

Commonwealth of Kentucky
Court of Appeals

NO. 2015-CA-001106-MR

WILLIAM JONES

APPELLANT

v. APPEAL FROM JACKSON CIRCUIT COURT
HONORABLE OSCAR GAYLE HOUSE, JUDGE
ACTION NO. 12-CR-00100

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * ** * ** *

BEFORE: CLAYTON, JONES, AND NICKELL, JUDGES.

CLAYTON, JUDGE: William Jones¹ (Jones) brings this appeal from the Jackson Circuit Court's voidance of his pretrial diversion. He argues that the circuit court abused its discretion when it failed to make adequate findings of fact under *Commonwealth v. Andrews*, 448 S.W.3d 773 (Ky. 2014), during his hearing, and

¹ Appellant, William Jones, is not related to Judge Jones.

also when it failed to make findings of fact under *Commonwealth v. Marshall*, 345 S.W.3d 822, 833 (Ky. 2011). Because the circuit court did not make findings of fact under either *Andrews, supra*, or *Marshall, supra*, we vacate and remand for the trial court to make findings under both cases.

Relevant Facts

Jones owed \$5,034.56 in child support, and he pleaded guilty to flagrant nonsupport. Kentucky Revised Statutes (KRS) 530.050. He was sentenced to two-years' imprisonment, which was diverted for five years on the condition that that he pay off the remainder of the amount he owed at the rate of \$100 per month. On September 12, 2014, the Commonwealth filed a motion to set aside the pretrial diversion agreement, because Jones had failed to make the required payments. Jessie Weaver (Weaver) from the Jackson County Child Support Office testified that Jones had made some payments, but that Jones was significantly in arrearage. Regina Jones, the payee, also testified that Jones had not provided her with any support beyond the amount stated by Weaver.

The trial court indicated that it was prepared to set aside Jones' pretrial diversion. Defense counsel objected, stating that the trial court had not made findings under KRS 439.3106. The trial court refused to make findings, then voided Jones' pretrial diversion agreement. This appeal follows.

Analysis

1. Findings under *Andrews*

Jones first argues that the trial court erred when it failed to make findings under KRS 439.3106 before it voided his diversion. In *Andrews, supra*, our Supreme Court stated that except for “[c]ertain violations, such as absconding or receiving a new felony conviction ... KRS 439.3106 must be considered before probation may be revoked.” 448 S.W.3d at 778-79. KRS 439.3106 states that:

Supervised individuals shall be subject to” the following:

- (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 Commonwealth argues that *Andrews* does not apply to pretrial diversion proceedings. However, in *Helms v. Commonwealth*, 475 S.W.3d 637 (Ky. App. 2015), this court did hold *Andrews* applicable to pretrial diversion proceedings, stating that “[a]fter HB 463, a trial court is not permitted to follow an unbending predetermined outcome but must consider the danger to the defendant’s victim or the community and the possibilities of rehabilitation in the community.” *Id.* at 644. *See also* KRS 533.256(2) (“In 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.”).

The error in this case is preserved. Defense counsel below requested findings under KRS 439.3106, and the trial court abused its discretion in denying that request. Therefore, this case must be reversed for the entry of new findings as to whether Jones’ “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” under KRS 439.3106.

II. Findings under *Marshall*

Jones next argues that the trial court palpably erred when it failed to make findings of fact pursuant to *Commonwealth v. Marshall*, 345 S.W.3d 822 (Ky. 2011). In *Marshall*, our Supreme Court reversed the trial court for its failure to make findings as to “(1) whether each defendant had made sufficient bona fide efforts to make payments but was unable to do so from no fault of his own and, if so, (2) whether alternatives to incarceration would suffice to accomplish the Commonwealth’s punishment and deterrence objectives.” *Id.* at 833. Jones concedes that this argument is unpreserved. The Commonwealth argues that the trial court was not required to make findings under *Marshall* because the appellant failed to meet his burden of persuasion in the trial court. The Commonwealth also argues that the failure to make findings under *Marshall* does not rise to the level of palpable error. We disagree. Kentucky Rules of Criminal Procedure (RCr) 10.26 provides that:

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 has resulted from the error.

Manifest injustice occurs where there exists a “probability of a different result or error so fundamental as to threaten a defendant's entitlement to due process of law.” *Martin v. Commonwealth*, 207 S.W.3d 1, 3 (Ky. 2006). Our Supreme Court noted the importance of making these findings, stating that:

The trial court must specifically identify the evidence it relies upon in making these determinations on the record, as well as the specific reason(s) for revoking probation on the record. Although we indicated in *Alleman* that such findings do not necessarily have to be in writing, we hold that the trial court must make such findings specifically on the record. It is not enough that an appellate court might find some evidence in the record to support a reason for revoking probation by reviewing the whole record.

Marshall, 345 S.W.3d at 833 (emphasis in original).

Although no published authority exists on point discussing whether the failure to make findings under *Marshall* is subject to palpable error review, *Schaffeld v. Com. ex rel. Schaffeld*, 368 S.W.3d 129 (Ky. App. 2012) is persuasive. In *Schaffeld* this Court reversed for the failure of the trial court to make findings under *Marshall*, stating that:

Although not argued by either party, the trial court’s written order revoking Shane’s conditional discharge did not contain specific findings, and the trial court’s comments from the bench do not satisfy the specificity requirement emphasized in *Marshall*. While the trial

court specifically asked Shane about his income and his reasons for not working before finding a violation, the trial court never made a specific finding that Shane did not try to remain current in his child support obligation through his own fault, nor that his noncompliance with the court's prior order was willful. Further, the trial court never summarized the evidence supporting its partial revocation of Shane's conditionally discharged sentence. Such findings, with citation to supporting evidence, are express requirements under *Marshall*.

Id. at 135. In light of *Schaffeld*, we believe that the trial court's failure to make findings in the present case rises to the level of palpable error. Therefore, upon remand the trial court must also make findings pursuant to *Marshall*.

Conclusion

In sum, we hold that the trial court abused its discretion when it failed to enter findings as to both elements under *Andrews, supra*, and *Marshall, supra*.

For the foregoing reasons, the judgment of the Jackson Circuit Court is reversed, and the matter is remanded back for the court to enter findings of fact under *Andrews, supra*, and *Marshall, supra*.

ALL CONCUR.

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