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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-001656-MR

MICHAEL BRANN

APPELLANT

v. APPEAL FROM GRAVES CIRCUIT COURT
HONORABLE TIMOTHY C. STARK, JUDGE
ACTION NO. 09-CR-00308

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
VACATING AND REMANDING

** ** * ** * ** *

BEFORE: CAPERTON, LAMBERT, AND MOORE, JUDGES.

LAMBERT, JUDGE: Michael Brann appeals from the Graves Circuit Court's August 2, 2012, order revoking his probation. After careful review, we vacate the trial court's order and remand for further findings consistent with this opinion.

In December 2009, Brann was indicted by a Graves County Grand Jury for theft by unlawful taking over \$500.00. The charge stemmed from Brann

stealing deposits from a Burger King restaurant in Mayfield, Kentucky, totaling approximately \$7,500.00. In February 2010, Brann pleaded guilty in reliance on an offer of pretrial diversion from the Commonwealth. The trial court approved the plea agreement and placed Brann on pretrial diversion conditioned on him making monthly restitution payments.

Within several months, the Commonwealth moved to revoke Brann's diversion for failure to make his required restitution payments. The trial court did not initially revoke Brann's diversion, but ultimately it did revoke it in November 2011, based on Brann's continued failure to make restitution payments. The trial court sentenced Brann to five years' imprisonment.

In July 2012, the trial court entered an order granting Brann's motion for shock probation and placed Brann on supervised probation for a period of five years. The trial court also imposed a number of conditions, which included, among others, that Brann make restitution payments, that he "be evaluated for alcohol and substance abuse and . . . comply with any treatment or aftercare as recommended;" and that he "comply with . . . other terms and conditions as required by Probation and Parole."

Shortly after Brann's release, a violation of supervision report was submitted alleging that he had violated the conditions of probation. Specifically, that report indicated that Brann had failed to attend substance abuse treatment sessions, failed to report to his probation officer, and falsified a releasee's report. The recommended sanction was revocation of probation.

On July 30, 2012, a revocation hearing was held at which Probation Officer Bradley Fooshee and Brann testified. Officer Fooshee testified that Brann's supervision began on June 13, 2012, and that he had reported to the probation office on several occasions. However, consistently with the supervision report, Officer Fooshee testified that Brann had violated the conditions of probation by missing a meeting with a social services clinician after having been told to report the previous day; by missing a report date with him; and by falsifying a releasee report by providing a non-working phone number. Officer Fooshee also testified that Brann had failed to pay any restitution.

In response, Brann testified that the meeting with the social services clinician "must have slipped [his] mind." He further stated that he missed the meeting with Officer Fooshee because he got his dates mixed up. Brann testified that he was not trying to avoid supervision and that he had initially reported to the probation office several times when Officer Fooshee was not there. Finally, he testified that the phone number he listed on the releasee's report was a valid number and produced phone records in support of his claim.

Following the testimony, Brann's counsel argued that the Commonwealth had failed to establish that Brann could not be safely supervised in the community. The Commonwealth responded that revocation was appropriate, indicating that there had been a number of violations in a short period of time. At the conclusion of the hearing, the trial court revoked Brann's probation and imposed a five-year sentence. In making its decision, the court noted that it had

considered Brann's past history and the fact that the violations had occurred so soon after Brann's release and concluded that there was little chance for success in the future. A revocation order was subsequently entered in which the court found that Brann had violated the conditions of probation as follows: 1) failure to attend treatment for substance abuse; 2) falsifying a police report; and 3) failure to report to probation officer. This appeal now follows.

On appeal, Brann argues that the trial court abused its discretion in revoking his probation in light of recently enacted Kentucky Revised Statutes (KRS) 439.3106 and that the trial court's findings were insufficient and amounted to a violation of his constitutional due process rights.

A trial court's authority to grant and revoke probation is set forth in KRS Chapter 533. Under that chapter, a trial court may place a defendant on probation and impose certain terms and conditions. *See* KRS 533.020; KRS 533.030. If the defendant commits an additional offense or violates a condition of probation, the court may "revoke the sentence at any time prior to the expiration or termination of the period of probation." KRS 533.020(1).

