

RENDERED: OCTOBER 2, 2009; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2008-CA-001815-MR

JUSTIN BRIERLY

APPELLANT

v. APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE JULIE REINHARDT WARD, JUDGE
ACTION NO. 05-CR-00206

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS, CHIEF JUDGE; THOMPSON, JUDGE; HARRIS,¹ SENIOR JUDGE.

HARRIS, SENIOR JUDGE: Justin Brierly appeals from a Campbell Circuit Court order revoking his probation.

¹ Senior Judge William R. Harris 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.

Upon learning that Brierly had been granted shock probation while this appeal was pending, we ordered the parties to file responses addressing his present status and whether this appeal should be dismissed as moot. Both parties have filed their responses, which we have considered. It is undisputed that Brierly is presently on shock probation under the trial court's order of April 30, 2009. One condition of shock probation is that he complete a 12 to 14 month residential drug rehabilitation program in which he is now participating. There was no such condition in the original probation order.

The Commonwealth argues that this appeal is moot because Brierly is now on shock probation and any future effort to revoke his shock probation would involve facts and circumstances different from those which underlay the decision to revoke his original probation. Brierly argues that the appeal is not moot because if he prevails on appeal, this Court would have the option of directing the trial court to reinstate him to his original probation status. Brierly cites *Keith v. Commonwealth*, 689 S.W.2d 613, 615 (Ky. App. 1985), which supports his position in this regard.

This Court recently dealt with an issue of mootness in the context of a probated defendant's appeal in *Jones v. Commonwealth*, 260 S.W.3d 355 (Ky. App. 2008). There it was written that “[a] moot case is one which seeks to get a judgment on a pretended controversy, when in reality there is none. . . .” *Id.* at 358

(internal quotation marks and citation omitted.) In *Medical Vision Group, P.S.C. v. Philpot*, 261 S.W.3d 485, 491 (Ky. 2008), this Court put it this way: “[A]n appellate court is required to dismiss an appeal when a change in circumstance renders that court unable to grant meaningful relief to either party.”

Applying these principles to the case before us, we conclude that this appeal is not moot. Both the original probation order and the subsequent shock probation order granted the appellant freedom from prison, but the original order imposed conditions less restrictive and onerous than those imposed by the shock probation order. If we ultimately reversed the order which revoked the original probation order and directed the trial court to reinstate the appellant to his prior probation status, as was done in *Keith v. Commonwealth, supra*, we would be granting him meaningful relief. Consequently, we decline to dismiss this appeal as moot and will now address the merits.

Brierly claims that the Commonwealth failed to provide sufficient evidence to conclude that he violated the conditions of his probation. Although the Commonwealth presented minimal evidence of probation violations, we find that the trial court reasonably concluded that Brierly knowingly violated his probation.

In 2005, Brierly pled guilty to first-degree robbery. Although he was only fifteen years old, Brierly was charged as an adult and sentenced to ten years’ imprisonment. In 2006, Brierly was granted shock probation. Six months later, Brierly’s juvenile probation officer filed an affidavit alleging that Brierly violated the conditions of probation. After a hearing on the matter, Brierly’s shock

probation was revoked. On March 26, 2008, Brierly appeared before the trial court pursuant to KRS 640.030 to be re-sentenced upon his eighteenth birthday. The trial court once again granted Brierly probation.

Upon his release on probation, Brierly moved into the basement of his father's home. Less than five months later, his probation officer filed an affidavit alleging that Brierly had violated his probation by possessing a gun, ammunition, and beer. According to the affidavit, Brierly had been fully informed that neither he nor anyone in his home could possess such items. He had also been instructed to share his conditions of probation with his family and search the house to ensure that no contraband was present in the home.

On July 10, 2008, Brierly's probation officer discovered a knife and alcohol during a home visit. At this time, Brierly was warned about these items and informed that he was responsible for the items present in the home. On August 13, 2008, the probation officer conducted another home visit and found a gun and ammunition in a lock box in Brierly's father's bedroom closet. She also found beer in the basement near Brierly's sleeping quarters. These findings resulted in the probation officer filing the affidavit mentioned above.

A revocation hearing was held August 19, 2008. Brierly stipulated that the gun, ammunition, and alcohol were found in the home but disavowed ownership or knowledge of their existence. Brierly's father testified that he owned the gun and that the alcohol belonged to his older son. Brierly's brother also testified that the alcohol belonged to him. The Commonwealth's proof consisted

of Brierly's probation officer's testimony, which supported the filed affidavit. On August 26, 2008, the trial court concluded that Brierly "violated the terms and conditions of his probation when he knowingly resided in a home where [a gun], ammunition, and alcohol were present". The trial court revoked Brierly's probation and imposed the ten-year sentence. This appeal follows.²

Our review of a trial court's decision to revoke a defendant's probation is limited to whether or not the court abused its discretion. *Tiryung v. Commonwealth*, 717 S.W.2d 503, 504 (Ky. App. 1986). Generally, we have declined to find an abuse of discretion where at least one violation is supported by evidence. *Messer v. Commonwealth*, 754 S.W.2d 872, 873 (Ky. App. 1988).

Although we are skeptical that the evidence supported a finding that Brierly knowingly possessed the gun and ammunition, we must conclude that ample evidence existed to suggest that Brierly was knowingly in possession of the beer. Brierly was repeatedly informed that it was his responsibility to ensure that no alcohol or weapons were present in his residence. Further, the alcohol was found in the basement near his sleeping quarters.

Although Brierly's brother testified that the alcohol was his, the trial court must only find that the violations occurred by a preponderance of the evidence, rather than beyond a reasonable doubt, to justify probation revocation.

Rasdon v. Commonwealth, 701 S.W.2d 716, 719 (Ky. App. 1986). Due to the

² The Commonwealth argues that Brierly failed to preserve his arguments for appeal because in closing statements during the revocation hearing defense counsel conceded that evidence existed that Brierly violated the terms of his probation. We are not convinced that this statement constituted a waiver of appeal. Therefore, we will address Brierly's arguments.

proximity of alcohol to his sleeping quarters and personal property and the extensive warnings that he had received, we conclude that the trial court had sufficient evidence before it to find that Brierly knowingly violated his probation by a preponderance of the evidence.

Although Brierly also argues that he did everything in his power to comply with probation and that revocation was unnecessary because he planned to leave his father's home, we find these arguments unconvincing. Trial courts are not required to determine whether a defendant attempted to comply with the terms of probation. Instead, the court must only assess whether the defendant violated the terms and conditions of probation. Likewise, the trial court is not required to determine whether the defendant intended to continue violating probation. Here, as we previously stated, the trial court had sufficient evidence on which to determine that the defendant violated his probation. There was no abuse of discretion.

Accordingly, the probation revocation order of the Campbell Circuit Court, entered on August 26, 2008, is affirmed.

COMBS, CHIEF JUDGE, CONCURS.

THOMPSON, JUDGE, CONCURS IN RESULT ONLY.

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