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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000898-MR

JEREL PATRICK HARPRING

APPELLANT

V. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE ANN O'MALLEY SHAKE, JUDGE
CIVIL ACTION NO. 03-CR-001247

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: GUIDUGLI AND MINTON, JUDGES; EMBERTON, SENIOR JUDGE.¹

MINTON, JUDGE: Jerel Harpring appeals the trial court's decision to revoke his felony probation. He argues that the revocation was unconstitutional and that the presiding judge should have recused herself. We disagree with his contentions and affirm the decision of the circuit court.

¹ Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Harpring pled guilty to illegal possession of a controlled substance in the first degree and tampering with physical evidence. He was sentenced, concurrently, to a maximum of one year for each offense. But on the Commonwealth's recommendation, the circuit court probated Harpring for five years. Probation was conditioned upon Harpring's compliance with specified provisions, including the requirement that he successfully complete the drug court program.

Six months later, Harpring was arrested on charges of trafficking in a controlled substance and trafficking in a controlled substance within 1000 yards of a school. Because of this arrest on new drug-related charges, his participation in drug court was terminated. On its own motion, the court moved to revoke Harpring's probation.

At the probation revocation hearing, Harpring was present and represented by counsel. The Commonwealth's first witness for revocation was Detective Scott Wachowiak, the arresting officer. He testified that he had been in the narcotics unit for three years. Wachowiak stated that he arrested Harpring for trafficking in cocaine; that one ounce of cocaine was found on Harpring's person; and that additional cocaine was located in Harpring's house, for a total of 37.7 grams.

Lara Harshfield, Harpring's probation officer, was the Commonwealth's other witness at the hearing. Harshfield stated that when Harpring began probation, he was required to read and sign certain conditions of probation. Two of those conditions were that Harpring was to complete the drug court program successfully; and he was to "report any arrest, or citation of criminal summons within 72 hours to [his] probation or parole officer." Harshfield testified that Harpring did not notify her of his new arrest.

Based on the testimony of Detective Wachowiak and Ms. Harshfield, the court revoked Harpring's probation. The specific reasons stated for the revocation were Harpring's failure to report his arrest within 72 hours and his termination from drug court. Harpring was then sentenced to a maximum of one-year imprisonment, with credit for time served. This appeal follows.

Harpring makes two main arguments: first, that "it was reversible error for the trial court judge not to disqualify herself when she lacked jurisdiction to revoke defendant's probation"; and, second, that the court erred by relying on "unverified assertions" to remove Harpring from drug court and "privileged communications" to revoke his probation.

It is well settled "that probation is a privilege rather than a right. One may retain his status as a probationer

only as long as the trial court is satisfied he has not violated the terms or conditions of the probation."² This Court has held that "[i]t is not necessary that the Commonwealth obtain a conviction in order to accomplish revocation of probation";³ therefore, "[o]ur review is limited to a determination of whether, after a hearing, the trial court abused its discretion in revoking the appellant's [probation]."⁴

Harpring first argues that the revocation hearing was flawed because the trial court judge did not disqualify herself. Specifically, Harpring contends that because "the trial court judge was the drug court judge, and the drug court judge was the probation revocation hearing judge," he was not afforded due process. We disagree.

KRS⁵ 26A.015(2)(a) reads:

(2) Any justice or judge of the Court of Justice or master commissioner shall disqualify himself in any proceeding:

(a) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceedings, or has expressed an opinion concerning the merits of the proceeding.

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

³ *Id.*

⁴ *Id.*

⁵ Kentucky Revised Statutes.

Subsection (e) of the statute further states that a judge must disqualify "[w]here [s]he has knowledge of any other circumstances in which [her] impartiality might reasonably be questioned."

In Robinson v. Commonwealth, this Court held that defendants at risk of probation revocation must be afforded the minimum requirements of due process.⁶ Those requirements include:

- (a) written notice of the claimed violations of [probation];
- (b) disclosure to the [probationer] of evidence against him;
- (c) opportunity to be heard in person and to present witnesses and documentary evidence;
- (d) the right to confront and cross-examine adverse witnesses . . . ;
- (e) a "neutral and detached" hearing body . . . ;
- and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking [probation].

