

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000244-MR

CHRISTOPHER MOORE

APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE F. KENNETH CONLIFFE, JUDGE
ACTION NO. 05-CR-001397

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION AFFIRMING

** ** *

BEFORE: CLAYTON, KELLER, AND MOORE, JUDGES.

KELLER, JUDGE: Christopher Moore has appealed from the order of the Jefferson Circuit Court revoking his probation. In support of his appeal, Moore argues that his due process rights were violated when the circuit court failed to specify in the written order the evidence it relied on and its reasons for revoking his probation. He also argues that the circuit court failed to consider his financial ability to pay or any alternate forms of punishment. We affirm.

The Jefferson County grand jury indicted Moore along with two other co-defendants in a four-count indictment returned on April 28, 2005. The grand jury

specifically charged Moore with Trafficking in a Controlled Substance, First Degree, Cocaine, pursuant to KRS 218A.1412 (a Class C felony); with Promoting Contraband, First Degree, pursuant to KRS 520.050 (a Class D felony); and with Illegal Possession of a Controlled Substance, Marijuana, pursuant to KRS 218A.1422 (a Class A misdemeanor). The first charge arose from Moore's involvement in a hand-to-hand drug transaction on January 5, 2005, while he was a passenger in an automobile. The other charges arose from a December 13, 2004, incident when officers found a small quantity of marijuana seeds in Moore's possession when he entered the Jefferson County Corrections Center, a detention facility.

Moore eventually entered a guilty plea to an amended charge of Illegal Possession of a Controlled Substance, First Degree, Cocaine; an amended charge of Promoting Contraband, Second Degree; and to the original charge of marijuana possession. In exchange for the plea, the Commonwealth recommended a four-year sentence on the cocaine possession charge and 12-month sentences on the two misdemeanor charges, all to run concurrently. Following a hearing, the circuit court accepted Moore's plea. In a judgment entered November 3, 2005, the circuit court sentenced Moore in accordance with the Commonwealth's recommendation. However, the circuit court opted to probate Moore's sentence, subject to several specific conditions:

1. That Defendant shall be placed on supervised probation for five **(5) years**,
2. The Defendant shall serve 45 days in the Home Incarceration Program (HIP), **with work release, with Probation and Parole release**, Defendant shall report to the Court on October 28, 2005¹ at 8:30 a.m. to report for HIP,

¹ We note that the sentencing hearing took place on October 27, 2005.

3. The Defendant shall comply with all instructions and conditions imposed by the Bureau of Corrections and Probation and Parole,
4. The Defendant shall obtain and maintain employment,
5. The Defendant shall pay a \$25/month supervision fee to **Probation & Parole** over the probation period,
6. The Defendant shall pay court costs of \$125.00 by December 15, 2005,
7. The Defendant shall submit to periodic drug testing at own expense and home visits,
8. The Defendant shall enroll [in] and complete a Drug and Substance Abuse Treatment Program,
9. The Defendant shall pay [a] \$1,000 fine at the rate of \$50.00 per month, commencing January 5, 2006 and the 1st of each month thereafter until paid in full
10. The Defendant shall obtain GED or Voc. Ed. Training.

Moore was also ordered to immediately report to the Probation and Parole office.

Officer Paulette Carron was assigned as Moore's supervisor.

On January 11, 2006, Officer Carron filed the first of three Special Supervision Reports. In the report, Officer Carron stated:

This officer received notice from New Beginnings Counseling Center that Mr. Moore was discharged non-compliant due to poor attendance on Wednesday, 1/4/2006. Mr. Moore had previously been drug tested on 11/10/2005. The results were returned positive for Marijuana. Mr. Moore failed to report on his scheduled report date of 1/5/2006. He has been sent a letter, which states that he must report on 1/26/2006.

This officer is requesting no further action at this time. This officer will keep the Court informed of any new developments in this case.

Officer Carron filed the second Special Supervision Report on February 21, 2006, and reported as follows:

This officer respectfully requests a motion to revoke due to the following violations:

- 1.) Use of Controlled Substance – Marijuana;
- 2.) Failure to attend substance abuse program;
- 3.) Failure to pay supervision fee;
- 4.) Failure to pay court costs;
- 5.) Failure to report as directed;
- 6.) Absconding Probation supervision.

Mr. Moore reported on 11/10/2005 and admitted to using marijuana on or about 11/08/2005. A subsequent lab test was returned positive for marijuana (>200 ng/ml). He was referred to the New Beginnings Counseling Center for substance abuse. He was discharged non-compliant due to poor attendance on 01/04/2006. He is currently four months behind on supervision fee. He was order[ed] to pay court costs of \$125 by 12/15/2005. He has not paid his court costs. He was scheduled to report on 1/5/2006. He did not report. He was sent a letter to report on 1/26/2006. He did not report on this day. On 2/21/2006, this officer went to the subject's previous address (while he was on HIP) of 10604 Hickory Grove. This officer spoke to his Aunt, who stated that he had not lived there for a couple of months. This officer then went to 2611 West Madison. This is the address that the subject was moving to when he was taken off HIP on 12/10/2005. No contact was made with the subject at this address.

