

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001671-MR

JOHN STULL

APPELLANT

v. APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE LEONARD L. KOPOWSKI, JUDGE
ACTION NO. 02-CR-00101

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: GUIDUGLI, McANULTY, AND MINTON, JUDGES.

GUIDUGLI, JUDGE: John Stull appeals from an order of the Campbell Circuit Court revoking his probation and ordering him to serve a five year sentence. Stull contends that his constitutional rights to due process and equal protection of the law were violated and that the trial court erred in revoking his probation. We affirm.

On July 25, 2002, Stull entered a guilty plea to the charge of theft of a controlled substance (KRS 218A.1418; KRS 520.020). In exchange, the Commonwealth dismissed the charge of

being a persistent felony offender first degree (KRS 532.080). At the time of the plea, Stull was on parole for unrelated charges not disclosed in the record. However, at the revocation hearing, Stull stated his parole did not expire until 2012. Following his guilty plea, the court ordered a pre-sentence investigation report and required Stull to contact the probation and parole office in Kenton County, Kentucky. Sentencing was scheduled for September 4, 2002.

On the day of sentencing, Stull and his attorney appeared in court. The court entered a judgment and sentence on plea of guilty on September 5, 2002. The judgment noted that Stull agreed with the "factual contends and conclusions contained in the written report prepared by the Division of Probation and Parole." Thereafter, the court sentenced Stull to "5 years with the Kentucky Department of Corrections probated for a period of 5 years reporting probation to the Department of Probation and Parole." As conditions of probation, the court ordered Stull to:

Receive a substance abuse evaluation and complete any recommended treatment, including aftercare; pay the court costs of this action; pay a supervision fee of \$15.00 per month while on probation; pay a \$400.00 fee to the Campbell County Public Defender's Corporation and follow all the terms and conditions as set forth by the probation officer. All fees are payable through the Campbell County Circuit Clerk's Office by

making monthly payments of \$100.00 until paid in full.

Following the sentencing hearing on September 4, 2002, Stull reported to the Probation and Parole Office in Kenton County and met with Cassandra Stella, a Probation and Parole Officer. Ms. Stella testified at the revocation hearing that she transferred Stull's case to the Probation and Parole Office in Mason County, Kentucky, because Stull resided there and was on reporting parole to Keith Fetters in that office. At the hearing, Mr. Fetters testified that Stull never physically reported to his office, although he did call once. Despite Stull's failure to report to Probation and Parole at that time, no action was taken. Mr. Fetters indicated that he was in the process of revoking Stull's parole based upon the Campbell County conviction when Stull was arrested in Kenton County on charges of fleeing or evading police in the first degree. Based upon the new charge, Stull was held in jail and subsequently pled guilty to the new charges and his parole was revoked. Stull was transferred to Luther Lockett Correctional Complex in LaGrange. The date of his guilty plea to the Kenton County charges and the date of his parole revocation are not included in the record before this Court.

On March 25, 2003, a deputy Campbell County Circuit Clerk filed an affidavit stating that Stull had not made any

payments towards the fines or costs previously ordered in this case. Based upon this affidavit, the circuit court issued a bench warrant for Stull's arrest. Thereafter, on April 23, 2003, Probation and Parole Officer Stella filed an affidavit indicating that Stull had a new conviction; that he had not signed the conditions of supervision; and that he had absconded from parole supervision. Based upon these two affidavits, the Campbell County Commonwealth Attorney's Office filed a motion to revoke Stull's probation on May 27, 2004.¹ Once the motion to revoke probation was filed, the court appointed Stull a public defender. Stull also filed a pro se response to the motion. On July 20, 2004, a hearing on the motion to revoke probation was held. Stull was present and represented by counsel. At the hearing, Probation and Parole Officers Stella and Fetters testified, as did Stull. The court heard the testimony and arguments of counsel and on the same day entered an order revoking Stull's probation and ordering him to serve the previously imposed five-year sentence. This appeal followed.²

On appeal, Stull contends Stella's affidavit contained perjured statements and therefore, should be stricken from the record and not considered a basis for his revocation. This is

¹ There is nothing in the record nor did anyone state at the hearing why the Commonwealth waited over one year to file this motion.

² It should be noted that following Stull's filing this appeal, he also filed a CR 60.02(c) motion in the circuit court on August 24, 2004. While the Commonwealth contends that motion was denied, no order is in the record and that issue is not before this Court.

based upon his contention that he was not under Stella's "active" supervision. Stull argues that Fetters was his Probation and Parole Officer and only Fetters could sign the affidavit alleging Stull had absconded from his probation supervision. Stull also contends that he was never given any conditions of probation to sign, thus he could not violate his probation. Finally, he argues that the trial court's order must be set aside for failure to make written findings. Despite Stull's arguments to the contrary, we believe the affidavits filed of record and the testimony presented at the hearing support the circuit court's action to revoke Stull's probation.

In Marshall v. Commonwealth,³ this Court set forth the due process rights that must be provided defendants at parole revocation hearings. This Court held:

In Morrissey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972) the Supreme Court indicated that in parole revocation hearings certain due process rights must be provided to the defendant. These include:

- (a) Written notice of the claimed violations of parole;
- (b) Disclosure to the parolee 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 (unless the hearing officer

³ 638 S.W.2d 288 (Ky.App. 1982).

specifically finds good cause for not allowing confrontation);

- (e) A "neutral and detached" hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and
- (f) A written statement by the fact-finders as to the evidence relied on and reasons for revoking parole. Id. At 489, 92 S.Ct. at 2604 (emphasis supplied in original)

The Court went on to say, however:

We emphasize there is no thought to equate this second stage of parole revocation to a criminal prosecution in any sense. It is a narrow inquiry; the process should be flexible enough to consider evidence including letters, affidavits, and other material that would not be admissible in an adversary criminal trial. Id.

The essence of Morrissey was two-fold: While it indicated certain rights must be afforded the defendant in these hearings it also emphasized that such hearings were not criminal prosecutions and the full panoply of rights due the defendant in criminal prosecutions did not apply to parole revocations. The Court emphasized that such hearings were an "informal process." (Emphasis in original).

In Gargon v. Scarpelli, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973), the Court held the reasoning of Morrissey also applied to probation revocation proceedings. Again, however, the Court emphasized the informal nature of such proceedings and the fact that

the defendant is not entitled to a "trial" on the issues.⁴

Having thoroughly reviewed the record herein, it is obvious that Stull was afforded all due process rights to which he was entitled. We do not believe the fact that Stella may not have been his acting supervisor and that he did not sign any written conditions of probation is controlling; rather the essential elements are that he was placed on probation, failed to report to Mr. Fetters, failed to pay his fines and costs, and received a new conviction. Stull was provided with notice of the claimed violations of probation, advised of the evidence against him, given an opportunity to be heard and present evidence on his behalf, afforded the opportunity to confront and cross-examine adverse witnesses before a "neutral and detached" judge and received a written order that his probation had been revoked. In fact, at the hearing he not only admitted that he had a new conviction, but added that he was under the influence of drugs, was driving the wrong way on the street and fled because Fetters had told him that his parole was going to be revoked. While we believe the trial court's order is lacking in specific findings as to the basis for the revocation, it is clear that the evidence at the hearing and Stull's own admissions were a sufficient basis for the court's action.

⁴ Id. at 289.

For the foregoing reasons, the order of the Campbell Circuit Court revoking Stull's probation is affirmed.

MINTON, JUDGE, CONCURS.

McANULTY, JUDGE, CONCURS IN RESULT ONLY.

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