

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA * **NO. 2014-KA-1315**
VERSUS * **COURT OF APPEAL**
JOHN AKERS * **FOURTH CIRCUIT**
* **STATE OF LOUISIANA**

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APPEAL FROM
ST. BERNARD 34TH JUDICIAL DISTRICT COURT
NO. 2013-09019, DIVISION "C"
Honorable Perry M. Nicosia, Judge

* * * * *

JUDGE SANDRA CABRINA JENKINS

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(Court composed of Chief Judge James F. McKay, III, Judge Dennis R. Bagneris, Sr.,
Judge Sandra Cabrina Jenkins)

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**APPEAL CONVERTED TO WRIT; WRIT GRANTED;
JUDGMENT AFFIRMED**

MAY 20, 2015

Defendant appeals the revocation of his probation. Because a judgment revoking probation is not an appealable judgment, this Court treats such an appeal as an application for supervisory writs. *State v. Manuel*, 349 So.2d 882 (La.1977); *State v. Russell*, 570 So.2d 91, 92 (La.App. 4th Cir.1990). Accordingly, defendant's appeal is converted into a writ. Upon our review of this matter, we grant defendant's writ and affirm the trial court's judgment revoking his probation.

STATEMENT OF CASE

On October 14, 2013, defendant was charged by bill of information with possession of a controlled dangerous substance, heroin, a violation of La. R.S. 40:966. On January 21, 2014, defendant entered a plea of guilty to possession of heroin. Defendant was sentenced on the same day to serve four years in the Department of Public Safety and Corrections. The trial court suspended all but four months of the sentence with credit for time served, and placed defendant on four years active probation. Defendant began active probation on March 6, 2014.

On June 10, 2014, defendant's probation officer filed a motion for hearing to revoke defendant's probation. The trial court conducted the hearing on the motion to revoke probation on June 24, 2014. On July 3, 2014, the trial court revoked

defendant's probation, and he was ordered to serve the remainder of his four-year sentence with credit for time all time served.

STATEMENT OF FACT

Probation Officer Clark met with defendant following his release on probation. Officer Clark reviewed the conditions of probation with defendant during this initial meeting. The conditions were reviewed verbally and provided in writing. Defendant was given a copy of the form he signed detailing the conditions of probation. Certain of these conditions of defendant's probation required that (1) defendant refrain from using any controlled dangerous substance; (2) defendant provide Officer Clark with a current address and notify Officer Clark prior to any change of address; (3) defendant refrain from being in the company of known felons or possible felons; and (4) defendant seek employment.

When Officer Clark went to visit defendant for the first time at his address of record: 3112 Lakewood Drive, Violet, Louisiana, defendant did not answer the door. Officer Clark then left a card on defendant's door instructing him to report to the St. Bernard probation office for an appointment. Defendant reported to the St. Bernard probation office on May 28, 2014. Defendant initially met with Officer Clark's supervisor, Toby Lenny. Defendant was asked about drug use and he admitted to using ecstasy and marijuana. Because of defendant's admitted drug use, a drug test was not administered. Officer Clark asked defendant about the drug use, and defendant once again admitted to using ecstasy and marijuana. Because of the admitted drug use by defendant, Officer Clark instructed defendant to attend three rehabilitation meetings. Between May 28 and June 3, defendant attended one meeting.

On June 3, 2014, Officer Clark returned to defendant's address of record. A female answered the door and informed Officer Clark that defendant was not currently living at that address. Officer Clark then went to Daniel Drive and found defendant exiting a home. Defendant informed his probation officer that he had relocated to that address. At that time Officer Clark detained defendant for violating the conditions of probation.

DISCUSSION

As this Court stated in *Russell*, not every probation violation warrants the revocation of probation. 570 So.2d at 92. The trial court should tailor the sanction imposed for probation violations to the facts of the case, the seriousness of the misdeed, and the needs of the probationer. *State v. Sussmann*, 374 So.2d 1256, 1259 (La.1979); *State ex rel. Robertson v. Maggio*, 341 So.2d 366 (La.1976). The trial court has much discretion in determining what sanction should be applied for a probation violation, and the trial court's ruling should be disturbed only upon a finding of an abuse of discretion. *State v. Rideau*, 376 So.2d 1251, 1253 (1979); *State ex rel. Dunkley v. Alford*, 450 So.2d 414, 415 (La. App. 4th Cir.1984). The revocation of probation for a relatively minor violation may be reversible error. *Sussmann*, 374 So.2d at 1259; *Russell*, 570 So.2d at 92.

ASSIGNMENT OF ERROR NUMBER 1

Defendant contends that the trial court erred by allowing the introduction of hearsay evidence regarding defendant's alleged admission of drug use in violation of the terms of his probation, which when balanced with defendant's right to minimum due process was unconstitutionally unfair. Defendant contends that Officer Clark relied on a report written by his supervisor regarding defendant's

drug use after being placed on probation, and that this use of hearsay was an inappropriate way to establish defendant violated his probation.

