

Commonwealth of Kentucky
Court of Appeals

NO. 2012-CA-001541-MR

BRIAN L. WEFENSTETTE

APPELLANT

v. APPEAL FROM JOHNSON CIRCUIT COURT
HONORABLE JOHN DAVID PRESTON, JUDGE
ACTION NO. 10-CR-00155

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE, CHIEF JUDGE; TAYLOR AND VANMETER, JUDGES.

VANMETER, JUDGE: Brian Wefenstette appeals from the Johnson Circuit Court's orders denying his motion to modify the conditions of probation and revoking his probation. For the following reasons, we affirm.

In October 2010, Wefenstette was indicted and charged with Unlawful Imprisonment in the First Degree (2 counts) and Wanton Endangerment in the First

Degree (2 counts), stemming from an incident involving him, his wife, Patty, and their minor child. Wefenstette has a number of health conditions including a seizure disorder, a “pace maker” implanted in his brain to treat his body tremors, mental health illnesses including depression, and multiple suicide attempts. He was found competent to stand trial and on November 4, 2011, entered a plea of guilty to the aforementioned charges.

Upon the Commonwealth’s recommendation, the trial court sentenced Wefenstette to five years for each of the Unlawful Imprisonment charges, to run consecutive to each other, and to five years for each of the Wanton Endangerment charges, to run concurrent to each other and concurrent to the Unlawful Imprisonment sentences, for a total sentence of ten years. This sentence was probated for a period of five years on the condition that Wefenstette “enroll in a long-term care facility” and “remain incarcerated until a long-term care facility acceptable by Patty Wefenstette is available for [his] care.” This condition of probation was imposed to provide for Patty’s safety and to treat Wefenstette’s health conditions. Placement in a long-term care facility was not arranged or identified at the time of sentencing.

In April 2012, Wefenstette wrote a letter to the trial court requesting an appearance before the court to address the terms of the long-term care facility including time frame, placement, length of stay, and what “acceptable by Patty Wefenstette” means. Thereafter, the court appointed the Department of Public Advocacy to represent Wefenstette. The court-appointed attorney requested

removal of the long-term care condition and asked that Wefenstette be released on supervised probation to his brother in Martin County.

In response, the Commonwealth stated that it had arranged placement for Wefenstette at a Veterans' Administration (VA) facility in Charleston, West Virginia, that was structured to provide care to homeless veterans who had drug addiction issues and problems re-entering society. This facility had agreed to admit Wefenstette, he was already registered with the VA, and Patty had approved this placement. The court continued the matter to allow Wefenstette additional time to address this issue.

On July 12, 2012, counsel for Wefenstette filed a motion to modify the conditions of probation, stating that Wefenstette had been incarcerated for 653 days and the "long-term care facility" condition was unreasonable on its face since the condition is subject to the whims of a layperson (Patty) and not to the review of a neutral hearing officer. Wefenstette further pointed out that the West Virginia facility was outside the Commonwealth's jurisdiction and argued that he should not be required to banish himself to a foreign jurisdiction to enter a facility not designed to treat his health conditions.

The court held a hearing on July 20, 2012 to address Wefenstette's motion. At that time, the Commonwealth asserted that the West Virginia facility was the only, and closest, facility able to accommodate Wefenstette's needs and that Wefenstette has been available for the past six months to enter this facility and has refused to do so. The Commonwealth asked that Wefenstette be ordered to either

stay in jail until he provides an acceptable option or have his probation revoked and be remanded to the Department of Corrections' custody to serve his ten-year sentence. Wefenstette stipulated on the record that he would not comply with the condition of probation requiring long-term care and likewise requested that his probation be revoked so that he would have a final order to appeal.

The trial court did not find the condition to be unreasonable and declined to modify the terms of probation. The court stated "it was time to fish or cut bait" and Wefenstette could either take the placement or have his probation revoked. The court passed the matter for a revocation hearing to allow the Commonwealth to present evidence that a placement in the West Virginia facility was in fact available.

The trial court held a probation revocation hearing on September 7, 2012, at which time Chad Fitzpatrick, a probation and parole officer, testified that no long-term care placement was arranged at the time of Wefenstette's sentencing, a placement had since become available in West Virginia, but Wefenstette was not amenable to it. Fitzpatrick conceded that the VA hospital in West Virginia was not designed to deal with Wefenstette's health issues but stated that this placement was the only option probation and parole had found.

