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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-001775-MR

ANNA MAGGARD — APPELLANT

v.

APPEAL FROM HARLAN CIRCUIT COURT
HONORABLE ROBERT V. COSTANZO, JUDGE
ACTION NO. 06-CR-00005

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: CLAYTON, NICKELL AND THOMPSON, JUDGES.

NICKELL, JUDGE: Anna Maggard appeals the Harlan Circuit Court's decision to revoke her shock probation. Admitting she did not argue denial of due process to the trial court, Maggard seeks palpable error review of her claim that witnesses had to testify at her revocation hearing so she could cross-examine them. She then alleges the trial court failed to find—before ordering revocation—that her absconding from and failing to successfully complete the drug court program (1)

created a "significant risk" to her victims and the general community; and (2) she could not be managed in the community, two findings required by KRS[1] 439.3106. After careful review, we reverse and remand.

FACTS

In 2006, Maggard pled guilty to one count of second-degree forgery, three counts of being an accomplice to second-degree forgery, and one count of tampering with physical evidence—all Class D felonies—for which she was sentenced to a total of four years' imprisonment. Maggard was later granted shock probation, specifically conditioned on successful completion of the drug court program. She was transferred from the Harlan County Drug Court Program to the Fayette County Drug Court Program in 2008.

In January 2012, a certification of violations, prepared by a drug court employee, was filed with the Harlan Circuit Court, alleging Maggard had absconded from the Fayette County Drug Court Program. A second page documented dirty and/or diluted urine screens on four dates; six missed urine screens; and four other events of note: not having a meeting sheet; missing curfew; dishonesty-not maintaining employment; and inability to produce a sample. A bench warrant based on the violations was issued on January 30, 2012; Maggard evaded arrest until June 17, 2013. Shortly after her arrest, the Commonwealth moved to revoke Maggard's probation.

[1] Kentucky Revised Statutes.

At the revocation hearing convened on September 5, 2013, denial of due process was not alleged and, therefore, not preserved for our review. Maggard never challenged the certification prepared by the Fayette County Drug Court employee stating she had absconded from the program, nor did she challenge how the revocation hearing was conducted by the Harlan Circuit Court. To the trial court she argued only that it had lost jurisdiction to revoke her probation because the five-year window mentioned in KRS 533.020(4)[2] had closed before the Commonwealth moved for revocation and the hearing occurred.

The Commonwealth countered Maggard's contention of a lack of jurisdiction with the fact that on January 30, 2012—*during the five-year period of probation*—which ended October 1, 2012—a bench warrant was issued for her arrest due to her absconding from the program. Because Maggard evaded service for some seventeen and one-half months, that warrant was not executed until June 17, 2013—*after* the window had closed. The Commonwealth admitted the window had closed, but maintained the pending warrant—also mentioned in KRS

[2] KRS 533.020(4) reads:

> The period of probation, probation with an alternative sentence, or conditional discharge shall be fixed by the court and at any time may be extended or shortened by duly entered court order. *Such period, with extensions thereof, shall not exceed five (5) years, or the time necessary to complete restitution, whichever is longer, upon conviction of a felony* nor two (2) years, or the time necessary to complete restitution, whichever is longer, upon conviction of a misdemeanor. Upon completion of the probationary period, probation with an alternative sentence, or the period of conditional discharge, the *defendant shall be deemed finally discharged, provided no warrant issued by the court is pending against him,* and probation, probation with an alternative sentence, or conditional discharge has not been revoked.

[Emphasis added].

533.020(4)—trumped the five-year window making revocation permissible. As an aside, *Whitcomb v. Commonwealth*, 424 S.W.3d 417, 420 (Ky. 2014), holds:

> issuance of a warrant for a probation violation will toll the period of probation preventing the probationer from being automatically discharged pursuant to KRS 533.020(4). The warrant, however, must be issued before the expiration of the period of probation.

The Commonwealth further noted it did not unduly delay seeking revocation—it filed its motion shortly after Maggard was arrested on the bench warrant. In response, Maggard suggested the Commonwealth should have moved for revocation *before* the window closed, even though she was on the lam, because she did not know she had not been formally discharged from drug court; she was unaware a warrant had been issued for her arrest; and, she was unaware anyone associated with drug court thought she had absconded.

After reviewing written briefs and hearing argument, the trial court found Maggard had violated the terms of probation and entered an order of revocation on September 9, 2013. That order read in its entirety:

> [Maggard] has not complied with the terms and conditions of her probation. According to the Certification of Violations from the Fayette County Drug Court the defendant absconded from the Fayette County Drug Court Program. The Defendant has failed to successfully complete the Drug Court Program.
>
> IT IS HEREBY ORDERED AND DIRECTED the Defendant's shock probation is revoked and she is remanded to the custody of the Department of Corrections to begin serving [her] sentence.

This appeal followed.