This officer has no knowledge of the subject's whereabouts and therefore requests a bench warrant and that a motion to revoke is scheduled.

In accordance with this request, the Commonwealth filed a motion to revoke Moore's probation on March 7, 2006. Moore was mailed a copy of the motion, which notified him that he was required to appear in court on March 13, 2006, and that his failure to do so may result in the issuance of a bench warrant. Moore failed to appear, and a bench warrant was issued on March 14, 2006.

Officer Carron filed the third Special Supervision Report on May 31, 2006.

In this report, Officer Carron stated:

Mr. Christopher Moore was scheduled to appear in court for motion hour on a motion to revoke. He failed to appear and a bench warrant was issued for Indictment #05CR1397. He

did appear in court on 4/19/2006 for a preliminary hearing on Indictment #05CR3361 (TICS III, Criminal Possession of Forged Instrument III and TICS within 1000 yards of a school). This officer was present in court on 5/16/2006, when the subject was to again appear in court on #05CR3361. He did not report and a bench warrant was issued for that case.

Presently, Mr. Moore has two outstanding bench warrants: 05CR1397 - \$35,000 full cash bond and #05CR3361 - \$25,000 full cash.

In light of this fact, this officer is transferring this case to the Probation & Parole Fugitive Unit.

Moore was arrested on a bench warrant several months later on October 27, 2006.

Shortly after Moore's arrest, the circuit court scheduled a revocation hearing for December 12, 2006. At the conclusion of the hearing, during which only Officer Carron testified, the circuit court made several oral findings in support of its decision to revoke Moore's probation. Those findings are summarized as follows:

- Moore failed to attend and complete a drug treatment program.
- Moore failed to pay court costs.
- Moore failed to pay monthly supervision fees.
- Moore failed to obtain and maintain employment.
- Moore failed to pay the \$1,000 fine.
- Moore had not obtained his GED or vocational educational training.
- Moore committed a crime (used marijuana).

The circuit court entered a written order revoking Moore's probation on December 27, 2006, and imposed the four-year sentence. This appeal followed.

On appeal, Moore presents two arguments: 1) the circuit court deprived him of his constitutional rights when it failed to specify in writing the evidence relied on and reasons for revoking his probation; and 2) the circuit court did not consider his financial ability to make payments or any alternative forms of punishment before

revoking his probation. The Commonwealth first argues that Moore did not preserve the first issue for review, but otherwise argues that the circuit court did not abuse its discretion.

STANDARD OF REVIEW

Both parties correctly point out that our standard of review in probation revocations appeals “is limited to a determination of whether, after a hearing, the trial court abused its discretion in revoking the appellant’s [probation].” *Tiryung v. Commonwealth*, 717 S.W.2d 503, 504 (Ky.App. 1986). We are further instructed that “[t]he 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).

ANALYSIS

We shall first address Moore’s argument that the circuit court’s failure to specify its findings in writing deprived him of his due process rights. At the outset, we disagree with the Commonwealth’s assertion that this issue was not preserved for appeal for the reasons set forth in Moore’s reply brief. Accordingly, we shall address the merits of this argument.

The United States Supreme Court addressed the due process protections necessary in parole revocation hearings in *Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972). The minimum requirements include:

- (a) written notice of the claimed violations of parole; (b) disclosure to the 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 parole.

Id. at 489. The following year, the Supreme Court held “that a probationer, like a parolee, is entitled to a preliminary and a final revocation hearing, under the conditions specified in *Morrissey v. Brewer*, *supra*.” *Gagnon v. Scarpelli*, 411 U.S. 778, 782, 93 S.Ct. 1756, 1760, 36 L.Ed.2d 656 (1973). In *Black v. Romano*, 471 U.S. 606, 611-12, 105 S.Ct. 2254, 2258, 85 L.Ed.2d 636 (1985), the Supreme Court again addressed this issue as related to probation revocation:

Thus the final revocation of probation must be preceded by a hearing, although the factfinding body need not be composed of judges or lawyers. The probationer is entitled to written notice of the claimed violations of his probation; disclosure of the evidence against him; an opportunity to be heard in person and to present witnesses and documentary evidence; a neutral hearing body; and a written statement by the factfinder as to the evidence relied on and the reasons for revoking probation. The probationer is also entitled to cross-examine adverse witnesses, unless the hearing body specifically finds good cause for not allowing confrontation. Finally, the probationer has a right to the assistance of counsel in some circumstances. [Citation omitted.]

