

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-000367-MR
AND
NO. 2013-CA-000368-MR

DANIEL COTTRELL

APPELLANT

v.

APPEAL FROM HARLAN CIRCUIT COURT
HONORABLE JAMES L. BOWLING JR., JUDGE
ACTION NOS. 08-CR-00662 AND 09-CR-00351

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * * * * *

BEFORE: MAZE, STUMBO AND TAYLOR, JUDGES.

STUMBO, JUDGE: Daniel Cottrell appeals from an Order of the Harlan Circuit Court revoking his probation. Cottrell argues that the trial court erred by improperly failing to make findings for revocation under KRS¹ 439.3106(1). He also contends that the evidence did not support the findings required for

¹ Kentucky Revised Statute.

revocation, and that other sanctions were more appropriate. We conclude, and the Commonwealth so concedes, that *Commonwealth v. Andrews*, 448 S.W.3d 773 (Ky. 2014), requires reversal in this matter. Specifically, the court in *Andrews* held that KRS 439.3106(1) requires trial courts to consider, prior to revocation, whether a probationer's failure to abide by a condition of supervision constitutes a significant risk to prior victims or the community at large, and whether the probationer can be managed in the community. Accordingly, we REVERSE the Order Revoking Probation and REMAND the matter to the Harlan Circuit Court.

On November 19, 2010, Cottrell entered a plea of guilty in Harlan Circuit Court to one count of trafficking in a controlled substance in the first degree (case 08-CR-00662). On the same day, he also entered a guilty plea to one count of complicity to trafficking in a controlled substance in the first degree (case 09-CR-00351). Cottrell was sentenced to two and one-half years in prison on each charge, to run consecutively for a total term of five years in prison. The Harlan Circuit Court then conditionally probated the sentence for three years.

On July 26, 2011, the Commonwealth moved to revoke Cottrell's probation because Cottrell violated a Domestic Violence Order ("DVO"). After taking proof, the trial court overruled the motion and Cottrell remained on probation.

The following year, on December 19, 2012, the Commonwealth filed another motion to revoke Cottrell's probation. The Commonwealth alleged that Cottrell had been arrested for Driving Under the Influence ("DUI"), driving on a

suspended license, possession of a controlled substance and other charges. A hearing on the motion was conducted, whereupon Cottrell's counsel acknowledged that Cottrell had driven on a suspended license in violation of his probation. However, counsel argued that the time Cottrell had already served in jail was sufficient punishment for the offense. Thereafter, the court revoked Cottrell's probation based in part on Cottrell's acknowledgement that he had driven on a suspended license in violation of the terms of his probation. The court imposed the five-year sentence arising from the underlying conviction, and this appeal followed.

Cottrell now argues that the trial court erred by failing to make findings for revocation under KRS 439.3106(1). He also contends that the evidence did not support the findings required for revocation, and that other sanctions were more appropriate. KRS 439.3106 provides that,

Supervised individuals shall be subject to:

- (1) Violation revocation proceedings and possible incarceration for failure to comply with the conditions of supervision when such failure constitutes a significant risk to prior victims of the supervised individual or the community at large, and cannot be appropriately managed in the community; or
- (2) Sanctions other than revocation and incarceration as appropriate to the severity of the violation behavior, the risk of future criminal behavior by the offender, and the need for, and availability of, interventions which may assist the offender to remain compliant and crime-free in the community.

The focus of Cottrell's argument is that the Harlan Circuit Court improperly failed to consider these factors prior to revoking his probation, and that as such, he is entitled to have the Order on appeal reversed and the matter remanded for another hearing and consideration of the KRS 439.3106 factors.

In response, the Commonwealth filed a motion to hold Cottrell's consolidated appeal in abeyance pending a decision in *Andrews, supra*. *Andrews* considered the applicability of KRS 439.3106 to revocation proceedings. An Opinion in that matter was rendered on December 18, 2014, holding in relevant part that the KRS 439.3106 factors were applicable to revocation proceedings. The Court held as follows:

We conclude that KRS 439.3106(1) requires trial courts to consider whether a probationer's failure to abide by a condition of supervision constitutes a significant risk to prior victims or the community at large, and whether the probationer cannot be managed in the community before probation may be revoked.

Andrews, 448 S.W.3d at 780.

After *Andrews* was rendered, the Commonwealth acknowledged that the KRS 439.3106 factors were not considered by the trial court when it revoked Cottrell's probation. Accordingly, it agreed with Cottrell that this matter must be reversed and remanded to the trial court for a new revocation hearing and consideration of the KRS 439.3106 factors.

We agree with the parties that *Andrews* is controlling. By its express language, it requires the trial court to consider whether a probationer's failure to

abide by a condition of supervision constitutes a significant risk to prior victims or the community at large, and whether the probationer cannot be managed in the community before probation may be revoked. These factors were not considered in the instant case.²

Having been sufficiently advised, and as the parties are in accord in this matter, we REVERSE the Order Revoking Probation and REMAND the matter to the Harlan Circuit Court for a new revocation hearing wherein the KRS 439.3106 factors may be considered.³

ALL CONCUR.

BRIEFS FOR APPELLANT:

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² It merits noting that *Andrews* was rendered subsequent to the Order on appeal.

³ We hold as moot Cottrell's argument that the evidence did not support the findings required for revocation, and that other sanctions were more appropriate.