

RENDERED: April 1, 2005; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000431-MR

DAVID SMALLWOOD

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE SHEILA R. ISAAC, JUDGE
INDICTMENT NO. 02-CR-00456

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: BARBER, HENRY, AND JOHNSON, JUDGES.

HENRY, JUDGE: David Smallwood pled guilty to one count of Second Degree Burglary, one count of Third Degree Burglary and one count of First Degree Criminal Trespass and was sentenced to five years, three years and twelve months respectively, with the felonies to be served consecutively. On September 13, 2002 Smallwood's sentence was probated for five years. One of the

conditions of his probation was that he successfully complete the Fayette County Drug Court program.

In December of 2003, Smallwood was arrested for Theft of Mail Matter, a felony. In January of 2004, a Certification of Violation was filed, stating that Smallwood had violated a Drug Court requirement by being "charged with a felony while participating in Drug Court." Evidence was found that Smallwood had participated in the theft of packages delivered by parcel delivery services in a Lexington subdivision. The Fayette County Drug Court issued an order which was served on Smallwood terminating his Drug Court status and notifying him that a probation revocation hearing would be held Friday January 23, 2004, at 2:00 p.m. The same order provided that counsel would be appointed to represent Smallwood at the hearing. Smallwood's probation was revoked as a result of the hearing.

Smallwood appeals the revocation by contending that he was not supplied with proper written notice of the allegations of the revocation hearing.

In Morrissey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972), the United States Supreme Court addressed due process requirements for parole revocation hearings. The court listed six due process requirements, including "written notice of the claimed violations ..." Morrissey, 408 U.S. at 489, 92 S.Ct. at 2604, 33 L.Ed.2d at 499. The Kentucky Supreme

Court later applied these standards to probation revocation hearings in Murphy v. Commonwealth, 551 S.W.2d 838, 840-841 (Ky. 1977). The written notice requirement is codified in KRS¹ 533.050(2) which states that:

The court may not revoke or modify the conditions of a sentence of probation or conditional discharge except after a hearing with defendant represented by counsel and following a written notice of the grounds for revocation or modification. (Emphasis added).

While Morrissey made it clear that parolees are not entitled to the full panoply of rights accorded criminal defendants prior to conviction, some liberty interests are affected by the revocation of parole or probation; therefore some "informal procedural guarantees" must exist. Morrissey, 408 U.S. at 483, 92 S.Ct. at 2601, 33 L.Ed.2d at 495. However, these rights are tempered by the State's "interest in being able to return the individual to imprisonment without the burden of a new adversary criminal trial if in fact he has failed to abide by the conditions of his parole." Id.

The right to written notice is an important due process requirement. This Court has previously held that "written notice of the grounds for the proposed revocation is an absolute essential for this type of proceeding." Rasdon v. Commonwealth, 701 S.W.2d 716, 719 (Ky.App. 1986). In that case,

¹ Kentucky Revised Statutes.

it is noteworthy that at the revocation hearing the Commonwealth offered no proof of the grounds of which Rasdon had been given notice, but instead his probation was revoked on other grounds not specified in the notice. Id. at 718.

In Morrissey, supra, 408 U.S. at 486-87, 92 S.Ct. 2603, 33 L.Ed.2d at 497, the court held that the parolee should receive notice that a hearing will take place, the purpose of which is to determine probable cause for revocation, and what violations of probation have been alleged.

In this case Smallwood was served with an order from the Drug Court stating the reasons for his removal from the program. The order also stated that because of his removal a probation revocation hearing would be held, and notified him of the date and time of the hearing. Smallwood was also served with warrants for violating his probation. The order and warrants advised Smallwood that a hearing would take place, that its purpose was to determine his probation status, and that his alleged violation was his removal from the Drug Court program.

In Bryan v. Petrovsky, 726 F.2d 431 (8th Cir. 1984) Bryan argued that he received inadequate notice under Morrissey because he did not receive a letter from the United States Parole Commission giving him notice of one of four counts of parole violation. The court held that the notice given in the

initial warrant, which detailed the charges, was sufficient for purposes of his revocation hearing.

It is the best practice to serve a probationer with a specific written notice of the date, time and place of his probation revocation hearing, drafted and designed for that particular purpose, giving notice of each specific term or condition of probation that is alleged to have been violated and in what way. KRS 533.050(2) has been the law for many years, and its requirements are not difficult or burdensome on the Commonwealth. Nevertheless, given the facts of this case we believe that it is clear that Smallwood actually received adequate written notice to allow him and his counsel to prepare a defense. There being no due process violation, the order of the Fayette Circuit Court is affirmed.

ALL CONCUR.

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