

RENDERED: OCTOBER 5, 2012; 10:00 A.M.  
NOT TO BE PUBLISHED

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

NO. 2011-CA-000550-MR

JOSEPH A. KENT

APPELLANT

v. APPEAL FROM OWEN CIRCUIT COURT  
HONORABLE STEPHEN L. BATES, JUDGE  
ACTION NO. 10-CR-00015

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: ACREE, CHIEF JUDGE; NICKELL AND STUMBO, JUDGES.

NICKELL, JUDGE: Joseph A. Kent has appealed from the Owen Circuit Court's March 11, 2011, order revoking his probation and ordering him to serve his underlying sentence of seven years' imprisonment. We affirm.

Kent entered a guilty plea to three counts of sexual abuse in the first degree<sup>1</sup> which stemmed from illegal sexual contact between Kent and his female cousin who was under twelve years of age and who resided in the same home as Kent during the time of the illicit contact. The trial court entered its final sentencing order on July 6, 2010, sentencing Kent in accordance with the recommendation of the Commonwealth to an aggregate term of seven years' imprisonment, probated for a period of five years, subject to numerous conditions. After setting forth seventeen specific conditions of Kent's probation, the trial court's sentencing order included the requirement that "[i]n addition to the conditions of probation set forth herein, Defendant shall follow and obey all conditions of probation imposed by the Office of Probation and Parole."

On February 16, 2011, the Commonwealth moved to revoke Kent's probation on the basis that he had violated the supplemental conditions of his probation by having unapproved contact with a minor. An affidavit accompanying the motion alleged that during a home visit of Kent's grandfather's residence, where Kent proposed to live, on February 14, 2011, the attesting officer found Kent's grandfather babysitting a "2 or 3 year old boy" while Kent was present in the residence. A hearing on the motion was conducted on March 8, 2011.

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<sup>1</sup> KRS 510.110, a class C felony. Kent was originally charged with one count each of rape in the first degree, KRS 510.040, a class A felony; sodomy in the first degree, KRS 510.070, a class A felony; and sexual abuse in the first degree. Following plea negotiations, the Commonwealth agreed to amend the more serious charges to three counts of sexual abuse, in exchange for Kent's guilty plea.

At the hearing, Probation Officer Bonnie Rawlings testified she had been Kent's probation officer from November 19, 2010, until he was transferred in January 2011 to another officer. Officer Rawlings stated that on the date Kent was assigned to her caseload she met with him and thoroughly went over the conditions of his probation, going so far as to have Kent sign a copy of the rules and giving him a copy. She stated the second condition listed on the form Kent signed was that he, as a sex offender, would have no contact with juveniles. Officer Rawlings further testified she made this condition known to Kent on numerous other occasions. When Kent stated his desire to relocate to his grandfather's home, which was outside Officer Rawlings' supervision area, she inquired as to why he had not moved there initially after being probated. Kent stated there were children living in the home at that time but they had recently moved out. Officer Rawlings stated she ensured Kent was aware the terms of his probation required that no children be at the residence and that it could not be located within 1,000 feet of parks, schools and day care centers. She testified she contacted the trial court to inquire about the move as the final sentencing order listed an address at which Kent was required to reside as a condition of being probated.

Probation Officer Cameron Watts testified that Kent's supervision had been transferred to his caseload on February 11, 2011, following Kent's move to his grandfather's residence. Officer Watts stated he conducted the home visit as a part of the transfer process. He further stated one of the specialized conditions Probation and Parole places on persons convicted of sexual abuse in the first

degree is that the probationer has no contact with minors. Officer Watts testified that when he went to Kent's residence, a minor child was seen immediately upon opening the front door. Kent was summoned from his room to the kitchen where he met with Officer Watts. Officer Watts testified the presence of the child in the home was a violation of Kent's supplemental conditions of probation.

The trial court entered an order revoking Kent's probation on March 11, 2011. The trial court specifically found Kent had violated the supplemental terms of his probation by having unapproved contact with a minor. This appeal followed.

Kent raises two allegations of error in seeking reversal of the trial court's order. First, he contends the Commonwealth failed to satisfy its burden of proving he had violated the terms of his probation as it did not introduce evidence of the condition that was violated, the meaning of the terms thereof, nor any document containing or defining this restriction. Thus, he contends the trial court's decision was based on insufficient evidence and violated his rights to minimal due process. He concedes this issue was not properly preserved for appellate review, but requests palpable error review pursuant to RCr<sup>2</sup> 10.26. Second, and alternatively, Kent contends the trial court abused its discretion in revoking his probation as the Commonwealth failed to prove he had "contact" with the minor child even under an expansive definition of that term.

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<sup>2</sup> Kentucky Rules of Criminal Procedure.

Kent first alleges the Commonwealth failed to satisfy its burden of proving he had violated his probation and failed to introduce sufficient evidence to support such a finding. He concedes this allegation is unpreserved for our full review but requests palpable error review. “This Court reviews unpreserved claims of error on direct appeal only for palpable error. To prevail, one must show that the error resulted in ‘manifest injustice.’” *Martin v. Commonwealth*, 207 S.W.3d 1, 3 (Ky. 2006). RCr 10.26 states

A palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error.