ANALYSIS

Palpable error review "allows reversal for an unpreserved error only when 'manifest injustice has resulted from the error[,]'" *Elery v. Commonwealth*, 368 S.W.3d 78, 98 (Ky. 2012) (quoting RCr[3] 10.26), and requires the showing of a

> probability of a different result or error so fundamental as to threaten a defendant's entitlement to due process of law. . . . When an appellate court engages in a palpable error review, its focus is on what happened and whether the defect is so manifest, fundamental and unambiguous that it threatens the integrity of the judicial process.

Martin v. Commonwealth, 207 S.W.3d 1, 3–5 (Ky. 2006).

Maggard first alleges her probation revocation hearing did not afford her minimal due process. She claims she was denied the right to cross-examine adverse witnesses because the court relied solely on the certification of violations provided by a Fayette County Drug Court employee who did not appear and did not testify. While the Commonwealth did not call witnesses and no proof was heard, Maggard could have called witnesses and questioned them "had [she] been so inclined." *Burke v. Commonwealth*, 342 S.W.3d 296, 298 (Ky. App. 2011).

"[P]robation revocation is a sufficient deprivation of liberty for certain requirements of due process to apply." *Hunt v. Commonwealth*, 326 S.W.3d 437, 439 (Ky. 2010). However, "probation 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

[3] Kentucky Rules of Criminal Procedure.

116, 129 (Ky. 2012). For example, in revocation hearings, the rules of evidence do not apply, *Hunt*, 326 S.W.3d at 439; KRE 1101(d)(5). Furthermore, hearsay is admissible. *Barker*, 379 S.W.3d at 130.

At the probation revocation hearing in *Marshall v. Commonwealth*, 638 S.W.2d 288 (Ky. App. 1982), the Commonwealth introduced a letter from the director of a drug abuse program stating the probationer had not complied with the program's requirements. The letter's author did not testify, but the trial judge revoked probation based on the letter. This Court affirmed that decision, noting that in rendering *Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972) and *Gagnon v. Scarpelli*, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973), the United States Supreme Court:

> did not intend to foreclose the admission of hearsay evidence at these informal types of hearings and there is no absolute right to confront witnesses, especially when the reliability of the witnesses, here trained personnel in an organized drug abuse program, can be easily ascertained.

Marshall, 638 S.W.2d at 289.

The situation here is similar. A Fayette County Drug Court employee submitted a certification of violations that was considered by the trial court during Maggard's revocation hearing. Although the employee did not appear or testify, under *Marshall*, the trial court could rely on the contents of the certification without more. Thus, no alleged flaw in the conduct of the revocation hearing rose to the level of "manifest injustice" warranting reversal.

Of greater concern is Maggard's other complaint—that the trial court failed to make two statutorily required findings. This issue was not argued to the trial court either. KRS 439.3106(1) was enacted as part of 2011 HB 463 which made sweeping changes to Kentucky's penal code in an attempt to reduce our prison population and associated costs—in part—by revamping probation. The provision reads:

> Supervised individuals[4] 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.

In *Commonwealth v. Andrews*, 448 S.W.3d 773, 777 (Ky. 2014)—a case decided *after* Maggard's probation was revoked—our Supreme Court held KRS 439.3106(1) "requires as conditions precedent to revocation that the probationer's failure to comply with the terms of probation constitutes 'a significant risk to [his] prior victims . . . or the community at large,' and that the probationer 'cannot be appropriately managed in the community.'" The Commonwealth's premise in

[4] A "supervised individual" is a person "placed on probation by a court or serving a period of parole or post-release supervision from prison or jail." KRS 439.250(10). [footnote added].

Andrews was KRS 439.3106(1) applies exclusively to the Department of Corrections—not to trial judges. Our Supreme Court rejected that theory, stating "when a probationer appears before the trial court because he has failed to comply with the terms of probation and the probation officer has determined that graduated sanctions are inappropriate, KRS 439.3106 must be considered before probation may be revoked." *Id.* at 778-79. We now echo *McClure v. Commonwealth,* 457 S.W.3d 728, 733 (Ky. App. 2015), which in applying *Andrews* made clear trial courts must consider and make findings—either oral or written—comporting with KRS 439.3106(1). The succinct written order entered in this case did not reference the statute or its elements, and we heard no mention of the statute or its elements during the brief revocation hearing. Under *Andrews,* revoking probation without making findings on (1) whether Maggard's conduct constituted a significant risk to her victims or the community at large; and (2) whether Maggard could be appropriately managed in the community was an abuse of discretion constituting palpable error and requiring reversal and remand. *McClure,* 457 S.W.3d at 733.

On remand, the trial court shall enter findings as to both elements of KRS 439.3106(1). Then, consistent with both *Andrews* and *McClure,* the trial court must conclude whether revocation or a lesser sanction is most appropriate.

ALL CONCUR.

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