

Commonwealth of Kentucky
Court of Appeals

NO. 2010-CA-000688-MR

JESSE HOWARD GLIDEWELL

APPELLANT

v. APPEAL FROM CLINTON CIRCUIT COURT
HONORABLE EDDIE C. LOVELACE, JUDGE
ACTION NO. 02-CR-00033

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: LAMBERT, THOMPSON AND VANMETER, JUDGES.

THOMPSON, JUDGE: Jesse Howard Glidewell appeals from an order of the Clinton Circuit Court revoking his probation. Glidewell argues that he is entitled to a new revocation hearing because his counsel was not afforded sufficient time to prepare for the revocation hearing. Because the record refutes Glidewell's argument, we affirm.

In 2009, Glidewell entered a guilty plea to theft by deception over \$300 and was sentenced to five-years' imprisonment, probated for five years, or until he paid restitution of \$2,500. Under the plea agreement's terms, he was to be supervised and pay monthly installments of \$200.

In November 2009, the Commonwealth moved to revoke Glidewell's probation for failing to return a rental car and passing a forged check as payment for the rental car. The notice acknowledged that it was served on Glidewell's counsel and on Glidewell by mailing it to his address in Burkesville, Kentucky. It further stated that the motion would be heard on November 16, 2009.

On November 16, 2009, Glidewell's counsel filed a "notice of non-representation" stating that his representation of Glidewell ceased when the order of probation was entered and advised that Glidewell should obtain new counsel for the scheduled hearing. That notice was also sent to Glidewell's Burkesville address.

The revocation hearing was continued until December 7, 2009. On December 2, 2009, the Commonwealth moved to amend its motion to revoke to include Glidewell's failure to report to his probation officer as required by the terms of his probation and to pay restitution as ordered. Again, the motion was served on Glidewell by mailing it to his Burkesville address.

Glidewell failed to appear at the December 7, 2009, hearing and a bench warrant was issued for his arrest. Eventually, Glidewell was located as an inmate in the Adair County Jail. The Clinton Circuit Court entered a transport

order requiring that he be transported from the Adair County Jail to the Clinton Circuit Court on March 1, 2010.

On the morning scheduled for the revocation hearing, Glidewell appeared with his retained counsel, who was licensed in Tennessee. A discourse ensued between the court and counsel regarding the appointment of local counsel because Glidewell's Tennessee counsel was not licensed in Kentucky. The circuit court then appointed local counsel employed by the Department of Public Advocacy.

Prior to the commencement of the revocation hearing, Glidewell's Tennessee counsel informed the Court that Glidewell was attempting to settle his mother's estate and had medical problems. He then requested that Glidewell be released on bond. The court rejected the request and announced that the revocation hearing would be held. Glidewell's counsel requested that the hearing be continued stressing that he was unaware that a hearing was to be held. The court denied the request but permitted Glidewell's Tennessee counsel and his newly appointed local counsel to confer.

After conferring for approximately ten minutes, Glidewell's Tennessee counsel and local counsel continued to object to conducting the hearing because they were not prepared to present a defense. Noting that Glidewell was aware of the scheduled revocation hearing, the circuit court again stated that the hearing would proceed.

The hearing commenced and the Commonwealth presented its witnesses. The defense did not present any witnesses. Glidewell's probation officer testified that after Glidewell's arrest and release from jail on November 16, 2009, for crimes unrelated to the underlying theft crime in this case, Glidewell failed to report as required and that his attempts to locate him were unsuccessful. He discovered that Glidewell had moved from his designated residence and, when apprehended, had been living in Tennessee. A deputy circuit court clerk testified that Glidewell's first restitution payment was due on November 8, 2009, and that he did not make that payment or any other payments.

The circuit court found that Glidewell knew the conditions of his probation and violated those conditions when he failed to make the required restitution payments and report to his probation officer. Although evidence of other crimes was introduced, the circuit court did not base revocation on that evidence because Glidewell had not been convicted of the crimes.

Glidewell argues that the appointment of local counsel was untimely and that his Tennessee counsel was unprepared resulting in a denial of due process. Although he alleges that a postponement would have afforded him the opportunity to call witnesses, he does not identify the witnesses or provide what testimony they would have offered. Further, Glidewell does not offer any evidence that contradicts the circuit court's finding that he had notice of the revocation hearing.

