

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-001861-MR

JONATHAN E. WALKER

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE ANGELA MCCORMICK BISIG, JUDGE
ACTION NOS. 08-CR-002987, 08-CR-003426, &
09-CR-001661

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS, DIXON, AND JONES, JUDGES.

JONES, JUDGE: Acting without the assistance of counsel, Jonathan Walker, appeals from an order of the Jefferson Circuit Court summarily denying his RCr¹ 11.42 /CR² 60.02 motion as related to the revocation of his probation. For the reasons more fully set forth below, we AFFIRM.

¹ Kentucky Rules of Criminal Procedure.

² Kentucky Rules of Civil Procedure.

I.

Between October of 2008 and June of 2009, Walker was indicted on various drug-related charges in three separate Jefferson Circuit Court actions. Walker negotiated an agreement with the Commonwealth wherein he pled guilty to manufacturing methamphetamine (08-CR-2987 & 09-CR-1661); possession of a defaced firearm (08-CR-2987); obtaining/attempt to obtain a controlled substance by fraud/deceit (08-CR-3426); trafficking in a controlled substance I-methamphetamine (with a firearm) (09-CR-1661); unlawful distribution of methamphetamine precursor with a firearm (09-CR-1661); and receiving a stolen firearm (09-CR-1661). The three cases were consolidated and Walker was sentenced to a "total term of imprisonment of twenty-three (23) years or until released in accordance with the law."

On March 21, 2011, the trial court granted Walker shock probation over the Commonwealth's objection. The trial court's order stated that the remainder of Walker's sentence would be "withheld for five (5) years with the provision that [Walker] be supervised and subject to the rules and regulations of the Division of Probation and Parole" in addition to various conditions set forth in the trial court's order. Those conditions included that Walker: 1) must remain on good behavior and refrain from any further violation of the law in any respect; 2) must be placed under the highest level of supervision of the Office of Probation and Parole until that office determines that a less restrictive status is appropriate; 3) must comply with all instructions and conditions imposed by the Office of

Probation and Parole, including any counseling it deems appropriate; 4) must remain drug and alcohol free and submit to random drug and alcohol urinalysis; 5) must be evaluated for any substance abuse problem and comply with whatever treatment is recommended; 6) shall have no contact with known drug dealers or users, nor be in any location where drug trafficking is known to occur; nor be in possession of any drug paraphernalia; 7) serve a period of confinement in the Jefferson County Jail of six (6) months, which period of confinement is held in abeyance so long as Walker complies with all conditions of probation; 8) pay a probation supervision fee of \$25.00 per month; 9) shall not own or possess any firearm or ammunition; and 10) must report to Probation and Parole within 72 hours of his release.

In January of 2012, the Probation and Parole Office filed certain reports detailing numerous alleged probation violations: 1) failure to report a change of home address on two separate occasions; 2) use of a controlled substance on three separate occasions; 3) failure to seek evaluation from social service clinician as directed; 5) failure to report to probation officer as directed on two separate occasions; 6) possession of a firearm; and 7) leaving area of supervision without permission of a probation officer. Based on these alleged violations, the Probation and Parole Office recommended revoking Walker's probation.

Following this recommendation, the Commonwealth filed a motion to revoke Walker's probation; the court appointed Walker counsel; and a revocation

hearing was set for February 29, 2012.³ On March 1, 2012, an order revoking Walker's probation was entered. Walker did not file a direct appeal of this order. Instead, with the assistance of counsel, Walker filed another motion for shock probation in August of 2012. Walker stated in his motion that since having been recommitted to the Commonwealth's custody, he had received much needed drug and alcohol education and rehabilitative services. He also claimed that through his additional time in custody he "learned a hard and valuable lesson and realized the seriousness of his convictions and his noncompliant behavior." The trial court denied Walker's motion.

In September 2013, Walker filed, *pro se*, a motion asking the trial court to vacate its February 2012 revocation order. Walker's motion was predicated on KRS⁴ 439.3106. This statute, which became effective June 8, 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

³ The hearing ultimately focused only on the first of three reports filed by the Probation and Parole Office because the trial court concluded that Walker was not provided with written notice that the hearing would also concern the latter two reports. The first report concerned Walker's drug use, failure to update his address, and noncompliance with counseling directives.

