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Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000531-MR

GEORGE BOWLING — APPELLANT

v.

APPEAL FROM CALLOWAY CIRCUIT COURT
HONORABLE DENNIS R. FOUST, JUDGE
ACTION NO. 02-CR-00063

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: STUMBO AND TAYLOR, JUDGES; HENRY,[1] SENIOR JUDGE.

HENRY, SENIOR JUDGE: George Bowling appeals from an order of the Calloway Circuit Court of February 26, 2007, which revoked his probation. We affirm.

Bowling was indicted on four counts of rape in the first degree and four counts of sodomy in the first degree. The victim was his stepdaughter, who was under twelve years old at the time the offenses were committed. On June 24, 2002, Bowling

[1] Senior Judge Michael Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

entered a plea of guilty to the charges and subsequently received a sentence of ten years on each count, to run concurrently for a total of ten years. His sentence was probated for five years, and he was ordered to complete a sex offender treatment program.

Over four years later, Bowling was served with notice that a preliminary revocation hearing would be held due to the following alleged violations of his probation: 1) Possession of items that attract children – during a home visit on July 14, 2006, stuffed animals were found in Bowling's room; 2) Possession of a dangerous instrument – during a home visit on August 18, 2006, the probation officer found three large swords in Bowling's room; and 3) Possession of sexually arousing material – during the home visit on August 18, 2006, a Maxim calendar depicting women in partial undress in provocative poses was found in Bowling's room.

After conducting two hearings, the circuit court found that Bowling had violated the terms of his probation and revoked his probation. This appeal followed.

Bowling argues that the circuit court abused its discretion in revoking his probation because he was denied the detached and neutral decision maker that minimum due process requires, and that the evidence introduced was not sufficient to justify revocation.

"Although the State has a great interest in reincarcerating those individuals who are unable to meet the conditions of their probation, it may not do so without first affording an individual the minimum requirements of due process." *Robinson v. Commonwealth*, 86 S.W.3d 54, 56 (Ky.App. 2002) *citing Morrissey v. Brewer*, 408 U.S. 471, 480, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972). These minimum requirements include:

> (a) written notice of the claimed violations of [probation]; (b) disclosure to the [probationer] 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].

Id., quoting Morrissey, 408 U.S. at 489.

Bowling argues that statements made by the judge during the revocation proceedings show that he was not a "neutral and detached" decision maker because he had made up his mind to revoke probation even before hearing the evidence. The first statement was made by the judge when Bowling requested a continuance of the revocation hearing because his treating psychologist could not be present to testify on the date originally set. The court granted the continuance but stated "not that it's going to make a whole lot of difference." Then, at a subsequent hearing on January 8, 2007, the court stated that "this was a deal [to grant probation], that I agree with Mr. Ward [the prosecutor], should never have been made, one, secondly, this court should never have accepted it, but it did and I accept responsibility for that." Bowling contends that these comments show that the judge regretted having probated his sentence, and that he was consequently unable to act as a neutral and detached decision maker in the revocation proceedings.

As to the judge's first comment, which indicated a predisposition to revoke probation, the judge also made other statements to Bowling at the conclusion of the first hearing which unmistakably show that he decided the case on the merits, in a neutral and

detached manner: "As of right now, I have no idea what my intentions are. I will tell you that coming in today, my thoughts were probably that I would revoke your probation. Again, I don't know that that's the right thing, I don't know that that's the wrong thing . . . ." The court then set a date for a final revocation hearing.

As to the court's comments expressing regret at having granted probation in the first place, these are not indicative of impermissible bias. The United States Supreme Court has stated that

> [J]udicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge. They may do so if they reveal an opinion that derives from an extrajudicial source; and they *will* do so if they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible.

