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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001685-MR

WILLIAM D. GOLDSMITH — APPELLANT

v.

APPEAL FROM HICKMAN CIRCUIT COURT
HONORABLE TIMOTHY A. LANGFORD, JUDGE
ACTION NO. 07-CR-00001

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON AND KELLER, JUDGES; KNOPF,[1] SENIOR JUDGE.

KELLER, JUDGE: Goldsmith appeals the revocation of his probation. After review, which we will discuss at length below, we affirm the order of the Hickman Circuit Court revoking Goldsmith's probation.

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

FACTS

At the time of these events, Goldsmith was dating Cari Moore (hereinafter Moore). According to the Uniform Citation, Goldsmith was initially charged with possessing a single forged check, while his girlfriend possessed the other two. The checks had been written from Moore's grandmother's checking account which had been closed due to the death of the grandmother. Goldsmith was charged by information, on January 17, 2007, with three counts of violating Kentucky Revised Statute (KRS) 516.060, criminal possession of a forged instrument in the second degree. The total amount of value of the checks was $150.00.

Counsel for Goldsmith entered his appearance on January 30, 2007. On February 15, sixteen (16) days later, Goldsmith was arraigned and entered a guilty plea to all three counts in the information. It appears that he and Moore were also facing charges in neighboring Carlisle County and that a "package deal" had been worked out resolving both cases. The plea offer in the instant case was a sentence of imprisonment for one year on each count, to be served consecutively for a total of three years in exchange for his plea of guilty.

The sentencing hearing was held on March 1, 2007, wherein Goldsmith moved the court to grant him probation. The Commonwealth opposed the immediate probation request. The court then stated that it would not agree to

probate Goldsmith on a three year sentence, but would consider immediate probation to a drug treatment program if Goldsmith were to agree to the maximum term of imprisonment (five years) on each of the charges, for a total of fifteen years. The Commonwealth opined that this arrangement would be "setting [Goldsmith] up for failure" with a fifteen year sentence and stated that the Commonwealth would prefer "shock" probation to a drug program on the original plea bargain of three years. Despite the Commonwealth's vocalized trepidation, and with woefully inadequate time for consultation with counsel,[2] Goldsmith persisted in his pursuit of immediate probation.[3] Goldsmith had likewise been sentenced to fifteen years in the case in Carlisle County in which, Judge Langford was also the presiding judge. The court granted probation and Goldsmith entered treatment at Lifeline Ministries, a religious based treatment program.

On June 7, 2007, the court held a hearing on allegations that Goldsmith had violated the terms of his probation via his dismissal from Lifeline. The alleged violation was due to using a cellular phone to text message his co-defendant, Moore, more than 100 times while in treatment. The record reflects

[2] The record reflects that less than three minutes passed between the time the plea agreement was discussed with the court and the time of acceptance by Goldsmith. The majority of Goldsmith's counsel's advice is audible on the record. At no time during this brief discussion between attorney and client is there any mention of the potential dire consequences of this course of action.

[3] Three days prior to his sentencing hearing, Goldsmith turned nineteen years of age.

Goldsmith was given a number of warnings that this violation of the rules at Lifeline could result in his dismissal from the program and that he had refused to comply with the discipline imposed regarding the cell phone.[4] Goldsmith stipulated to violating the terms of his probation, and was briefly questioned by his counsel as follows:[5]

> Defense counsel: Can you state your name for the record please?
>
> Goldsmith: William Dustin Goldsmith.
>
> Defense: And how old are you, Mr. Goldsmith?
>
> Goldsmith: 19.
>
> Defense: Um is it true that you had your probation revoked in Carlisle County?
>
> Goldsmith: Yes sir.
>
> Defense: Ok and what was the result of that?
>
> Goldsmith: Uh, they revoked me in Carlisle.
>
> Defense: Right and now you have a 15 year sentence?
>
> Goldsmith: Yeah.
>
> Defense: Correct?

[4] This dismissal from Lifeline also resulted in a probation revocation hearing in Carlisle County.

[5] Goldsmith was represented by different counsel at the revocation hearing than he had previously been represented by during the underlying case.

Goldsmith: Yeah.

Defense: You were being revoked for having a cellular phone at Lifeline, is that correct?

