

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-000597-MR

JESSE MARTIN

APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE A.C. MCKAY CHAUVIN, JUDGE
ACTION NO. 06-CR-003222

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
VACATING AND
REMANDING

** ** * ** * ** *

BEFORE: DIXON, JONES, AND J. LAMBERT, JUDGES.

DIXON, JUDGE: Jesse Martin appeals from an order of the Jefferson Circuit Court revoking his probation and sentencing him to two-years' imprisonment. After careful review, we reverse and remand to the trial court for further proceedings.

In October 2006, Martin pled guilty to receiving stolen property over \$300.00. He was sentenced to two-years' imprisonment and placed on pretrial diversion for five years. In May 2008, Martin was removed from diversion for violating the conditions of the diversion, and the court placed Martin on supervised probation for a period of five years. The court revoked Martin's probation in January 2012, and imposed the two-year prison sentence. Six months later, the court granted Martin's motion for shock probation. Martin ultimately absconded from supervision, and the Commonwealth moved to revoke his probation. A revocation hearing was held in March 2015, and the court revoked Martin's probation and imposed the remainder of the two-year sentence. This appeal followed.

Martin's sole argument is that the trial court abused its discretion by revoking his probation without making the findings required by KRS 439.3106. On the other hand, the Commonwealth contends this error was not preserved;¹ alternatively, the Commonwealth argues that the statutory considerations were implicit in the court's statements at the hearing.

KRS 439.3106 provides:

Supervised individuals shall be subject to:

(1) Violation revocation proceedings and possible incarceration for failure to comply with the conditions of

¹ We believe this issue was properly preserved by counsel's request that the court consider alternative sanctions in light of Martin's time in custody and need for drug treatment. However, even if the issue was not preserved, the trial court's failure to make the statutory findings required by KRS 439.3106(1) constituted palpable error pursuant to RCr 10.26.

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.

In *Commonwealth v. Andrews*, 448 S.W.3d 773 (Ky. 2014), the Kentucky Supreme Court held that, before a court may revoke probation, it must make findings on the record as to whether “the probationer's failure to comply with the terms of probation constitutes ‘a significant risk to [his] prior victims . . . or the community at large,’ and that the probationer ‘cannot be appropriately managed in the community.’” *Id.* at 777 (quoting KRS 439.3106(1)).

The trial court’s written order revoking probation did not address the statutory factors. In its ruling from the bench, the court opined Martin had been given many opportunities, yet he had continued to make bad decisions while on probation. The court concluded that, although Martin had already served a substantial portion of the two-year sentence, it would be unreasonable to leave Martin on probation since he had absconded and received new charges.

After careful consideration, we are not persuaded by the Commonwealth’s contention that the statutory findings were implicit in the court’s ruling. Our review clearly indicates the record does not contain any express verbal or written findings that Martin’s violations constituted a significant risk to the community

and that he could not be appropriately managed in the community. KRS 439.3106(1). The trial court's decision to revoke Martin's probation, without making the statutory findings outlined in *Andrews*, constituted an abuse of discretion. *McClure v. Commonwealth*, 457 S.W.3d 728, 733 (Ky. App. 2015).

On remand, the trial court must make express findings as to both elements of KRS 439.3106(1). Thereafter, consistent with *Andrews*, the court must determine whether revocation or a lesser sanction is most appropriate. *Id.* at 734.

The order of the Jefferson Circuit Court is vacated, and this matter is remanded for further proceedings consistent with this opinion.

ALL CONCUR.

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