not preserved for appellate review. When a trial court has allegedly failed to make findings on essential issues, the failure to bring such omission to the attention of the trial court is fatal to the appeal. *Vinson v. Sorrell*, 136 S.W.3d 465 (Ky. 2004). "A final judgment shall not be reversed or remanded because of the failure of the trial court to make a finding of fact on an issue essential to the judgment unless such failure is brought to the attention of the trial court by a written request for a finding on that issue or by a motion pursuant to Rule 52.02." Kentucky Rule of Civil Procedure (CR) 52.04. In the matter at bar, Marney did not seek additional findings nor otherwise avail the circuit court of the opportunity to correct the alleged error. As such, the alleged error is not preserved for appellate review, and this fact alone forms a sufficient basis for affirming the order on appeal.

Arguendo, even if Marney's claim were preserved, we would find no error. KRS 533.050(2) states that 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." Similarly, *Morrisey* held that:

> Our task is limited to deciding the minimum requirements of due process. They 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 [sic] as to the evidence relied on and reasons for revoking parole.

Resolution of Marney's claim of error would turn on whether his minimal due process rights were satisfied during the course of the revocation proceeding. We must conclude that they were. A revocation hearing is an "informal process." *Marshall v. Commonwealth*, 638 S.W.2d 288, 289 (Ky. App. 1982). It is not a criminal prosecution and the full panoply of rights due the defendant in criminal prosecutions is not applicable. *Id*. "[T]here is no thought to equate . . . parole revocation to a criminal prosecution in any sense. It is a narrow inquiry; the process should be flexible enough to consider evidence including letters, affidavits, and other material that would not be admissible in an adversary criminal trial." *Morrissey,* 408 U.S. at 489, 92 S.Ct. at 2604, 33 L.Ed.2d at 499.

In the matter at bar, while the circuit court did not render written findings of fact, there can be little doubt but that Marney was apprised of the court's basis for revoking his probation. A written allegation signed by his probation officer was entered into the record, which set forth with specificity the claim that Marney tested positive for cocaine usage on three occasions, admitted in writing to having used cocaine, and failed to participate in drug counseling as ordered. Marney signed the written allegation. Furthermore, testimony was adduced at the revocation hearing in support of the claim that Marney violated the

terms of his probation, and the entire proceeding was memorialized on videotape and is part of the appellate record. It is not plausible that Marney was unaware of the basis for his probation officer's allegation that Marney violated his probation, nor the basis for the revocation. Accordingly, even if this argument were preserved for review, we could not conclude that Marney was denied the minimal due process rights set out in *Morrissey*, and accordingly find no error.

For the foregoing reasons, we affirm the Final Judgment and Revocation of Probation of the Fulton Circuit Court.

ALL CONCUR.

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