Regarding the requirement of a written statement, *Black* states: “The written statement required by *Gagnon* and *Morrissey* helps to insure accurate factfinding with respect to any alleged violation and provides an adequate basis for review to determine if the decision rests on permissible grounds supported by the evidence.” *Id.* at 613-14.

Kentucky courts have followed both *Morrissey* and *Gagnon*. In *Rasdon v. Commonwealth*, 701 S.W.2d 716 (Ky.App. 1986), this Court addressed a situation where the trial court did not make any written findings, but did make oral findings, which were in the hearing transcript. After recognizing that “[f]indings are a prerequisite to any unfavorable decision and are a minimal requirement of due process of law[.]” the Court stated in dicta that the issue “is one of questionable merit, because the court's findings were transcribed and included as a part of the transcript of hearing. Furthermore, it is

the type of error which could be corrected by a remand rather than a total reversal and vacation of the court's decision.” *Id.* at 719.

Both parties also cite to separate, unreported decisions of this Court in support of their respective positions. The Commonwealth directs our attention to *Dipietro v. Commonwealth*, 2006 WL 335987 (Ky.App. February 3, 2006), in which this Court held that although the trial court's written order revoking probation did not contain any findings of fact, the court did make adequate oral findings at the hearing. Thus, Dipietro's due process rights were protected and the oral findings provided sufficient material to allow for appellate review. On the other hand, Moore cites to *Combs v. Commonwealth*, 2006 WL 1360878 (Ky.App. May 19, 2006), rendered a few months after *Dipietro*. In *Combs*, the trial court stated on the record at the close of the hearing that Combs's probation would be revoked due to his misdemeanor conviction and felony indictment, but not due to his alleged failure to report to his probation officer. However, the written order did not delineate the particular conditions he violated, but merely stated the ultimate conclusion that Combs had violated the terms of his probation, creating an apparent ambiguity between the oral findings and written order. For that reason, the order revoking Combs's probation violated the written findings requirement of *Morrissey* and *Gagnon* and was remanded for the entry of the requisite written statement of the evidence relied on and reasons for revocation.² Our independent research also uncovered this Court's unreported opinion of *Jenkins v. Commonwealth*, 2004 WL 360999 (Ky.App. Feb. 27, 2004), in which the order revoking probation was

² Subsequent to the rendition of *Dipietro* and *Combs*, this Court rendered two more opinions designated for publication that are currently pending on motions for discretionary review before the Supreme Court. In *Alleman v. Commonwealth*, 2007 WL 2141932 (Ky.App. July 27, 2007), this Court remanded the order to the trial court for written findings where the trial court made no findings at all, either oral or written, when it revoked Alleman's probation. In *Richardson v. Commonwealth*, 2007 WL 2343741 (Ky.App. August 17, 2007), this Court also remanded the order for the trial court to make written findings after determining that the written order revoking Richardson's probation did not adequately state the evidence it relied on or the reasons for revocation. The opinion does not reflect that the trial court made any oral findings.

remanded for the entry of factual findings, as the trial court did not issue either oral or written findings, but merely stated its conclusions.

In addition to Kentucky law, we have also examined several federal cases that have addressed this issue, which we believe are persuasive and shall adopt. In *United States v. Barth*, 899 F.2d 199, 201-02 (2nd Cir. 1990), the Second Circuit Court of Appeals held:

We see no reason why transcribed oral findings cannot satisfy the written statement requirement of *Morrissey*, at least where, as here, we possess a record that is sufficiently complete to allow the parties and us to determine “the evidence relied on and the reasons for revoking probation.” *Black*, 471 U.S. at 612, 105 S.Ct. at 2258. . . . We agree with the Seventh Circuit that “these goals are satisfied when the oral findings in the transcript enable a reviewing court to determine the basis of the judge's decision to revoke probation.” *Id.* [at 613-14]; see also *Morishita [v. Morris]*, 702 F.2d [207,] 210 [(10th Cir. 1983)]. Of course, we might rule differently were we faced with “general conclusory reasons by the district court for revoking probation,” [*United States v.*] *Lacey*, 648 F.2d [441,] 445 [(5th Cir. Unit A 1981)], or with a record from which we were “unable to determine the basis of the district court's decision to revoke probation.” [*United States v.*] *Smith*, 767 F.2d [521,] 524 [(8th Cir. 1985)]. But absent such situations, to demand that a district court turn its transcribed oral findings into a written order seems to us unduly formalistic.

The Fourth Circuit Court of Appeals followed suit in *United States v. Copley*, 978 F.2d 829, 831 (4th Cir. 1992):

In our view, however, as in the view of several of our sister circuits, a transcribed oral finding can serve as a “written statement” for due process purposes when the transcript and record compiled before the trial judge enable the reviewing court to determine the basis of the trial court's decision.

