

RENDERED: OCTOBER 7, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000436-MR

WILLIAM NIMON WEHBY

APPELLANT

v. APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE FRED A STINE V., JUDGE
ACTION NO. 08-CR-00719

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE AND WINE, JUDGES; LAMBERT,¹ SENIOR JUDGE.

WINE, JUDGE: William Wehby appeals from an order of the Campbell Circuit Court revoking his probation and imposing a three-year term of imprisonment. On

¹ Senior Judge Joseph E. Lambert 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.

appeal, Wehby alleges he suffered due process violations at the revocation hearing because of hearsay testimony offered by a probation and parole officer. Upon a review of the record, we affirm the Campbell Circuit Court.

In December of 2008, Wehby was indicted on three counts of criminal possession of a forged instrument for cashing over \$600 in checks on his roommate's checking account. Wehby later pled guilty to one count of criminal possession of a forged instrument and was sentenced to a three-year term of imprisonment which was probated for three years.

Wehby thereafter reported to the Campbell County probation and parole office. As Wehby was a resident of Richmond, Kentucky, his supervision was transferred to Madison County.

In November of 2009, a Campbell County probation and parole officer, Cassandra Stella ("Stella"), filed an affidavit for Wehby's arrest based on several probation violations. Wehby was arrested and a revocation hearing was held on February 3, 2010. The sole testimony at the hearing was given by Stella. Stella testified at the hearing that her testimony was based upon the affidavit and report of Wehby's supervising probation officer, Mitchell King. At the conclusion of the hearing, the court found that Wehby had violated the terms of his probation

by: (1) using a controlled substance (cocaine); (2) leaving the state without permission; (3) failing to report to his probation officer; and (4) absconding from probation supervision. The court revoked Wehby's probation and recommended that he be placed in an institution offering the Substance Abuse Program ("SAP") for treatment of his substance abuse issues.

Wehby timely appealed to this Court. On appeal, Wehby alleges that the trial court erred in relying on the hearsay testimony of Stella. This alleged error is preserved for review by defense counsel's objection to Stella's testimony at the hearing. Wehby notes that he was supervised by probation and parole officer King and that he had not been supervised by Stella since his supervision was transferred from Campbell County.

Wehby points to *Morrissey v. Brewer*, 408 U.S. 471, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972), for the proposition that he is entitled to retain his status as a probationer unless the Commonwealth presents credible evidence to support the revocation. He further states that the Kentucky Supreme Court has held that "probation revocation is a sufficient deprivation of liberty for certain requirements of due process to apply." *Hunt v. Commonwealth*, 326 S.W.3d 437, 439 (Ky. 2010). Although Wehby acknowledges that hearsay testimony is permissible at revocation hearings, he argues that he still has a constitutional right to confront and

cross-examine witnesses, which was denied to him when Stella testified because he was not given the opportunity to separately cross-examine King. Wehby argues that Stella had no knowledge of his alleged violations, other than what she was told by King.

Wehby distinguishes his case from the seminal case of *Marshall v. Commonwealth*, 638 S.W.2d 288 (Ky. App. 1982), which holds that hearsay testimony is permissible at revocation hearings in the Commonwealth. Wehby points out that in *Marshall*, a probation officer testified based upon a letter from a drug treatment program in Ohio stating that the probationer had been in possession of drugs while participating in the program. Wehby distinguishes his case by pointing out that, unlike in *Marshall*, the witness in question (King) is a Kentucky probation and parole officer that could easily have been compelled to testify.

Wehby also argues that under *Hunt*, 326 S.W.3d 437, the Kentucky Supreme Court has indicated that probation revocation proceedings are not mere informal proceedings as described in *Marshall, supra*, but are proceedings that must be taken more seriously by the trial courts. Wehby argues that because his probation and parole officer was not present, he was denied due process of law. We disagree.

