

RENDERED: NOVEMBER 1, 2013; 10:00 A.M.  
NOT TO BE PUBLISHED

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

NO. 2012-CA-001819-MR

BRANDI BURLINGAME

APPELLANT

v. APPEAL FROM BALLARD CIRCUIT COURT  
HONORABLE TIMOTHY A. LANGFORD, JUDGE  
ACTION NO. 09-CR-00104 AND 10-CR-00036

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: CLAYTON, MAZE AND STUMBO, JUDGES.

MAZE, JUDGE: Appellant, Brandi Burlingame, appeals the Ballard Circuit Court's decision to revoke her probation following several violations of the conditions of that probation. Specifically, she contends that the trial court violated her right to due process by revoking her probation without first considering

alternatives to her incarceration. However, finding no palpable error on the part of the trial court, we affirm.

On July 16, 2010, Burlingame pled guilty to one count of theft of a controlled substance under \$300.00 and one count of giving an officer a false name or address. She also pled guilty to bail jumping, a separate charge which stemmed from her failure to appear at a pretrial conference pertaining to her other charges. Following her plea, the trial court sentenced Burlingame to two five-year sentences to run consecutively with one another for a total of ten years. The trial court probated its sentence for a period of five years. The conditions of Burlingame's probation included no use or possession of alcohol, no entry of a place where alcohol is sold as a primary commodity, no association with convicted felons and proof of attendance at substance abuse treatment classes.

Following a revocation hearing held in November of 2010, the trial court allowed Burlingame's probation to continue. Burlingame was again brought before the trial court in September of 2011 for violating the conditions of her probation. The trial court revoked Burlingame's probation following this hearing, but granted her shock probation six weeks later. The trial court then revoked Burlingame's probation in July 2012 only to grant her shock probation again three days later.

On September 7, 2012, Probation and Parole Officer Kenya Atherton filed a violation of supervision report regarding Burlingame. The report alleged that Burlingame violated the conditions of her probation upon her recent purchase,

possession and consumption of alcohol prior to her regularly scheduled “report day” with Officer Atherton. Following this report, the Commonwealth sought revocation of Burlingame’s probation and the trial court held a hearing on September 21, 2012.

At the revocation hearing, Officer Atherton testified that on September 4, 2012, Burlingame arrived at Atherton’s office with the smell of alcohol on her breath. A test revealed Burlingame’s blood alcohol content to be .007 and Burlingame admitted to having purchased and consumed beer before arriving. Burlingame also admitted to having repeated contact with a convicted felon who was at her home while she was in the Probation and Parole office. In addition, Burlingame was unable to produce any proof of attendance at substance abuse treatment classes since August 13, 2012. Burlingame contended at the hearing that she had attended additional substance abuse classes. Officer Atherton also noted for the trial court that Burlingame had passed all drug screens up to the date of the hearing.

During argument at the hearing, Burlingame’s defense counsel acknowledged that Burlingame had consumed alcohol in violation of her probation, but urged the court to continue her probation given Burlingame’s on-going and difficult divorce, which she claimed was the likely cause of Burlingame’s inability to comply with the conditions of her probation. Based on the evidence and argument at the hearing, the trial court revoked Burlingame’s probation and ordered her to serve both five-year sentences consecutively and

ninety days concurrently on the charge of giving the officer a false name or address.

In revoking Burlingame's probation, the trial court stated on the record that it had reviewed the file and believed that Burlingame had bought and used alcohol, had associated with a convicted felon, and had failed to attend substance abuse treatment as required. Prior to imposing its sentence, the trial court also recounted Burlingame's history of violations and subsequent revocations. Defense counsel did not request that the trial court make additional findings. Burlingame now appeals from the trial court's order revoking her probation.

Before addressing the single substantive issue in this case, we must first define the scope and standard of our review. On appeal, Burlingame acknowledges her defense counsel's failure to request from the trial court additional findings pursuant to the statute she now contends that court violated in revoking her probation. Hence, because her allegation of error is unpreserved for appeal, Burlingame urges us to review the trial court's decision for "palpable error" pursuant to Kentucky Rules of Criminal Procedure (RCr) 10.26, which states

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.

Therefore, we will reverse the trial court's order only if it resulted in "manifest injustice;" that is, the order to revoke seriously affected the "fairness, integrity, or public reputation of the proceeding as to be 'shocking or jurisprudentially intolerable.'" *Commonwealth v. Jones*, 283 S.W.3d 665, 669 (Ky. 2009) (quoting *Martin v. Commonwealth*, 207 S.W.3d 1, 4 (Ky. 2006)); *McGuire v. Commonwealth*, 368 S.W.3d 100, 112 (Ky. 2012); *see also Johnson v. United States*, 520 U.S. 461, 462, 117 S.Ct. 1544, 1546, 137 L.Ed.2d 718 (1997). In other words, we must determine whether there is a "substantial possibility that the result in the case would have been different without the error." *Brewer v. Commonwealth*, 206 S.W.3d 343, 349 (Ky. 2006) (internal quotations and citations omitted).

