

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-001040-MR

DONALD NOLAN

APPELLANT

v. APPEAL FROM GREENUP CIRCUIT COURT
HONORABLE LEWIS D. NICHOLLS, JUDGE
ACTION NO. 04-CR-00089

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** *

BEFORE: ABRAMSON AND BARBER, JUDGES; EMBERTON,¹ SENIOR JUDGE.

EMBERTON, SENIOR JUDGE: Donald Nolan appeals from an order of the Greenup Circuit Court revoking his conditional discharge. He alleges that he was denied due process because the conditional discharge was revoked based on his inability to complete a sex offender treatment program as required by the order of conditional discharge and KRS 532.045.² We agree with the trial court that Nolan's failure to complete the program is

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.

² Kentucky Revised Statutes.

good and sufficient cause to revoke the period of conditional discharge. We therefore affirm.

Nolan pled guilty to one count of sex abuse, first degree and, in November 2004, was sentenced to one year probated and three years conditional discharge. His sentence was conditioned, in part, on finding a residence in which there were no children and after the payment for, and completion of, a sex offender treatment program. Following a hearing, on February 22, 2005, the court found that Nolan had not found the required housing, and, therefore, ordered that he remain incarcerated in the Greenup County Detention Center. Another hearing was held March 3, 2005, and he was again reminded to comply with the conditions of his discharge. Nolan remained in the detention center until April 3, 2005, when, with time served, he completed his one year sentence and was released; the same day, however, he was returned to the detention center because he failed to maintain a registered address.

He was later transported to Ashland, Kentucky to the Transitions Halfway House where he was required to comply with the house rules, including attending a sex offender treatment program. Although provided clothing, Nolan was not provided transportation to seek employment or attend the sex offender treatment program in Morehead, Kentucky. He was terminated from the halfway house on April 11, 2005, because of his failure to

attend sex offender treatment and was returned to the detention center. Following a revocation hearing, Nolan's conditional discharge was revoked.

Nolan's only justification for not attending the required treatment program is that he had no transportation either to Morehead or to seek employment, whereby he could purchase transportation. He asserts that his failure to meet the conditions of his discharge was the "inevitable consequence" of the halfway house's rule, not due to any "affirmative misconduct". He further asserts that he had no knowledge when entering the halfway house that transportation was not provided.

Our review of the trial court's decision to revoke Nolan's conditional discharge is limited to whether the court abused its discretion.³ Conditional discharge is a privilege and subject to revocation if the court finds that the defendant violated the conditions of his discharge.⁴ Although the revocation process requires that minimum due process requirements be met, KRS 533.050(2) provides that the court may revoke a conditional discharge after written notice of the grounds for the revocation has been given and following a hearing where the defendant is represented by counsel.

³ Tiryung v. Commonwealth, 717 S.W.2d 503, 504 (Ky.App. 1986).

⁴ Id.

Nolan was given notice of the hearing and was represented by counsel. He had the opportunity to, and did, present evidence on his own behalf. His complaint that due process requires he be provided the means to comply with the conditions of his discharge is unpersuasive. Although admittedly difficult for many on conditional discharge status, there was nothing done by the Commonwealth or the halfway house that prevented Nolan from successfully completing the conditions of his discharge. His physical inability to obtain transportation or suitable housing was a product of the circumstances he created by the commission of his crime.

The record is clear that at his sentencing and at subsequent hearings, Nolan was informed that he must comply with the conditions of his probation. There is no merit to his contention that he was unaware he must pay for, and complete, a sex offender treatment program.

ALL CONCUR.

BRIEF FOR APPELLANT:

Julia K. Pearson
Assistant Public Advocate
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

George G. Seelig
Assistant Attorney General
Frankfort, Kentucky