

RENDERED: NOVEMBER 16, 2018; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2017-CA-001274-MR

WILLIAM REYNOLDS

APPELLANT

v. APPEAL FROM TAYLOR CIRCUIT COURT
HONORABLE SAMUEL TODD SPALDING, JUDGE
ACTION NO. 16-CR-00119

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: J. LAMBERT, MAZE AND SMALLWOOD, JUDGES.

SMALLWOOD, JUDGE: William Reynolds appeals from an order of the Taylor Circuit Court revoking his probation. Reynolds argues that the trial court erred in failing to comply with the mandatory criteria set out in Kentucky Revised Statute (KRS) 439.3106. We find no error, and AFFIRM the order on appeal.

On June 2, 2015, Reynolds entered a guilty plea in Owen Circuit Court on charges of tampering with physical evidence, possession of drug paraphernalia and first-degree trafficking in methamphetamine. He was sentenced to 8 years in prison. The sentence was probated for 5 years on several conditions, including his successful participation in the Hopkins County Drug Court.

Reynolds began his participation with the Drug Court, but soon violated the terms of his probation several times by failing to attend treatment, disrespecting Drug Court staff, and having positive drug screens. Over the following year, Reynolds was placed in a 30-day residential treatment program, was later taken into custody for non-compliance, and was ordered to serve various sanctions ranging from 2 to 15 days in custody for violating the terms of his probation and for contempt. Based on his behavior, Reynolds was terminated from Drug Court.

On July 5, 2017, a written notice to revoke Reynolds's probation was entered, and a hearing on the notice was conducted on July 11, 2017. At the hearing, Reynolds's Drug Court supervisor, Ginger Ford, testified that Reynolds began having positive drug screens in February 2017. Reynolds tested positive for benzodiazepines, and Ford believed that Reynolds was using "spice," or synthetic marijuana, based on his behavior and her interactions with other Drug Court

participants who had used spice. Reynolds, through counsel, argued that the Commonwealth failed to demonstrate that he violated the terms of his probation.

Upon considering the matter, the trial court determined that Reynolds had violated the terms of his probation by being terminated from Drug Court. It noted that the finding was made on a preponderance of the evidence, and that there were no appropriate interventions in the community in lieu of revocation. The court revoked his probation and remanded him to custody to serve the underlying sentence. This appeal followed.

Reynolds now argues that the Taylor Circuit Court erred when it revoked his probation without complying with the mandatory criteria set out in KRS 439.3106. Specifically, he notes that KRS 439.3106 requires the court to make a determination 1) of whether a violation occurred, and 2) the appropriate consequence for violating probation. Reynolds directs our attention to *Commonwealth v. Andrews*, 448 S.W.3d 773, 777 (Ky. 2014), for the proposition that by requiring a trial court to determine if a probationer is dangerous and cannot be appropriately managed in the community before revoking probation, the legislature furthers the objectives of a graduated scheme of sanctions to ensure that probationers are not being incarcerated for minor violations. The substance of Reynolds's argument is that the Taylor Circuit Court bypassed the legislative criteria by failing to expressly consider whether a violation occurred and whether

appropriate consequences short of revocation could be implemented. He seeks an opinion reversing the order on appeal and remanding the matter for further findings consistent with KRS 439.3106.

We must first note that Reynolds has not preserved this argument for appellate review. The Commonwealth properly argues, and the record so reflects, that Reynolds never raised nor cited below the elements of KRS 439.3106. While trial counsel did argue in favor of alternatives to probation, Reynolds's appellate counsel acknowledges that his trial counsel never raised KRS 439.3106. A party may not raise an argument for the first time on appeal. *Springer v. Commonwealth*, 998 S.W.2d 439, 446 (Ky. 1999).

Arguendo, even if Reynolds had raised KRS 439.3106 before the trial court, we would find no error on appeal. KRS 439.3106 states that,

[s]upervised 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 record refutes Reynolds's claim that the Taylor Circuit Court improperly failed to apply KRS 439.3106. After hearing the arguments of counsel and considering the record, the court found "by a preponderance of the evidence that the defendant violated the terms of his probation by being terminated from drug court." It further determined that there were "not appropriate interventions in the community which may assist the Defendant in remaining compliant and crime-free." These findings satisfy the statutory scheme.

"Probation revocation is not dependent upon a probationer's conviction of a criminal offense. Instead, the Commonwealth need only prove by a preponderance of the evidence that a probationer has violated the terms of probation." *Commonwealth v. Lopez*, 292 S.W.3d 878, 881 (Ky. 2009) (footnotes and citations omitted). Probation revocation hearings "must be conducted in accordance with minimum requirements of due process of law." *Rasdon v. Commonwealth*, 701 S.W.2d 716, 718 (Ky. App. 1986). On appeal, we review a circuit court's decision revoking a defendant's probation for an abuse of discretion. *Lucas v. Commonwealth*, 258 S.W.3d 806, 807 (Ky. App. 2008).

We find no basis for reversing the revocation order of the Taylor Circuit Court. Reynolds received due process and the Commonwealth demonstrated by a preponderance of the evidence that he violated the terms of his

probation. We find no abuse of discretion and accordingly AFFIRM the order on appeal.

ALL CONCUR.

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