

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001408-MR

RODNEY NELSON

APPELLANT

v. APPEAL FROM FULTON CIRCUIT COURT
HONORABLE WILLIAM L. SHADOAN, JUDGE
ACTION NO. 95-CR-00048

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

** ** * * *

BEFORE: EMBERTON, CHIEF JUDGE; McANULTY, AND MINTON, JUDGES.

McANULTY, JUDGE. Rodney W. Nelson (hereinafter appellant) appeals the judgment of revocation of his probation by the Fulton Circuit Court. Although he made no challenge below, appellant complains that his revocation hearing did not comport with the minimum standards of due process.

There are not specific rules to govern the conduct of probation revocation hearings, but they clearly must be conducted in accordance with minimum requirements of due process

of law. Rasdon v. Commonwealth, Ky. App., 701 S.W.2d 716 (1986). In a revocation proceeding, the defendant is not entitled to the "full panoply of rights" accorded one not yet convicted since he is deprived of only a conditional, as opposed to an absolute, liberty. Childers v. Commonwealth, Ky. App., 593 S.W.2d 80, 81 (1979). Furthermore, revocation proceedings do not require proof beyond a reasonable doubt, but merely proof of an occurrence by a preponderance of the evidence. Rasdon, 701 S.W.2d at 719.

The minimal due process requirements of a parole revocation hearing were set forth in Morrissey v. Brewer, 408 U.S. 471, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972), and were applied to probation revocation hearings in Gagnon v. Scarpelli, 411 U.S. 778, 93 S. Ct. 1756, 36 L. Ed. 2d 656 (1973). These are: (1) written notice of the claimed violations of probation; (2) disclosure to the probationer of the evidence against him; (3) opportunity to be heard in person and to present witnesses and documentary evidence; (4) the right to confront and cross-examine adverse witnesses, unless the hearing officer specifically finds good cause for not allowing confrontation; (5) a neutral and detached hearing body; and (6) a written statement by the factfinder as to the evidence relied on and the reasons for revoking parole. Gagnon, 411 U.S. at 786, 93 S. Ct. at 1762. Where appropriate, conventional substitutes for live

testimony, including affidavits, depositions, and documentary evidence, may be used, and hearsay evidence is admissible at these informal hearings. Marshall v. Commonwealth, Ky. App., 638 S.W.2d 288, 289 (1982).

Appellant complains that he did not get a proper hearing. In particular, he complains that the Commonwealth did not call sworn witnesses or provide sworn or certified documents regarding any of the allegations of the violations of probation. Instead, the judge at the hearing read appellant's Special Supervision Report from the Division of Probation and Parole. This report was signed by a Probation Officer. It stated that appellant had received convictions for two counts of burglary, evading arrest, theft, and driving while license revoked. It also noted that appellant did not report his arrest or conviction to the local Probation and Parole Office, but that the undersigned officer discovered the convictions while trying to locate appellant for failure to report.

Despite the extreme informality of the hearing, we conclude from the record that the court met the constitutional due process requirements: appellant was provided with a written notice of the violations, he was informed of the evidence against him, and he was given an opportunity at the hearing to speak and produce evidence. There was no due process violation in the failure to call witnesses, since hearsay is permitted

during probation revocation hearings. Appellant had a right and opportunity to challenge the Commonwealth's evidence of the fact of his recent conviction and other claims in the Notice of Preliminary Hearing. However, appellant admitted, through his attorney, that he had received an additional conviction and that this circumstance was a violation of the terms of his probation.

The record does not indicate that appellant was prevented from presenting witnesses and documentary evidence. It is worth noting that the accusation that he had been convicted of additional offenses was not amenable to mitigating evidence or challenge by testimonial witnesses. Appellant does not suggest on appeal that he could have provided any evidence in contradiction or mitigation. We conclude appellant has not identified any requirements in Gagnon which he was denied.

An appellate court's review of a trial court's decision to revoke probation is limited to a determination whether the court abused its discretion. Tiryung v. Commonwealth, Ky. App., 717 S.W.2d 503, 504 (1986). We find no abuse of discretion in the Fulton Circuit Court's revocation of appellant's probation.

ALL CONCUR.

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