

Commonwealth of Kentucky
Court of Appeals

NO. 2014-CA-001820-MR

DAVID M. BINGHAM

APPELLANT

v. APPEAL FROM BELL CIRCUIT COURT
HONORABLE ROBERT COSTANZO, JUDGE
ACTION NO. 12-CR-00263

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: CLAYTON, NICKELL, AND THOMPSON, JUDGES.

CLAYTON, JUDGE: David M. Bingham appeals the October 1, 2014 Bell Circuit Court Order Setting Aside Probation. After careful review, we affirm.

BACKGROUND

In April 2012, Bingham was convicted of harassing communications, a Class B misdemeanor under Kentucky Revised Statutes (KRS) 525.080, and

ordered to have “no contact” with Rebecca Miracle. Five months later, Miracle contacted the police and accused Bingham of leaving two voice messages on her phone that contained sexual threats. Thereafter, he was indicted on one count of stalking in the first degree.

In March 2013, Bingham agreed to plead guilty to first-degree stalking in exchange for the Commonwealth’s recommendation of a sentence of five years probated. On March 4, 2013, Bingham pled guilty to the charge of first-degree stalking and was sentenced in accordance with the plea on April 1, 2013. The sentence had two specific conditions – that he stay away from Miracle and complete a substance abuse program.

On August 12, 2013, the Commonwealth filed its first motion to set aside probation based on its belief that Bingham had failed to complete substance abuse treatment. This motion was denied by the trial court when it ascertained that Bingham’s discharge from the treatment program was improper. Next, on September 16, 2014, the Commonwealth filed a renewed motion to set aside probation.

The Commonwealth noted in this motion that on September 10, 2014, Bingham was arrested for stalking in the first degree. Following Bingham’s arrest, a probation officer wrote a violation of supervision report wherein it was stated that Bingham had a new felony arrest and had contact with the victim and her family.

A hearing was held on September 29, 2014, regarding the motion. At the revocation hearing, Miracle testified that Bingham contacted her by phone on September 8, 2014, at 11:25 a.m. The call itself was verified by her cell phone call log. Miracle testified that she and her mother were driving through a Kroger's parking lot when she received a phone call, which she placed on speaker. Although the caller did not identify himself, she and her mother immediately recognized that it was Bingham.

He said some words to her, which she wrote down on a piece of paper since she was having a hard time saying them out loud in court. The piece of paper with these words was shown to Bingham's counsel and the court. Miracle acknowledged that Bingham was to have no contact with her. Additionally, Miracle said that she was one-hundred per cent certain it was Bingham because he had called her and left messages frequently in the past. Her mother confirmed that it was Bingham calling and that he did state the words written on the paper.

Additional evidence was presented that Bingham's phone was not active on September 8, 2014, and that Miracle's phone number was not found on it. The phone used to make the call was unidentified, and the phone number for the call blocked its identification. The Commonwealth argued that Bingham was terrorizing Miracle and that sufficient proof existed that Bingham had violated the terms of his probation.

At the conclusion of the hearing, the trial court revoked Bingham's probation. Besides its oral finding that Bingham had violated the terms of his

probation by contacting the victim, the trial court provided a written order that found Bingham had violated the terms and conditions of his probation by breaking the law and by failing to stay away from the victim. Because Bingham violated the express terms of his probation, the trial court set aside his probation and ordered that he serve the balance of the five-year sentence.

Bingham now appeals from the October 1, 2014 order revoking his probation.

STANDARD OF REVIEW

The appellate standard of review of a decision to revoke a defendant's probation is whether the trial court abused its discretion. *Lucas v. Commonwealth*, 258 S.W.3d 806, 807 (Ky. App. 2008). To amount to an abuse of discretion, the trial court's decision must be "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Clark v. Commonwealth*, 223 S.W.3d 90, 95 (Ky. 2007), quoting *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). An appellate court will not hold a trial court to have abused its discretion unless its decision cannot be located within the range of permissible decisions allowed by a correct application of the facts to the law. *Miller v. Eldridge*, 146 S.W.3d 909, 915 (Ky. 2004). Furthermore, "[g]enerally, a trial court's decision revoking probation is not an abuse of discretion if there is evidence to support at least one probation violation." *Lucas v. Commonwealth*, 258 S.W.3d at 807–08 (Ky. App. 2008), citing *Messer v. Commonwealth*, 754 S.W.2d 872, 873 (Ky. App. 1988).

ANALYSIS

Statutory guidance regarding defendants on probation is found in KRS 439.3106. Therein, in pertinent part, it is noted that supervised individuals shall be subject to “[v]iolation revocation proceedings and 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.”

On appeal, Bingham alleges two errors: that insufficient evidence existed to establish he violated the law or any other condition of probation and that the trial court abused its discretion by failing to grant a continuance.

Regarding its argument that insufficient evidence existed to support the revocation of probation, Bingham acknowledges that no specific objection was made at the trial. Under Kentucky Rules of Criminal Procedure (RCr) 9.22, Bingham was required to object to the sufficiency of the evidence in order to preserve the issue for review. However, he maintains that the issue is preserved because it is obvious and because a denial of due process in a probation revocation proceeding is reviewable as palpable error.

A review of the hearing shows that Bingham never made an objection that the Commonwealth had not provided sufficient evidence for the revocation of his probation. Hence, the argument was not preserved for our review. Further, while he points to a due process violation as mandating “palpable error” review, he does not provide any due process violation.

Probation revocation proceedings are not part of the original criminal prosecution, and thus, more informal and require less proof than a criminal trial. *See Gagnon v. Scarpelli*, 411 U.S. 778, 786-87, 93 S.Ct. 1756, 1762, 36 L.Ed.2d (1973). In fact, the standard for revocation of probation is proof, by a preponderance of the evidence, that a violation has occurred. *Rasdon v. Commonwealth*, 701 S.W.2d 716, 719 (Ky. App. 1986).

