

Commonwealth of Kentucky
Court of Appeals

NO. 2007-CA-000156-MR

JOEY KENT SMITH

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE MARTIN F. MCDONALD, JUDGE
ACTION NO. 02-CR-000855-001

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** *

BEFORE: DIXON AND KELLER, JUDGES; GRAVES,¹ SENIOR JUDGE.

KELLER, JUDGE: Joey Kent Smith, proceeding *pro se*, has appealed from the November 20, 2006, order of the Jefferson Circuit Court denying his motion to reinstate his probation. We affirm.

In 2002, Smith, along with co-defendant Shannon Zehner, was indicted by the Jefferson County grand jury on charges of burglary, receiving stolen property, and theft. Smith was also indicted for being a persistent felony offender. Zehner entered a

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

guilty plea later that year, while Smith did so several years later. On April 6, 2005, the circuit court accepted Smith's guilty plea and sentenced him to a probated five-year sentence, subject to several conditions, including good behavior and supervision under Probation and Parole.

Two months later, on June 8, 2005, the Commonwealth moved the circuit court to revoke Smith's probation, relying upon the first of several Special Supervision Reports from Probation and Parole Officer William E. McDonald. This report, dated June 6, 2005, detailed that Smith left Jefferson County without the officer's approval, had been arraigned on charges of operating a motor vehicle on a DUI suspended license, had stolen a vehicle in Hodgenville, Kentucky, and had recently assaulted his girlfriend. A second Special Supervision Report dated June 23, 2005, indicated that the Jefferson County Sheriff's Department had taken Smith into custody on a Larue County arrest warrant for theft. Another report dated July 25, 2005, showed that Smith had been terminated from AAEC (a condition of his probation was to complete any recommended substance abuse treatment) due to his lack of motivation and poor attendance. A fourth report dated August 22, 2005, alleged that Smith had failed to appear in Larue Circuit Court and that he had committed a number of burglaries in and around the Louisville Metro area. Officers were continuing to search for Smith at that time.

On August 22, 2005, the circuit court entered an order finding probable cause to issue an arrest warrant. Smith was eventually arrested in Shelbyville, Kentucky, on September 9, 2005. The Commonwealth filed a second motion to revoke Smith's

probation on September 13, 2005. A fifth Special Supervision Report dated September 14, 2005, indicated that Smith failed to appear in Larue County and failed to report to his Probation and Parole officer. It appears that the revocation hearing was finally held on December 15, 2005,² after it had previously been scheduled for July 7 and then for October 11, 2005. By order entered December 15, 2005, the circuit court found that Smith had violated the terms of his probation. The circuit court then revoked Smith's probation and remanded him to the custody of the Jefferson County Sheriff to begin service of the five-year sentence imposed the previous April. Smith did not appeal this ruling.

In March 2006, Smith filed a *pro se* motion seeking jail time credit for the time he served from April 2002 through October 2004 that was related to a different prison sentence. In support of his motion, Smith noted that a detainer had been lodged against him in relation to the present action, which affected his privileges. Smith also sought another 113 days of credit for time he spent in jail from August 23 through December 15, 2005, while he was awaiting his revocation hearing. Smith was later granted an additional 111 days of credit for time served at various times from 2002 through 2005, including 91 days of credit from September 13 to December 15, 2005. In a letter to Judge McDonald, Smith indicated that he still wanted credit for the time he served from April 2002 through October 2004.

On March 8, 2006, Smith filed another *pro se* motion, this time for reinstatement of his probation pursuant to KRS 439.265, which relates to shock

² The record on appeal does not contain a videotape of the revocation hearing.

probation. He argued that his due process rights were violated by the circuit court's delay in holding the revocation hearing. Finally, Smith filed a motion to proceed *in forma pauperis* (IFP) and for appointment of counsel, which was denied. Smith then filed a motion for reconsideration of the circuit court's denial of IFP status, citing to the motions that were still pending before the circuit court seeking jail time credit and reinstatement of his probation.

On November 20, 2006, the circuit court entered an order ruling on Smith's three pending motions:

This matter is before the Court on the Defendant's Motions for additional jail time credit, for reconsideration of his earlier request to proceed *in forma pauperis*, and to reinstate his probation. For the following reasons, all the Motions must be DENIED.

I. Motion for additional jail time credit.

The Defendant alleges that he should receive jail time credit for the time spent serving out a previous sentence from which he had been paroled prior to his arrest on the charges in this case. A defendant who violates his parole and is incarcerated prior to conviction for charges constituting the parole violation is not entitled to credit for time spent in custody because of parole violations. Mills v. Commonwealth, 723 S.W.2d 859 (Ky.App. 1986).

II. Motion to reinstate his probation.

The Defendant received a sentence of probation in this case on April 5, 2005. In August of 2005, the Defendant was arrested on a bench warrant from this Court due to alleged violations of the conditions of his probation. The Defendant alleges that the only reason his probation was revoked is because he was in Shelby County and did not know he was not permitted to leave Jefferson County while on probation.

