

Commonwealth Of Kentucky

Court of Appeals

NO. 2001-CA-002584-MR

JAMES EDWARD AMES

APPELLANT

v. APPEAL FROM CLARK CIRCUIT COURT
HONORABLE JULIA HYLTON ADAMS, JUDGE
ACTION NO. 99-CR-00077

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING
** ** * * * * *

BEFORE: BARBER, DYCHE, AND TACKETT, JUDGES.

TACKETT, JUDGE: James Edward Ames appeals from the decision of the Clark Circuit Court revoking his conditional discharge, imposed pursuant to Kentucky Revised Statute 532.043, following service of his sentence for a sex offense. Ames presents several issues on appeal which include that the circuit court should have dismissed the proceedings because witnesses under subpoena did not appear at the scheduled hearing, that the terms of his conditional discharge were overbroad insofar as they proscribed constitutionally protected conduct, and that the

court improperly concluded that he was in constructive possession of a knife. We affirm.

Ames was allegedly involved in an incident with another resident at Deliverance Ministries in Louisville, Kentucky, a transitional home. Ames' parole officer, Evan Roach, testified that Ames had reportedly threatened another resident with a knife; a small kitchen knife was found under Ames' bed. Roach also found several illustrations depicting partial nudity and violent images among Ames' papers and some of these illustrations were signed by Ames. The court found, based on the facts presented, that Ames had been in control of a dangerous instrument, and had been in possession of material depicting partial or complete nudity in violation of the conditions of his release. The court then ordered that Ames serve the conditionally discharged time. This appeal followed.

Ames argues that the circuit court erred in failing to dismiss the revocation action when the Commonwealth's witnesses failed to appear at a scheduled hearing. Defense counsel objected to any continuance and moved to dismiss the action, but the circuit court denied Ames' motion and continued the matter. Ames argues that the court abused its discretion by granting that continuance. We disagree. The circuit court has broad discretion regarding continuances, and may grant or deny a continuance for any number of reasons. "It is fundamental for a

judge to have the right to decide when it is appropriate to grant a continuance in any given case." Brutley v. Commonwealth, Ky., 967 S.W.2d 20, 23 (1998). Ames fails to show how he was prejudiced by the continuance, and the continuance did not result in an unreasonable delay of the proceedings (the hearing was rescheduled from November 8, 2001, to November 16, 2001.) We therefore reject Ames' assertion that the court abused its discretion by granting the continuance.

Ames next argues that the court improperly found that he had constructively possessed the knife. This is not precisely accurate, as the court actually found both constructive and actual possession, based on where the knife was found and the testimony of the parole officer about the incident between Ames and the other resident. Under the applicable law, the court was permitted to rely on the testimony of the parole officer, who interviewed the complainant, to conclude that beyond a preponderance of the evidence, Ames had been in possession of the knife and had threatened the other resident. Marshall v. Commonwealth, Ky. App., 638 S.W.2d 288 (1982); Rasdon v. Commonwealth, Ky. App., 701 S.W.2d 716 (1986).

Finally, Ames argues that the terms of his conditional discharge unfairly impinge on his constitutional rights by being overbroad. While Ames makes an interesting, though not compelling, comparison between his illustrations and those

adorning the Sistine Chapel, we are bound to reject this argument as the requirement that he possess no pictures or illustrations containing complete or partial nudity is neither vague nor overbroad. We must also note that it is perfectly permissible for the terms of probation, parole, or other conditional discharge to require giving up even otherwise constitutionally protected conduct.

For the foregoing reasons, the decision of the Clark Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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