

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001459-MR

ROBERT TACKETT

APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE STEVEN R. JAEGER, JUDGE
ACTION NO. 01-CR-00578

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING
** **

BEFORE: BARBER, McANULTY, AND TACKETT, JUDGES.

TACKETT, JUDGE: Robert Tackett appeals from an order of the Kenton Circuit Court, revoking his probation. Tackett argues on appeal that the court improperly considered remarks by the prosecutor, which he characterizes as "political," and evidence of additional charges which he claims to have been unaware would be used against him at the proceeding. Tackett also argues that the court failed to take into account his reduced capacity for employment due to his status as a convicted felon. We affirm.

The standard of review in cases of revocation of probation is whether the court abused its discretion in revoking probation. Tiryung v. Commonwealth, Ky. App., 717 S.W.2d 503, 504 (1986). We note at the outset that appellant stipulated to violating two conditions of his probation.

At the hearing, the Commonwealth made the following statement:

"He does have a prior misdemeanor non-support conviction for the same child. . . He was given a chance to make payments. Since that time, he has failed to report to his probation officer, ever. We have not received any child support payments. The last payment our office received was made November 22, 1999. Despite the fact that he was ordered to pay child support way back in 1998, he's only made five (5) child support payments all totaling \$254.06. On top of that I've been told that he currently has pending in Kenton County, a traffic violation for either not having a license and also operating with an invalid license. He has a misdemeanor charge for attempted burglary and giving a police office a false name or address. Looks like that is going up on June 11. So those would be supplementally violations of his probation. The Commonwealth believes that he looks able-bodied, like he is able to work. I work two jobs, I watch and wheel a paraplegic to the IRS office every day and he works all day and then they wheel him out and this type of case is getting frustrating. In all honesty, I'm a democrat and it's turning me into a republican. I'm just sick of these people, absolutely sick of them, and I'm asking that his original sentence be give to him and if you find he deserves another chance, that he be given jail time, just to reinforce the fact that

I'm sick of him. You know there would be no unemployment if everybody went out and got arrested and when we were getting ready to do something, they all have jobs all of a sudden." (Id., 03:09:57-03:12:07)

Tackett argues that the prosecutor's remarks were unfairly prejudicial and caused the court to revoke his probation. Given that Tackett was admittedly in violation of the terms of his probation by failing to pay his child support and failing to report to probation and parole, we find this proposition to be dubious at best. The court did not abuse its discretion in revoking Tackett's probation. Even though the prosecutor mentioned other pending misdemeanor charges, there is substantial evidence independent of those facts on which the court could have based its decision.

Tackett next argues that the court abused its discretion in failing to consider his reduced chance of maintaining employment due to his status as a convicted felon. Tackett cites United States v. Boswell, 605 F.2d 171 (5th Cir. 1979) and United States v. Taylor, 321 F.2d 339 (4th Cir. 1963) in support of the argument that where the failure to pay is not willful, probation should not be revoked. However, those cases involved extremely high fines or restitution (\$53,517 and \$20,000, respectively) where no inquiry regarding the defendant's ability to pay had been made. The case sub judice is quite different, and furthermore Tackett offered no evidence

that he was repeatedly refused employment because of his status as a convicted felon. We do not believe that the court abused its discretion by not considering his status as a convicted felon as a factor of his inability to obtain employment.

For the foregoing reasons the decision of the Kenton Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Denis Stutsman
Assistant Public Advocate
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Albert B. Chandler, III
Attorney General of Kentucky

Louis F. Mathias, Jr.
Assistant Attorney General
Frankfort, Kentucky