Goldsmith: Yes sir.

Defense: And you were receiving treatment at Lifeline Ministries?

Goldsmith: Yes sir.

Defense: Um and now essentially, as you understand, the court can sentence you or revoke your probation the full 15 years in this jurisdiction?

Goldsmith: Yes.

Defense: Is that correct?

Goldsmith: Yes sir.

Desense: Ok. No further questions.

The court asked Goldsmith questions regarding the allegations, as follows:

Judge: So you were well aware that you had to complete their program, you couldn't just violate the rules, weren't you?

Goldsmith: I didn't know that rehab was church based rehab. Y'all just rushed me into that. I wasn't ready for that.

Judge: You mean you didn't want to go to that rehab?

Goldsmith: Nobody told me nothing about it. I figured I was going there to get help. All it is, is like church. That's all it is.

Judge: It didn't help you any?

Goldsmith: No sir.

When asked about the cell phone text messages, Goldsmith advised the court that he had been found "not guilty" on the charge of harassment in another county regarding the messages.[6]

In his argument to the court, Goldsmith's attorney requested that the original sentence be altered to run concurrently, for a total of five years, citing Goldsmith's age, the non-violent nature of the offense, the amounts of the checks, and the fact that fifteen years was an unduly harsh punishment given the circumstances. The Commonwealth countered with the fact that Goldsmith had been given a "wonderful opportunity" which he squandered.

The trial court then noted the stipulation of violation and the following occurred after the court announced that it would run the sentences in Carlisle County and Hickman County consecutively:

> Judge: Really thought I would, Mr. Goldsmith, but an answer of "no excuse" would have been a whole lot better than you telling me that its church based. I can't imagine that anything up there was designed to hurt you or inflict anything on you other than help. Those words make me want to run this consecutive.
>
> Goldsmith: F***in' do it.
>
> Judge: What say son?

[6] The record reflects that the harassment charge was dismissed.

Goldsmith: I said do it.

Judge: Ok.

(voice from off camera: Mr. Goldsmith try to remain silent.)

Defense counsel: Sir I would just – again I understand the court's made its decision but again, 30 years for this is unduly harsh.

Judge: I think you're right.

Defense counsel: Regardless of this . . .

Judge: I think you're right but your defendant's attitude is not the best in the world and once he wants to come back, I'll be glad to look at it another day but today its going to be consecutive for a total of 30 years in the penitentiary consecutive with Carlisle County 07-CR-001. Give you a little time to think about that Mr. Mills. You may decide you want to ask for help again, I'll be glad to hear from you, the door's not shut to that. But you best work on a little attitude adjustment between now and then.

Defense counsel: Yes sir.

Goldsmith: Maybe you all should work on your little doings.

Prosecutor: Mr. Goldsmith please be quiet. Be quiet.

Goldsmith: I thinks its pretty crappy you are gonna give me 30 years for f***ing getting kicked out with a cell phone. That's f***in' crazy.

Judge: Sheriff, remove the defendant from this courtroom.

After the entry of the order revoking his probation, Goldsmith through Mills, moved the court on July 16, 2007, to reconsider the fifteen year sentence. At the hearing on the matter,[7] the following exchange took place:

> Judge: Commonwealth v. William Dustin Goldsmith
>
> Defense counsel: Judge, that's my motion to reconsider the court's decision in his probation revocation hearing to run –
>
> Judge: Mr. Goldsmith was the man that cursed *inaudible* in this courtroom.
>
> Defense counsel: He did, Judge. Mr. Goldsmith . . .
>
> Judge: Overruled.
>
> Judge: I will take this under advisement but is there anything you want to say, Mr. Mills?
>
> Defense counsel: (shakes head) Again, I just reiterate that 30 years for 3 class D felonies is unduly harsh.
>
> Judge: The court will say on the record that you are 100% right. An idiot. But I know if you could tell me some way I could punish him for his outburst in the courtroom other than that, I'll be glad to consider it. But the problem I've got is that young man sat over there with me having the word concurrent all but written on a piece of paper and he convinced me to consecutive. He was gonna say whatever he wanted to say and if he didn't hear what he wanted to hear he was gonna take it out on everybody. He can curse in front of me all he wants to, other than respect for this bench but when he starts doing

[7] Goldsmith was not present in the courtroom during this "hearing".