In *Robinson v. Commonwealth*, 86 S.W.3d 54, 56 (Ky.App. 2002), this Court held that due process requires a probation revocation proceeding to

comply with the requirements set forth in *Morrissey v. Brewer*, 408 U.S. 471, 480, 92 S.Ct. 2593, 2600, 33 L.Ed.2d 484, 494 (1972). The defendant must be afforded minimum due process including: 1) written notice of the alleged probation violations; 2) disclosure to the probationer of the evidence supporting the violations; 3) opportunity for the probationer to be heard in person and to present evidence; 4) the right to confront and cross-examine witnesses; 5) a fact finder that is neutral and detached; and 6) a written statement by the fact finder setting forth the evidence relied upon and the reasons for revocation. *Id.* at 56. Consistent with *Robinson*, KRS 533.050(2) provides that probation may not be revoked “except after a hearing with defendant represented by counsel and following a written notice of the grounds for revocation or modification.”

To support his due process argument, Glidewell cites *Hunt v. Commonwealth*, 326 S.W.3d 437 (Ky. 2010), which he contends is “nearly identical” to his case. A brief summary of the facts in *Hunt* easily dispels Glidewell’s contention.

Hunt involved a complete denial of due process. Just prior to the thirteen-minute revocation hearing, a public advocate was appointed. No witnesses were sworn and no testimony was taken. The judge simply asked a probation officer who was not under oath what Hunt had done to violate his probation. The probation officer responded by listing Hunt’s violations. Hunt’s probation officer was not present. After Hunt’s counsel attempted to explain the reasons for the violations, the circuit court revoked Hunt’s probation. *Id.* at 438-439.

Presented with obvious due process violations as set forth in *Morrissey*, and although Hunt did not preserve the errors, the Court reversed the order revoking Hunt's probation. Even absent a valid defense, the Court stated that the denial of the minimum requirements of due process was exactly the "type of error to which the 'manifest injustice' standard of RCr 10.26 was meant to apply." *Id.* at 440.

There is no dispute that Glidewell's alleged error is preserved and, if there was an egregious denial of due process as in *Hunt*, we would be bound to order a new revocation hearing regardless of whether Glidewell could successfully defend against revocation. However, Glidewell must first establish that he was denied due process, a requirement he cannot meet.

The record reflects that the Commonwealth filed detailed motions to revoke summarizing the facts and evidence on which the motions were based. A hearing was held providing the opportunity to call witnesses and cross-examine witnesses. Following the sworn testimony, the circuit court made specific findings of fact and stated its reasons for revocation. The only due process violations alleged are lack of notice of the hearing and counsel's lack of preparedness. Again, the record demonstrates that the due process requirements were met.

The Commonwealth served notice of the motions to revoke probation by mailing it to Glidewell's last known address in Burkesville. The probation officer testified that he attempted to contact Glidewell at that same Burkesville address but was unsuccessful and that it was apparent that he no longer lived at that address. Notably, as a condition of his probation, Glidewell was to notify his

probation officer if he changed his residential address. Glidewell is precluded from arguing that he did not receive a notice that was sent to his last known address and, therefore, benefit from a probation violation. Moreover, the circuit court found that prior to the hearing, Glidewell contacted the court by letter requesting to be excused indicating his knowledge of the pending hearing. Glidewell does not challenge the court's finding.

Because Glidewell's Tennessee counsel did not enter an appearance in the record, the motions to revoke probation were not served on him. However, he was present at the revocation hearing and, therefore, despite his alleged lack of preparation, it logically follows that he was aware of the hearing. Regardless, Glidewell's receipt of notice is sufficient to meet the notice standard under *Robinson* and *Morrissey*.

Finally, Glidewell argues that the local public advocate appointed had no prior knowledge of his case and no time to prepare. Contrary to the situation in *Hunt*, Glidewell had retained counsel who appeared at the hearing. The local public advocate was appointed only because Glidewell's retained counsel was not licensed in Kentucky. It remains that Glidewell was aware of the nature of the proceeding and was represented by his retained counsel.

It could be that a continuance may have served to ensure that any due process argument would be foreclosed and further litigation avoided. However, a trial court has broad discretion in granting or overruling a motion for a continuance, and this Court will not interfere in the exercise of that discretion

unless it is clearly abused. *Riordan v. Riordan*, 252 S.W.2d 901, 902 (Ky. 1952) (citing *Farris v. Evans*, 289 Ky. 418, 158 S.W.2d 941, 943 (1942)). We cannot conclude that the circuit court abused its discretion in denying a continuance. As revealed by the procedural history, the Commonwealth filed numerous motions to revoke that were delayed by the authorities' inability to locate Glidewell because of his change of address and his failure to appear at the designated hearings.

Based on the foregoing, the order of the Clinton Circuit Court revoking Glidewell's probation is affirmed.

ALL CONCUR.

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