On review of a trial court's revocation of probation, we review only for abuse of discretion. *Tiryung v. Commonwealth*, 717 S.W.2d 503, 504 (Ky. App. 1986). As our courts have said numerous times before, "probation is a privilege rather than a right" and a court may revoke such status at any time if the court determines the probationer has violated the terms of his probation. *Id.* A probationer in a probation revocation proceeding is not afforded the full panoply of rights typically enjoyed by a defendant in a criminal trial. *Morrissey*, 408 U.S. at 480; *Gagnon v. Scarpelli*, 411 U.S. 778, 782, 93 S. Ct. 1756, 1759, 36 L. Ed. 2d 656 (1973). Indeed, a revocation proceeding is not a part of a criminal prosecution. *Id.* Instead, probation revocation proceedings are less formal and require less proof than a criminal trial. *Hunt*, 326 S.W.3d at 439. For example, the Kentucky Rules of Evidence (and consequently the rules on hearsay) do not apply in such proceedings. *Id.*; KRS 1101(d)(5).

Nonetheless, certain minimal requirements of due process still apply because of the liberty interest involved. *Hunt, supra; Gagnon, supra.* The United States Supreme Court has established that the minimum due process required at such proceedings, includes: (1) written notice of the alleged violations; (2) disclosure of the evidence against the probationer; (3) the opportunity to be heard; (4) the opportunity to confront and cross-examine witnesses (unless good cause is

found to disallow confrontation); (5) a hearing conducted by a neutral or detached hearing body; and (6) receipt of a written statement as to the evidence relied on in revoking the probation. *Id.* at 786. *See also, Murphy v. Commonwealth*, 551 S.W.2d 838, 840 (Ky. App. 1977).

In the present case, Wehby was afforded minimum due process as he received notice of the alleged violations, disclosure of the evidence against him, an opportunity to be heard in person and to cross-examine Stella, a hearing in front of an impartial decision maker, and a final written statement from the judge highlighting the reasons for the revocation. In addition, the evidence presented against him for revocation was more than sufficient since the trial judge found Wehby used cocaine, left the state without permission, failed to report to his probation officer, and absconded from supervision.

We are not persuaded that Wehby was denied the opportunity to confront and cross-examine the witnesses against him simply because Stella testified rather than King. As this Court noted in *Marshall*, 638 S.W.2d 288, hearsay testimony is permissible at probation revocation proceedings and a finding of unavailability is unnecessary. *Id.* at 289. Indeed, “there is no absolute right to confront witnesses [at a revocation hearing], especially when the reliability of the witnesses, . . . can be easily ascertained.” *Id.*

Moreover, although Wehby likens his case to *Hunt*, 326 S.W.3d 437, his case is distinguishable. In *Hunt*, the probationer was appointed a public defender on the morning of the hearing and the attorney did not receive the case file until that morning. Further, the hearing itself lasted only thirteen minutes and no witnesses were sworn, nor any testimony taken. A probation officer, who was not the supervising officer, merely proceeded to list the probationer's violations, although he was not under oath at the time. *Id.* at 438-39. Further, instead of being allowed to cross-examine the unsworn probation and parole officer, the probationer was merely asked to "respond to the allegations." *Hunt*, 326 S.W.3d. at 439. While Wehby is correct in asserting that the *Hunt* Court found that the probationer was denied his right to confront and cross-examine the witnesses, the Court did so because the probation and parole officer was not under oath during the hearing and the probationer was merely "allowed" to "respond" to the unsworn allegations.

In the present case, probation and parole officer Stella was a sworn witness who testified to the claimed violations based upon an affidavit and routine supervision report. Further, Wehby's counsel was given the opportunity to cross-examine Stella. Thus, we do not find support in *Hunt* for Wehby's argument that the allowance of Stella's testimony violated his right to confront and cross-

examine the witnesses against him. Instead, we find the opposite support in *Hunt*, which reaffirms this Court's previous rulings that the Kentucky Rules of Evidence, including the rules on hearsay, do not apply in probation revocation proceedings. *Id. See also, Rasdon v. Com.*, 701 S.W.2d 716 (Ky. App. 1986); *Marshall*, 638 S.W.2d 288. As stated above, Stella's testimony was based upon the report and affidavit of probation and parole officer King, which was a sufficiently reliable basis for her testimony.

Accordingly, finding no error or abuse, we affirm the revocation order issued by the Campbell Circuit Court.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Emily Holt Rhorer
Assistant Public Advocate
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Joshua D. Farley
Assistant Attorney General
Frankfort, Kentucky