KRS 533.050(2) also states that "[t]he court may not revoke or modify the conditions of a sentence of probation . . . except after a hearing with defendant represented by counsel and following a written notice of the grounds for revocation or modification."

Harpring asserts that he did not have a "neutral and detached hearing body" and, therefore, was not afforded the minimum requirements of due process. He claims that because the

⁶ 86 S.W.3d. 54, 56 (Ky.App. 2002).

judge presided over the entirety of his court proceedings, "[i]t would seem most unlikely, irrespective of how balanced and excellent a judicial temperament one may possess, to be a neutral and detached trier of fact"

We do not believe the fact that the same judge presided over Harpring's trial proceedings, drug court sessions, and probation revocation hearing necessarily violates the requirement for an unbiased judge, nor do we believe Harpring was denied due process. There is no evidence in the record to suggest that the judge harbored any personal bias or prejudice against Harpring, had personal knowledge of disputed evidentiary facts outside the record, or expressed any opinions showing pre-judgment of Harpring's case. In fact, there is nothing that draws the judge's impartiality into question.

Further, it is clear that the probation revocation hearing satisfied the requirements of due process and KRS 533.050(2): Harpring received written notice of the claimed violations; the evidence against him was disclosed; he was afforded a hearing where he had the opportunity to be heard in person and to confront and cross-examine the Commonwealth's witnesses; he was before a neutral and detached hearing body; and he received a written statement from the judge highlighting the evidence and reasons for the revocation.

Therefore, we disagree with Harpring's contentions. There was no reason the trial judge should have disqualified herself; and, absent a motive for disqualification, there is no proof that Harpring was denied a "neutral and detached" probation revocation hearing.

Harpring's second argument is that the court erred by removing him from the drug court program and then by relying on that removal as a basis to revoke his probation. Specifically, Harpring claims "[i]t is clear from reading the transcripts of the Drug Court Proceedings and the probation revocation hearing that the trial court was strongly influenced in its decisions to terminate [him] from Drug Court and, then, to revoke his probation by the allegation that [he] said he was a drug dealer." Again, we disagree.

While drug court is a program operated through Kentucky's Court of Justice, it "is not a 'court' in the jurisprudence sense."⁷ Rather, "it is a drug treatment program administered by the court system."⁸ Accordingly, a participant's termination from the drug court program is "not subject to due process protections any more than his participation in a private drug treatment program would have been, or his participation in

⁷ Dunson v. Commonwealth, 57 S.W.3d 847, 850 (Ky.App. 2001).

⁸ *Id.*

any other rehabilitation program such as anger management counseling or a job training program.”⁹

Harpring’s last drug court session took place approximately one week after he was arrested on narcotics charges. In terminating him from the program, the judge noted that she was aware of his arrest and “what the police found at his location.” The judge further stated that in light of this information and the fact that “Drug Court is clearly not a place for drug dealers,” Harpring would be removed from the program.

As stated, Harpring’s termination from the drug court program was not subject to due process requirements. Rather, his removal was clearly within the judge’s discretion. Upon review of the record, we find no proof that the judge was “strongly influenced” in terminating his participation. Rather, acting on the fact that Harpring had been arrested for trafficking in a controlled substance, the judge decided to remove him from the program. We find no fault with this decision. And because we find no fault with the court’s decision to terminate Harpring’s participation in drug court, we do not believe it was error to rely on this removal as a basis for revoking his probation.

⁹ *Id.*

We further find no fault with the court's reference to Harpring as a "drug dealer." Harpring claims that this information was confidential because, apparently, he admitted during a drug court session that he was a drug dealer. But we believe there was sufficient evidence in the record for the court to adduce that Harpring was a drug dealer without resorting to his confession in drug court. The fact that he was arrested for trafficking in cocaine while on probation for drug possession could certainly lead one to that conclusion. Regardless, it is clear that the court's decision to revoke Harpring's probation was not based on the fact that he was a drug dealer but, rather, his termination from drug court and his failure to notify his probation officer of his arrest within 72 hours.

For these reasons, the decision of the circuit court revoking Harpring's probation is affirmed.

ALL CONCUR.

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