Liteky v. United States, 510 U.S. 540, 555, 114 S.Ct. 1147, 127 L.Ed.2d 474 (1994). Prior familiarity with the case does not create a presumption that the judge is biased against the defendant. Our Supreme Court has held that "recusal is appropriate only when the information is derived from an extra-judicial source. Knowledge obtained in the course of earlier participation in the same case does not require that a judge recuse himself." *Marlowe v. Commonwealth*, 709 S.W.2d 424, 428 (Ky. 1986) *citing United States v. Winston*, 613 F.2d 221, 223 (9th Cir. 1980).

In Bowling's case, the court's expression of regret was not based on any information derived from an extra-judicial source, nor did it reveal such antagonism as to make a fair judgment impossible. Indeed, even after the judge found evidence that Bowling had violated the terms of his probation, he did not rush to revoke probation but instead expressed doubt as to the correct course of action:

> There is not any question in my mind that there is a violation. The question in my mind is, against the backdrop of everything, what is the appropriate remedy . . . I can't tell you what the right remedy is. . . . I know that at one point there was a discussion about jail time in lieu of revocation. I don't know that I think that is appropriate. I don't know that I think outright revocation is the right thing in this case . . .

Bowling also contends that the court revealed its bias by failing to accord sufficient weight to the testimony of Dr. Muehleman, a psychologist who had treated Bowling for several years. Dr. Muehleman testified that Bowling's ability to empathize with his victim, and his remorse for what he had done, would be sufficient to keep him from re-offending. But the court was not obligated to act on this testimony in the face of the evidence that Bowling had violated the terms of his probation by possessing prohibited items. Dr. Muehleman's testimony was not so compelling as to cast doubt on the neutral and detached nature of the decision maker.

Bowling also contends that the alleged violations were not violations of the original conditions of probation as they were set forth in the judgment, but rather were based upon supplemental conditions for sexual offenders that were not part of the original order. Bowling has provided us with no citation to the record to show that this issue was preserved for appellate review. *See* Kentucky Rules of Civil Procedure (CR) 76.12(4)(c)(v). Our own review of the record shows that this matter was never raised by Bowling on any of the occasions when he appeared before the court, although he was given ample opportunity to do so. "Because the theory of error being advanced on appeal was never argued to the trial court, it is not preserved for our review and we will not address it now." *Williams v. Commonwealth*, 233 S.W.3d 206, 211 (Ky.App. 2007).

Next, Bowling argues that the evidence was insufficient to justify revocation. On appeal, the standard of review for a probation revocation is whether the trial court abused its discretion. *Tiryung v. Commonwealth*, 717 S.W.2d 503, 504 (Ky.App. 1986). Bowling argues that the stuffed animals in his room were not toys, that no evidence was presented to show that they would attract children, and that he removed them immediately when told to do so by the probation officer. As to the Maxim calendar, he argues that calendars are not specifically prohibited by the supplemental conditions of probation, that the calendar did not depict nudity, and that there was no evidence that it created sexual images or thoughts in his mind. Finally, he contends that the swords were purely ornamental in nature.

We do not find any of these arguments to be persuasive. Bowling's probation officers testified that he knew that he was not supposed to possess any article that could be perceived as attractive to children; stuffed animals certainly fall within that category. As to the calendar, one of the probation officers testified that it contained sexually arousing material because the women depicted wore revealing clothing and were posed provocatively. There is no requirement that it be shown that the probationer found the material in the calendar arousing. Finally, although Bowling may have intended to use the swords in a purely ornamental manner, they were nonetheless capable of causing death or serious injury in contravention of the conditions of probation. Bowling's purported intent in possessing the swords is not a factor in this determination. Because a probation revocation proceeding is not part of a criminal prosecution, the violation must be found by only a preponderance of the evidence. *Rasdon v. Commonwealth*, 701

S.W.2d 716, 719 (Ky.App. 1986). In this case, the preponderance of the evidence supported the circuit court's decision to revoke Bowling's probation.

For the foregoing reasons, the order of the Calloway Circuit Court revoking Bowling's probation is hereby affirmed.

ALL CONCUR.

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