Kentucky case law has long recognized that probation revocation hearings rest within the trial court's discretionary powers "both in respect to initiation of a hearing and the disposition thereof." *Ridley v. Commonwealth*, 287 S.W.2d 156, 158 (Ky. 1956). As such, an appellate court reviews a trial court's decision to revoke probation for an abuse of discretion. *Lucas v. Commonwealth*, 258 S.W.3d 806, 807 (Ky. App. 2008). A trial court abuses its discretion if its

decision is “arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

Furthermore, a trial court’s decision to revoke probation is generally “not an abuse of discretion if there is evidence to support at least one probation violation.”

Lucas, 258 S.W.3d at 807-08 (internal citation omitted).

Brann first argues that the trial court’s revocation was improper under KRS 439.3016. Brann does not dispute that he violated the conditions of his probation, but claims the violations were an insufficient basis to revoke under the statute. The Commonwealth argues, however, that the revocation was a proper exercise of the trial court’s discretion and that KRS 439.3106 does not limit a court’s authority to revoke probation, and even if it does, Brann’s revocation conformed to the KRS 439.3106 standard.

KRS 439.3106 was enacted as part of the 2011 Corrections Reform Bill, HB 463 and went into effect on June 8, 2011. The statute provides as follows:

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.

While the Kentucky Supreme Court has yet to directly address it, this Court has discussed the statute in several published opinions. *See Kaletch v. Commonwealth*, 396 S.W.3d 324, 329 (Ky. App. 2013); *Jarrell v. Commonwealth*, 384 S.W.3d 195, 202-03 (Ky. App. 2012); *Southland v. Commonwealth*, 372 S.W.3d 882, 884-85 (Ky. App. 2012). The Commonwealth urges this Court to adopt its reasoning that KRS 439.3106 is *not* directed to trial courts and should not be viewed as limiting a court's authority to revoke probation.

In support of its argument, the Commonwealth contends that KRS Chapter 439 is entitled "Probation and Parole," and that included in this chapter is KRS 439.310, which is directed to the Commissioner of the Department of Corrections. KRS 439.310 makes clear that the Commissioner is to appoint Probation and Parole employees to administer the provisions of KRS 439.250 to KRS 439.560—of which KRS 439.3106 is included. Many of the provisions in this section are specifically directed to "the department," meaning the Department of Corrections, which includes the division of Probation and Parole. *See* KRS 439.250(3). The plain language of these provisions directs "the department" to take measures such as adopting a system of graduated sanctions for supervised individuals, establishing administrative regulations to govern the system, and establishing an administrative process to review contested sanctions. *See* KRS 439.3107. Furthermore, the Commonwealth points out that KRS 439.3106 makes no reference whatsoever to the judiciary. In contrast, KRS 533.020(1) specifically

references “*the court*” in setting forth a trial court’s authority to grant and revoke probation. The Commonwealth argues that if the legislature had intended for KRS 439.3106 to limit a court’s ability to revoke probation, it stands to reason that it would have expressly so stated. According to the Commonwealth, the legislature’s failure to do so and the location of the provision in KRS Chapter 439 suggests that KRS 439.3106 is not directed to trial courts at all, but rather to Probation and Parole officers.

We disagree with the Commonwealth’s theory that KRS 439.3106 is not applicable here. This Court has twice determined that KRS 439.3106 is applicable to trial courts and that an analysis under it must be undertaken by the trial court. *See Jarrell v. Commonwealth*, 384 S.W.3d 195 (Ky. App. 2012), and *Southland v. Commonwealth*, 372 S.W.3d 882 (Ky. App. 2012). In *Jarrell*, this Court determined that the trial court properly considered the General Assembly’s wishes as espoused in KRS 436.3106 in deciding to revoke the defendant’s probation. In *Southland*, this Court determined that the trial court had considered whether or not the defendant could be appropriately managed in the community and whether other sanctions were appropriate even though it did not make explicit written findings detailing such. This Court ultimately affirmed the trial court’s revocation of probation because an analysis under KRS 439.3106 had been done.

Despite the Commonwealth’s claims to the contrary, case law indicates that KRS 439.3106 applies to trial courts when determining whether or not to revoke a

defendant's probation. Thus, we vacate the Graves Circuit Court's order revoking Brann's probation and remand for consideration under KRS 439.3106.

ALL CONCUR.

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