This simply overlooks the litany of violations reported by his probation officer. On May 27, 2005, the Department of Probation and Parole reported that the Defendant was charged with operating on a suspended operator's license, no insurance and no registration/plates. On June 13, 2005, the Department reported that there was an arrest warrant on the Defendant from Larue County, Kentucky for Theft by Unlawful Taking over \$300. On July 19, 2005, the Department reported that the Defendant had been terminated from AAEC for lack of motivation and poor attendance. Finally, on September 14, 2005, the Department reported that the Defendant had failed to report to his probation officer as directed.

Clearly, the Court had a number of reasons to revoke the Defendant's probation and the Court will not set aside that revocation.

III. Motion to reconsider denial of *in forma pauperis* status.

In light of the disposition of the pending Motions, the Defendant's Motion for IFP status is moot.

IT IS HEREBY ORDERED that the Defendant's Motions are DENIED.

It is from this order that Smith has taken the present appeal.

On appeal, Smith has raised essentially one issue; namely, whether the circuit court properly denied his motion to reinstate his probation, without appointing counsel or holding an evidentiary hearing, based upon the 113-day delay in holding the revocation hearing. The Commonwealth argues that Smith was not entitled to another hearing following the circuit court's decision to revoke his probation and that the circuit court did not abuse its discretion in either revoking his probation or in denying his motion to reinstate probation.

In support of his argument, Smith first asserts that the circuit court erred in summarily denying his motion to reinstate probation without first appointing counsel or holding an evidentiary hearing. He cites to a plethora of cases involving post-conviction actions pursuant to RCr 11.42 or the entry of guilty pleas. However, we agree with the Commonwealth that Smith was not entitled to another hearing regarding the revocation of his probation, nor was he entitled to the appointment of counsel on this matter. Although the record does not contain a recording of the revocation hearing, it certainly indicates that one was scheduled and Smith even states that a revocation hearing was held. Smith has not pointed to any statute or rule that affords him another evidentiary hearing on what appears to be a request for reconsideration of the circuit court's original order. Accordingly, we perceive no error or abuse of discretion in the circuit court's decision to summarily deny Smith's motion to reinstate probation without the further appointment of counsel or hearing.

Smith next argues that he was deprived of his due process rights based upon the delay in holding the revocation hearing. Specifically, Smith states that, as a result of the delay over the statutory limit of ninety days, he was unable to call alibi witnesses who “would have testified that he was never informed that being in Shelbyville at the time that the house was search [sic] would have reflected upon him to any degree.”

Based upon our review of the applicable law, we agree with the Commonwealth that Smith is relying upon KRS 533.040(3) to argue that the probation revocation hearing must be held within ninety days: “The revocation shall take place

prior to parole under or expiration of the sentence of imprisonment or within ninety (90) days after the grounds for revocation come to the attention of the Department of Corrections, whichever occurs first.” We also note that “[t]he court may not revoke or modify the conditions of a sentence of probation or conditional discharge except after a hearing with the defendant represented by counsel and following a written notice of the grounds for revocation or modification.” KRS 533.050(2). This may be done “[a]t any time before the discharge of the defendant or the termination of the sentence of probation or conditional discharge[.]” KRS 533.050(1).

The Supreme Court of Kentucky addressed the application of KRS 533.040(3) in *Sutherland v. Commonwealth*, 910 S.W.2d 235 (Ky. 1995). In *Sutherland*, the Supreme Court held:

Reading KRS 533.040(3) within the context of the entire legislative scheme, it appears to be the legislative intent to require the Department of Corrections to push for revocation proceedings in a speedy manner, if any subsequent term of sentence is to be served consecutive to any time spent in incarceration as a result of a revocation of probation.

Id. at 237. The Supreme Court specifically upheld the trial court's ruling that “KRS 533.040(3) was intended to deal with the *calculation* of periods of time for the running of sentences of probation, rather than setting a time limit beyond which a court could not make a ruling.” *Id.* at 236. (Emphasis in original.) In *Brewer v. Commonwealth*, 922 S.W.2d 380, 382 (Ky. 1996), the Supreme Court again addressed this subsection, noting that it “addresses the calculation of sentences and whether they are to be served concurrently or consecutively, not the jurisdiction of the trial court to revoke.”

In the present case, Smith argues that his due process rights were denied solely due to the delay in the revocation hearing and the circuit court's decision to revoke. He provides a single example to support this argument; namely, that he was unable to secure alibi witnesses regarding his presence in Shelbyville the day the house was searched. However, the record establishes many examples of Smith violating the terms of his probation, as set forth in the Special Supervisory Reports and in the circuit court's order, which were more than sufficient to support both the revocation of his probation and the denial of the motion to reinstate probation. Smith failed to address any of those incidents in his motion below or in his appellate brief, nor did he attempt to explain how his due process rights were violated with regard to these additional incidents. For these reasons, we perceive no error or abuse of discretion in the circuit court's denial of Smith's motion to reinstate his probation.

The order the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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