At the conclusion of the hearing, the trial court recalled the facts of this case and that Wefenstette had faced up to twenty years' imprisonment for these charges, which the jury might well have imposed. The court noted that extraordinary efforts had been made to try and find a suitable placement for Wefenstette, which

he refused to accept. Due to Wefenstette's refusal to comply with this condition of probation, the court revoked his probation. On appeal, Wefenstette alleges the trial court abused its discretion by revoking his probation because the condition of probation that he enter a long-term care facility acceptable by Patty was unreasonable. We disagree.¹

Our standard for reviewing a trial court's decision to revoke a defendant's probation is whether the trial court abused its discretion. *Commonwealth v. Lopez*, 292 S.W.3d 878, 881 (Ky. 2009). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair or unsupported by sound legal principles." *Woodard v. Commonwealth*, 147 S.W.3d 63, 67 (Ky. 2004) (quotations and citation omitted).

A trial court is authorized to impose reasonable conditions when ordering a sentence of probation. KRS² 533.030(1)-(2). In this Commonwealth, "probation is a privilege rather than a right. One may retain his status as a probationer only as long as the trial court is satisfied that he has not violated the terms or conditions of the probation." *Barker v. Commonwealth*, 379 S.W.3d 116, 122 (Ky. 2012) (internal quotations and citation omitted). The Commonwealth need only prove by

¹ Wefenstette also argues that the procedure for revocation was not followed; specifically, that the Commonwealth never filed a written motion to revoke. However, the record shows that Wefenstette waived any objection to the lack of a written motion by stipulating on the record that he was refusing to comply with the condition of probation requiring long-term treatment and by requesting revocation himself.

² Kentucky Revised Statutes.

a preponderance of the evidence that a probationer has violated the terms of probation. *Id.* at 123.

In this case, the record reflects that Wefenstette voluntarily and knowingly entered into a plea agreement with the Commonwealth, one of the terms being that the Commonwealth would recommend supervised probation and Wefenstette would remain incarcerated until he secured placement in a long-term care facility that was acceptable by Patty. While giving Patty approval power of the facility might arguably be arbitrary, nevertheless Wefenstette, on the advice of counsel, accepted the terms of the plea agreement and was sentenced accordingly.

Further, it was not *impossible* for Wefenstette to comply with the condition, as was the case in *Keith v. Commonwealth*, 689 S.W.2d 613 (Ky. App. 1985), discussed by the parties in their appellate briefs. In *Keith*, this court held that the defendant's probation could not be revoked for reasons beyond his control. *Id.* at 615. The condition of probation required Keith to present himself to Eastern State Hospital "for a term of treatment to be so long as the hospital authorities believe that he needs to stay and receive treatment." *Id.* at 614. In conformance with the sentence and order of probation, Keith presented himself to Eastern State Hospital and was evaluated upon arrival. *Id.* Yet, the admitting psychiatrist determined that hospitalization was not appropriate for Keith at that time and recommended Keith continue with outpatient treatment, which he did. *Id.* On review, this court held that the trial court's decision to revoke Keith's probation for violating this condition was arbitrary since the record showed that Keith did everything he

possibly could to comply with the requirement that he admit himself to the mental health hospital. *Id.* at 615. This court stated, “it is fundamentally unfair to deprive him of his liberty for reasons beyond [his] control, that is, because the hospital’s admitting physician did not believe he needed the treatment anticipated by the court.” *Id.*

Here, Wefenstette simply refused to enter the only facility found that would accommodate his special needs and was approved by Patty. Wefenstette made no effort to secure placement in any other facility. Given Wefenstette’s time served, it appears that he would have had to only spend a few months in the facility. Still, Wefenstette declined to comply with this condition, knowing that his failure to do so would result in the revocation of his probation. As a result, we are unable to say that the trial court’s decision to revoke Wefenstette’s probation was arbitrary, unreasonable, unfair or unsupported by sound legal principles.

For the reasons stated, the Johnson Circuit Court’s orders are affirmed.

ALL CONCUR.

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