> it in front of my clerks and everybody else in this courtroom, that's a whole different ballgame.
>
> Defense counsel: I understand Judge. (head down while speaking).
>
> Judge: You got longer. You still got some 110 days to file this motion. You may convince me later to do something for him cause I agree with you, 30 years is too harsh. But, its also too fresh in my memory what he sat right over there and did last time. Overruled.

Subsequently, there were no further motions filed by Goldsmith. Instead, this appeal followed.

STANDARD OF REVIEW

Goldsmith argues as to two errors[8] for our review. First, that the probation revocation hearing violated minimal due process requirements; and second, that the trial court could have revoked probation and punished Goldsmith for criminal contempt contemporaneously rather than running the sentences consecutively. The standard of review of a probation revocation order is limited as to whether the trial court abused its discretion in revoking the probation. *Tiryung v. Commonwealth*, 717 S.W.2d 503, 504 (Ky. App. 1986), quoting *Brown v. Commonwealth,* 564 S.W.2d 21 (Ky. App. 1977). It is well settled law that probation is a privilege and not a right. "In the first place, it is entirely within the discretion of the trial court whether a defendant shall be given his liberty

[8] Goldsmith initially argued three errors occurred, but in his reply brief, Goldsmith withdrew one of his arguments.

conditionally. This is regarded as a privilege or a 'species of grace extended to a convicted criminal' for his welfare and the welfare of organized society." *Ridley v. Commonwealth,* 287 S.W.2d 156, 158 (Ky. 1956), quoting *Darden v. Commonwealth,* 277 Ky. 75, 125 S.W.2d 1031, 1033 (1939). "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

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. In this case, Goldsmith stipulated that he had, indeed, violated the terms of his probation. However, he now maintains that his due process rights were violated during the hearing on the matter. The Commonwealth correctly points to the fact that this claim of error is unpreserved and therefore, our review must be for palpable error.

Kentucky Rule of Criminal Procedure (RCr) 10.26 establishes the standard of review when error is not brought to the attention of the trial court. In order for such error to be deemed palpable error it must affect the substantial rights of a party and constitute a manifest injustice. Only then may it be considered by a court upon a motion for a new trial or by an appellate court on appeal.

The context of the entire case must be analyzed to determine the degree of prejudice; a substantial possibility must exist that the result would have been different had the error not occurred. The Supreme Court of Kentucky explained in *Martin v. Commonwealth*, 207 S.W.3d 1 (Ky. 2006):

> A better understanding is gained from an examination of RCr 10.26 with emphasis on the concept of "manifest injustice." While the language used is clear enough, we further explain that the required showing is probability of a different result or error so fundamental as to threaten a defendant's entitlement to due process of law.
>
> . . .
> [A]n appellate court may then exercise its discretion to notice a forfeited error but only if . . . the error seriously affects the fairness, integrity or public reputation of judicial proceedings. *Johnson v. United States*, 520 U.S. 461, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997).
>
> . . .
>
> To discover manifest injustice, a reviewing court must plumb the depths of the proceeding . . . to determine whether the defect in the proceeding was shocking or jurisprudentially intolerable.

Martin v. Commonwealth, 207 S.W.3d 1, 3-4 (Ky. 2006).

Goldsmith argues that minimal due process standards were violated when the trial court issued its order using the phrase "hereby finding the defendant has violated the terms of his probation by committing other offenses and/or failure to comply with the terms of his Probation Order." We disagree with Goldsmith

that due process requirements were not met in that the court did not set forth a definite and specific reason stated for the revocation.

In *Gagnon v. Scarpelli*, 411 U.S. 778, 93 S. Ct. 1756, 36 L.Ed.2d 656 (1973), which followed *Morrissey v. Brewer*, 408 U.S. 471, 92 S. Ct. 2593, 33 L.Ed.2d 484 (1972), the minimum due process requirements for parole revocation proceedings were outlined. These requirements were incorporated into KRS 533.050(2), which states in pertinent part: "[t]he 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." This written notice must state the evidence relied upon and the reasons for revoking Goldsmith's probation. A trial court's "[f]indings are a prerequisite to any unfavorable decision and are a minimal requirement of due process of law[,]" in revocation hearings. *Rasdon v. Commonwealth*, 701 S.W.2d 716, 719 (Ky. App. 1986), quoting *Gagnon v. Scarpelli*, 411 U.S. 778, 93 S. Ct. 1756, 36 L.Ed.2d 656 (1973).