Kent contends the Commonwealth failed to introduce evidence of the meaning of the phrase “no unauthorized contact with a minor child” which was included in his supplemental terms of probation. He alleges the Commonwealth likewise failed to produce any documentation containing this restriction at the revocation hearing. According to Kent, these failures amount to a denial of his right to due process and constitute reversible error.

It is well-settled in this Commonwealth that the full panoply of due process rights is not applicable in probation revocation proceedings, but rather, a defendant is entitled to minimal due process. *Murphy v. Commonwealth*, 551 S.W.2d 838, 840 (Ky. App. 1977) (citing *Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972) and *Gagnon v. Scarpelli*, 411 U.S. 778, 93 S.Ct. 1756, 36

L.Ed.2d 656 (1973)). Minimal due process rights guaranteed in revocation proceedings are deemed to have been complied with and protected if:

(1) a written notice of the claimed violations of parole are served, (2) a disclosure of the evidence to be used is made, (3) an opportunity is granted to be heard in person, present witnesses and documentary evidence, (4) confrontation and cross-examination of witnesses is afforded (unless a specific finding for good cause is made to the contrary), (5) a neutral and detached hearing body conducts the procedure and (6) a written statement is made by the fact finder(s) as to the evidence relied on and the reasons for revoking parole.

*Id.* A trial court may only revoke a defendant's probation if the Commonwealth proves, by a preponderance of the evidence, that the terms of probation have been violated. *Commonwealth v. Lopez*, 292 S.W.3d 878, 881 (Ky. 2009) (citing *Rasdon v. Commonwealth*, 701 S.W.2d 716, 719 (Ky. App. 1986)).

Our review of the record reveals no dispute that Kent was aware of the terms of his probation, including those included in the supplemental conditions referenced throughout the revocation hearing. Similarly, there was no disagreement as to the condition Kent was alleged to have violated. We believe these undisputed facts underscore the reason that no objection was lodged to the Commonwealth's failure to introduce the writing containing the conditions of Kent's supervision. Contrary to Kent's assertion, the trial court had sufficient evidence before it to conclude he had violated the terms of his supervision despite not having the writing before it, including the testimony of two probation officers. Thus, no violation of Kent's minimal due process rights occurred solely because

the Commonwealth did not introduce a piece of paper he had signed stating the undisputed conditions of Kent's supervision. Thus, we discern no error and certainly no manifest injustice requiring reversal.

Finally, Kent contends the trial court's decision to revoke his probation was based on insufficient evidence that he had "contact" with a minor child in violation of the terms of his release. He alleges that even under an expansive definition of the term, the Commonwealth did not meet its burden of proving any "contact" with a minor. Thus, he contends the trial court's ruling was arbitrary, unreasonable, unfair, and unsupported by sound legal principles and thus constituted an abuse of discretion. We disagree.

As previously stated, a trial court may revoke a defendant's probation if the Commonwealth proves a violation by a preponderance of the evidence. *Lopez*. The decision will be reversed on appeal only if it constitutes an abuse of discretion. *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). Kent contends that his mere presence in the same residence as a minor does not constitute "contact" and the trial court abused its discretion in so finding. He relies solely on an opinion of the Indiana Supreme Court as legal support for his argument. In response, the Commonwealth cites us to authorities from other sister jurisdictions tending to show the Indiana court's ruling constitutes the minority viewpoint. It appears no published case exists on the issue from any Kentucky court.

Based on the facts before us, we must agree with the Commonwealth that the trial court's determination that the terms of Kent's probation that he was to

have “no contact with minors” necessarily includes “proximity” and the opportunity to touch or directly communicate with a child was supported by substantial evidence. Even where conflicting or inconsistent evidence is presented, it is the duty of the trial court to judge the credibility of witnesses and weigh the evidence as these are tasks directly within the province of the fact-finder. *Moore v. Asente*, 110 S.W.3d 336, 355 (Ky. 2003).

In the matter at bar, the trial court clearly believed the testimony of the two probation officers over the self-serving testimony of Kent and his witnesses. We cannot say this constituted an abuse of discretion.

The evidence produced at the revocation hearing proved Kent was aware that being in the same house as a minor would violate his probation and subject him to revocation. Testimony from Officer Rawlings indicated this restriction was the sole reason Kent had not gone to live with his grandfather at an earlier date. However, on the first home visit following his change of residence, a child was found to be present. Although Kent and his grandfather each alleged Kent was unaware the child was there until called out of his room by Officer Watts, the trial court apparently did not lend credibility to these statements.

Similarly, testimony from Kent’s grandfather as to his mistaken belief that Kent’s probation allowed him to be around children so long as another adult was in the residence was obviously met with skepticism by the trial court. The trial court was also not persuaded by Kent’s assertion that any “contact” he had with the child was completely unintentional, coincidental, inadvertent, and beyond his control.



We cannot conclude, based on the facts and the record before us, that the trial court's rejection of Kent's testimony and theories was arbitrary, unreasonable, unfair, and unsupported by sound legal principles. There being no abuse of discretion, we cannot grant Kent the relief he seeks.

For the foregoing reasons, the judgment of the Owen Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Brandon Neil Jewell  
Assistant Public Advocate  
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Jack Conway  
Attorney General of Kentucky

Jason B. Moore  
Assistant Attorney General  
Frankfort, Kentucky