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NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2005-CA-000312-MR

EDWARD J. DIPIETRO

APPELLANT

v. APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE JANET P. COLEMAN, JUDGE
INDICTMENT NO. 01-CR-00497

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: BUCKINGHAM AND McANULTY, JUDGES; PAISLEY, SENIOR JUDGE.¹

PAISLEY, SENIOR JUDGE: Edward Dipietro appeals an order of the Hardin Circuit Court, revoking his probation and sentencing him to serve eight years. He maintains that his due process rights were violated because the terms of his probation were not entered into the record at his revocation hearing, and because

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

the circuit court failed to make written findings of fact to support its decision to revoke his probation. We affirm.

Dipietro entered a plea of guilty in the Hardin Circuit Court on January 30, 2002, to failure to comply with sex offender registration and being a persistent felony offender in the second degree. He was sentenced to serve eight years, probated for five years. The final judgment and order imposing sentence set forth the specific terms and conditions of Dipietro's probation, which included the following:

1. Not commit another offense[.]
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14. No drugs or alcohol.
15. Submit to random alcohol and drug testing.

Almost three years later, on November 23, 2004, the Hardin County Circuit Court issued a criminal summons alleging that Dipietro had violated the terms of his probation by committing the following new offenses: driving under the influence in the first degree, having no operator's license, fleeing or evading police, disorderly conduct, and failure to submit to a drug/alcohol test.

A probation revocation hearing was held as required under Kentucky Revised Statutes (KRS) 533.050(2). Dipietro's probation and parole officer testified that Dipietro had signed

the terms and conditions of his probation on September 24, 2004. He explained that the delay was due to the fact that at the time the final judgment was entered, Dipietro had been serving time on another charge, and that his probation had been running while he was imprisoned.

Kentucky State Police Trooper Chris Berry then testified that he had been called to investigate a single-vehicle accident involving Dipietro. The dispatcher also told him that Dipietro was reportedly chasing away with a large piece of wood some neighbors who were trying to assist him. Berry testified that when he arrived at the scene of the accident, Dipietro was acting belligerently towards the neighbors. Berry made Dipietro sit down. Dipietro did not have a driver's license, and Berry stated that he smelled very strongly of alcohol. When Berry turned away from him to investigate the accident, Dipietro got up. Berry told him to sit down again. Dipietro then became very agitated, and shouted "You might as well go ahead and shoot me now, I'm tired of playing your games," and "Shoot me now before I kill you all." Dipietro then ran away. Berry pursued him on foot and eventually subdued him. Upon being caught, Dipietro asked Berry "What are you going to do now?" and called Berry a "dead pig."

In his initial testimony, Berry did not allege that Dipietro had been driving while drunk or that he had refused to

submit to an alcohol test. Defense counsel proceeded to argue that the Commonwealth had therefore failed to prove either of the alleged probation violations. The defense also argued that the proceedings were flawed because the conditions of probation had never been entered into the record. The judge thereafter allowed the Commonwealth to recall Officer Berry, who testified that Dipietro had refused to submit to an alcohol test. Defense counsel reiterated that the conditions of probation were not in the record, and in the alternative asked the court to withhold a ruling on the probation issue until a disposition of the charges against Dipietro.

The court decided to revoke Dipietro's probation, stating:

What I have got to determine today is whether it's appropriate that he [Dipietro] be revoked. I do not believe in my memory that I've also had witnesses from the new case come in and tell me about what happened. Now I'm finding in Mr. Dipietro's case that based on the information that he's [Berry] given about the use of alcohol, I think that it is appropriate, even though there hasn't been testimony that there is a document in existence that contains the standard conditions of probation in this case, where there obviously is an agreement that this defendant was on probation, I think it is permissible for me to take judicial notice of standard conditions such as that he not use alcohol and that he not commit further illegal acts, and I've had sworn testimony presented to me today that he was using alcohol and that he committed further illegal acts.

Based on the testimony I think that it is appropriate in this particular situation, given the behaviors described, I think that he clearly was in violation of his probation . . . I think it is my duty to try to determine if probation is working But I think that the testimony that I have in front of me has shown a clear violation of the standard conditions of probation. So I am going to go ahead and do a revocation on him at this point.

