

# Commonwealth of Kentucky

## Court of Appeals

NO. 2006-CA-002549-MR

JEFFERY KISER

APPELLANT

v.

APPEAL FROM LEWIS CIRCUIT COURT  
HONORABLE LEWIS D. NICHOLLS, JUDGE  
ACTION NO. 03-CR-00008

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: COMBS, CHIEF JUDGE; DIXON, JUDGE; KNOPF,<sup>1</sup> SENIOR JUDGE.

COMBS, CHIEF JUDGE: Jeffery Allen Kiser appeals from a judgment of the Lewis Circuit Court that revoked his probation and reinstated a five-year prison sentence for his conviction of first-degree sexual abuse. After our review, we affirm.

On March 7, 2003, the Lewis County Grand Jury indicted Kiser on one count of first-degree sodomy, a Class A felony pursuant to Kentucky Revised Statutes (KRS) 510.070. The indictment alleged that Kiser had engaged in deviate sexual

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<sup>1</sup> Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

intercourse with a child who was under the age of 12. On December 1, 2003, Kiser filed a motion to enter an *Alford*<sup>2</sup> plea of guilty to an amended charge of first-degree sexual abuse. The trial court accepted his guilty plea on May 21, 2004, and sentenced him to five-years' imprisonment. This sentence, however, was probated for a period of five years. As part of his probation, Kiser was ordered to complete a sex offender treatment program.

On May 23, 2005, the Division of Probation and Parole filed a "special supervision report" to advise the trial court that Kiser had shown a lack of progress in the sex offender treatment program. According to Brenda Hatton, Kiser's treatment clinician, Kiser had made "virtually no progress after participating in the program for nearly one year." She gave him a rating of "unsatisfactory" in the following categories: "verbal participation in group," "actively assists and confronts other group members," "applies principles of relapse prevention treatment to self and lifestyle," and "has successfully completed a therapy task in the last ninety days." Hatton requested that Kiser's case be docketed for review by the trial court in an effort to motivate him.

On June 3, 2005, a hearing was held regarding the special supervision report. At the hearing, Hatton told the trial court that although Kiser had been in the sex offender treatment program for more than a year, he had made "very, very limited" progress. Kiser's attorney told the court that Kiser suffered from depression as a possible explanation for his unsuccessful participation in the program. He asked the court to give Kiser a chance to be treated for depression and to be placed on anti-depressant

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<sup>2</sup> *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970).

medication. The court refrained from making a revocation decision at that point and scheduled another hearing.

On August 19, 2005, the court received an update on Kiser's progress. Hatton reported that Kiser was doing better and that although he had a long way to go, his treatment providers were satisfied with his improvement. Kiser told the court that he wanted to continue with his treatment. In light of Kiser's progress, the court ruled that it would not revoke his probation at that time.

Kiser was terminated and discharged from the sex offender treatment program on March 6, 2006. The termination summary report documenting his discharge recited that he had failed to participate sufficiently in group therapy sessions, that he had failed to complete a requisite "therapy task" within the allotted time limit, that he had previously been placed on probation on two occasions, that he had failed to bring a partner for the program's "partner groups" session on two occasions, and that he had failed to voluntarily disclose to staff or in-group that he was involved in a relationship with an adult woman who had two children. The report further provided that Kiser scored in the moderate-to-high risk category for sexual recidivism on the "Static 99" risk assessment test.

On March 8, 2006, a warrant was issued for Kiser's arrest on the ground that he had violated the terms of his probation. Kiser appeared before the court for a hearing on April 21, 2006. At this hearing, Kiser's attorney asked that Kiser be sent to the Kentucky Correctional Psychiatric Center (KCPC) for a psychiatric examination. Along with this request, his counsel filed a written motion asking that Kiser be evaluated in accordance with KRS 504.060 and 504.070 to determine whether he met "the criteria

for competency and criminal liability,” including specific findings as to insanity. His attorney again argued that Kiser’s depression was adversely affecting his ability to comprehend and to follow instructions successfully and to take other necessary steps to complete the sex offender treatment program successfully. The Commonwealth agreed with this proposal, and Kiser subsequently was sent to the KCPC for evaluation.

