

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2014-CA-000481-MR

DENNIS LOOP

APPELLANT

v. APPEAL FROM BELL CIRCUIT COURT  
HONORABLE ROBERT COSTANZO, JUDGE  
ACTION NOS. 13-CR-00078 & 13-CR-00100

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
REVERSING AND REMANDING

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BEFORE: KRAMER, CHIEF JUDGE; ACREE AND CLAYTON, JUDGES.

ACREE, JUDGE: Dennis Loop appeals the order of the Bell Circuit Court revoking his probation based solely upon violations of conditions of Loop's probation. Because the trial court failed to consider the criteria of KRS<sup>1</sup> 439.3106(1) as interpreted by *Commonwealth v. Andrews*, 448 S.W.3d 773 (Ky.

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<sup>1</sup> Kentucky Revised Statutes.

2014) prior to revoking Loop's probation, we reverse the trial court's order and remand for proceedings consistent with this opinion.

Dennis Loop pleaded guilty to third-degree burglary, receiving stolen property over \$500, and intimidating a participant in legal process in August 2013. Loop was sentenced to five-years' supervised probation based upon a report of the Division of Probation and Parole as an alternative to imprisonment. The terms of Loop's probation were set forth in the trial court's judgment, which included that he pay restitution.

In January 2014, Loop's probation officer filed a violation of supervision report alleging that Loop had violated the terms of his probation by absconding from supervision and failing to pay restitution. The Commonwealth requested that Loop's probation be revoked as a result of the violations.

The trial court held a revocation hearing in February 2014 at which Loop and his probation officer, Michelle Hensley, testified. Hensley said Loop did not report on December 18, 2013. Loop's report date was then rescheduled for December 27, 2013. Hensley testified she spoke with Loop on the 27th and informed him that if he did not report, there would be a warrant issued for his arrest. Despite the warning, Loop failed to report. Loop and Hensley had no further contact. Hensley also testified that Loop failed to pay restitution, that he had not found employment and had not demonstrated any efforts to find employment during this probationary period.

Loop testified that he had not attempted to find employment since he had been on probation, but he had applied for Social Security Disability benefits. He did not know the status of his application. Loop testified that he failed to report on December 18th because he was caring for a sick family member. He further testified that after he spoke with Hensley on the rescheduled report date he “just didn’t go after that.”

The trial court found that Loop had violated the terms of his probation by absconding from supervision and failing to pay restitution. As a result, the court entered an order revoking Loop’s probation and ordered him to serve his complete sentence. Loop now appeals.

Loop argues that the trial court abused its discretion when it failed to consider KRS 439.3106. He maintains the trial court did not engage in the required analysis under the statute because its order fails to make specific findings as to whether Loop’s probation violation posed “a significant risk to [his] prior victims . . . or the community at large” and that he “cannot be appropriately managed in the community.” KRS 439.3106(1). The Commonwealth contends that this argument should not be considered as it is not properly preserved for appellate review.

Our review of Loop’s revocation hearing demonstrates that Loop did not ask the trial court to consider KRS 439.3106 prior to its probation revocation determination. Issues are preserved for review on appeal when they have been “precisely raised or adjudicated” to the trial court. *Smith v. Bear, Inc.*, 419 S.W.3d

49, 60 (Ky. App. 2013). However, Loop requests in his brief that this Court review the trial court's decision for palpable error pursuant to Kentucky Rule of Criminal Procedure (RCr) 10.26, which provides:

A palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice resulted from the error.

RCr 10.26. For an error to be palpable, it “must be so grave in nature that if it were uncorrected, it would seriously affect the fairness of the proceedings.”

*Brewer v. Commonwealth*, 206 S.W.3d 343, 349 (Ky. 2006). Manifest injustice results from a “defect in the proceeding [that is] shocking or jurisprudentially intolerable.” *Martin v. Commonwealth*, 207 S.W.3d 1, 4 (Ky. 2006).

The Supreme Court in *Commonwealth v. Andrews*, 448 S.W.3d 773 (Ky. 2014) declared that the legislature's enactment in 2011 of KRS 439.3106 (as part of House Bill 463<sup>2</sup>) ushered in a “new state of the law[,]” requiring trial courts to consider the parameters of the statute before probation may be revoked. *Andrews*, 448 S.W.3d at 780.

We recognize that neither the trial court nor the parties had the guidance of *Andrews* at the time of the revocation hearing and subsequent appeal;<sup>3</sup> but, given

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<sup>2</sup> “In 2011, the Kentucky General Assembly enacted the Public Safety and Offender Accountability Act, commonly referred to as House Bill 463 (“HB 463”).” *Andrews*, 448 S.W.3d at 776.

<sup>3</sup> *Andrews* was rendered on December 18, 2014. Loop's revocation hearing was held in February 2014.

the Supreme Court's explicit directive in that case, we are compelled to deem the trial court's failure to consider KRS 439.3106 as palpable error. There is a "substantial possibility" that the result of Loop's probation revocation hearing would have been different without the alleged error. *Brewer*, 206 S.W.3d at 349.

The requirement that trial courts consider "whether a probationer's failure to abide by a condition of the 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" promotes the objectives and intentions of the Kentucky Legislature in its enactment of HB 463, including KRS 439.3106, for the imposition of graduated sanctions in response to minor probation violations. *Andrews*, 448 S.W.3d at 779. Prior to this statutory reform related to probation revocation, a trial court could revoke probation at any time if there was evidence "to support at least one probation violation." *Lucas v. Commonwealth*, 258 S.W.3d 806, 807-08 (Ky. App. 2008).

The Court in *Andrews* makes clear that the trial court retains its discretion in matters of probation revocation, but that discretion must be exercised within the measures provided in KRS 439.3106(1). In this case, the trial court revoked Loop's probation solely based upon the finding that he violated the terms of his probation. The only testimony presented at the revocation hearing was in relation to Loop's two instances of failing to report and his subsequent failure to maintain contact with his probation officer as well as his inability and noncompliance to pay restitution.

For the foregoing reasons, we reverse and remand this matter to the Bell Circuit Court to reconsider whether Loop's failure to abide by the terms of his probation constitute a significant risk to prior victims or the community, and whether Loop cannot be appropriately managed in the community before his probation may be revoked as required by KRS 439.3106(1).

ALL CONCUR.

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