Furthermore, the Kentucky Supreme Court in *Hunt v. Commonwealth*, 326 S.W.3d 437 (Ky. 2010), clarified the due process requirements in a probation revocation. The Court observed that the United States Supreme Court has established the minimum due process requirements for probation and parole revocation and they “include (a) written notice of the claimed violations of (probation or) parole; (b) disclosure to the (probationer or) parolee 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 ... and (f) a written statement by the factfinder[] as to the evidence relied on and reasons for revoking (probation or) parole.” *Id.* at 439 (citations omitted).

Here, Bingham is alleging insufficient evidence to establish both that Bingham was arrested and that he failed to stay away from the victim. But he references no specific due process violation listed above, and a claim of insufficient evidence is not a due process violation. Moreover, the trial court made

both oral and written findings that Bingham violated the terms and conditions of his probation by violating the law and failing to stay away from Miracle. The written and oral findings of the court satisfy the demands of due process.

Notwithstanding the failure to preserve this argument, we believe that the trial court had sufficient evidence to revoke Bingham's probation. To evaluate, we first note that KRS 533.030(1) states that "[t]he court shall provide as an explicit condition of every sentence to probation or conditional discharge that the defendant not commit another offense during the period for which the sentence remains subject to revocation." Bingham was arrested for stalking in the first degree and making contact with Miracle. Certainly, such conditions existed in Bingham's sentence.

Continuing with our analysis, we observe that to convict someone of a crime requires proof beyond a reasonable doubt. Yet, "the standard for revocation of probation is proof, by a preponderance of the evidence, that a violation has occurred." *Hunt*, 326 S.W.3d at 439. Because of the lower burden of proof required to revoke probation, a trial court could revoke probation before a jury convicts the probationer by finding him guilty beyond a reasonable doubt on identical facts, and a trial court could properly revoke probation on less evidence than is required for a jury to convict. Accordingly, the trial court, if satisfied by a preponderance of the evidence that a probationer violated a condition of probation, may revoke probation.

Bingham was arrested for violating the law, and as such, he violated a condition of his probation regardless of whether he is later convicted of this new charge. Although new charges may form the basis for revocation proceedings, a conviction on those charges is not necessary in order to revoke probation. *Barker v. Commonwealth*, 379 S.W.3d 116, 123 (Ky. 2012).

Second, Bingham maintains that the Commonwealth did not produce a preponderance of evidence to prove that Bingham did not stay away from Miracle. Before addressing this second argument, we point out that a trial court does not abuse its discretion in revoking probation if there is evidence to support at least one probation violation. *Lucas v. Commonwealth*, 258 S.W.3d at 807–08 (Ky. App. 2008). In the instant case, it has already been determined that Bingham violated the law, so revocation is proper. Nevertheless, we consider this argument regarding whether sufficient evidence existed that Bingham violated his probation condition to stay away from Miracle.

Bingham argues that a phone call to the victim was not covered under the probation condition to stay away from the victim. Although the sentence in establishing the conditions of probation stated that Bingham was to stay away from Miracle rather than using “no contact” language, this language is broad enough to encompass a directive for Bingham not to make phone calls to Miracle. Keeping in mind that he was convicted of first-degree stalking, it is reasonable that the trial court intended in that sentencing proviso that he not telephone the victim and do everything necessary to stay away from her. Since the trial court found that

Bingham did call Miracle, it was not improper based on this finding that it revoke his probation.

Lastly, we consider Bingham's argument that the trial court abused its discretion by refusing to grant a continuance so that a third party, Verizon, could ascertain the phone used to place the call. RCr 9.04 vests trial courts with the discretion to grant or deny a motion for continuance. With respect to the denial of a continuance, our standard of review is again whether the court abused its discretion. *Guffey v. Guffey*, 323 S.W.3d 369, 371 (Ky. App. 2010), *citing Stallard v. Witherspoon*, 306 S.W.2d 299, 300 (Ky. 1957).

The Kentucky Supreme Court set forth various factors for us to consider when reviewing the denial of a continuance. *Snodgrass v. Commonwealth*, 814 S.W.2d 579, 581 (Ky. 1991) (*overruled on other grounds by Lawson v. Commonwealth*, 53 S.W.3d 534 (Ky. 2001)). The Court first admonishes that “[w]hether a continuance is appropriate in a particular case depends upon the unique facts and circumstances of that case.” *Id.* It then delineates the factors: 1) length of delay; 2) previous continuances; 3) inconveniences to litigants, witnesses, counsel, and the court; 4) whether the delay is purposeful or is caused by the accused; 5) availability of other competent counsel; 6) complexity of the case; and, 7) whether denying the continuance will lead to identifiable prejudice.

The trial court denied the motion for continuance. At the probation revocation hearing, the trial court remarked that under these circumstances, it was unlikely that Bingham would use his own phone to make such a call. Additionally, both Miracle and her mother identified his voice. Miracle had been stalked by this gentleman, and she was adamant it was his voice. The trial court heard the evidence, which was compelling, and was convinced that it was not necessary in the probation revocation hearing to have this information. The trial court did not abuse its discretion since, under this scenario, the information was not necessary to determine whether Bingham violated the conditions of his probation, and consequently, a continuance was not necessary under the unique facts and circumstances of this case.

CONCLUSION

For the foregoing reasons, the order of the Bell Circuit Court revoking Bingham's is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Susan Jackson Balliet
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Courtney J. Hightower
Assistant Attorney General
Frankfort, Kentucky