It is clear, when applying the above principles to this trial court's findings in this instance, we must hold that they were constitutionally sufficient, even though the reasons for the revocation are not listed, and nor is the evidence relied upon presented. This is only because Goldsmith stipulated to violating his probation and thus, no "evidence" was presented. The trial court need not set forth

any further written findings as, presumably, Goldsmith knew the basis to which he had stipulated. We cannot hold that the written order in this matter reaches the level of palpable error. While other issues present in this case certainly affect the substantial rights of Goldsmith and constitute manifest injustice, this issue does not.

We now turn to Goldsmith's next argument, that is, that the trial court erred when it did not find Goldsmith in contempt of court and punish him separately for contempt, rather than run his sentences consecutively. Goldsmith correctly points out that criminal contempt is an act that is disrespectful to the court. In this instance, Goldsmith committed direct criminal contempt, in that the act of disrespect was committed in the presence of the court.

There can be little doubt that Goldsmith could have been punished for his contemptuous behavior during the revocation hearing and that the court did not avail itself of that option. What is likewise clear, is that the consecutive sentence was entered by the court on March 5, 2007. Kentucky Rules of Civil Procedure (CR) Rule 59.05 states: "A motion to alter or amend a judgment, or to vacate a judgment and enter a new one, shall be served not later than 10 days after entry of the final judgment." We have long held that a trial court loses jurisdiction to amend or alter a previously entered judgment after ten days have passed, whether or not the sentence is enhanced or diminished.

In *Commonwealth v. Gaddie*, 239 S.W.3d 59, 62 (Ky. 2007), the Supreme Court of Kentucky reviewed the myriad decisions upholding this principle: "[W]hen one is tried for an offense, upon a finding of guilt, he is entitled to have his sentence fixed with certainty and finality. Constitutional restraints prevent subsequent enhancement." *Id.* quoting *Galusha v. Commonwealth*, 834 S.W.2d 696 (Ky. App. 1992).

Thus, had the court altered the original judgment and sentence, it would have been a nullity. Goldsmith's argument that the situation presented was one in which the court could choose to either run the sentences consecutively, concurrently, or find him guilty of criminal contempt is a fallacy. This erroneous belief was apparently shared by the court and counsel on both sides, as it appears from the record that they all believed the court could change the sentence from consecutive to concurrent at that time. Nevertheless, at the revocation hearing, the court had only the option to impose the original sentence, or continue Goldsmith's probation.

As previously stated, the court could have punished Goldsmith for contempt of court for his repugnant behavior aside from a consecutive sentence of thirty (30) years. When the court declared that it needed an "explanation" as to how it could punish Goldsmith's "outburst" other than by running the sentences consecutively there was no answer attempted by either side to the court's apparent

lack of knowledge regarding the court's ability to find Goldsmith guilty of contempt.

This matter disturbs this Court for a number of reasons, not the least of which is the disproportionately harsh sentence. The record reflects that Goldsmith received minimal guidance from his attorney in reference to his initial stipulation to the revocation. Further, the court imposed an overly harsh sentence. Unfortunately, we cannot, at this time, grant Goldsmith relief from the choice he hastily and ill-advisedly made at the hearing when he made his "deal". Even the trial court, when later denying the motion to reconsider, deemed the sentiment that the sentence was unduly harsh, "100% right." What is truly confounding is that the trial court seemed not to remember that it was the trial court who constructed this sentence. While the legislature made this maximum sentence possible under the criminal code, there must be some rational discretion used by the court. Indeed, the court should have the necessary inherent sense of justice to determine the gravity of the offense, and to make the punishment fit the crime. In Goldsmith's case, the court apparently knew the sentence to be outsized, but, nevertheless, imposed it.

For the foregoing reasons, we affirm.

KNOPF, SENIOR JUDGE, CONCURS.

DIXON, JUDGE, CONCURS IN RESULT ONLY.

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