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TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-001093-MR

MARK JOHNSON

APPELLANT

v.

APPEAL FROM GRAVES CIRCUIT COURT
HONORABLE TIMOTHY C. STARK, JUDGE
ACTION NO. 06-CR-00212

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION VACATING AND REMANDING

** ** * * * * *

BEFORE: CAPERTON AND THOMPSON, JUDGES; GRAVES,¹ SENIOR JUDGE.

CAPERTON, JUDGE: Mark Johnson brings this appeal from an order of the Graves Circuit Court revoking his conditional discharge for the offense of flagrant nonsupport. We vacate and remand for proceedings consistent with this opinion.

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 Kentucky Revised Statutes (KRS) 21.580.

On December 12, 2006, a sentence of five years was imposed on Johnson for the felony charge of Flagrant Nonsupport but probated on condition, *inter alia*, that he pay his current child support pursuant to a previous court order, with an additional \$158.75 per month for 60 months to pay off arrears totaling \$9524.66. On January 18, 2008, the Commonwealth filed a motion to revoke Johnson's conditional discharge. The Commonwealth maintained Johnson failed to comply with the terms of the conditional discharge, specifically stating that the last payment made was \$25.00, paid on March 6, 2007.

On May 12, 2008, a probation revocation hearing was conducted for Johnson's failure to pay child support, a condition of his probation. A short hearing was held; the sole issue was whether or not the child support had been paid. The court found that Johnson had violated his probation and imposed the five-year sentence. This appeal followed.

Johnson argues that he was denied Due Process of Law under the Fourteenth Amendment to the U.S. Constitution by having his conditional discharge revoked merely because he could not pay the child support ordered by the court. Johnson maintains that he was denied Due Process "because of his poverty and his inability to obtain a job, which resulted in his inability to pay the required child support." The Commonwealth argues that the trial court properly revoked Johnson's probation.

After review of the record, the parties' arguments, and the applicable law, we believe Johnson was entitled to a probation revocation hearing wherein he

could have presented evidence that, *post-plea*, his financial position had changed in such a way that he could not make the payments, whether as to the amount or frequency.

At the outset, we note that the standard of review of the circuit court's decision to revoke probation is whether the circuit court abused its discretion. *Lucas v. Commonwealth*, 258 S.W.3d 806 (Ky.App. 2008)(citing *Tiryung v. Commonwealth*, 717 S.W.2d 503, 504 (Ky.App. 1986)). An abuse of discretion occurs when the "decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Miller v. Eldridge*, 146 S.W.3d 909, 914 (Ky. 2004)(quoting *Goodyear Tire & Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000)). With this in mind, we turn to our established jurisprudence on probation revocation.

In reviewing the cases of *Bearden v. Georgia*, 461 U.S. 660, 103 S.Ct. 2064, 76 L.Ed.2d 221 (1983); *Clayborn v. Commonwealth*, 701 S.W.2d 413 (Ky.App. 1985); *Polk v. Commonwealth*, 622 S.W.2d 223 (Ky.App. 1981); and *Mauk v. Commonwealth*, 700 S.W.2d 803 (Ky.App. 1985), we note that various results were reached. Given the dissimilarity in results, we undertake a review of the aforementioned cases.

First, in *Bearden, supra*, the issue was whether the Fourteenth Amendment prohibits a state from revoking an indigent defendant's probation for failure to pay a fine and restitution. The Supreme Court held that a sentencing

court must inquire into the reasons for failure to pay in revocation proceedings for failure to pay a fine or restitution. The Court said:

By sentencing petitioner to imprisonment simply because he could not pay the fine, without considering the reasons for the inability to pay or the propriety of reducing the fine or extending the time for payments or making alternative orders, the court automatically turned a fine into a prison sentence. . . . If, upon remand, the Georgia courts determine that petitioner did not make sufficient bona fide efforts to pay his fine, or determine that alternate punishment is not adequate to meet the State's interests in punishment and deterrence, imprisonment would be a permissible sentence.

Bearden at 674.

Second, in *Clayborn, supra*, the issue was whether Clayborn was entitled to present evidence of his inability to pay restitution to a victim at a probation revocation hearing, with said restitution being a condition of probation which required the payment of a definite amount of money over a period of months. Our Court decided Clayborn was entitled to present evidence of his inability to pay restitution as a condition of probation and that the trial court must consider alternative sentencing. *Id.* at 415.