Defendant relies on *Baggert v. State*, 350 So. 2d 652 (1972) in support of his contention that the trial court erred when it allowed the introduction of hearsay evidence regarding defendant's admitted drug use while on probation. In *Baggert*, the Louisiana Supreme Court addressed whether a parolee is entitled to confront and cross-examine adverse witnesses at his parole revocation hearing and whether he is entitled to be represented by appointed counsel at such a hearing. The defendant in *Baggert* was not represented by counsel at his revocation hearing, and the only evidence introduced at the parole revocation hearing consisted of a written police report of the previously dismissed charges for which he was arrested while on parole and a written report by his parole officer; no testimony was presented. *Baggert* denied implication in the alleged crimes. Nevertheless, at the conclusion of the revocation hearing, *Baggert's* parole was revoked since he was found to have violated the condition of probation prohibiting engaging in criminal conduct.

The Court in *Baggert* stated:

[T]he Supreme Court did not prohibit the use, where appropriate, of affidavits, depositions, and documentary evidence. See, *Gagnon v. Scarpelli*, 411 U.S. 782, 93 S.Ct. 1760, 36 L.Ed.2d at 662, f. n. 5. However, *Morrissey [v. Brewer]*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972)] established as a minimum requirement of due process in revocation hearings "the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation)." When the Parole Board has before it allegations of criminal conduct, and it has not been specifically found that confrontation and cross-examination would expose a witness to a significant risk of harm, **it is decidedly inappropriate to receive unassailable written reports as the sole evidence of the alleged violation.**

Id. at 655 (emphasis added). Finding that the revocation proceedings did not fulfill the minimum requirements of federal due process, the Louisiana Supreme Court reversed and remanded the case to the trial court for rehearing. *Id.* at 655.

The United States Supreme Court has substantively discussed the due process right to cross-examination and confrontation at revocation hearings in only two cases, neither of which explicitly detailed the contours of the right. *See Gagnon v. Scarpelli*, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973); *Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484. In *Morrissey*, the Court had before it a habeas petitioner whose parole was revoked without any hearing at all. The Court outlined the requirements of a probable cause and final revocation hearing, including a qualified right to cross-examine and confront adverse witnesses, but did not have cause to expand upon or apply these rights. 408 U.S. at 488–89. In *Gagnon*, decided less than a year later, the Court held only that the *Morrissey* framework applies in the probation as well as the parole context, and it determined that a probationer was wrongly denied both a preliminary and final revocation hearing. 411 U.S. at 791. The Supreme Court has not further defined the due process requirements of revocation hearings, leaving that task to the state and lower federal courts. Defendant concedes that a probation revocation hearing should be flexible enough to consider evidence such as letters, affidavits, and other materials that would not necessarily be admissible in a criminal trial.

Defendant contends that the trial court allowed the state to establish he violated the condition of his probation almost entirely through hearsay evidence. Defendant asserts that Officer Clark testified regarding defendant's admitted drug use by repeating what he read from a report written by another probation officer, and that the record does not establish that defendant admitted using drugs to

Officer Clark himself. Defendant's contention is in error. The record clearly establishes that defendant told Officer Clark he had used ecstasy and marijuana and additionally admitted to Officer Clark's supervisor that he had used the drugs following a request that he submit to a drug test. Defendant was permitted to question Officer Clark extensively at the revocation hearing through his court appointed counsel. The facts in this case are clearly distinguishable from those in *Baggert*. Defendant admitted his drug use while on probation to both his probation officer and the probation officer's supervisor, and defendant did not deny the underlying probation violation at the revocation hearing.

This assignment of error is without merit.

ASSIGNMENT OF ERROR NUMBER 2

Defendant contends the trial court erred in concluding that defendant had violated his probation by failing to refrain from criminal conduct absent sufficient proof that defendant had engaged in criminal activity.

In ruling that defendant had violated his probation by failing to refrain from criminal conduct, the trial court stated:

The court finds that the evidence at the revocation hearing proved that the defendant did engage in criminal activity within three months of being sentenced on the felony charge of Possession of Heroin and placed on probation. Upon being asked to submit to a drug test, the defendant admitted to his probation officer that he possessed and used illegal, dangerous substances: ecstasy and marijuana. The defendant admitted this only after the probation officer requested a drug test.

The defendant's admissions that he used illegal drugs to his probation officer and the probation officer's supervisor were sufficient proof that he violated his probation by engaging in criminal activity.¹

We find no abuse of the trial court's discretion in finding that the admission by defendant to his probation officer that he used illegal substances. This assignment of error is without merit.

