

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2012-CA-001130-MR

JAMES KIDD

APPELLANT

v. APPEAL FROM LEE CIRCUIT COURT  
HONORABLE THOMAS P. JONES, JUDGE  
ACTION NO. 09-CR-00034

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: CLAYTON, MAZE, AND NICKELL, JUDGES.

CLAYTON, JUDGE: James Kidd appeals from a Lee Circuit Court order revoking his probation. He contends that the trial court failed to comply with Kentucky Revised Statutes (KRS) 439.3106, and violated his due process rights by considering hearsay evidence.

In 2009, Kidd entered a plea of guilty to first-degree trafficking in a controlled substance. He received a sentence of ten years, probated for five years. As a condition of his probation, he was required to leave the state for five years. In April 2010, the trial court entered an order allowing Kidd to return to Kentucky for two months to spend time with his sister, who was terminally ill. When that period had expired, the trial court entered a second order extending his stay for an additional two months.

In March 2012, the trial court issued a bench warrant for Kidd's arrest after receiving information that he was in Owsley County. The Commonwealth moved to revoke Kidd's probation two days later. The police arrested Kidd in Booneville, Owsley County, on March 22, 2012. Kidd allegedly had returned to Kentucky to visit his mother, who was ill. Following an evidentiary hearing, the trial court entered a written order revoking probation. This appeal followed.

A trial court's decision to revoke probation is reviewed for an abuse of discretion. *Tiryung v. Commonwealth*, 717 S.W.2d 503, 504 (Ky. App. 1986). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). KRS 533.050(2) provides that "the court may not revoke or modify the conditions of a sentence of probation or conditional discharge except after a hearing with defendant represented by counsel and following a written notice of the grounds for revocation or modification."

“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.” *Miller v. Commonwealth*, 329 S.W.3d 358, 359-60 (Ky. App. 2010) (internal citations and quotation marks omitted). “Generally, a trial court’s decision revoking probation is not an abuse of discretion if there is evidence to support at least one probation violation.” *Lucas v. Commonwealth*, 258 S.W.3d 806, 807-808 (Ky. App. 2008) (internal citation omitted).

Kidd argues that the trial court failed to observe the requirements of KRS 439.3106. That statute, which was enacted in 2011, states:

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.

KRS 439.3106.

Kidd argues that before revoking his probation, the trial court was required to make a finding under section (1) that his violation of the terms of his

probation posed a significant risk to prior victims or the community at large and could not be appropriately managed in the community. Although Kidd has provided citations to the video record where this argument is allegedly preserved, our review indicates only that his attorney asked the court to consider graduated sanctions. At no time did he allude specifically to the terms of section (1) of the statute, or request the court to make findings under that section. Consequently, we may only review this claim for palpable error pursuant to Kentucky Rules 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 has resulted from the error.

In any event, “[t]he statutory language of KRS 439.3106 does not require the court to make specific findings of fact.” *Southwood v. Commonwealth*, 372 S.W.3d 882, 884 (Ky. App. 2012).

The trial court based its decision to revoke probation on the fact that Kidd had violated what the court described as the main condition of his probation. The court specifically rejected the characterization of Kidd’s return, by both the Commonwealth and the defense, as a “technical violation.” The trial court noted that on two prior occasions, it had granted leave to Kidd to remain in Kentucky with a sick relative, which had put Kidd on notice that he should seek permission to return to Kentucky when a family member was ill and that the length of his stay

was of grave importance to the court. The trial court acknowledged that Kidd had not been charged with any crimes in Kentucky or elsewhere since he was placed on probation. His prior offenses in Kentucky included convictions for operating a motor vehicle under the influence of alcohol/drugs, second offense, and speeding 15 MPH over limit in Lee County; operating a motor vehicle under the influence of alcohol/drugs in Madison County; third-degree escape in Owsley County; and failure to illuminate head lamps in Powell County. In response to defense counsel's request, the trial court considered and rejected the possibility of graduated sanctions, concluding that there was a substantial risk that Kidd would commit another violation during any extended period of probation; that he was in need of correctional treatment; and that further probation would unduly depreciate the seriousness of his crime. Thus, the trial court complied with KRS 439.3106 in that it considered and rejected the possibility of other sanctions. "The trial court determined that there was not any other sanction short of revocation and incarceration that would be appropriate." *Southwood* at 885. This determination that revocation was the only appropriate course was a matter well within the discretion of the trial court and will not be reversed on appeal.

Next, Kidd argues that his due process rights were violated when he was denied the right to confront and cross-examine witnesses against him.

At the hearing, the victim's advocate, Sharla Plowman, was asked by the trial court if she had any knowledge of Kidd's return to Kentucky. She replied, "I've had several phone calls. . . ." Defense counsel objected on the grounds that a

witness with more direct knowledge of any alleged violation was needed, and that he would not be able to cross-examine Plowman if she was going to repeat second- or third-hand information. The trial court overruled the objection on the grounds that hearsay is permissible due to the informal nature of revocation hearings.

Plowman testified that she had prepared the motion to revoke Kidd's probation after receiving several phone calls from an individual who told her that Kidd was staying in Owsley County. She could not remember this individual's name and it was not on the motion she prepared for the Commonwealth's attorney. Kidd argues that while the post-arrest complaint stated that Kidd was arrested in Kentucky, the trial court simply assumed that the document was correct without sworn testimony from anyone with actual knowledge that Kidd was in Kentucky.

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) (citing *Gagnon v. Scarpelli*, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973)). "[P]robation revocation hearings are not criminal proceedings but flexible hearings that accept matters into evidence otherwise inadmissible in a criminal prosecution." *Barker v. Commonwealth*, 379 S.W.3d 116, 129 (Ky. 2012) (citing *Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972)). Kentucky courts have held that hearsay evidence is admissible in "these informal types of hearings and there is no absolute right to confront witnesses[.]" *Barker* at 129. It was permissible for the court to allow

Plowman's testimony and to rely upon its own executed bench warrant and the post-arrest complaint as proof that Kidd had been found in Kentucky.

The order revoking Kidd's probation is therefore affirmed.

ALL CONCUR.

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