

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-000553-MR

CRAIG BIGSBY

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE SHEILA R. ISAAC, JUDGE
ACTION NO. 99-CR-00971

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

** ** * * *

BEFORE: JOHNSON, KNOPF, AND McANULTY, JUDGES.

McANULTY, JUDGE: Craig Bigsby (Bigsby) appeals from an order of the Fayette Circuit Court revoking his mandatory three year conditional discharge under Kentucky Revised Statutes (KRS) 532.060. Bigsby argues that the trial court did not have sufficient grounds to revoke his discharge when the court based its decision primarily on Bigsby's failure to sign the contract to enter the sex offender treatment class. Because we conclude

that the trial court did not abuse its discretion in revoking Bigsby's conditional discharge, we affirm.

In September of 1999, the Fayette County Grand Jury returned an indictment against Bigsby charging him with seventeen felony sex offenses toward two girls, L.P. and her sister, R.P. Because R.P. was incapable of testifying at the October 23, 2000, trial, the Commonwealth moved to sever eight counts of the indictment, which motion the trial court granted. Thereafter, the trial court held a jury trial on the remaining nine counts relating to L.P. A jury acquitted Bigsby on all counts.

As to R.P., on September 14, 2001, Bigsby ultimately entered an Alford plea, see North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970), to one count of criminal attempt to rape in the third degree; one count of rape in the third degree; two counts of criminal attempt to sodomy in the third degree; and four counts of criminal attempt to sexual abuse in the first degree. On November 9, 2001, the trial court sentenced Bigsby to one-year imprisonment on the third degree rape count and twelve months on the remaining counts to run concurrently with the one-year sentence.

At that point, Bigsby had served a total of 477 days in custody; therefore, he had already served his sentence. However, because Bigsby pleaded guilty to a sexual offense, his

sentence also included an additional three-year period of conditional discharge as mandated by KRS 532.060. Accordingly, the court imposed a number of conditions upon Bigsby including registration as a sexual offender and entry and completion of a sex offender treatment class. In addition to these court-imposed conditions, the Division of Probation and Parole required Bigsby to obtain and maintain full-time, verifiable employment.

On February 5, 2002, the Commonwealth filed a motion to revoke Bigsby's conditional discharge on the grounds that Bigsby failed to find verifiable full-time employment; failed to register his correct address with probation and parole; and failed to sign a contract for the sex offender treatment program. A revocation hearing was held on February 20, 2002. The primary witness for the Commonwealth was Lisa Howard, Bigsby's probation and parole officer. In addition, Kim Warner, a chef at a local restaurant, testified on Bigsby's behalf regarding Bigsby's employment; and John Baldrige, an investigator for Fayette County Legal Aid, testified regarding his verification of Bigsby's address.

Lisa Howard (Howard) testified that she was a state probation and parole officer specifically assigned to parolees who were convicted sex offenders. Although the court did not order Bigsby to maintain full-time employment, it was one of the

standard conditions of supervision imposed by probation and parole of which Howard advised Bigsby at the outset of his conditional discharge. Bigsby informed Howard that he had employment at a local restaurant called the Racquet Club; however, Bigsby was never able to provide a check stub as proof that he was indeed employed. At some point, Howard was able to confirm through speaking with the Racquet Club's manager that Bigsby worked part-time on an as-needed basis. Howard informed Bigsby that he needed to obtain full-time employment. Eventually, on January 10, 2002, Bigsby provided Howard with a list of three different places where he had applied for full-time employment.

Howard further testified on the issue of Bigsby's living address. Specifically, the court ordered Bigsby to register with probation and parole, which meant that he was to provide them with his address. Initially, Bigsby informed Howard that he lived with his mother. When Howard went to that address to visit Bigsby, she spoke with the apartment manager and informed the manager that Bigsby was a sex offender. Upon learning this, the manager informed the family that Bigsby could no longer reside there. Bigsby then moved in with a friend on West High Street (the High Street address) and provided this new address to Howard. However, when the state police attempted to

verify this address by sending a letter to the High Street address, the letter came back as undeliverable.