Burlingame's only argument on appeal is that the trial court failed to take up the required considerations listed in the recently enacted Kentucky Revised Statutes (KRS) 439.3106 and that such a failure deprived her of due process, constituting palpable error. The relevant statute 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. Burlingame argues that the trial court's proper consideration of these statutory alternatives would have resulted in continuation of her probation.

Since the enactment of this statute, we have held that trial courts retain broad discretion in deciding whether or not to revoke probation, even with the requirements of KRS 439.3106 and other statutes. *See Jarrell v. Commonwealth*, 384 S.W.3d 195 (Ky. App. 2012). While KRS 439.3106 urges our trial courts to consider means of punishment other than incarceration, we have discerned that “the General Assembly clearly wanted incarceration to remain a possible penalty for probation violations....” *Id.* at 202 (specifically interpreting the language of KRS 439.3106). Therefore, the crucial question is whether the trial court committed palpable error by revoking Burlingame's probation without making specific findings regarding the factors listed in KRS 439.3106.

Again, in the short time since enactment of KRS 439.3106 and other similar statutes, this Court has had few occasions to discuss the effect of the statute's provisions on the trial court's ability and discretion to revoke probation. Among these few cases are *Southwood v. Commonwealth*, 372 S.W.3d 882 (Ky. App. 2012), and *Jarrell v. Commonwealth*, *supra*. In *Southwood*, the defendant had violated the terms of his probation by, among other things, possessing a firearm. During the revocation hearing, the trial court was informed that the defendant also had assault charges pending and had possibly been involved in a

shooting while on probation. As the result of this and other evidence, the trial court revoked the defendant's probation.

We took up the defendant's appeal in *Southwood* on the issue of the trial court's failure to make specific findings regarding the elements listed in KRS 439.3106. We found that the grounds stated by the trial court on the record, *i.e.*, the defendant's possession of a deadly weapon, his status as a convicted felon and the "nature and risk of [the defendant's] alleged criminal behavior" to be sufficient for revocation, though these findings did not precisely align with the factors in KRS 439.3106. *Southwood*, 372 S.W.3d at 885. More importantly, we held that "the statutory language of KRS 439.3106 does not require the [trial] court to make specific findings of fact" based upon the factors in that statute. *Id.* at 884. Similarly, we held in *Jarrell* that due to the violent nature of the defendant's pending charges, among other factors, the trial court did not abuse its discretion in revoking his probation, though it did not specifically reference the elements of KRS 439.3106. *Jarrell*, 384 S.W.3d at 202.

Under current case law, the language of KRS 439.3106 does not require specific findings addressing the elements it lists,<sup>1</sup> and we share that interpretation of the statute in the present case. Nothing in the language of KRS 439.3106 compels trial courts to make findings concerning the treatment to which it very expressly states "[s]upervised individuals shall be subject," and we will not

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<sup>1</sup> We acknowledge our recent opinion in *Carter v. Commonwealth*, 2013 WL 645829, --- S.W.3d ---, (Ky. App. 2013), in which a separate panel of this Court found that specific findings *are* required pursuant to KRS 439.3106. However, that case is not final and is currently pending before the Supreme Court on a motion for discretionary review.

presume to “breathe into the statute that which the Legislature has not put there.”

*Commonwealth v. Gaitherwright*, 70 S.W.3d 411, 413 (Ky. 2002).

Like the trial courts in *Smallwood* and *Jarrell*, the present court made findings which did not expressly comport with the factors in KRS 439.3106 but which were based on other relevant facts. Paramount among the facts the trial court clearly considered is that Burlingame had twice been permitted to serve her sentence outside of jail (or “in the community” to quote the statute) and that she had thrice been unable to do so according to the conditions of her probation. From this, we are satisfied that the trial court’s consideration of Burlingame’s revocation met the minimum requirements of due process and that its findings were sufficient to support revocation.

It bears repeating that, on appeal, we are looking for a “substantial possibility” that the result in the case would have been different without the alleged error. *Brewer, supra*, at 349. Such a possibility simply did not exist here. Rather, we find that revocation of Burlingame’s probation was not “shocking or jurisprudentially intolerable,” did not result in “manifest injustice,” and thus, did not constitute palpable error.

Accordingly, the order of the Ballard Circuit Court is affirmed.

CLAYTON, JUDGE, CONCURS.

STUMBO, JUDGE, DISSENTS WITHOUT SEPARATE OPINION.



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