

Commonwealth of Kentucky
Court of Appeals

NO. 2006-CA-002206-MR

CHRISTOPHER SMITH

APPELLANT

v. APPEAL FROM HENDERSON CIRCUIT COURT
HONORABLE STEPHEN A. HAYDEN, JUDGE
ACTION NO. 03-CR-00067

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
VACATING AND REMANDING

** ** *

BEFORE: MOORE AND STUMBO, JUDGES; ROSENBLUM,¹ SENIOR JUDGE.

ROSENBLUM, SENIOR JUDGE: Christopher Smith appeals from an order of the Henderson Circuit Court revoking his shock probation. Smith contends that due to mental illness he was incapable of appreciating the criminality of the conduct underlying his probation violations (use of marijuana and failure to report to his probation officer), and, accordingly, revocation of his shock probation was improper. For the reasons stated below, we vacate and remand for additional proceedings.

¹ Senior Judge Paul W. Rosenblum sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

FACTUAL AND PROCEDURAL BACKGROUND

On February 4, 2003, Smith was indicted for two counts of first-degree trafficking in a controlled substance (cocaine), and of being a first-degree persistent felony offender. Smith eventually entered into a plea agreement with the Commonwealth providing that he would plead guilty to two counts of first-degree possession of a controlled substance, with the first-degree persistent felony offender charge being dropped. Pursuant to the agreement Smith would receive a sentence of five years' imprisonment on each of the possession charges, to run concurrently. On October 29, 2003, the circuit court entered judgment in accordance with the plea agreement.

On January 24, 2004, Smith filed a motion for shock probation. On January 26, 2004, the circuit court entered an order granting the motion, and Smith was released from incarceration.

On September 27, 2004, Smith's probation officer filed an Affidavit to Revoke Probation. The affidavit alleged that Smith had violated his conditions of probation in connection with events occurring in September 2004. During this time Smith was arrested for, among other things, two counts of disorderly conduct, third-degree criminal mischief, giving a false name or address, and operating on a suspended or revoked operator's license. The police report stated that Smith was intoxicated at the time of his arrest. Also during this time Smith was cited for several traffic violations. The

probation officer's affidavit stated that Smith had violated the conditions of his probation by using alcoholic beverages and committing criminal violations.

On October 5, 2004, the circuit court entered an order continuing the revocation proceedings to provide Smith with the opportunity to undergo a voluntary admission to Western State Hospital. On November 4, 2004, the circuit court entered an amended shock probation order which set forth conditions of probation relating to his ongoing need for mental health care. The order required him to keep all appointments with his mental health care providers, required him to follow all directions of his mental health care providers as to medication and after care, required him to refrain from drinking alcoholic beverages and nonprescribed illegal drugs, and required him to refrain from committing criminal violations.

On June 22, 2005, Smith's probation officer again filed an Affidavit to Revoke Probation. The affidavit alleged that Smith had violated his probation by failing to report to his probation officer, and by using marijuana. According to the affidavit, Smith was required to report to his probation officer twice monthly and had last reported on April 20, 2005. The affidavit further stated that Smith had tested positive for marijuana use on January 19, 2005, and April 6, 2005, and that Smith had admitted to having used the illegal substance on or about December 31, 2004, and March 26, 2005.

In response to the revocation effort, Smith's competency was raised as an issue, and on February 24, 2006, the circuit court entered an agreed order for Smith to undergo a competency evaluation at the Kentucky Correctional Psychiatric Center

(KCPC). KCPC issued its competency report on June 13, 2006. The report stated, in summary, that “Mr. Smith is competent to proceed in a revocation hearing[,]” but that “Mr. Smith has substantial grounds to argue that he should not be held responsible for the alleged [probation] violations.”

A probation revocation hearing was held on July 24, 2006. At the hearing Dr. Free testified that in his opinion, because of mental illness, Smith was not criminally responsible for his conduct during the period that he committed his probation violations.

On September 28, 2006, the circuit court entered an order finding Smith competent to have assisted in his defense in challenging the violations in the revocation proceedings. The order also stated “that there is no evidence to find the Defendant was prevented from comprehending the nature of the law or conforming his behavior to it.” On the same day the circuit court entered an order revoking Smith's probation based upon his failure to report to his probation officer and his admitted use of marijuana. This appeal followed.