Howard followed up with Bigsby on his address, and he informed her that he would go to the post office to straighten out the problem. Thereafter, Howard conducted two home visits to the High Street address and never found Bigsby, or anyone else, at home.

On cross-examination, Howard admitted that her visits were random and that it was possible that Bigsby was actually living at the address he provided. However, in the two months that Bigsby had been under Howard's supervision, she had never been inside an apartment or house where Bigsby was living. When questioned further about Howard's efforts to verify Bigsby's address, Howard admitted that after one visit, she left her business card, and Bigsby promptly called her back; but Howard elaborated that this was not uncommon for people to do, even those that were not actually living at the specified address.

Finally, Howard testified regarding Bigsby's satisfaction of the court-imposed condition that he enroll in the sex offender treatment program. Kevin Conlee is the clinician in the sex offender treatment program who initially met with Bigsby. Kevin Conlee was unavailable on the date of the hearing, so Howard spoke about what transpired between Bigsby and Kevin Conlee on January 15, 2002.

Sex offenders are required to sign the program's treatment contract. Moreover, the first step in rendering treatment is to get the offenders to take some level of responsibility for their sexual convictions. As documented by Conlee in a letter to Howard, Bigsby's response to Conlee's attempts to obtain an admission from Bigsby was that he would do whatever it took, including lying, to get through the program. Bigsby went on to say that he did not commit any sexual offenses against anyone, but he would take responsibility if he had to. Conlee explained to Bigsby that he felt it was illogical for a person to take responsibility for something he did not do.

At the end of the session, Conlee gave Bigsby the opportunity to sign the treatment contract; however, he also informed him that if he signed the contract and continued to deny all sexual convictions, he could be terminated from the program. According to Conlee, Bigsby chose not to sign the contract and further stated that he would take his chances with Howard and the courts.

At the end of this initial meeting, both Conlee and Bigsby called Howard, and both men were extremely upset with what had transpired. As to Bigsby, Howard advised him to cool off and ordered him to report to her office the next morning, which he did. At that point, Howard placed Bigsby into custody.

On the issue of convicted sex offenders refusing to admit that they had a problem and could benefit from help, Howard testified that "non-admitters" may enter the program. Moreover, statistics show that such "non-admitters" do eventually admit; however, both Conlee and Howard felt that Bigsby had such a level of denial that it was futile to continue his treatment. Howard's ultimate recommendation in light of her experience with Bigsby was that his conditional discharge should be revoked.

Bigsby called Kim Warner (Warner) to testify on his behalf. Warner was the head chef at the Racquet Club, and he hired Bigsby to work at the restaurant. Although Bigsby was not on the payroll, Warner tried to give Bigsby between 25 and 28 hours per week. Warner also stated that he frequently picked Bigsby up for work and dropped him off at the High Street address. Moreover, he helped Bigsby move his belongings from his mother's house to the High Street address when the apartment manager informed the family that Bigsby had to move.

Next, Bigsby called John Baldrige (Baldrige). Baldrige was an investigator employed by Legal Aid. Baldrige testified that on February 19, 2002, the day before the hearing, he went to the High Street address and saw Bigsby's name on the mailbox. On cross-examination by the Commonwealth, Baldrige

admitted that he had no other proof that Bigsby was living at the High Street address.

Finally, Bigsby testified on the employment, address and treatment program conditions. After briefly hearing Bigsby on the employment and address evidence, the court moved Bigsby's attorney along onto what it felt was the central issue -- Bigsby's perceived unwillingness to participate in the sex offender treatment program.

Bigsby told the court that he was willing to sign the contract, but Conlee would not let him sign it. Then, Bigsby said that he felt there was no use in signing the contract if Conlee was going to kick him out of the class. When asked by the court what he felt was going to happen if he did sign the contract, Bigsby replied that he thought he would get a probation violation.

