

RENDERED: MAY 2, 2003; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001055-MR

MATTHEW T. ADAMS

APPELLANT

v. APPEAL FROM HENDERSON CIRCUIT COURT
HONORABLE STEPHEN A. HAYDEN, JUDGE
ACTION NO. 00-CR-00086

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

** **

BEFORE: BAKER, BARBER AND JOHNSON, JUDGES.

BARBER, JUDGE: Matthew T. Adams appeals from an order of the Henderson Circuit Court revoking his probation. We affirm.

Adams entered a non-conditional guilty plea to charges of burglary in the first degree¹, theft of a firearm², two counts of theft by unlawful taking³, burglary in the third degree⁴,

¹ Kentucky Revised Statutes (KRS) 511.020.

² KRS 514.030.

³ KRS 514.030.

criminal mischief in the first degree⁵, intimidating a witness⁶, and criminal mischief in the third degree⁷. He was sentenced to five years on each of the felony counts, and ninety days for the misdemeanor criminal mischief. The sentences were ordered to run concurrently for a total of five years.

On October 1, 2000, the court granted Adams' motion for shock probation. In the order granting shock probation, among other conditions were, 1) that Adams not commit another offense and 2) that Adams abide by any and all rules, regulations, and directions given to him by his probation officer.

While on probation, Adams tested positive on a drug screen. On May 2, 2001, he signed an admission/sanctions form admitting that he had voluntarily used marijuana on April 10, 2001. The form stated that an admission to the use of illicit substances could result in an oral warning and increased frequency of drug testing.

On April 16, 2002, Adams' probation officer (Officer Kizer) filed an Affidavit to Revoke Probation with the Henderson

⁴ KRS 511.040.

⁵ KRS 512.020.

⁶ KRS 524.040.

⁷ KRS 512.040.

Circuit Court. The affidavit charged that Adams violated the conditions of his probation by:

1. Use of Marijuana.

On May 23, 2001, Adams was administered a random drug urinalysis and tested positive for marijuana. Adams signed an Admission/Sanctions form.

2. Use of Alcohol.

Kentucky State Trooper Armhurst interviewed Adams in reference to an alleged sexual assault that occurred on April 28, 2001. Adams admitted that at the time of the alleged sexual assault, he had consumed one fifth bottle of Alcohol [sic]. Adams was arrested by Trooper Armhurst on April 2, 2002, and lodged in the Henderson County Detention Center.

The trial court issued an Order of Arrest on April 16, 2002. On May 13, 2002, a revocation hearing was held pursuant to KRS 533.050. At the hearing Officer Kizer testified that she filed the affidavit after being contacted by Trooper Armhurst. She testified that when Adams signed the admission form, she gave him a verbal warning and that she informed him that if she noted other violations, she would proceed with revocation. Officer Kizer also testified that the admission/sanction form only covered the admitted use of marijuana and that there had been no admission to the use of alcohol.

The Order Revoking Probation was entered on May 15, 2002, stating in pertinent part:

. . . the Court being otherwise sufficiently advised does now hereby FIND and ADJUDGE

that the Defendant violated a term of his probation by committing another offense and failing to follow directions given him by his probation officer, contrary to paragraphs (1) and (11), respectively, of the probation order . . .

The only issue on appeal is whether Adams's due process rights were violated when his probation officer informed him in writing that the possible consequences of admitting to marijuana were an oral warning and increased drug testing, and then used that admission one year later as the grounds for probation revocation. Adams admits that this issue is unpreserved, but asks that we review it for palpable error under RCr⁸ 10.26.

Adams argues that the admission/sanction form amounted to a promise by Officer Kizer that she would not initiate probation revocation and therefore, the trial court was bound by that promise. In support of his argument, Adams cites Workman v. Commonwealth.⁹ In Workman the Kentucky Supreme Court reversed a conviction when the Commonwealth promised the defendant that if he took and passed a polygraph examination, the charges against him would be dismissed. Adams also directs our attention to an opinion from the New York Supreme Court,¹⁰ whereby the court restored the defendant's probation pursuant to

⁸ Kentucky Rules of Criminal Procedure.

⁹ Ky., 580 S.W.2d 206 (1979).

¹⁰ People v. Fonville, 414 N.Y.S.2d 195 (N.Y. App. Div. 1979).

a promise by the District Attorney that if she pled guilty to a subsequent offense the People would waive prosecution of any probation violation.¹¹ We find neither of these cases applicable to the case sub judice, precisely because no promise was made to Adams by his probation officer. In fact, Officer Kizer testified that she expressly warned Adams that if she noted any other violations, she would pursue revocation. There was no promise that if revocation was initiated the admission would or could not be used by the court in making a decision whether to revoke Adams' probation.

The record does not reveal exactly when Officer Kizer became aware of Adams' admission to Trooper Armhurst. However, the admission signed by Adams on May 2, 2001, was an admission that he smoked marijuana on April 10, 2001. According to Officer Kizer's testimony, the events Trooper Armhurst was investigating occurred on April 28, 2001. Officer Kizer testified that Adams admitted to Trooper Armhurst that he drank bourbon, took a controlled substance, and smoked marijuana on that date. Officer Kizer had expressly warned Adams that she would pursue revocation if she noted any other violation. It is inconsistent for Adams to argue that smoking marijuana, drinking

¹¹ *Id.* At 195.

a fifth of bourbon, and taking a controlled substance were not additional violations.

Because the admission/sanction form was not a promise to Adams that his probation would not be revoked, we need not address whether or not the Court could be bound by such a promise. The standard of review is whether, after a hearing, the trial court abused its discretion in revoking appellant's probation.¹² There was no abuse of discretion.

The judgment of the Henderson Circuit Court is affirmed.

ALL CONCUR.

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¹² Tirying v. Commonwealth, Ky. App., 717 S.W.2d 503, 504 (1986).