DISCUSSION

Before us, Smith does not contend that he did not engage in the probation violations underlying the revocation proceedings or that he was not competent to participate in the probation revocation proceedings. Rather, Smith contends that the circuit court erred in revoking his probation as the evidence presented in Dr. Free's report and at the revocation hearing established that he was not criminally responsible for the conduct underlying the violations because he suffered from a mental illness at the time of

the conduct. Smith alleges that because he was not criminally responsible for his probation violations, those violations cannot be used to revoke his probation.

A probationer is not entitled to the full panoply of due process rights required for criminal prosecutions. *Marshall v. Commonwealth*, 638 S.W.2d 288, 289 (Ky.App. 1982). The United States Supreme Court set out the minimum due process rights for parole revocation proceedings in *Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972). These rights were subsequently held to be equally applicable to probation revocation proceedings. *Gagnon v. Scarpelli*, 411 U.S. 778, 782, 93 S.Ct. 1756, 1759-60, 36 L.Ed.2d 656 (1973). Those minimum due process requirements are:

(a) written notice of the claimed violations of (probation or) parole; (b) disclosure to the (probationer or) parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a “neutral and detached” hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking (probation or) parole.

Gagnon, 411 U.S. at 786, 93 S.Ct. at 1761-62, quoting from *Morrissey*, 408 U.S. at 489, 92 S.Ct. at 2604.

Further “[i]t is clear in this Commonwealth that probation is a privilege rather than a right.” *Brown v. Commonwealth*, 564 S.W.2d 21 (Ky.App. 1977).

“Kentucky courts have repeatedly held that there is no constitutional right to [probation

or] parole, but rather [they are] matter[s] of legislative grace or executive clemency.”

Land v. Commonwealth, 986 S.W.2d 440, 442 (Ky. 1999); *Tiryung v. Commonwealth*, 717 S.W.2d 503 (Ky.App. 1986).

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. KRS 533.030; *United States v. Markovich*, 348 F.2d 238 (2nd Cir. 1965). It is not necessary that the Commonwealth obtain a conviction in order to accomplish revocation of probation. *Tiryung*, 717 S.W.2d at 504.

Our review is limited to a determination of whether, after a hearing, the trial court abused its discretion in revoking the appellant's parole. *Id.* 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).

COMPETENCY TO PARTICIPATE IN REVOCATION PROCEEDINGS

The issue of competency is a question of fact. *Harston v. Commonwealth*, 638 S.W.2d 700, 701 (Ky. 1982). As such, we will not disturb the circuit court's finding of competency unless is clearly erroneous. CR 52.01 (“Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.”) Furthermore, findings of fact are not clearly erroneous if supported by substantial evidence. *Black Motor Co. v. Greene*, 385 S.W.2d 954, 956 (Ky. 1965). The test for substantiality of evidence is whether when

taken alone, or in the light of all the evidence, it has sufficient probative value to induce conviction in the minds of reasonable people. *Janakakis-Kostun v. Janakakis*, 6 S.W.3d 843, 852 (Ky. 1999). Here, the trial court's determination that Smith was competent to participate in the probation revocation proceedings was not clearly erroneous. Dr. Free's report fully supports this conclusion.

CRIMINAL RESPONSIBILITY

In support of his argument that he was not criminally responsible for the conduct underlying his probation violations, Smith relies principally upon KRS 504.020, which provides, in relevant part, as follows:

(1) A person is not responsible for criminal conduct if at the time of such conduct, as a result of mental illness² or retardation, he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law.

. . . .

(3) A defendant may prove mental illness or retardation, as used in this section, in exculpation of criminal conduct.

