

RENDERED: NOVEMBER 9, 2012; 10:00 A.M.  
NOT TO BE PUBLISHED

# Commonwealth of Kentucky

## Court of Appeals

NO. 2011-CA-001698-MR

JAMES JONES

APPELLANT

v. APPEAL FROM MADISON CIRCUIT COURT  
HONORABLE WILLIAM G. CLOUSE JR., JUDGE  
ACTION NO. 09-CR-00067

COMMONWEALTH OF KENTUCKY

APPELLEE

### OPINION REVERSING AND REMANDING

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BEFORE: CAPERTON, DIXON AND STUMBO, JUDGES.

DIXON, JUDGE: Appellant, James Jones, appeals from an order of the Madison Circuit Court revoking probation of his two-year sentence on a conviction of flagrant non-support. For the reasons set forth herein, we reverse and remand for further proceedings.

In April 2009, Appellant was indicted by a Madison County Grand Jury on one count of flagrant non-support for persistently failing to pay child support

ordered in a divorce decree nine years earlier. In November 2009, Appellant pled guilty to the charge and was sentence to two years imprisonment, conditionally discharged for a period of two years of supervised probation. Subsequently, Appellant's supervision was transferred to a Florida probation and parole officer in Santa Rosa, Florida.

Following a series of domestic disputes involving Appellant at his Florida residence, the Santa Rosa Sheriff's Department contacted the Kentucky Division of Probation and Parole to determine whether Appellant was fulfilling his child support obligation. Upon learning that Appellant was in arrears over \$5,000, the Madison Circuit Court issued a warrant in June 2011 for Appellant's arrest and extradition back to Kentucky.

On August 4, 2011, the trial court held an evidentiary hearing on the probation violation. Appellant admitted to having received a copy of the written special report prepared by the Division of Probation and Parole and stipulated to the violation contained therein. However, Appellant requested that his probation not be revoked as he had recently learned of a business opportunity that would enable him to make his support payments. Further, Appellant informed the trial court that he had recently appeared before a Florida court and was successful in having his support obligation reduced from \$500 to \$200 a month. Nevertheless, the court orally ruled:

[I]t's the court's belief that after reading through the special, it's unlikely that you're going to make any effort, except in response to being arrested, to make your

payments, sir. So therefore the Court is going to order that your probation is revoked and you're to serve that balance of your time.

. . .  
I honestly and truly do not believe that you have any intention ever to live up to the requirements of your probation, and I think we might as well get on with it.

On August 15, 2011, the trial court entered a written order setting aside probation and imposing a sentence of imprisonment, finding that:

- A. Mr. Jones was [sic] failed to remain in good behavior since being placed on probation; and
- B. Mr. Jones failed to pay child support as . . . ordered.

Appellant thereafter appealed to this Court as a matter of right.

Appellant argues that the trial court erred in failing to make specific findings pursuant to *Commonwealth v. Marshall*, 345 S.W.3d 822 (Ky. 2011), prior to revoking his probation. Although the Commonwealth essentially concedes that the trial court did not make the required findings, it contends that such is irrelevant because Appellant stipulated to violating the other terms of his probation and thus revocation was still warranted.

In *Commonwealth v. Marshall*, 345 S.W.3d 822 (Ky. 2011), the Kentucky Supreme Court considered appeals in two separate actions arising from motions to revoke for failure to comply with conditions requiring the payment of child support. The Court engaged in an extensive review of existing authority, including *Bearden v. Georgia*, 461 U.S. 660, 103 S.Ct. 2064, 76 L.Ed.2d 221 (1983) and *Gamble v. Commonwealth*, 293 S.W.3d 406 (Ky. App. 2009). Although noting

that *Bearden* concerned the payment of fines and restitution, the Court held that *Bearden's* due process requirements apply to cases when probation revocation is sought for failure to comply with child support payment conditions because the payment of past due child support is restitution. *Marshall*, 345 S.W.3d at 828.

The *Marshall* Court stated:

[D]ue process requires that the trial court considering revocation for nonpayment of support (1) consider whether the probationer has made sufficient bona fide efforts to pay but has been unable to pay through no fault of his own and (2) if so, consider whether alternative forms of punishment might serve the interests of punishment and deterrence. This holding is consistent with existing Kentucky and United States Supreme Court precedent concerning motions to revoke probation for failure to pay fines or restitution.

*Id.*

The *Marshall* Court further determined that in resolving the above considerations, the trial court is required to make clear findings on the record specifying the evidence relied upon and the reasons for revoking probation. *Id.* at 833. Although the findings do not necessarily have to be made in writing, they must be specific and clearly evident from the record. *Id.*

In the instant case, the trial court ruled on the revocation both orally at the conclusion of the hearing and then later by written order. Unfortunately, neither ruling contained any finding other than Appellant failed to pay his child support as ordered. The trial court did not address the *Bearden* factors at all, including whether Appellant had made sufficient bona fide efforts to pay, but was unable to

do so through no fault of his own, and if so, whether alternative forms of punishment might apply. Therefore, we must hold that the trial court abused its discretion in revoking Appellant's probation without first making such findings.

The Commonwealth contends that notwithstanding the trial court's failure to follow *Marshall*, revocation was justified because Appellant stipulated during the evidentiary hearing to violating the other conditions of his probation. After reviewing the record, we must disagree.

Contrary to the Commonwealth's assertion, the only enumerated "violation" listed in the special report was Appellant's failure to comply with his support obligation. The report specifically stated:

SPECIAL ATTENTION SECTION

Mr. Jones violated his probation based upon the following:

- 1) Failure to Pay Child Support as Directed. As of this report Jones has failed to pay \$5045.00 in child support payments since his release on probation.

Indeed, the report also contained the incident statements filed by the Santa Rosa Sheriff's Department. However, such information was provided to explain why the Madison County Child Support Office was initially contacted regarding Appellant's probation compliance. The incidents that occurred in Florida were not listed as probation violations.

Furthermore, a review of the evidentiary hearing makes it clear that Appellant stipulated to "the violation" contained in the special report, i.e. failure to pay child support. There was absolutely no discussion or reference to any of the

information provided by the Florida authorities. And the trial court's questions and oral revocation of Appellant's probation during the hearing were solely limited to his failure to pay. We must agree with Appellant that the special report put him on notice that he needed to be prepared to defend against one specific violation.

Despite the trial court's written order including failure to maintain good behavior as a basis for the revocation of Appellant's probation, in the absence of any discussion or reliance upon the Florida allegations during the hearing, we cannot conclude that revocation based on such was proper.

Due to the lack of specific findings required by *Marshall*, we must vacate the order of the Madison Circuit Court revoking Appellant's probation and remand the matter to the trial court for further proceedings.

ALL CONCUR.

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