

RENDERED: JANUARY 12, 2007; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2005-CA-002335-MR

TIMOTHY MAINOUS

APPELLANT

v. APPEAL FROM BALLARD CIRCUIT COURT
HONORABLE WILLIAM L. SHADOAN, JUDGE
ACTION NO. 97-CR-00020

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: BARBER¹ AND DIXON, JUDGES; PAISLEY,² SENIOR JUDGE.

PAISLEY, SENIOR JUDGE: This is an appeal from a judgment of the Ballard Circuit Court which revoked Timothy Mainous's probation and ordered that he serve twelve months in the Ballard County Jail. Mainous contends that the court erred when it failed to consider less severe alternatives to revocation. We affirm.

¹ Judge David A. Barber concurred in this opinion prior to the expiration of his term of office on December 31, 2006. Release of the opinion was delayed by administrative handling.

² 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.

Mainous pleaded guilty to one count of possession of marijuana and one count of possession of drug paraphernalia, second offense, with the understanding that the Commonwealth would confirm whether the paraphernalia charge was his first or second offense. He was sentenced to five years on the drug paraphernalia conviction and twelve months for the possession offense and both sentences were probated for a period of five years. As conditions of his probation, Mainous was ordered to refrain from committing another offense and submit to random drug tests. On January 21, 2005, upon the Commonwealth's motion, the drug paraphernalia conviction was amended to a first offense and the sentence was amended to twelve months, probated for a period of two years.

On January 25, 2005, Mainous's probation officer filed a special supervision report stating that Mainous had admitted to marijuana use on December 31, 2004, and a bench warrant was issued. At the revocation hearing, it was further demonstrated that Mainous had failed drug screenings on July 28, 2005, January 12, 2005, and May 12, 2005. Mainous argued, however, that although in the past he had self-medicated with marijuana, he was now under a physician's care and that his prescribed medications controlled his schizophrenia. Thus, he pleaded for a less severe penalty than a probation revocation and execution of the previously imposed sentence.

Mainous's argument is that the court erred when it did not consider an alternative form of punishment less onerous than confinement in the county jail. The record establishes that the circuit court heard the evidence, gave consideration to Mainous's plea for a more lenient penalty, made the written finding that he had violated the terms of his probation and ordered that the sentence be executed. Mainous was afforded adequate due process. *Rasdon v. Commonwealth*, 701 S.W.2d 716, 718 (Ky.App. 1986). The only question that remains, therefore, is whether the circuit court's decision to impose the twelve month sentence of confinement was an abuse of its discretion. *Ridley v. Commonwealth*, 287 S.W.2d 156, 158 (Ky. 1956).

That question is easily answered. Once it is determined that the conditions of probation are violated, it is within the circuit court's discretion to decide whether or not to revoke the probation. If the probation is revoked, the court has the authority to order that the sentence previously imposed be executed. See *Commonwealth v. Tiryung*, 709 S.W.2d 454 (Ky. 1986).

The judgment revoking Mainous's probation and ordering him to serve twelve months in the Ballard County Jail is affirmed.

ALL CONCUR.

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