

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-000366-MR

ADRIAN HARDY

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE DENISE CLAYTON, JUDGE
INDICTMENT NO. 02-CR-001729

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** *

BEFORE: MINTON AND VANMETER, JUDGES; MILLER, SENIOR JUDGE.¹

MINTON, JUDGE: Adrian Hardy appeals from the Jefferson Circuit Court's order revoking his shock probation. Finding no error, we affirm.

In October 2002, following his guilty plea, Hardy was sentenced to three years' imprisonment for wanton endangerment and thirty days for DUI. Those sentences were ordered to be

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

served concurrently. In June 2003, the trial court granted Hardy's motion for shock probation. Among the conditions of Hardy's probation were that he attend inpatient substance abuse counseling and that he comply with all instructions and conditions imposed by the Bureau of Corrections, Department of Probation and Parole.

In August 2004, the Commonwealth filed a motion to revoke Hardy's probation based on allegations that Hardy had, among other things, failed to report to his probation officer and had failed to attend substance abuse counseling. A hearing was held on the motion to revoke in November 2004. At the hearing, Hardy admitted that he failed to report timely to his probation officer twice and that he had not undertaken inpatient substance abuse counseling. Following the hearing, the court revoked Hardy's probation. Hardy submitted a notice of appeal later in November 2004, although the circuit clerk did not file the notice until February 2005. Meanwhile, Hardy sent the circuit court judge a letter, dated December 30, 2004, alleging that he did not receive notice of the revocation hearing. The trial court has taken no action on this letter.

Since probation is a privilege, not a right, a person "may retain his status as a probationer only as long as the trial court is satisfied that he has not violated the terms or

conditions of the probation.”² Given the Commonwealth’s strong interest in being able to return a person who violates probation to prison without having to go through another full-blown adversarial, trial-like proceeding,³ the procedures for revocation hearings are more flexible; and the Commonwealth is only required to prove that a defendant violated probation by a preponderance of the evidence.⁴ On appeal, the scope of our review is narrow as we may only determine if the trial court abused its discretion in revoking Hardy’s probation.⁵

Hardy admitted at his revocation hearing that he reported to his probation officer one day late in February 2004 and failed to report at all in May 2004. And Hardy admitted that he was only on a waiting list for inpatient substance counseling and had not actually received such counseling. So we find that the Commonwealth presented more than sufficient evidence to support revocation of Hardy’s probation. We find no merit to Hardy’s contention that the trial court should have been more lenient because of his being HIV positive. The trial court had the discretion to impose several possible punishments

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

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

⁴ Rasdon v. Commonwealth, 701 S.W.2d 716, 719 (Ky.App. 1986).

⁵ Tiryung, 717 S.W.2d at 504.

for Hardy's probation violations, and we cannot say that the trial court abused its discretion by choosing revocation.

Finally, Hardy's brief halfheartedly contends that he did not receive notice of the revocation hearing. We agree with Hardy that a person is entitled to receive notice of any revocation proceedings against him.⁶ But we do not agree with Hardy that he is entitled to relief on the notice issue for several reasons. First, Hardy's brief does not explicitly say that he did not receive notice. Rather, Hardy's brief only states "[i]f Hardy indeed had not received proper notice" We cannot grant relief on suppositions and speculation. Second, we note that the certificate of service on the Commonwealth's motion to revoke states that the motion was mailed to Hardy at his last known address. Third, we observe the obvious fact that Hardy appeared at the revocation hearing. Finally, Hardy did not give the trial court an opportunity to rule on his alleged lack of notice because he did not raise this issue until nearly two months after the revocation hearing took place. And, by that time, Hardy had already filed his notice of appeal.

Generally, "the filing of a notice of appeal divests the trial court of jurisdiction to rule on any issues while the

⁶ Robinson, 86 S.W.3d at 56.

appeal is pending.”⁷ We recognize that exceptions to that rule exist in situations involving allegations of ineffective assistance of counsel brought under Kentucky Rules of Criminal Procedure (RCr) 11.42, or a timely motion for a new trial based on newly discovered evidence.⁸ But neither of those exceptions appears to be applicable to this case, especially in light of the fact that Hardy has not given any reason why he did not raise his alleged lack of notice in a timely manner.

For the foregoing reasons, the judgment of the Jefferson Circuit Court revoking Adrian Hardy’s probation is affirmed.

ALL CONCUR.

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⁷ Johnson v. Commonwealth, 17 S.W.3d 109, 113 (Ky. 2000).

⁸ See Wilson v. Commonwealth, 761 S.W.2d 182, 184-185 (Ky.App. 1988); Johnson, 17 S.W.3d at 113 (“[t]here is authority permitting a trial judge to rule on a motion filed in a criminal case while the case is pending on appeal, if the motion raises new issues, *e.g.*, newly discovered evidence or ineffective assistance of counsel, which could not have been the subject of the direct appeal.”).