On October 6, 2006, the trial court held a competency hearing. It heard testimony from Dr. Richard Johnson, the KCPC psychologist who had examined Kiser. Dr. Johnson had also prepared an evaluation report setting forth his findings and conclusions as to the questions of Kiser’s “competency to stand trial and whether he was criminally responsible at the time of the alleged probation violation.” Dr. Johnson testified that Kiser was prescribed Zoloft and Wellbutrin while at the KCPC because he exhibited signs of “anxiety and some mild depression.” Kiser had previously been prescribed Paxil, but he had not taken it for some time because he did not believe that it was helping his depression and because it made him tired. Dr. Johnson believed that the two new drugs had helped Kiser become more active and more socially interactive. However, since he did not believe that Kiser had been very deficient in these categories, he did not find the improvement to be especially significant.

Dr. Johnson also reported that Kiser did not suffer from any “psychosis, thought disorder, or mania.” He testified that Kiser was diagnosed with “mild to moderate depression” even after being on the Zoloft and Wellbutrin regime and that he suffered from anxiety and depressive disorder; however, he believed that the drugs would help with Kiser’s anxiety in group settings.

Dr. Johnson also reported that Kiser tested within the average range for intelligence and that his reading ability ranked between eighth and ninth grade. He indicated that Kiser demonstrated an understanding of why he had been discharged from the sex offender treatment program and that he comprehended the nature of his deficiencies in that respect. Johnson ultimately concluded that Kiser was competent to stand trial because he had a basic understanding of the nature and the consequences of the proceedings against him and because he demonstrated the capability to participate rationally and cooperatively in his own defense. Johnson concluded that there was no evidence to support a defense of legal insanity.

A probation revocation hearing was conducted on November 17, 2006, in which testimony was received from all parties. At the conclusion of this hearing, the trial court revoked Kiser's probation and made the following oral findings: that Kiser had submitted to the sex offender treatment program but that he had not fully participated in group therapy, that he had dated a woman who had children without reporting that relationship, that he had admitted to sexually abusing a minor but would not give sufficient details to therapists to facilitate adequate treatment, that he had failed to bring a partner to therapy sessions as was required, that he had been discharged from the sex offender treatment program and would not be re-admitted, and that he was a danger to the public and to children if he remained untreated. The court also noted that Kiser was prescribed drugs at KCPC that stabilized his anxiety and depression. It specifically emphasized that it was not revoking Kiser's probation because of his difficulty in obtaining steady employment, acknowledging that convicted sex offenders frequently encounter such a problem.

On December 1, 2006, the court entered an order officially revoking Kiser's probation. The order provided that Kiser "had not successfully completed the requirements of the sex offender treatment program and has not demonstrated his willingness to do so." The order further provided that Kiser had been dismissed from the sex offender treatment program. Consequently, Kiser was remanded to the custody of the Department of Corrections and ordered to serve out the remainder of his original five-year sentence. This appeal followed.

Our review of a trial court's probation revocation decision is limited to determining whether the court abused its discretion. *Dunson v. Commonwealth*, 57 S.W.3d 847, 848 (Ky.App. 2001). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000); *see also Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

Kiser argues on appeal that the trial court's decision to revoke his probation was completely arbitrary in light of his fragile mental health status. In support of this contention, he cites to a pre-conviction psychological report which found that he suffered from depression, low cognitive functioning, and attention deficit disorder (ADD). The ADD causes him to have difficulty paying attention and results in his being easily distracted, fidgety, and restless. Kiser contends that the trial court particularly erred in failing to take his ADD into account because it directly affected his ability to adequately participate in the sex offender treatment program. Kiser also refers to Dr. Johnson's conclusions that he suffered from anxiety and depression as support for his contentions that he experienced social anxiety when speaking in front of a group. Thus, he believes

that the sex offender treatment program failed to address his need for mental health treatment. He also argues that Dr. Johnson's report emphasizes that he needed a stronger antidepressant medication than the one that he was taking when he was discharged from the sex offender treatment program. He claims that the trial court erred in failing to consider all of these mental health factors.

