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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2012-CA-001138-MR

TIMOTHY CAMPBELL

APPELLANT

v. APPEAL FROM LAWRENCE CIRCUIT COURT
HONORABLE JOHN DAVID PRESTON, JUDGE
ACTION NO. 11-CR-00027

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
VACATING AND REMANDING

** ** * ** * ** *

BEFORE: DIXON, MOORE, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Timothy Campbell brings this appeal from a May 31, 2012, order of the Lawrence Circuit Court revoking Campbell's probation. We vacate and remand.

In 2011, Campbell was indicted by the Lawrence County Grand Jury upon four counts of theft by deception over \$500. Campbell allegedly stole

approximately \$325,000 from one victim. Campbell and the Commonwealth reached a plea agreement. In exchange for Campbell's guilty plea, Campbell was sentenced to a total term of ten-years' imprisonment with two years to serve and the remaining eight years was to be probated for five years. Campbell was also required to pay restitution to the victim, Frank Hay, in the amount of \$12,500 by April 8, 2012, and then \$400 per month starting on May 5, 2012, and continuing for 60 months.

Campbell was eventually released on probation by the Department of Corrections. While probated, it is undisputed that Campbell failed to make the required restitution payments of \$12,500 by April 8, 2012 and \$400 on May 5, 2012. Due to his failure to make the required restitution payments, the Commonwealth filed a motion to revoke Campbell's probation. Following an evidentiary hearing, the circuit court granted the Commonwealth's motion and revoked Campbell's probation. In its order revoking considering probation, the circuit court found:

This matter having come before the Court upon the motion of the Commonwealth and the Court having heard arguments of counsel, reviewed the record before it, and being otherwise fully and sufficiently advised hereby ORDERS that the probation of Defendant is hereby REVOKED and he shall be remanded to the Department of Corrections for further placement.

This appeal follows.

Campbell contends that the circuit court erred by revoking his probation without making adequate findings of fact as mandated by *Commonwealth v. Marshall*, 345 S.W.3d 822 (Ky. 2011). For the following reasons, we agree.

In *Marshall*, the Kentucky Supreme Court held that before revoking probation based upon a defendant's failure to make required restitution payments the trial court shall make two findings of fact on the record:

(1) whether . . . defendant had made sufficient bona fide efforts to make payments but was unable to do so from no fault of his own and, if so, (2) whether alternatives to incarceration would suffice to accomplish the Commonwealth's punishment and deterrence objectives.

Id. at 833.¹ The Supreme Court further held that the constitutional guarantee of due process of law mandates the trial court to make the above two findings before revoking probation based upon a defendant's failure to pay restitution. The Supreme Court explained that if a defendant made reasonable efforts to pay restitution but was unable to do so "it would be fundamentally unfair and a 14th Amendment due process violation to revoke automatically without considering" alternative punishments. *Marshall*, 345 S.W.3d at 832 (citation and footnote omitted). The Court further concluded that a trial court must directly make the two findings of fact either in writing as memorialized in an order entered in the record or orally upon the official video record. And, the Supreme Court pointed out:

It is not enough that an appellate court might find some evidence in the record to support a reason for revoking

¹ Although *Commonwealth v. Marshall*, 345 S.W.3d 822 (Ky. 2011) involved payment of past due child support, the payments are deemed restitution as defined in Kentucky Revised Statutes 532.350(1)(a) and, thus, the case analysis is applicable to our case.

probation by reviewing the whole record. Stating “general conclusory reasons” for revoking probation is not enough[.]

Marshall, 345 S.W.3d at 833-34 (citation omitted).

In the case now before this Court, the circuit court failed to make the required two findings of fact as set forth by *Marshall*, 345 S.W.3d 822 before revoking Campbell’s probation for his failure to remit the restitution payments. In its written order revoking probation, the circuit court makes no findings of fact, and further fails to orally make any findings of fact upon the official video record. Thus, we conclude that the circuit court erred by failing to make the required findings of fact before revoking Campbell’s probation for his failure to pay restitution.

The Commonwealth argues that this issue is unpreserved for our review and does not constitute palpable error under Kentucky Rules of Criminal Procedure (RCr) 10.26. Under RCr 10.26:

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.

To be entitled to RCr 10.26 relief, an unpreserved error must affect the party’s substantial rights, be prejudicial, and result in manifest injustice. Manifest injustice occurs where there exists a “probability of a different result or error so

fundamental as to threaten a defendant's entitlement to due process of law.”

Martin v. Com., 207 S.W.3d 1, 3 (Ky. 2006).

In *Marshall*, the Kentucky Supreme Court painstakingly and repeatedly pointed out that the constitutional guarantee of due process of law is offended when a defendant's probation is revoked for failure to pay restitution without the trial court initially making two required findings of fact – (1) whether defendant made sufficient bona fide efforts to make restitution but was unable to do so through no fault of his own and (2) whether alternatives to incarceration exists. *See Marshall*, 345 S.W.3d 822. Because the trial court failed to make the above two findings of fact before revoking Campbell's probation, Campbell's right to due process was violated, and under the particular facts herein, the violation resulted in manifest injustice to Campbell under RCr 10.26.²

Accordingly, we hold that palpable error resulted from the circuit court's failure to make the required findings of fact as mandated under *Marshall*, 345 S.W.3d 822 and thus vacate the circuit court's order revoking Campbell's probation. Upon remand, the circuit court shall reconsider the Commonwealth's motion to revoke and shall specifically find whether: (1) Campbell made sufficient bona fide efforts to make the April 8, 2012, restitution payment of \$12,500 and the \$400 payment on May 5, 2012, but was unable to do so, and if so, (2) alternatives to incarceration would suffice to accomplish the Commonwealth's punishment and

² Upon review of the evidentiary hearing, it appears that originally the family of Timothy M. Campbell intended to remit the restitution payments but ultimately failed to do so. Also, there was evidence that Campbell applied for social security disability benefits. So, a substantial question exists concerning Campbell's ability to pay the restitution payments.

deterrence goals. *See Marshall*, 345 S.W.3d 822. The required findings of fact shall be either memorialized in a written order entered in the circuit court record or orally announced by the court upon the official video record. *See id.*

For the foregoing reasons, the order of the Lawrence Circuit Court is vacated and this case is remanded for proceedings consistent with this opinion.

DIXON, JUDGE, CONCURS.

MOORE, JUDGE, CONCURS IN RESULT ONLY.

BRIEFS FOR APPELLANT:

John Gerhart Landon
Assistant Public Advocates
Department of Public Advocacy
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Wm. Robert Long, Jr.
Assistant Attorney General
Frankfort, Kentucky