

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-001781-MR

JOSHUA E. COMBS

APPELLANT

v. APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE JANET P. COLEMAN, JUDGE
INDICTMENT NO. 00-CR-00381

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
VACATING AND REMANDING

** ** * * *

BEFORE: BARBER, KNOPF, AND MINTON, JUDGES.

MINTON, JUDGE: Joshua Combs challenges on appeal the revocation of his probation. Because the trial court's revocation order failed to make the requisite written factual findings concerning the conditions of release that Combs violated, we must vacate and remand.

Under the terms of a plea bargain agreement, Combs pled guilty to attempt to commit kidnapping and complicity to commit theft by unlawful taking of property valued over \$300. Again, accepting the terms of the plea agreement, the trial

court imposed consecutive sentences of confinement totaling 12 years. But in lieu of 12 years' confinement, the trial court imposed the creative sort of split sentence called for in the plea agreement. As stated in the amended judgment, Combs was sentenced "for a total of Twelve (12) years, Two (2) years[] to serve, and Ten (10) years[] probated" The amended judgment contains no statement of the period of probation or the conditions of release. But page three of the original judgment states that Combs's probation was subject to several conditions of release, including one that he "[n]ot commit another offense[.]" Based on our review of Combs's sentencing hearing, Combs was not orally informed of the conditions of his probation as they are stated in the original judgment. Furthermore, Combs was not required to sign the judgment to confirm that he had read and understood the conditions of release. And the distribution list of the original and amended judgments reflects that the clerk of the court sent a copy to Combs's attorney, but not to Combs.

Apparently, Combs was released from prison a year later, in October 2003. In April 2005, the trial court ordered that a warrant be issued for him for his having received six misdemeanor convictions and for his having been indicted on a felony charge of possession of a controlled substance. At a

preliminary conference, Combs stipulated receiving the misdemeanor convictions and felony indictment.

Eventually, the trial court conducted a revocation hearing. At the close of the hearing, the trial court stated that she would not revoke Combs's probation for his admitted failure to report to his probation officer because there was insufficient evidence to show that Combs was told that his probation was conditioned upon his reporting to a probation officer. Instead, the trial court announced that she was revoking Combs's probation because of the misdemeanor convictions and the felony indictment. Unfortunately, the trial court's revocation order contains no written factual findings. Instead, the order states only that "the Court finds that the [Defendant] has violated his/her terms of probation[.]" Combs has appealed from this order.

Combs contends that the trial court erred by revoking his probation because he did not receive proper notice of the terms of his probation. Combs further contends that the trial court erred by not making explicit written findings as to the reasons it revoked his probation. We may not address the merits of Combs's argument regarding whether he received notice that the terms of his probation precluded him from committing another offense, however, because we agree with Combs that the order

revoking his probation must be vacated because the trial court failed to make written findings.

The United States Supreme Court set out the minimum due process rights for parole revocation proceedings in Morrisey v. Brewer.¹ These were later held to be equally applicable to probation revocation proceedings in Gagnon v. Scarpelli.² Among the specifically enumerated minimum due process requirements are written notice of the claimed violations of probation and a written statement by the fact-finder of the evidence relied on and reasons for revoking probation.³ In the context of revocation hearings, we have held that written “[f]indings are a prerequisite to any unfavorable decision and are a minimal requirement of due process of law.”⁴

Here the trial court’s order states only that Combs’s probation was revoked because he violated the conditions of his probation. The particular conditions Combs allegedly violated are not identified in the order, nor does the order contain any findings detailing the evidence relied upon by the court. Simply put, the order revoking Combs’s probation does not meet the Gagnon standard. This means for us that the revocation

¹ 408 U.S. 471 (1972).

² 411 U.S. 778 (1973).

³ *Id.* at 786 (quoting Morrisey, 408 U.S. at 489).

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

order must be vacated, and this matter must be remanded to the trial court.⁵

On remand, if the trial court still believes that revocation is proper, it may again revoke Combs's probation, provided that it first makes the requisite written findings. At this juncture, however, we may not address the merits of Combs's argument that he did not receive proper notice of the terms of his probation because the resolution of that argument will necessarily entail the making of factual findings, which may only be done by the trial court.

For the foregoing reasons, the order of the Hardin Circuit Court revoking Joshua Combs's probation is vacated; and the matter is remanded for further proceedings consistent with this opinion.

ALL CONCUR.

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⁵ *Id.*