

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001699-MR

DAVID L. BAKER

APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE W. DOUGLAS KEMPER, JUDGE
ACTION NO. 04-CR-001862

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION AFFIRMING

** ** *

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

COMBS, CHIEF JUDGE: David L. Baker appeals from an order of the Jefferson Circuit Court that revoked his shock probation. After our review, we affirm.

On June 17, 2004, the Commonwealth filed an information against Baker in the Jefferson Circuit Court charging him with one count of illegal possession of a controlled substance in the first degree (cocaine), a Class D felony pursuant to Kentucky Revised Statutes (KRS) 218A.1415. On the same day, Baker accepted a plea offer from the Commonwealth and filed a motion to enter a guilty plea. As part of its offer, the

Commonwealth agreed to recommend a one-year sentence of imprisonment or a three-year sentence if the trial court decided to probate the sentence; the Commonwealth agreed to leave the question of probation fully within the discretion of the court. In accordance with the offer and Baker's motion, the trial court entered a judgment on August 23, 2004, finding Baker guilty of the charged offense and sentencing him to three-years' imprisonment; however, the court suspended execution of the sentence and placed him on probation for five years.

On December 15, 2004, the Commonwealth filed a motion to revoke Baker's probation. In support of its motion, the Commonwealth alleged that Baker had committed the following probation violations: (1) use of a controlled substance (cocaine); (2) use of a controlled substance (marijuana); (3) failure to comply with treatment program for substance abuse; (4) absconding from probation supervision; (5) failure to pay a supervision fee as directed; (6) failure to maintain full-time employment; (7) possession of a knife; and (8) associating with a convicted felon. A hearing was held on March 22, 2005, in which Baker stipulated that he had violated the conditions of his probation. Baker's probation was consequently revoked in an order entered on March 23, 2005, and he was remanded to the custody of the Department of Corrections to serve out his original three-year sentence.

On June 6, 2005, Baker, *pro se*, filed a motion for shock probation. Following a hearing, the trial court granted the motion and suspended his sentence for five years in an order entered on August 17, 2005; however, the court imposed a number

of conditions -- including that Baker successfully complete the Jefferson County Drug Court Program.

On October 31, 2005, a bench warrant was issued for Baker's arrest after he failed to appear for Drug Court. The Division of Probation and Parole subsequently issued a report on November 21, 2005, which indicated that Baker had again absconded from supervision and reciting the following grounds in support of its recommendation that his probation again be revoked: (1) use of alcohol; (2) use of cocaine; (3) use of marijuana; (4) failure to comply with treatment; (5) a discharge from Drug Court for non-compliance; (6) failure to obtain or maintain employment; and (7) absconding from supervision. The report also noted that Baker had tested positive for marijuana and cocaine on October 19, 2005, and that he had not been seen at Drug Court or otherwise heard from after his counselor told him to report to the Men's Healing Place for detoxification and treatment. On November 30, 2005, the Commonwealth officially filed a notice of its intent to seek to revoke Baker's probation.

Baker was eventually found by a fugitive task force in Des Moines, Iowa, on April 28, 2006. On July 6, 2006, a hearing was held on the Commonwealth's motion to revoke Baker's shock probation, and the trial court granted the motion. The court entered an order on July 12, 2006, reflecting this decision, and Baker was remanded to the custody of the Department of Corrections to serve out the remainder of his sentence. This appeal followed.

The decision as to whether probation should be revoked when the conditions of probation are violated rests firmly within the discretion of the trial court and may be overturned only when the court abuses that discretion. *Tiryung v. Commonwealth*, 717 S.W.2d 503, 504 (Ky.App. 1986). “The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). Baker argues on appeal that the trial court abused its discretion by revoking his shock probation without properly considering whether the circumstances supported revocation of only part of his probated sentence. He contends that trial courts are **required** to consider partial revocation pursuant to the alternative sentencing provisions of KRS 533.010(6), arguing that it is reversible error for a court to fail to do so before revoking a probated sentence in its entirety.

Baker admits, however, that he did not raise this particular argument before the trial court; the record reflects instead that he sought only to have his probation reinstated in full. It is well established that appellants are not permitted to make one argument to a trial judge and a different one to the appellate court. *Kennedy v. Commonwealth*, 544 S.W.2d 219, 222 (Ky. 1976). Thus, Baker’s argument is not preserved for our review. Even if Baker had appropriately presented this contention to the trial court, we are not persuaded that it has merit. There is nothing within the language of KRS 533.010(6) that **mandates** a trial court to consider any of the alternative

sentences contained in the statute before revoking an appellant's probation in full. The statute provides as follows:

[u]pon initial sentencing of a defendant **or upon modification or revocation of probation, when the court deems it in the best interest of the public and the defendant, the court may order probation with the defendant to serve one (1) of the following alternative sentences:**

- (a) To a halfway house for no more than twelve (12) months;
- (b) To home incarceration with or without work release for no more than twelve (12) months;
- (c) To jail for a period not to exceed twelve (12) months with or without work release, community service and other programs as required by the court;
- (d) To a residential treatment program for the abuse of alcohol or controlled substances; or
- (e) To any other specified counseling program, rehabilitation or treatment program, or facility. (Emphasis added).

The plain language of the statute provides that a trial court **may** order a person whose probation is being modified or revoked to serve an alternative sentence. There is nothing to suggest that a court is **required** to give consideration to such an alternative -- particularly in circumstances where there has been no request made to the court that an alternative sentence be considered. “[U]nder general rules of statutory construction, this Court may not interpret a statute at variance with its stated language.” *General Motors Corp. v. Book Chevrolet, Inc.*, 979 S.W.2d 918, 919 (Ky. 1998). We

note that KRS 446.010(20) provides that when the word *may* is used, the provision is permissive – as distinguished from the use of the mandatory *shall*. KRS 446.010(30).

Baker also relies upon KRS 533.020(1) and 533.030(6). We have not discovered any language in those statutes to support his argument that a trial court is obligated to consider partial revocation before revoking probation in full. KRS 533.020(1) sets forth, in part, that a court:

may modify or enlarge the conditions [of probation] or, if the defendant commits an additional offense or violates a condition, revoke the sentence at any time prior to the expiration or termination of the period of probation.

(Emphasis added). KRS 533.060(6) sets forth, in part, that:

[w]hen imposing a sentence of probation or conditional discharge, the court, in addition to conditions imposed under this section, **may** require as a condition of the sentence that the defendant submit to a period of imprisonment in the county jail or to a period of home incarceration at whatever time or intervals, consecutive or nonconsecutive, the court shall determine.

(Emphasis added). Again, there is no requirement that a trial court consider partial revocation or alternative sanctions before revoking probation. On the contrary, the decision as to whether to consider or implement any such alternatives to full revocation rests entirely within the discretion of the court.

We have discovered no abuse of discretion in the court's decision to revoke Baker's probation. Baker was granted probation in lieu of imprisonment – not once, but on **two** separate occasions – with the second award of probation occurring even after he had tested positive for drug use and had absconded from supervision. Baker was given

multiple opportunities to rehabilitate himself and to avoid prison; he failed to take advantage of them. He does not dispute that even after being given a second chance through shock probation, he violated multiple conditions of his parole and once again absconded from supervision after failing to satisfy the requirements of the Drug Court Program. “One 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.” *Tiryung*, 717 S.W.2d at 504.

We conclude that the trial court did not come close to abusing its discretion in holding that Baker’s probation should be revoked and that he should serve out the remainder of his prison sentence. Therefore, we affirm the judgment of the Jefferson Circuit Court.

ALL CONCUR.

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