On appeal, Dipietro argues that his due process rights were violated because the terms of his probation were never entered into the record at his revocation hearing. Dipietro has drawn our attention to KRS 533.050(2) which states that

[t]he court may not revoke or modify the conditions of a sentence of probation or conditional discharge except after a hearing with the defendant represented by counsel and following a written notice of the grounds for revocation or modification.

The record shows that the terms and conditions of his probation were clearly set forth in the court's final judgment and order of sentencing, entered on March 22, 2002. We are unaware of any rule demanding that the terms and conditions of probation be restated or placed into the record again immediately prior to revocation. Dipietro's probation officer testified that Dipietro had signed the terms and conditions of his probation. Furthermore, the grounds for the revocation were clearly set forth in the criminal summons issued by the court on November 23, 2004. We believe that this constitutes sufficient

notification to satisfy the demands of due process and the terms of KRS 533.050(2).

Dipietro has argued that the criminal summons did not give him adequate notice that one of the alleged probation violations was alcohol use. We note that there was a charge of driving under the influence. Furthermore, the court clearly stated that his probation was being revoked on the basis of the testimony regarding not just alcohol use but "other illegal acts."

As to Dipietro's contention that the circuit court erred in taking judicial notice of his probation conditions, it appears that the court's action fell squarely within Kentucky Rule of Evidence (KRE) 201, which permits a court to take judicial notice of adjudicative facts that are "[c]apable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." KRE 201(b)(2). The final judgment and order imposing sentence which contained the terms and conditions of probation was readily available in the court record. "A court may properly take judicial notice of public records[.]" Polley v. Allen, 132 S.W.3d 223, 226 (Ky.App. 2004).

Dipietro next argues that his due process rights were violated when the court failed to provide a written statement containing the evidence relied on and the reasons for revoking

his probation. He relies on Morrissey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972), a United States Supreme Court decision which established "a floor upon which the State is able to construct its own due process requirements."

Robinson v. Commonwealth, 86 S.W.3d 54, 56 (Ky.App. 2002).

Although Morrissey set forth the minimum requirements of due process specifically for parole revocation, these were made applicable to probation revocation by Gagnon v. Scarpelli, 411 U.S. 778, 782, 93 S.Ct. 1756, 1759, 36 L.Ed.2d 656, 661 (1973).

The Morrissey requirements include the following:

(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 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 factfinders as to the evidence relied on and reasons for revoking parole.**

Morrissey, 408 U.S. at 489, 92 S.Ct. at 2604, 33 L.Ed.2d at 499

(emphasis supplied).

The Morrissey court also cautioned that

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.

This Court has provided the following commentary on

Morrissey:

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."

Marshall v. Commonwealth, 638 S.W.2d 288, 289 (Ky.App. 1982).

The written order of the trial court revoking Dipietro's probation did not contain any findings of fact, stating only that "the Court finds that the Defendants [sic] has violated his/her terms of probation[.]" The court did, however, make adequate oral findings at the revocation hearing, stating that the evidence presented about the use of alcohol and the commission of illegal acts indicated that Dipietro had violated the terms of his probation. Revocation hearings do not require proof beyond a reasonable doubt but, merely, proof of an occurrence by a preponderance of the evidence. Rasdon v. Commonwealth, 701 S.W.2d 716, 719 (Ky.App. 1986). Dipietro was fully notified of the court's findings, and the basis of the revocation, at the hearing. In our view, this is adequate to

meet the demands of due process. As the Court of Appeals for the Fourth Circuit has explained, the function of a written statement setting forth the findings of fact is to enable the reviewing court to determine the basis of the trial court's decision to revoke. See United States v. Copley, 978 F.2d 829, 831 (4th Cir. 1992). The trial court's oral findings in this case provide sufficient material for meaningful appellate review, and therefore fulfill the same function as a written statement.

We conclude that the trial court did not abuse its discretion in revoking Dipietro's probation. See Tiryung v. Commonwealth, 717 S.W.2d 503, 504 (Ky.App. 1986).

For the foregoing reasons, the order of the Hardin Circuit Court is affirmed.

ALL CONCUR.

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