⁴ Kentucky Revised Statutes.

need for, and availability of, interventions which may assist the offender to remain compliant and crime-free in the community.

It "requires trial courts to find that the probationer's failure to abide by a condition of supervision constitutes a significant risk to prior victims or the community, and that the probationer cannot be managed in the community before probation may be revoked." *Commonwealth v. Andrews*, 448 S.W.3d 773, 781 (Ky. 2014).

Walker argued that the trial court failed to apply KRS 439.3106 in his case as evidenced by the fact that the only finding contained in the trial court's revocation order is that he violated the terms of his release. He further alleged that his counsel's performance was deficient because counsel did not advise him that KRS 439.3106 applied to his proceeding and failed to protect Walker's rights to be sentenced in accordance with KRS 439.3106. The trial court denied Walker's motion without an evidentiary hearing.

This appeal followed.

II.

As a preliminary matter, we note Walker appears to have abandoned his argument concerning the trial court's failure to follow KRS 439.3106 during the revocation proceedings. Walker's brief is limited to his arguments concerning ineffective assistance of counsel. Nevertheless, as a matter of thoroughness, we will briefly address this issue.

Walker was present at the hearing and the court memorialized its findings, or lack thereof, in a written order. RCr 11.42 and CR 60.02 motions are

not designed to provide criminal defendants with additional bites at the apple.

Such motions are "limited to issues that were not and could not be raised on direct appeal." *Sanborn v. Commonwealth*, 975 S.W.2d 905, 908-09 (Ky. 1998).

Because the trial court's failure to comply with KRS 439.3106 was an issue that Walker knew or should have known of during the time for direct appeal, Walker cannot rely on it for post-conviction relief.

We now turn to Walker's claims of ineffective assistance of counsel.

The standards for assessing ineffective assistance of counsel are set out in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

This two-pronged test requires Walker to show that his counsel's performance was deficient and that the deficient performance prejudiced his defense. *Id.* at 687.

An attorney's performance is evaluated "by the degree of its departure from the quality of conduct customarily provided by the legal profession." *Henderson v. Commonwealth*, 636 S.W.2d 649, 650 (Ky. 1982). In addition, courts should "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Commonwealth v. Pelfrey*, 998 S.W.2d 460, 463 (Ky. 1999).

Walker first argues that his counsel was ineffective because he failed to advise Walker that KRS 439.3106 applied to his case. Even if we were to assume that counsel did not specifically cite KRS 439.3106 to Walker and go through the statute with him, we do not believe that such a failure worked to Walker's prejudice in this case. The evidence that Walker violated the terms of his

probation was overwhelming and Walker has not presented us with anything to suggest that he had a valid defense that his counsel failed to present. Likewise, Walker does not explain how knowledge of KRS 439.3106 would have caused him to take some different course of action with respect to the revocation proceedings.

Additionally, having reviewed the record, we believe that Walker's counsel placed argument and evidence in the nature of KRS 439.3106 before the trial court. Counsel called Walker's mother to the stand to explain some of the difficulties Walker encountered in finding housing. Additionally, in closing argument, Walker's counsel specifically argued to the trial court that instead of outright revoking Walker's probation that it should order Walker committed to a long-term drug rehabilitation program. Counsel asserted that Walker's problems stemmed from drug addiction and this was the least restrictive and most effective way to rehabilitate Walker and protect the community. We believe that in presenting this evidence and making these arguments, counsel acted consistently with preserving Walker's rights under KRS 439.3106. Therefore, it is clear to us from the record that counsel was not deficient in this regard.

Walker makes the additional argument in his brief that counsel was deficient for not "requiring the probation officer to introduce the test results from any drug test that confirmed the allegations of the probation officer." We find this argument particularly ironic in that the record reflects that the probation officer testified that Walker violated his parole by refusing to submit to drug tests after admitting that he had relapsed. The probation officer did not allege that Walker

failed a test; she alleged that he refused to submit to the tests. Thus, we find no merit to Walker's claim that his counsel should have insisted that the drug test results be admitted.

III.

Based on the foregoing, we affirm the Jefferson Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

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