

RENDERED: AUGUST 16, 2013; 10:00 A.M.  
NOT TO BE PUBLISHED

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

NO. 2012-CA-000137-MR

JOSHUA LEE

APPELLANT

v. APPEAL FROM TAYLOR CIRCUIT COURT  
HONORABLE ALLAN RAY BERTRAM, JUDGE  
ACTION NO. 08-CR-00139

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: MAZE, STUMBO, AND VANMETER, JUDGES.

VANMETER, JUDGE: Joshua Lee appeals from the Taylor Circuit Court's order revoking his probation and imposing five years of incarceration. Finding no abuse of discretion, we affirm.

Following his arrest, Lee and the Commonwealth entered into a plea agreement whereby Lee pled guilty to one count of sexual abuse in the first degree

and the Commonwealth recommended a sentence of five years' imprisonment, of which 90 days would be served and the remainder probated for five years. The agreement also required Lee to register as a sex offender, comply with a sex offender treatment program ("SOTP"), and pay costs and fines. On August 31, 2009, the trial court accepted Lee's plea and the Commonwealth's recommendation and entered a judgment accordingly.

In November 2009, upon notice from the Taylor County Detention Center that Lee had been arrested on assault charges, the trial court entered a show cause order requiring Lee to appear and explain why his probation should not be revoked. Following a hearing, the trial court revoked Lee's work release; he remained probated.

Thereafter, in September 2011, the Commonwealth filed a motion to revoke Lee's probation, attaching an affidavit of Lee's probation officer, Chastity McCorkle, in which she alleged a litany of instances in which Lee violated his probation. At a hearing on the motion, McCorkle testified that Lee tested positive for marijuana, admitted to using the drug, and also admitted to a second instance of marijuana use to another probation officer. McCorkle further testified that Lee failed to report to her as scheduled on October 18, 2011, and she had not seen him since September 26, 2011. Lee also failed to make monthly payments to the SOTP; he had been permitted to clean the SOTP offices in lieu of paying any fees, but at some point Lee stopped cleaning the offices, and did not make the required payments. He also missed several meetings, and did not apply for any financial

assistance for the program. The trial court granted the Commonwealth's motion to revoke probation and imposed a sentence of five years' imprisonment. This appeal followed.

We review a trial court's revocation of a defendant's probation for an abuse of discretion. *Miller v. Commonwealth*, 329 S.W.3d 358, 359-60 (Ky. App. 2010) (citation omitted). Such an abuse occurs if the trial court's decision was "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999) (citation omitted).

On appeal, Lee first claims that the trial court abused its discretion and violated his due process rights by revoking his conditional discharge without inquiring into the reasons for his failure to make payments necessary to comply with the SOTP. We disagree.

A probationer receives conditional liberty through the granting of probation and "due process safeguards intercede to ensure that liberty is not unfairly taken away." *Barker v. Commonwealth*, 379 S.W.3d 116, 122 (Ky. 2012) (citation omitted). However, a proceeding to revoke probation "is not a part of a criminal prosecution and thus the full panoply of rights due a defendant in such a proceeding does not apply[.]" *Robinson v. Commonwealth*, 86 S.W.3d 54, 56 (Ky. App. 2002) (quoting *Morrissey v. Brewer*, 408 U.S. 471, 480, 92 S.Ct. 2593, 2600, 33 L.Ed.2d 484, 494 (1972)). The minimal due process rights afforded during a probation revocation proceeding are as follows:

“(a) written notice of the claimed violations of [probation]; (b) disclosure to the [probationer] of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a ‘neutral and detached’ hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking [probation].”

*Robinson*, 86 S.W.3d at 56 (quoting *Morrissey*, 408 U.S. at 489, 92 S.Ct. 2593).

Due process requires that prior to revoking probation for failure to pay fines and restitution, a trial court must consider “whether the probationer made sufficient bona fide attempts to make payments but been unable to do so through no fault of his own[.]” *Commonwealth v. Marshall*, 345 S.W.3d 822, 828 (Ky. 2011) (citation omitted). Lee asks us to extend the holding of *Marshall*, as it applies to revoking probation for failure to pay child support restitution, to situations such as the present in which probation is revoked for failure to make payments in compliance with probation, such as to a SOTP.