In *United States v. Gilbert*, 990 F.2d 916, 917 (6th Cir. 1993), a case arising out of Kentucky, the Sixth Circuit Court of Appeals determined that the district court's delivery of its findings and ruling from the bench was sufficient to constitute a “written statement”:

The Federal District Courts are courts of record since all hearings are transcribed verbatim; to require a judge to copy or paraphrase the transcript of his findings in the wake of a revocation hearing would elevate form over substance and do absolutely nothing to further secure the rights of those on supervised release.

Finally, the Eleventh Circuit Court of Appeals joined its sister circuit courts in *United States v. Copeland*, 20 F.3d 412, 414-15 (11th Cir. 1994), in holding:

[O]ral findings, if recorded or transcribed, can satisfy the requirements of *Morrissey* when those findings create a record sufficiently complete to advise the parties and the reviewing court of the reasons for the revocation of supervised release and the evidence the decision maker relied upon. . . .

. . . When a district court has stated in the record its reasons for revoking the defendant's supervised release, and those statements are recorded and can be transcribed, we see no reason to demand that the district court turn its oral findings into a written order. Such a requirement would be "unduly formalistic." . . . Although written findings are preferable for the reasons the Supreme Court stated, when a district court's oral findings satisfy those requirements, and are preserved, we will not require that the court duplicate its findings on paper.

We hold that the law as expressed in the federal Courts of Appeals should be the law in Kentucky, and therefore we adopt the legal proposition that oral findings made by a trial court shall be sufficient to meet the written findings requirement of *Morrissey*, so long as the record of the oral findings is sufficient for due process purposes to permit the parties and the reviewing court to ascertain the basis of the trial court's decision. In the present case, the videotaped record of the revocation hearing provides an adequate record of the evidence relied on and the basis for the revocation, as the trial judge made a lengthy oral ruling at the conclusion of the hearing. Therefore, we hold that the circuit court's oral findings were sufficient to satisfy the written requirement of *Morrissey*, and that there is no need to remand the matter for the entry of written findings.

Next we shall address whether the circuit court violated *Bearden v. Georgia*, 461 U.S. 660, 103 S.Ct. 2064, 76 L.Ed.2d 221 (1983), when it revoked Moore's probation without considering his financial ability to pay or alternative forms of punishment.

In *Bearden*, the United States Supreme Court addressed a situation where a person's probation was revoked solely due to his failure to pay the balance of a fine and restitution. After discussing the applicable due process and equal protection principles, the Supreme Court held:

[I]n revocation proceedings for failure to pay a fine or restitution, a sentencing court must inquire into the reasons for the failure to pay. If the probationer willfully refused to pay or failed to make sufficient bona fide efforts legally to acquire the resources to pay, the court may revoke probation and sentence the defendant to imprisonment within the authorized range of its sentencing authority. If the probationer could not pay despite sufficient bona fide efforts to acquire the resources to do so, the court must consider alternate measures of punishment other than imprisonment. Only if alternate measures are not adequate to meet the State's interests in punishment and deterrence may the court imprison a probationer who has made sufficient bona fide efforts to pay. To do otherwise would deprive the probationer of his conditional freedom simply because, through no fault of his own, he cannot pay the fine. Such a deprivation would be contrary to the fundamental fairness required by the Fourteenth Amendment.

Id. at 672-73. In *Mauk v. Commonwealth*, 700 S.W.2d 803 (Ky.App. 1985), this Court held that the *Bearden* principles were controlling where the defendant's conditional release was revoked solely due to her failure to pay fines and court costs without an inquiry into the reasons for her failure to pay.

We disagree with Moore's assertion that the circuit court ignored *Bearden* when it revoked his probation. Although Moore did express to his probation officer the difficulties he experienced in paying the fees associated with his probation, the circuit court made it clear that Moore had been permitted to participate in work release while

serving his period of home incarceration. Furthermore, Moore admitted at the hearing, through his counsel, that he was working, at least during the period when Officer Carron was searching for him. The circuit court considered all of these factors when determining that Moore's probation should be revoked. Furthermore, the circuit court did not base its decision to revoke Moore's probation solely on his failure to make payments. Rather, there were a number of non-financial reasons supporting the circuit court's decision to revoke, including the commission of another crime, his failure to attend and complete a drug treatment program, his failure to find and maintain employment, and his failure to obtain his GED or vocational educational training. Therefore, we hold that the circuit court did not abuse its discretion in revoking Moore's probation and imposing a sentence of imprisonment.

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

ALL CONCUR.

BRIEF FOR APPELLANT:

Cicely J. Lambert
Louisville, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

Ken W. Riggs
Assistant Attorney General
Frankfort, Kentucky