Evidence was presented to support both continuing and revoking Kiser's probation. However, since ample evidence was presented to support the decision to revoke, we cannot say that the court abused its discretion. As Kiser acknowledges, the trial court had full access to all of the pertinent reports and records and was fully aware of their information and recommendations. Dr. Johnson's report noted that there were indications that Kiser did not cope well with stress and that he experienced both anxiety and depression, observing that "[i]t is reasonable to accept Mr. Kiser's statement that he experienced some social anxiety in talking in front of a group." Nonetheless, he then added: "However, that level of discomfort should not have risen to the level of his being unable to participate in the treatment program." Accordingly, the trial court was presented with evidence that Kiser's level of anxiety and depression should not have been so debilitating as to preclude his ability to participate in sex offender group therapy.

Twice he was placed on probation within the program; he had previously been brought before the trial court in an effort to motivate him to take his treatment seriously. He displayed deficiencies in areas that did not involve group therapy: the failure to report that he had been dating a woman who had children and the failure to bring a partner to sessions on two separate occasions when such was required. He unilaterally stopped taking anti-depressant medication even though he had been showing

improvement in his progress while on the drug. Ultimately, Kiser's treatment providers became so dissatisfied by how he was approaching his treatment that he was discharged from the sex offender treatment program altogether; they also expressed a clear desire that he not return. Prior to the revocation of his probation, Kiser received multiple opportunities to comply with the requests of his treatment providers and to make progress in the sex offender treatment program. KRS 532.045(6) provides that "[f]ailure to successfully complete the sexual offender treatment program constitutes grounds for the revocation of probation or conditional discharge." In light of the facts, we cannot conclude that the trial court abused its discretion in revoking Kiser's probation or that it erred in failing to address his mental health problems.

In the alternative, Kiser asks us to enforce an alleged agreement that he made with the Commonwealth, which he contends provided that:

if he would submit to evaluation and treatment at KCPC, and it were determined that he had a condition that could be treated with the proper or a different psychotropic medication than the one he was currently taking, he would be allowed, upon his return from KCPC, to continue as an outpatient for purposes of his sexual offender treatment program.

The Commonwealth denies that such an agreement ever existed. Although Kiser argues that the record is "unambiguous" as to the existence of this agreement, our review of the record does not support his contention.

Kiser claims that the agreement was entered into at his competency hearing on April 21, 2006. The record does reflect that the parties entered into an agreement at that hearing. However, after reviewing the record, we conclude that the parties agreed – at most – that Kiser would submit to a psychiatric evaluation at the KCPC and that the findings of this evaluation would be considered by the trial court in its decision as to

whether to “re-probate” Kiser. At that hearing, Kiser’s counsel stated that the understanding between the parties was that the findings and recommendations of the KCPC evaluation would be binding **on his client**. The Commonwealth responded by agreeing that this was “a really good plan” because a question existed as to what Kiser “was capable of doing.” We can find nothing in the record to support Kiser’s assertions that the parties reached an agreement at this hearing to allow him to continue as an outpatient in the sexual offender treatment program if it were possible for him to be treated with a different medication.

Kiser also argues that his second attorney advised the court at a hearing on November 3, 2006, that Kiser’s previous counsel “had an agreement with the Commonwealth concerning the outcome of treatment and new medications.” However, after reviewing the record, we have determined that this characterization of counsel’s statements is erroneous. Instead, it appears as if counsel raised a question about whether negotiations had been made toward some unspecified agreement. No explicit reference to treatment or new medications was made. The Commonwealth denied knowledge that such negotiations had taken place, and the trial court noted that it was unaware of such an agreement. Both Kiser and the Commonwealth were represented by different counsel at this November hearing – perhaps accounting for the confusion between the April and November hearings. Nevertheless, we have found nothing in the record to establish that an agreement as alleged and understood by Kiser was ever reached by the parties. Thus, his argument in the alternative is not persuasive.

We affirm the judgment of the Lewis Circuit Court.

ALL CONCUR.

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