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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-000209-MR

TUCKER MCCORMICK

APPELLANT

v. APPEAL FROM BOYD CIRCUIT COURT
HONORABLE GEORGE W. DAVIS, III, JUDGE
ACTION NO. 12-CR-00312-001

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
VACATING AND REMANDING

** ** * * * * *

BEFORE: ACREE, STUMBO AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Tucker McCormick brings this appeal from a Boyd Circuit Court Order entered January 8, 2015, voiding his pretrial diversion agreement. He argues that the trial court's findings of fact did not satisfy the requirements of Kentucky Revised Statutes (KRS) 439.3106. We reluctantly agree and, therefore, vacate the order and remand the case for further findings.

McCormick was originally charged with second-degree burglary in 2012. He entered a plea of guilty to an amended charge of third-degree burglary. In exchange for the plea, the Commonwealth recommended supervised pretrial diversion for a period of five years, with a sentence of five-years' imprisonment if diversion was unsuccessful. On March 22, 2013, the trial court entered an order in accordance with this recommendation. The conditions of diversion included paying restitution to the victim, remaining drug and alcohol free, being subject to random testing, not having access to guns, and not committing another offense during the diversion period.

The supervision of McCormick's diversion was subsequently transferred to West Virginia. On July 31, 2013, the Kentucky Division of Probation and Parole filed a violation of supervision report containing allegations relayed from West Virginia that McCormick had driven under the influence of alcohol, had violated his curfew and had admitted that he used marijuana.

McCormick was arrested but ultimately allowed to continue on diversion after the parties agreed in October of 2013 to a stipulation of contempt of court in lieu of revocation. McCormick was ordered to complete the long-term inpatient rehabilitation program at The Healing Place in Huntington, West Virginia. The order continued the original conditions of diversion and specified that failure to complete the rehabilitation program would constitute a violation of the diversion agreement.

On October 2, 2014, another violation of supervision report was filed in Kentucky alleging that McCormick had been discharged from The Healing Place for drinking a bottle of cough syrup, that McCormick had tested positive for heroin, and had admitted to using it. The report also stated that McCormick had been relocated to The Life House Farm in Kenova, West Virginia.

Following a hearing on December 12, 2014, the trial court voided the diversion agreement, based on the following findings:

The Court allowed the Defendant the opportunity to better himself through a Diversion. It allowed the Defendant to be monitored by West Virginia in order that the Defendant might maintain closer contact with his residence. It allowed the Defendant further time to pay restitution. It, upon violation, then permitted a graduated sanction of contempt rather than revocation and afforded the Defendant the ability to have his own choice of treatment centers. The Defendant, now caught once again in his own devices, wants this Court to once again allow him to pick his own treatment and go unpunished.

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The Court has attempted graduated sanctions, same have failed and the Court finds that any further treatment or sanctions in this matter would be of no benefit as the Defendant has demonstrated his inability to comply with this Court's Orders.

KRS 533.256(2) provides that "[i]n making a determination as to whether or not a pretrial diversion agreement should be voided, the court shall use the same criteria as for the revocation of probation, and the defendant shall have the same rights as he or she would if probation revocation was sought." Thus, the standard for reviewing a trial court's decision to void a diversion agreement is the

same abuse of discretion standard which is used to review probation revocation decisions. *Lucas v. Com.*, 258 S.W.3d 806 (Ky. App. 2008).

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.

Recently, the Kentucky Supreme Court explained 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.” *Com. v. Andrews*, 448 S.W.3d 773, 780 (Ky. 2014). As another panel of this Court recently stated, “the General Assembly intended the task of considering and making findings regarding the two factors of KRS 439.3106(1) to serve as the analytical precursor to a trial court’s ultimate decision: whether revocation or a lesser sanction is appropriate.” *McClure v. Com.*, 457 S.W.3d 728, 732 (Ky. App. 2015). By directing the trial court to make such a determination, “the legislature furthers the objectives of the

graduated sanctions schema to ensure that probationers are not being incarcerated for minor probation violations.” *Andrews*, 448 S.W.3d at 779.

The trial court in this case made sufficient factual findings under KRS 439.3106(2) to support its conclusion that McCormick was not eligible for alternative sanctions, as these had already been provided and had not worked, and that he could not be “managed in the community.” However, the court did not provide sufficient findings to show that it had considered whether McCormick’s failure to abide by a condition of supervision constitutes a significant risk to prior victims or the community at large as required by KRS 439.3106(1) and *Andrews*, 448 S.W.3d 773. Hence, we are unable to adequately review whether voiding the diversion agreement was the appropriate sanction, or whether it constituted an abuse of discretion.

The Commonwealth has argued that because the *Andrews* opinion only became final after McCormick’s diversion was voided, it cannot be applied retroactively. It relies on *Southwood v. Commonwealth*, 372 S.W.3d 882 (Ky. App. 2012) for the proposition that, prior to *Andrews*, it was not necessary for the trial court to make specific findings of fact to support a revocation decision. *Southwood*, 372 S.W.3d 882 *abrogated by McClure*, 457 S.W.3d 728. But the *Southwood* court merely pointed out that the “statutory language of KRS 439.3106 does not require the court to make specific findings of fact.” *Southwood*, 372 S.W.3d at 884. The opinion then holds that the trial court in that case did make a sufficient oral explanation on the record to support the revocation.

The Commonwealth's retroactive application argument is misplaced and not applicable to this analysis. In *Andrews*, the Supreme Court merely clarified for the first time the extent of the findings trial courts are required to make under the specific terms of the statute. As the Court noted, *Andrews* was the earliest opportunity for the Court to analyze the statute, upon passage of HB 463 in 2011. *Andrews*, 448 S.W.3d at 776. Thus, there was no change in the law to support an argument regarding retroactive application.

Accordingly, the trial court's order revoking McCormick's diversion is vacated, and the case is remanded for the trial court to make the appropriate findings as to whether McCormick's failure to comply with the terms of the diversion agreement constituted "a significant risk to prior victims of the supervised individual or the community at large[.]" KRS 439.3106(1). We reiterate, as did the *McClure* court, that "[w]hile HB 463 reflects a new emphasis in imposing and managing probation, it does not upend the trial court's discretion in matters of probation revocation, provided that discretion is exercised consistent with statutory criteria." *McClure*, 457 S.W.3d at 731-32 (quoting *Andrews*, 448 S.W.3d at 780).

For the foregoing reasons the Order of the Boyd Circuit Court is vacated and remanded for proceedings consistent with this Opinion.

ALL CONCUR.

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