As noted above, in its September 28, 2006, order the circuit court made a finding that “there is **no evidence** to find the Defendant was prevented from comprehending the nature of the law or conforming his behavior to it.” (Emphasis added). This finding was clearly erroneous. As further noted below, Dr. Free presented

² KRS 504.060(6) defines “mental illness” as “substantially impaired capacity to use self-control, judgment, or discretion in the conduct of one's affairs and social relations, associated with maladaptive behavior or recognized emotional symptoms where impaired capacity, maladaptive behavior, or emotional symptoms can be related to physiological, psychological, or social factors[.]”

extensive evidence during the proceedings that Smith suffered from a mental illness at the time he committed his probation violations and, accordingly, was not criminally responsible for the violations.

Dr. Free's June 13, 2006, report states, in part, as follows:

CRIMINAL RESPONSIBILITY

Presuming that the standard for assessing a person's ability to bear responsibility for violations of probation is the same as that for criminal responsibility generally, as noted previously, the evaluator believes that a diagnosis of mental retardation would be incorrect in Mr. Smith's case, as his limited cognitive abilities are at least in part the result of his mental illness. Also as noted, although the results of psychological testing could not exclude the possibility of an organic impairment or brain damage in Mr. Smith, the results of medical examination and medical testing were to the contrary and it is not believed that he suffers from such difficulties.

The results of the total evaluation at KCPC, however, suggest that Mr. Smith does suffer from a serious mental illness, believed to be schizophrenia, paranoid type. This is a "mental illness" within the meaning of the statute, and one that has the potential to so impair a person's contact with reality and ability to think clearly as to render him or her unable to recognize the criminality of conduct or to resist conduct known to be criminal. It is the evaluator's opinion that this is what has happened in Mr. Smith's case. . . . In the present case, however, to the extent that Mr. Smith's behavior was the product of chemical intoxication, the consumption of those chemicals would have been a violation of his probation and his ability to recognize that such conduct would be a violation of his probation, and if he did recognize that such conduct would be a violation, his ability to resist committing those violations, would not have been seriously impacted by his underlying mental illness. **It is the evaluator's opinion that Mr. Smith has substantial grounds to argue that he should not be responsible for the alleged violations.** (Emphasis added).

Further, at the probation revocation hearing, the following exchange occurred between defense counsel and Dr. Free:

Defense Counsel: I think you stated in your report that at the time of the drug screens Chris was not criminally responsible. Is that correct?

Dr. Free: Yes

Defense Counsel: And that would also encompass the time period when he failed to report?

Dr. Free: Yes.

Thus the trial court's determination that there was “**no** evidence” to support Smith's assertion that he was not criminally responsible for his probation violations was clearly erroneous. Dr. Free presented extensive evidence during the proceedings that Smith suffered from a mental illness at the time he committed his probation violations and, accordingly, was not criminally responsible for the violations. As it appears that the circuit court may have overlooked the rather extensive evidence provided by Dr. Free that Smith suffered from a mental illness at the time he committed his probation violations, we are constrained to remand the cause for a reevaluation of the evidence, and for additional findings on the issue of Smith's criminal responsibility at the time he committed his probation violations. The findings should include specific reasons for its determination of Smith's criminal responsibility, or lack thereof.

If the circuit court again determines that Smith was criminally responsible for his probation violations, it should again exercise its discretion in determining whether to revoke the appellant's probation.

If, however, the court determines that Smith was not criminally responsible for his probation violations, it should consider whether the lack of criminal responsibility, under the circumstances of this case, is a defense to his probation violations, is not a defense to his probation violations, or is simply a mitigating factor to be considered in the revocation determination, and issue a revocation determination accordingly.³

CONCLUSION

For the foregoing reasons the judgment of the Henderson Circuit Court is vacated and remanded for additional proceedings consistent with this decision.

ALL CONCUR.

³ We note that there is a split among the jurisdictions which have decided the issue of whether lack of criminal responsibility is a defense probation revocation proceedings. Three approaches are used: that lack of criminal responsibility is not a defense, that lack of criminal responsibility is a defense, and that lack of criminal responsibility is a mitigating factor to consider in the revocation decision. *See Probation Revocation: Insanity as Defense*, 56 A.L.R.4th 1178 . Kentucky has not squarely decided the issue. Because the parties have not briefed or otherwise addressed the matter, we decline to decide the issue upon this appeal, and foresee that the parties and the trial court will address the issue in full upon remand as applicable to the circumstances of this case.

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