However, even if *Marshall* applied, the record shows that Lee did not address his inability to pay other than to say he has had trouble finding employment since his arrest. He also did not address why he stopped cleaning the SOTP offices in lieu of making payments. Finally, the trial court did not base its decision to revoke his probation on his failure to pay certain costs. The court expressed orally that its decision was based on Lee’s arrest for assault, his failure

to report to his probation officer, and his continued inability to comply with the terms of his probation over a period of time with no marked signs of improvement. Based on this, the court did not believe the Commonwealth could adequately supervise Lee and found the only alternative was incarceration. Accordingly, we fail to appreciate Lee's argument and find no abuse of discretion by the trial court in this regard.

Lee next argues the trial court abused its discretion by permitting hearsay testimony during the hearing. Specifically, he argues that McCorkle should not have been permitted to testify that Lee admitted to using marijuana to another parole officer. We find McCorkle's testimony to that effect to be cumulative and also admissible in the context of a probation revocation hearing, and thus decline to reverse on this basis.

“Probation revocation proceedings are not part of the original criminal prosecution, and are thus more informal and require less proof than a criminal trial.” *Hunt v. Commonwealth*, 326 S.W.3d 437, 439 (Ky. 2010) (citation omitted). To revoke probation, the Commonwealth need only establish by a preponderance of the evidence that a probation violation has occurred. *Id.* (citation omitted). The Kentucky Rules of Evidence (KRE), including those prohibiting hearsay, do not apply to probation revocation proceedings. KRE 1101(d)(5).

Since hearsay evidence is permitted at a probation revocation hearing, the trial court did not abuse its discretion by allowing McCorkle to testify regarding Lee's admission to another parole officer. Lee contends that due process requires

the opportunity for him to confront any adverse witness; however, McCorkle's testimony concerning Lee's marijuana use was cumulative, since she also testified that Lee tested positive for marijuana and he admitted using the drug. Lee had ample opportunity to cross-examine McCorkle. Thus, the court's admission of this testimony did not violate Lee's due process rights.

Lee next alleges the trial court did not make sufficient or clear findings with respect to the evidence it relied upon to revoke probation. Specifically, Lee contends the trial court failed to make any written findings and failed to consider less severe sanctions as required under KRS<sup>1</sup> 439.3106. We disagree.

In *Commonwealth v. Alleman*, 306 S.W.3d 484 (Ky. 2010), Kentucky's highest court held that oral findings made from the bench satisfied the probationer's federal due process right to know the basis upon which his probation was revoked and to enable him to argue the sufficiency of those facts on appeal. *Id.* at 487. The Court reasoned that since the purpose of requiring written findings is to provide an adequate basis for review, the goal is achieved when the oral findings and reasons for revocation are recorded. *Id.* (citations omitted). Here, the hearing was recorded, during which the trial court made oral findings explaining its view of the evidence and reasons for revoking Lee's probation.<sup>2</sup>

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<sup>1</sup> Kentucky Revised Statutes.

<sup>2</sup> The Kentucky Supreme Court, post-*Alleman*, emphasized that “[n]otwithstanding our conclusion that the trial court's rationale is readily determinable from the record, we state again that compliance with CR 52.01 and the applicable sections of KRS Chapter 403 requires *written* findings. We do not expect the appellate courts of this state to search a video record or trial transcript to determine what findings the trial court might have made with respect to the essential facts. Moreover, the final order of the trial court . . . often serves as more than a vehicle for appellate review.” *Keifer v. Keifer*, 354 S.W.3d 123, 126 (Ky. 2011).

With respect to those findings, and Lee's contention that the trial court failed to consider lesser sanctions than revocation, we note that KRS 439.3106 subjects probationers to "possible incarceration for failure to comply with the conditions of supervision when such failure constitutes a significant risk to prior victims of the supervised individual or the community at large, and cannot be appropriately managed in the community[.]" KRS 439.3106(1). Otherwise, sanctions less than revocation and incarceration should be considered. KRS 439.3106(2).

Here, as we mentioned above, the trial court expressed its concern during the hearing that Lee violated his probation when he was arrested for assault within three months of being probated. The court expressed further concern with Lee's failure to report to his probation officer, noting that the Commonwealth is unable to properly supervise his behavior when he fails to report. Furthermore, for unknown reasons, Lee has failed to comply with the SOTP required as a condition of his probation. Given the serious nature of his crime, his immediate and continued violations of his probation, and his failure to report, we find that the decision to revoke probation was based on sufficient evidence. As a result, the trial court did not abuse its discretion by revoking Lee's probation.

The order of the Taylor Circuit Court is affirmed.

ALL CONCUR.

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