ASSIGNMENT OF ERROR NUMBER 3

Defendant contends the trial court erred in its determination that the defendant had consorted with disreputable people, in violation of the conditions of defendant's probation, in that no evidence was presented upon which the court could reasonably base that conclusion. In reaching its conclusion that defendant had consorted with disreputable people, the trial court stated: "A defendant on probation is required to refrain from consorting with disreputable people; that had to be violated when Mr. Akers illegally obtained ecstasy and marijuana. Defendant was advised of these conditions of probation when he was convicted and sentenced."

The trial court did not abuse its discretion in determining that defendant must have associated with disreputable people when he purchased the illegal substances. This assignment of error is without merit.

ASSIGNMENT OF ERROR NUMBER 4

Defendant next asserts that the trial court abused its discretion in revoking defendant's probation because the trial court did not properly consider mitigating factors and alternative sanctions. This assertion is in error.

¹ Defendant did not testify at the hearing and did not refute the fact that he used ecstasy and marijuana.

The record reflects that defendant, upon admitting to illegal drug use while on probation, was instructed to attend three rehabilitation meetings at Gethsemane Lutheran Church and obtain a log book documenting the time and date he attended, with a signature from the instructor establishing he actually attended the classes. Defendant was also instructed to report to the probation office every Wednesday for a drug test.

The transcript of the probation revocation hearing reflects that defendant did not fulfill certain required conditions of his probation. However, prior to conducting the revocation hearing, defendant was offered a ninety-day sentence and he declined. In stating its reasons for judgment revoking defendant's probation, the trial court acknowledged that it had many options in assessing sanctions against defendant, and that it considered all aggravating and mitigating factors with respect to defendant. The trial court then determined that defendant had shown an undue risk that he would commit another crime; that defendant was in need of correctional treatment or a custodial environment that can be provided by his commitment to an institution; and that defendant was not likely to respond affirmatively to probationary treatment.

Upon our review of the trial court's reasons for revoking defendant's probation, we find no abuse of discretion and this assignment of error is without merit.

ASSIGNMENT OF ERROR NUMBER 5

In his final assignment of error, defendant asserts that even if his revocation was a reasonable exercise of judicial discretion, the trial court improperly ordered defendant to serve the remainder of his entire four year sentence because this was

his first violation and it was technical in nature. In issuing the ruling revoking defendant's probation, the trial court found the following:

The court finds that the evidence at the revocation hearing proved that the defendant did engage in criminal activity within three months of being sentenced on the felony charge of Possession of Heroin and placed on probation. Upon being asked to submit to a drug test, the defendant admitted to his probation officer that he possessed and used illegal, dangerous substances: ecstasy and marijuana. The defendant admitted this only after the probation officer requested a drug test. Additionally, the defendant failed to notify his probation officer of his change of address. A defendant on probation is also required to refrain from consorting with disreputable people; that had to be violated when Mr. Akers illegally obtained ecstasy and marijuana. Defendant was advised of these conditions of probation when he was convicted and sentenced.

Pursuant to Louisiana law, the court has many options in assessing sanctions against the defendant. The defendant was convicted of Possession of Heroin as part of a plea deal and was sentenced to the minimum sentence of four-years in the Department of Public Safety and Corrections with three years and eight months being suspended. The plea deal gave him credit for time served (four months) and then placed the defendant on active probation for four years.

The court considered all aggravating and mitigating factors and hereby orders that John Akers be revoked and that he serve the remainder of his entire four year sentence with credit for all time served since his arrest on his probation violation. By violating conditions of probation as stated herein, the defendant has shown an undue risk that during the period of a suspended sentence or probation that he will commit another crime; that he is in need of correctional treatment or a custodial environment that can be provided most effectively by his commitment to an institution; and that he is not likely to respond affirmatively to probationary treatment. Mr. Akers has shown a complete disregard for the law and a four-year sentence could not deter him from illegal conduct. Further, he made very minimal attempts to fulfill the conditions of probation and was not motivated toward rehabilitation.

Defendant contends that he should not have been required to serve more than ninety days at this first revocation hearing for what he alleges is his first technical violation. However, as the trial court noted, defendant admitted to drug use within three months of being sentenced on the felony charge of possession of heroin following his release on probation; failed to notify his probation officer of

his change of address; consorted with disreputable people; and had not demonstrated that he was seeking gainful employment. In addition, the record reflects that defendant refused the offer made by Probation and Parole of a 402 violation without full revocation with a ninety day sentence as recommended to the trial court. Defendant did not want to accept that offer, and the offer was withdrawn. Defendant elected to proceed with the hearing on revocation.

Defendant has not shown any mitigating factors which the trial court failed to consider. Given the facts established at the revocation hearing, the trial court did not abuse its discretion in finding that defendant's probation should be revoked. This assignment of error lacks merit.

CONCLUSION

For the reasons stated above, defendant's appeal is converted to a writ application. We grant defendant's writ and, finding no merit in defendant's assignments of error, we affirm the trial court's judgment revoking his probation.

**APPEAL CONVERTED TO WRIT; WRIT GRANTED;
JUDGMENT AFFIRMED**