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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-000675-MR

CHRISTOPHER WARNER

APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE MARTIN J. SHEEHAN, JUDGE
ACTION NO. 03-CR-00594

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: TAYLOR, CHIEF JUDGE; KELLER AND THOMPSON, JUDGES.

THOMPSON, JUDGE: Christopher Warner appeals from an order of the Kenton Circuit Court revoking his probation alleging that his revocation for failing to pay child support without proper findings by the court constituted an abuse of discretion. For the reasons stated, we affirm.

On August 8, 2004, Warner pled guilty to two counts of flagrant nonsupport and, on September 23, 2004, was sentenced to five years on each count to be served concurrently, probated for five years. As of December 31, 2007, Warner owed \$28,097.02 to one woman, and \$51,420.12 to another woman. The trial court ordered him to pay current support plus an additional \$100 per week toward his arrearage to each woman.

On February 5, 2008, following a probation revocation hearing, the trial court ordered his probation continued but that he serve a six month sentence, which was altered to shock probation on April 24, 2008. In that order, he was required to immediately pay \$7,500 to each of the women he owed child support, to pay \$6,000 per year to each woman toward arrearages and to remain current on child support payments.

On January 29, 2009, an order continuing probation modified the term of his probation to the length of time necessary to pay child support in full. He was placed on 120 days of home incarceration and ordered to pay \$2,000 child support within sixty days and an additional \$2,500 in six months.

On March 10, 2010, he was found once again to have violated the terms of his probation by failing to pay child support, but his probation was again continued on April 7, 2010, on the condition that his \$5,000 bond be used to pay child support. In December 2010, a new probation revocation motion was filed with supporting affidavit stating that except for the court ordered bond forfeiture,

since the previous order continuing probation, Warner paid \$1,854 on the first count and \$883.25 on the second count.

At Warner's March 14, 2011, probation revocation hearing, he agreed that there was a deficiency in his payments. However, he denied that he had violated his probation because he was willing to pay, but lacked the ability to pay in large measure due to the economy. He worked as an independent contractor buying and reselling cars but did not have a full-time job with a consistent income. Although Warner's counsel declined to present evidence of Warner's inability to pay, Warner explained as follows:

I'm making a living but I've got wage garnishments, I've got judgments against me, I've got people, I mean Mr. Mike Ruberg wants me to pay back an old business loan, I've lost my home, I haven't filed bankruptcy for the second time, I filed bankruptcy fifteen years ago and I'm due to file again, I want to pay this thing.

Warner's claim of inability to pay was contested by the Commonwealth. It pointed out that Warner repeatedly failed to pay child support of his own volition, but he managed to obtain substantial payments when he was brought before the court.

The court asked whether Warner had attempted to get his child support obligations modified. He responded that he had but his attorney believed that based on his income, his child support would increase.

The trial judge found that Warner's past behavior demonstrated a consistent pattern:

We have the orders, we issue the order of arrest, we put a bond on it, he gets picked up, he hires you [the attorney],

he posts twenty-five hundred, five thousand dollars bond within minutes of getting picked up every single time, I mean there's always plenty of money to post the bond to get out of jail, there's always plenty of money to hire you, but there's no money to keep paying these women over a regular period of time.

Warner's counsel pointed out that Warner did not always have money to bond out immediately and, noted that when last arrested, he had to have someone else post the bond and was not released for fifteen days. The trial court found Warner in violation based upon his stipulation that he had not paid child support as ordered and revoked his probation.

Warner alleges that the trial court abused its discretion in revoking his probation without making sufficient findings of fact that he was financially able to pay. The Commonwealth stresses that there was evidence that Warner had enough money to quickly bond out and hire an attorney each time he violated his probation, only paid a significant amount toward his child support obligations when he was facing probation revocation, and that repeatedly continuing probation did not stop Warner's pattern of behavior.

We review the trial court's revocation of Warner's probation under an abuse of discretion standard. *Lucas v. Commonwealth*, 258 S.W.3d 806, 807 (Ky.App. 2008).

Both parties agree that *Commonwealth v. Marshall*, 345 S.W.3d 822, 828-29 (Ky. 2011), is controlling. In *Marshall*, the Kentucky Supreme Court determined that the due process requirements made applicable to restitution cases in *Bearden*

v. Georgia, 461 U.S. 660, 672-73, 103 S. Ct. 2064, 2073, 76 L.Ed.2d 221 (1983), applied to motions for probation revocation for failure to comply with conditions requiring payment of child support. Therefore, circuit courts are required to determine: “(1) whether the probationer made sufficient bona fide attempts to make payments but been unable to do so through no fault of his own and, if so, (2) whether alternatives to imprisonment might suffice to serve interests in punishment and deterrence.” *Marshall*, 345 S.W.3d at 828. Written factual findings are not required if the court made oral findings which are adequate to provide meaningful review. *Id.* at 833-834. It is appropriate for the circuit court to focus on whether circumstances have changed in the probationer’s ability to pay since the imposition of probation. *Id.* at 834.

While the Commonwealth has the burden to prove by a preponderance of the evidence that Warner violated the conditions of his probation, the Commonwealth does not bear the burden of proving why Warner failed to make payments. Once the Commonwealth met its burden by showing that Warner violated the terms of probation by failing to make the required payments, Warner had “the burden of persuading the trial court that he made bona fide efforts to comply with payment conditions but was unable to do so through no fault of his own.” *Id.* See also *Gamble v. Commonwealth*, 293 S.W.3d 406, 411 (Ky.App. 2009).

Warner agreed that he did not make his required child support payments. Therefore, it was his burden to show that he made bona fide efforts to comply with his payment obligations. Warner’s statements supported his assertion that he was

unable to pay and, supported the opposite conclusion, that he was able to pay.

While he stated that he owed people money and had lost his house, he also indicated that he was making a living and if his child support obligations were to be modified that he believed his obligations would increase based on his income history.

Warner did not call witnesses or present documentary evidence showing his inability to pay or demonstrating his income. Warner never asserted that he was unable to regularly pay a portion of his child support obligation. He did not show bona fide efforts to make regular partial payments. Additionally, his reason for not paying did not establish that he was unable to pay “through no fault of his own.” *Marshall*, 345 S.W.3d at 834. Warner stated that he had wage garnishments, judgments against him and additional debt. He did not establish that these obligations were not his fault, or why they should take priority over his child support obligations. Moreover, he did not offer evidence that he was paying these obligations.

The trial court considered whether “alternatives to imprisonment might suffice to serve interests in punishment and deterrence.” *Id.* at 828. The trial court explained that it had repeatedly afforded Warner an opportunity to succeed at probation when it allowed his probation to be continued on three previous occasions despite violations. However, Warner repeatedly failed to make regular support payments after his probation was continued, and the same pattern was repeated. Based on these findings, the trial court did not fail to consider other

options short of revoking his probation but had a reasonable belief that they would not succeed where they had not previously changed Warner's behavior. *See Lucas*, 258 S.W.3d at 808.

For the foregoing reasons, the Kenton Circuit Court's order revoking probation is affirmed.

ALL CONCUR.

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