Third, in *Polk, supra*, the main issue was whether Polk was entitled to present evidence that he was indigent at a probation revocation hearing. Polk was required, as a condition of probation, to pay restitution to a victim. Our Court decided he was not entitled to present evidence of his indigency and held:

[I]n the case at bar, the appellant made a firm commitment as a condition to his probation that a certain sum would be paid rather than his going to prison. This

is a different situation from a fine imposed by a court. It was the understanding of all parties concerned that if the conditions of probation were not met, the probation would be revoked. Indigency has no application here.

Polk at 225.

In *Mauk, supra*, the issue was whether Mauk was entitled to a hearing where she could present evidence of her indigency for failing to pay fines and court costs. Our Court decided that she was entitled to present evidence and that alternative sentencing must be considered. *Mauk* at 804.

It is clear that a probation revocation proceeding must conform to the minimum requirements of due process of law. *Rasdon v. Commonwealth*, 701 S.W.2d 716, 718 (Ky.App. 1986). The United States Supreme Court has set forth the minimal due process requirements applicable to a probation revocation proceeding:

(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.

Morrissey v. Brewer, 408 U.S. 471, 489, 92 S.Ct. 2593, 2604, 33 L.Ed.2d 484 (1972); *Gagnon v. Scarpelli*, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973), quoting *Morrissey*.

The May 12, 2008, order revoking Johnson's conditional discharge

reads:

This matter is now before the Court on motion of the Commonwealth to revoke the defendant's conditional discharge on grounds of violation of the terms of his conditional discharge by his failure to appear for show cause why his conditional discharge should not be revoked and for his failure to keep his child support payments current.

A review of the May 12, 2008, order reveals that the circuit court failed to make findings of fact specifying the evidence relied upon to support its decision to revoke Johnson's conditional discharge. We believe, based on our caselaw, that Johnson should have been given the opportunity to present evidence arising post-plea of his inability to make payments. The "post-plea" aspect must necessarily be considered and as such requires explanation.

Johnson pled guilty to the felony and agreed to make the payments as ordered by the court. It would have been disingenuous of Johnson to consider probation conditions and enter a plea knowing that, based on his current circumstances, he could not comply with the terms of probation for the payment of money.

The payment of money, as a probation condition, is certainly different from many conditions oft imposed which merely require adherence by controlling one's conduct. Income is often not wholly dependent upon one's desire to acquire it; the desire may be great but the ability or opportunity may be lacking.

Regardless, Johnson knew at the time of his plea of both his current and prior

ability to earn income and to make the required payments. Thus, the only consideration for the trial court is whether, post-plea, financial conditions beyond Johnson's control lessened or wholly negated his ability to comply with the probation condition requiring the payment of money.

Accordingly, the order of the Graves Circuit Court is vacated and remanded for further proceedings consistent with this opinion.

THOMPSON, JUDGE, CONCURS.

GRAVES, SENIOR JUDGE, DISSENTS AND FILES SEPARATE OPINION.

GRAVES, SENIOR JUDGE, DISSENTING: Respectfully, I dissent. Johnson was indicted for flagrant nonsupport. He pled guilty to the charge and received a sentence of five years' imprisonment, which was conditionally discharged on the grounds that Johnson pay past and current child support. The trial court entered judgment in accordance with the plea agreement on December 13, 2006. On January 18, 2008, the Commonwealth moved to revoke Johnson's conditional discharge because of his continued failure to satisfy his child support obligations. After twice failing to appear for a hearing, Johnson was apprehended. The trial court held a hearing and ultimately revoked the conditional discharge and ordered Johnson to serve the remainder of his sentence in accordance with the plea agreement. This appeal followed.

Johnson argues that the Commonwealth failed to prove that his inability to pay was intentional and that the trial court failed to consider alternative

measures of punishment. He cites *Clayborn v. Commonwealth*, 701 S.W.2d 413 (Ky. App. 1985), and *Bearden v. Georgia*, 461 U.S. 660, 103 S.Ct. 2064, 76 L.Ed.2d 221 (1983), in support of his argument.

First, Johnson pled guilty to the offense and therefore admitted to every element of the crime. *Whitworth v. Commonwealth*, 437 S.W.2d 731 (Ky. 1969). The revocation of probation is reviewed under the abuse of discretion standard. *Ridley v. Commonwealth*, 287 S.W.2d 156 (Ky. 1956). Johnson's reliance on *Clayborn* and *Bearden* is misplaced. Those cases dealt with the nonpayment of fines and restitution. Johnson was incarcerated for the nonpayment of child support. There is no legal authority requiring the trial court to inquire into the reason for nonpayment or to consider alternative methods of punishment when revoking Johnson's conditional discharge for nonpayment of child support. Johnson voluntarily entered into a plea agreement and received its benefit, but did not abide by its terms. There is ample evidence in the record to support the trial court's decision. The trial court did not abuse its discretion.

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