After extensive interrogation by the court, Bigsby said that he was willing to sign the contract, and he further admitted to abusing R.P. The court accused Bigsby of "playing the game" and told Bigsby that his overall problem was his attitude. The court further expressed serious doubts as to Bigsby's credibility and conviction, but took the matter under advisement and postponed its ruling until March 1, 2002. On March 1, 2002, the court informed Bigsby that it was revoking

his conditional discharge without any additional evidence being introduced into the record. This appeal followed.

The sole issue on appeal is: Did the trial court abuse its discretion in revoking Bigsby's conditional discharge? See KRS 532.060(3) ("During this period of conditional discharge, if a defendant violates the provisions of conditional discharge, the defendant may be reincarcerated . . ."); Dunson v. Commonwealth, Ky. App., 57 S.W.3d 847, 848 (2001) (An appellate court is to use an abuse of discretion standard when reviewing the trial court's revocation of probation.); Tiryung v. Commonwealth, Ky. App., 717 S.W.2d 503, 504 (1986) ("Our review is limited to a determination of whether, after a hearing, the trial court abused its discretion in revoking the appellant's parole.") "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair or unsupported by sound legal principles." Goodyear Tire & Rubber Co. v. Thompson, Ky., 11 S.W.3d 575, 581 (2000).

Bigsby argues that the trial court did not have sufficient grounds to revoke his mandatory conditional discharge. In support, Bigsby asserts the Commonwealth moved to revoke Bigsby's conditional discharge less than four months after Bigsby had been released from custody. In addition, although the Commonwealth presented evidence of three violations to the court, the court based its decision solely on Bigsby's

failure to sign the contract for the sex offender treatment program.

Bigsby contends that the court should not have revoked his conditional discharge after one failed meeting with a sex offender treatment provider. Moreover, a review of the revocation hearing shows that Bigsby was willing to enter the program and admit his guilt in abusing R.P., even though the court did not believe that his admission at this point was genuine. In this appeal, Bigsby asserts that sex offender treatment is a long process, and since he was willing to enter the program, he met the requirement of his conditional discharge, therefore the trial court did not have sufficient evidence to revoke it.

Preliminarily, as set out above, we reiterate that the standard of review in this case is abuse of discretion, not the hybrid standard of whether there was sufficient evidence of an actual and substantial violation as Bigsby advocates in this appeal. As such, we hold that the trial court did not abuse its discretion in revoking Bigsby's conditional discharge based on Bigsby's failure to sign the contract for the sex offender treatment program. This was the first step in satisfying one of the conditions of Bigsby's discharge, namely entering and completing the sex offender treatment class. At the hearing, Bigsby admitted that Conlee gave him every opportunity to sign

the contract, and Bigsby refused to sign it. Moreover, Bigsby's attitude was one of contempt, instead of one of a person who was willing to cooperate in his treatment. Bigsby's later efforts to redeem himself at the revocation hearing did not convince the court otherwise. Bigsby's refusal to sign the contract in combination with his scant effort to obtain full-time, verifiable employment and questionable permanent address support the trial court's revocation.

In further support of Bigsby's arguments in this appeal, he reminds this court that he entered an Alford plea, and because he did so, there is no merit to Conlee's assertion that it is not logical to take responsibility for something he did not do. On this point, we note that Bigsby acknowledges that he understood that he had to admit to sexually abusing R.P. as part of the sex offender treatment class. Accordingly, we conclude that Bigsby knowingly accepted the requirement that he admit guilt as a term of his probation and cannot later refuse to do so on the grounds that he entered an Alford plea. See Razor v. Commonwealth, Ky. App., 960 S.W.2d 472, 475 (1997) (Defendant entering an Alford plea to felony and misdemeanor sex offenses and being sufficiently advised that he must later admit to such offenses as part of the sex offender treatment program cannot later contend that the court violated his right to due process in revoking his probation based upon his failure to

comply with the admission of guilt requirement of the sexual offender treatment program.)

For the foregoing reasons, the order of the Fayette Circuit Court revoking Bigsby's conditional discharge is affirmed.

JOHNSON AND KNOPF, JUDGES, CONCUR IN RESULT ONLY.

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