

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001014-MR

BRIAN VOLTZ

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE ANN O'MALLEY SHAKE, JUDGE
ACTION NOS. 96-CR-002370 AND 01-CR-000989

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: COMBS, GUIDUGLI, and SCHRODER, Judges.

COMBS, JUDGE. Brian Voltz appeals from an order of the Jefferson Circuit Court revoking his probation and executing his sentences for Robbery in the Second Degree¹ and Possession of a Firearm by a Convicted Felon². We affirm.

Voltz pled guilty in case no. 96-CR-002370 to robbery in the second degree. At the time of his plea, he was a juvenile who had been waived over to Jefferson Circuit Court,

¹ Kentucky Revised Statutes (KRS) 515.030.

² KRS 527.040.

Division 12. He received a sentence of seven years -- probated for five years.

On September 27, 2001, Voltz entered an Alford plea³ to possession of a firearm by a convicted felon in case no. 01-CR-000989 in Division 16 of Jefferson Circuit Court. In exchange for his plea of guilty, the Commonwealth agreed to dismiss charges of possession of a controlled substance with a firearm implicated and one count of possession of a handgun by a convicted felon. The Commonwealth also agreed to recommend a sentence of five years to be probated and to remand a motion to revoke his probation in Division 12. Voltz was sentenced to five years for the Division 16 offenses to run consecutively with respect to the seven-year sentence in the previous Division 12 case for a total of 12 years to serve -- probated to five years.

Voltz's probation officer filed a special supervision report in Division 16 on December 17, 2001,⁴ advising the court that Voltz had registered positive in a urinalysis test for recent use of marijuana and codeine; consequently, Voltz had been directed to a substance abuse coordinator for an evaluation

³ Pursuant to North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970).

⁴ The order revoking Voltz's probation refers to a special supervision report supposedly dated December 5, 2001. The report is actually dated December 17, 2001, with his last probation office contact on December 5, 2001 -- the date on which he tested positive for marijuana use.

and referral for treatment. The probation officer filed a subsequent report on January 24, 2002, informing the court that the Jefferson Family Court had entered a Domestic Violence Order (DVO) against Voltz based on an incident with his live-in girlfriend.

In light of these incidents, a probation revocation hearing was held in Division 16 on April 1, 2002. The court found that Voltz:

. . . violated his probation based upon the Special Supervision Reports dated December 5, 2001 and January 24, 2002 and the record of the Family Court proceedings in which there was uncontroverted proof and a finding of threats and use of physical force, resulting in a lump to her arm and soreness to her body.

The trial court entered the following order:

This five (5) year sentence is to run consecutive to the seven (7) year sentence imposed in Division 12 in its order entered the 14th day of February, 1997 in Case No. 96CR2370 for a total sentence of twelve (12) years to serve.

Voltz raises several arguments on appeal. He contends that his right to due process was violated because his admission in Family Court was not entered knowingly and voluntarily. Therefore, it should not have been used against him in the parole revocation hearing. He also contends that the trial court abused its discretion and violated his due right to due process by allowing the Commonwealth to consolidate the two

actions (the drug report and the entry of domestic violence order) without prior notice and a hearing. Finally, he claims that the court abused its discretion by imposing a penalty for marijuana use in excess of that which is permitted by law.

At the hearing on the motion for revocation, the Commonwealth submitted a videotape of the Family Court proceedings. While appellate counsel maintains that this issue was preserved, our careful review of the record reveals that Voltz's counsel offered no objection to the admission of the tape. Thus, it is unpreserved for appellate review. However, even if counsel had objected properly, we believe that the tape would have been admissible.

A person subject to loss of status as a probationer no longer enjoys the "full panoply of rights accorded to one yet not convicted." Childers v. Commonwealth, Ky. App., 593 S.W.2d 80, 81 (1980), citing Morrissey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972). Voltz argues that he should have received a Miranda⁵ warning from the trial judge before he was questioned. In Childers, this court addressed that point and held that statements obtained without benefit of Miranda warnings were admissible in a probation revocation hearing. Id. Questioning by a trial judge does not require the Miranda warning usually associated with and required during custodial

⁵ Miranda v. Arizona, 384 U.S. 436 (1966).

interrogation. In Tiryung v. Commonwealth, Ky. App., 717 S.W.2d 503, 504 (1986), we noted the diminished due-process status afforded to a probationer by holding that a trial court did not abuse its discretion in revoking probation when it admitted evidence which may have been illegally seized. We do not believe that the trial court abused its discretion in this case in admitting court proceedings concerning the domestic violence order.

In the alternative, Voltz argues that he could not have known that an argument with his girlfriend could result in the revocation of his probation. At the time of his sentencing in Division 16, the court carefully stated that it was granting probation on the recommendation of the Commonwealth -- and that without that recommendation, Voltz would not have been granted probation. The court emphatically informed Voltz that any infraction -- no matter how arguably minimal -- would result in revocation of his probation. There was evidence that Voltz not only threatened but also injured his girlfriend to support the issuance of the domestic violence order against him. In addition, he also tested positive for marijuana use. Either incident alone was sufficient to support the revocation of his probation.

Voltz next argues that it was improper for the trial court to revoke his probation on both merged convictions without

notice and a hearing on the merger of the two. Again, contrary to the claims of appellate counsel, we have uncovered no objection in the record; therefore, this issue has not been preserved for appellate review. We have, however, examined the issue despite the preservation problem.

The requirements to insure adequate due process in the context of a probation revocation hearing include:

(a) written notice of the claimed violations of [probation]; (b) disclosure to the [probationer] 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 such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking [probation]. Robinson v. Commonwealth, Ky. App., 86 S.W.3d 54, 56 (2002), citing Morrissey at 489, 92 S.Ct. 2593.

The record reveals that Voltz received adequate notice and a proper hearing as to his two violations. Due process did not entitle him to an initial hearing on the propriety of merging the two charges as a condition precedent to proceeding to a hearing on the merged issues.

Voltz last argues that revoking his probation for marijuana use was tantamount to sentencing him to twelve years

for a misdemeanor offense. While Voltz has failed to preserve this argument for review, we have nonetheless examined this argument and find it to be without merit. Voltz was sentenced to seven years for robbery in the second degree and to five years for possession of a firearm by a convicted felon. Because he committed the second offense while on probation for the first offense, the sentences were ordered to run consecutively for a total of twelve years. His combined offenses committed while on probation sufficed to serve as a proper basis for its revocation. He is serving twelve years for serious offenses. Smoking marijuana did not result in a twelve-year sentence; however, it was one of two catalysts that properly caused the revocation of the privilege of probation. Voltz's own ill-chosen course of conduct cannot be mis-characterized as a violation of due process by the judge.

The judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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