

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000974-MR

TOMMY SUMSER

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE STEPHEN K. MERSHON, JUDGE
ACTION NOS. 02-CR-002378, 03-CR-001001 & 04-CR-000596

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: COMBS, CHIEF JUDGE; ACREE AND TAYLOR, JUDGES.

ACREE, JUDGE: Tommy Sumser appeals from an order of the Jefferson Circuit Court revoking his shock probation. Sumser argues the trial court's order was arbitrary and that he was entitled to a truly adversarial hearing with reliable evidence to establish he violated the terms of his probation. Having reviewed the facts and the law governing his claims, we disagree and affirm the trial court.

Sumser was originally charged in three felony indictments in 2002, 2003, and 2004. He entered into a plea agreement with the Commonwealth for a sentencing

recommendation totaling seven years and the Commonwealth's promise not to oppose shock probation, provided Sumser filed the motion at least ninety days after his sentencing. Sumser sought shock probation three months after he was sentenced and the Commonwealth, true to its word, did not oppose the motion. After a hearing, the trial court granted his request on June 15, 2004. Less than a year later, the Commonwealth moved for probation revocation based on a special supervision report from Stephen Ross, Sumser's probation officer. Ross reported that Sumser failed to pay court costs, supervision fees, and restitution. In addition, Sumser did not report to Ross as directed on two occasions, left the state without permission, was arrested on unrelated felony charges, and failed to report that arrest.

Sumser was taken into custody. His first probation revocation hearing was held on July 11, 2005. Probation Officer Ross could not be present as he had been deployed to Iraq. The Commonwealth further advised the trial court that the grand jury had returned a no true bill on Sumser's new charges. The Commonwealth requested a relatively short continuance in order to secure the attendance of another probation officer from the LaGrange office. The trial judge decided to continue the hearing for a more lengthy period to allow Sumser to redeem himself. The judge questioned Sumser's failure to obtain a GED as ordered by the terms of his probation agreement. Sumser informed the court that he planned to move in with his sister in Louisville upon his release from jail. The trial court continued the hearing for two months, told Sumser to stay out of

trouble, and entered a new written order regarding the current circumstances of his probation.

A month after the hearing, Sumser was arrested once again. The Commonwealth filed another motion to revoke his probation. Probation Officer Ross, who had returned from Iraq, filed a special supervision report stating that Sumser failed to report to his office and had been arrested in Indiana while driving a stolen car. He attached a copy of an Indiana State Police Report containing details of Sumser's arrest.

When the revocation hearing which had been continued was held on September 21, 2005, Sumser was unable to attend because he was in jail in Indiana. The Commonwealth brought probation officers from both LaGrange and Louisville to the hearing and asked the trial court to revoke Sumser's probation. His defense counsel objected to holding a hearing in his absence, arguing he had the right to be present to explain his actions and informing the trial court that she had been unable to speak with him since his arrest in Indiana. The judge stated that Sumser's presence in an Indiana jail was sufficient cause to revoke his probation. Over counsel's objection, the trial court revoked Sumser's probation, but stated that the matter could be re-docketed after counsel spoke with Sumser. No appeal was taken from this order.

Sumser appeared before the trial court five months later and asked for a hearing. Despite the Commonwealth's opposition, the trial court granted a hearing because it had not previously entered written findings supporting its September 2005 order revoking Sumser's probation. This final hearing was held April 6, 2006. Sumser

complained that there were no probation officers present to cross-examine; however, he failed to dispute the contents of Ross's report. Instead, Sumser's counsel informed the trial court that he had pleaded guilty to a misdemeanor in Indiana and was sentenced to time served. The trial court found Sumser had violated his probation requirements by his failure to report, by leaving the state without permission, by being arrested for auto theft, and by avoiding probation supervision. Consequently, Sumser's probation was revoked. This appeal followed.

On appeal of a probation revocation, “[o]ur review is limited to a determination of whether, after a hearing, the trial court abused its discretion in revoking [probation].” *Tiryung v. Commonwealth*, 717 S.W.2d 503, 504 (Ky.App. 1986). Sumser first argues his probation revocation hearing was arbitrary. He asserts that he was entitled to a true adversary proceeding with reliable evidence. Thirty years ago, this court adopted criteria set forth by the United States Supreme Court to define the minimum due process requirements for probation revocation hearings. *Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972); *Gagnon v. Scarpelli*, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973). In *Murphy v. Commonwealth*, 551 S.W.2d 838, 840 (Ky.App. 1977), we enumerated six requirements for due process in probation revocation hearings:

- (1) a written notice of the claimed violations of parole are served,
- (2) a disclosure of the evidence to be used is made,
- (3) an opportunity is granted to be heard in person, present witnesses and documentary evidence,
- (4) confrontation and cross-examination of witnesses is afforded (unless a specific finding for good cause is made to the contrary),
- (5) a neutral and detached hearing body conducts the procedure and
- (6) a

written statement is made by the fact finder(s) as to the evidence relied on and the reasons for revoking [probation].

Sumser contends he did not receive due process because he had no opportunity to cross-examine Probation Officer Ross about the contents of his supervision reports. At the April 2006 revocation hearing, Sumser stated that he told his probation officer he was going to Indiana. However, Ross's report actually stated that Sumser did not have permission to leave the state. Whether or not Sumser informed Ross of his travel plans is irrelevant. We have previously considered the issue of whether *Murphy* requires in-person testimony and have decided “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.” *Marshall v. Commonwealth*, 638 S.W.2d 288, 289 (Ky.App. 1982). Further, Kentucky Rule of Evidence 1101(d)(5) exempts probation revocation hearings from compliance with the rules. Thus, things which might normally be considered inadmissible as hearsay are permitted as evidence in a probation revocation hearing.

The trial court correctly pointed out at the hearing that Sumser admitted to being incarcerated in Indiana when he was supposed to appear for a previous hearing. His presence in Indiana without permission from his probation officer violated the terms of his probation and was sufficient grounds to revoke probation. “[W]hether the trial court revoked upon one violation or [more] is of no consequence to the appellant so long as the evidence supports at least one violation.” *Messer v. Commonwealth*, 754 S.W.2d

872. 873 (Ky.App. 1988). We agree with the Commonwealth's comment in its brief that the authority upholding the trial court's decision to revoke Sumser's probation is well-established.

Finally, we note that Sumser attempts to persuade this Court that his personal liberty, guaranteed by the Kentucky Constitution, was impermissibly infringed upon.

As the United States Supreme Court has noted, “[r]evocation [of probation] deprives an individual, not of the absolute liberty to which every citizen is entitled, but only of the conditional liberty properly dependent on observance of special . . . restrictions.”

Robinson v. Commonwealth, 86 S.W.3d 54, 46 (Ky.App. 2002), quoting *Morrissey*, 408 U.S. at 480 (1972). Sumser cites no persuasive law, either in our statutes or our caselaw, in support of his position. Consequently, we perceive no arbitrariness on the part of the trial court in revoking his probation.

For the foregoing reasons, the judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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