RENDERED: June 25, 2004; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-000068-MR

TIFFANY DAWN SIZEMORE — APPELLANT

v.

APPEAL FROM HART CIRCUIT COURT
HONORABLE LARRY D. RAIKES, JUDGE
ACTION NO. 00-CR-00061

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION

AFFIRMING

** ** ** ** **

BEFORE: JOHNSON, TAYLOR AND VANMETER, JUDGES.

VANMETER, JUDGE. On March 23, 2001, the Hart Circuit Court accepted appellants' guilty plea to manslaughter in the second-degree. On June 6, 2001, in accordance with the Commonwealth's recommendation, the court entered a final judgment sentencing appellant to ten years, directing her to serve eighteen months, with the balance of the sentence probated

for five years.[1] Simultaneously with the final judgment, the circuit court entered an order of probation to apply upon the appellant's release after serving her initial prison sentence. The appellant's terms of probation required her to:

> Avoid injurious or vicious habits, including but not limited to, abuse of alcohol, drugs or other substances;
>
> Good behavior and no substantial violations of law;
>
> Support dependents and meet other family obligations;
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> Report to probation officer as directed;
>
> Enroll in and complete counseling program designed to address drug/alcohol problem, as arranged for by probation officer;
>
> Comply with all financial obligations imposed through Final Judgment of Conviction;
>
> Other: all other conditions will be set once defendant is released;
>
> Other: no abuse of alcohol or drugs;
>
> Defendant is to remain receiving counseling at Life Skills.

The record discloses that appellant filed two motions for shock probation, both of which were denied. She was

[1] The terms of the Commonwealth's plea offer were "Manslaughter 2nd degree- 10 years in penitentiary; defendant to serve 18 months and upon release shall be evaluated by a qualified mental health facility to recommend appropriate in-house drug and mental health treatment. Balance of sentence probated on condition of successful treatment, good behavior; no drugs or alcohol; random drug and alcohol testing and other court conditions."

released from the initial eighteen month portion of her sentence on October 1, 2001.

On or about February 26, 2002, appellant's probation officer, Tom La Follette, filed a special supervision report setting out a number of issues and allegations. Most importantly, the report stated that during a February 12, 2002, meeting with La Follette, appellant admitted to the violation of her established curfew,[2] the use of a controlled substance (crank), and the use of a controlled substance (Tylenol III) prescribed for another person.[3] In response to this report, the trial court issued a rule setting a hearing for April 2, at which time appellant was to show cause why her probated sentence should not be revoked "for the following reason: 1. See attached Special Supervision Report." However, the April 2 hearing was continued after it was learned that appellant, who apparently was in a halfway house, Park Place Recovery Center, had not been served with the rule.

Although, the written record does not clearly reflect that appellant was served with notice of the August 6, 2002, hearing, the video record shows that appellant and her counsel

[2] The probation officer apparently set a curfew as a condition of his supervision upon appellant's release in October 2001. While listed as one of the violations in the February 2002 special supervision report, the trial court did not base its revocation order on this violation.

[3] The report also contained allegations of child neglect and living with a convicted felon that La Follette was unable to substantiate.

appeared before the court for that hearing. Appellant made no objection to the rule based on lack of service or insufficiency of notice, and she and her counsel participated in the examination and cross-examination of witnesses. In fact, appellant's counsel objected to any questions related to those issues stated in the February 2002 Special Supervision Report which Officer La Follette was unable to substantiate. Thus, the record is clear that both appellant and her counsel were aware of the curfew violation and illegal drug use allegations which served as the bases for allegations of probation violations. Appellant attempted to forestall possible revocation by presenting testimony of her mental illness and continued recovery efforts in halfway houses and assisted living programs. Notwithstanding the violations as proven at the August 6 hearing, the trial court continued the hearing to December 17 to give appellant an opportunity to enter Phoenix House, an assisted living program in Bowling Green.

Upon first attempting to enter the Phoenix House on August 26, 2002, appellant tested positive for methamphetamine and was denied admission. La Follette filed another special supervision report dated September 5, 2002, setting out the facts of this incident. In response, the trial court issued an additional rule setting a hearing at which appellant was to show cause why the probated sentence should not be revoked "for the

following reason: 1. See attached Special Supervision Report." During the December 17 show cause hearing, the testimony established that appellant initially was denied admission to the Phoenix House program due to her positive drug test results. In addition, the program director testified that even after her admission to the program, appellant did not make progress towards recovery. As a result, the trial court advised appellant that she was making a joke of the probation process, and it revoked her probation based on the undisputed evidence of positive drug tests, plus, the whole evidence produced at the August 6 and December 17 hearings. The trial court entered a revocation order setting forth the violations as "Abuse of drugs and/or alcohol" and "Other: failure to comply with Park Place requirements and requests." This appeal followed.

Appellant's sole argument for reversal is that the trial court erred by entering a rule which insufficiently identified the grounds for probation revocation by referring generally to attached reports.[4] We disagree.

[4] A court may not revoke or modify the conditions of a sentence or probation except after a hearing with defendant represented by counsel and following a written notice of the grounds for revocation or modification. KRS 533.050(2). In *Radson v. Commonwealth*, Ky. App., 701 S.W.2d 716 (1986), a panel of this court discussed in great detail the requirements of notice for a probation revocation hearing, and reversed a revocation finding that the trial court had not given sufficient notice. In *Radson*, the grounds set forth in the revocation notice specified an arrest in another specific case. At the revocation hearing, the trial court revoked the defendant's probation because it believed he had failed to avoid persons of disreputable character, not because it believed he had committed an additional crime. The court stated that if "specific violations existed, they should have been stated in

As an initial matter, we note that appellant did not present this argument to the trial court. Thus, procedurally this issue has been waived. *See Port v. Commonwealth*, Ky., 906 S.W.2d 327, 333 (1995) (court noting that "[a] defendant cannot pursue one theory at the trial court level and another on the appellate review").

Moreover, we need not address the merits of appellant's argument in order to prevent the occurrence of manifest error. RCr 10.26. The record is clear that appellant was notified and aware that she would be called upon to answer the allegations that she had engaged in illegal drug use and had violated her curfew. She and her counsel appeared at two scheduled hearings and defended the charges, not by disputing them, but instead by attempting to present mitigating factors, such as mental illness and enrollment in halfway houses and assisted living programs, in an effort to avoid revocation.[5] Given the fact that the record clearly discloses that appellant violated her terms of probation by the illegal use of drugs.

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some manner to notify him of the charges he would require to defend." *Id.* at 717.

[5] *See Polk v. Commonwealth*, 622 S.W.2d 223, 225 (1981) (court holding that defendant's procedural due process claims failed in light of facts that he was not under arrest, and attended and participated in the hearing "fully aware of and ready to show cause why his probation should not be revoked").

The trial court did not abuse its discretion in revoking her probation and imposing the balance of the sentence.[6]

The judgment of the Hart Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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[6] The burden of proof required to revoke probation is "merely proof of an occurrence by a preponderance of the evidence." *Myers v. Commonwealth*, Ky. App., 836 S.W.2d 431, 433 (1992), *overruled on other grounds by Sutherland v. Commonwealth*, 910 S.W.2d 235 (1995) (citing *Rasdon v. Commonwealth,* Ky. App., 701 S.W.2d 716, 719 (1986) and *Murphy v. Commonwealth,* Ky. App., 551 S.W.2d 838 (1977)).