

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-40638
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

WESLEY WILLIAM WALTER,

Defendant-Appellant.

Appeal from the United States District Court
For the Eastern District of Texas
(4:91-CR-4(1))

(December 14, 1994)

Before POLITZ, Chief Judge, GARWOOD and PARKER, Circuit Judges.

PER CURIAM:*

Wesley William Walter appeals the revocation of the probation which was part of the punishment imposed following his conviction for conspiracy to transport stolen property interstate in violation of 18 U.S.C. § 2314. Finding no error, we affirm.

*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

Background

Walter pleaded guilty to conspiracy to transport stolen aircraft electronic equipment interstate and was sentenced to prison for five years. The sentence called for a term in prison of five months and 27 days with the remainder suspended, and Walter was placed on probation for five years. Over a year into the probation period Walter's conduct caused the filing of a petition seeking the revocation of probation because of violations which included: (1) an arrest in California for driving under the influence of alcohol and a guilty plea to a reduced charge of reckless driving involving alcohol; (2) associating with a convicted felon; (3) failure to pay child support; (4) failure to appear for drug testing as directed; (5) failure to report to the probation office as directed; (6) failure to seek gainful employment; and (7) failure to pay court-ordered restitution.

After a hearing on the merits the district court was "reasonably satisfied" of the verity of the charges of alcohol-related reckless driving, association with a convicted felon, failure to seek employment, failure to pay child support, failure to timely report to the probation office, and failure to submit to the required drug testing. As a consequence of these findings, the probation was revoked and he was ordered to prison for three years. Walter timely appealed.

Analysis

Our review of the revocation of probation is under an abuse of

discretion standard.¹ Walter's challenges primarily deal with the sufficiency of the alleged improprieties supporting his violations of the conditions of probation.

Walter first contends that the evidence was insufficient to find that he knowingly had associated with a convicted felon and he insists that he had supported his legal dependents to the best of his ability. We are not persuaded; there need only be "enough evidence to satisfy the district judge that the conduct of the petitioner has not met the conditions of probation."²

The record contains testimony that, despite having been specifically told otherwise, Walter continued an association with a convicted felon. This association was demonstrated by Walter's storing personal property with the felon, his introduction of the felon to his father, and his facilitating his father's entry into a business venture with the felon. The record also demonstrates that Walter's payments of child support were sporadic and only occurred during the pendency of the instant revocation proceeding in a transparent attempt to obtain leniency. Thus, there was "enough evidence, within a sound judicial discretion, to satisfy the district judge that the conduct of the probationer [had] not met the conditions of the probation."³

Walter also maintains that the court improperly considered his

¹**United States v. King**, 990 F.2d 190 (5th Cir.), cert. denied, U.S. _____, 114 S.Ct. 223 (1993).

²**United States v. Dozier**, 707 F.2d 862, 865 (5th Cir. 1983).

³**United States v. Garza**, 484 F.2d 88, 89 (5th Cir. 1973).

California alcohol-related reckless driving conviction, as he claims that the guilty plea leading to his conviction was only in exchange for his probation officer's broken promise that the conviction would not be used as a basis for revocation. The record reflects that the probation officer made no such promise; to the contrary, he stated that he would inform the court of the violation. The district court committed no error in using this matter as part of the basis for revocation.

Walter next claims that he was denied due process because of a variance between an oral finding that he had missed one appointment with his probation officer and a written finding that he had missed two appointments. He contends that this error may have misled the court into concluding that he was not abiding by the conditions of his probation. Probation hearings must be fundamentally fair. Due process requires a hearing at which the probationer is given the opportunity to show either that there was no violation or that there were mitigating circumstances surrounding the violation.⁴ Walter received such a hearing; his claim to the contrary is specious. Further, even assuming that there was a mistake in the written order, there still was no challenge to the district court's finding that Walter, without excuse, had missed a required appointment with his probation officer. Thus, Walter failed to comply with a critical condition of his probation and provided the district court with ample grounds for revocation.

⁴**Morrissey v. Brewer**, 408 U.S. 471 (1972).

Next, Walter challenges the district court's use of his repeated failure to undergo scheduled drug tests as a basis for revocation, contending that the tests were both oppressive in number and unrelated to the criminal activity surrounding his conviction. Walter may not raise this issue as it was not challenged at either his sentencing hearing or on his direct appeal.⁵

As Walter does not present any "clear evidence that the district court abused its discretion by ordering the revocation,"⁶ the order of the district court must be affirmed. Further, as it is clear that the above violations were "an adequate basis for the district court's discretionary action of revoking probation,"⁷ we need not reach Walter's other claims of error. Accordingly, the judgment of the district court revoking Walter's probation is AFFIRMED.

⁵**United States v. Irvin**, 820 F.2d 110 (5th Cir. 1987).

⁶**United States v. Ramirez**, 675 F.2d 707, 709 (5th Cir. 1982).

⁷**United States v. Turner**, 741 F.2d 696, 698 (5th Cir. 1984).