

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2013-CA-002000-MR

DAVID W. ISAACS

APPELLANT

v. APPEAL FROM BOYD CIRCUIT COURT  
HONORABLE GEORGE W. DAVIS, III, JUDGE  
ACTION NO. 08-CR-00359

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING  
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BEFORE: COMBS, KRAMER, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: David W. Isaacs brings this appeal from an October 21, 2013, Order of the Boyd Circuit Court revoking Isaacs' probation. We affirm.

In September 2008, Isaacs was indicted upon the offense of first-degree trafficking in a controlled substance. Kentucky Revised Statutes 218A.1412. Isaacs was accused of trafficking in oxycontin. Pursuant to a plea agreement with the Commonwealth, Isaacs entered a guilty plea to said offense and

was sentenced to seven-years' imprisonment probated for a period of five years on June 12, 2009. The conditions of Isaacs' probation were that he remain drug free, obtain employment, pay a \$25 per month supervision fee, and pay for random drug testing.

On December 6, 2012, the Commonwealth filed a motion to revoke Isaacs' probation. The Commonwealth asserted that Isaacs failed to obtain employment, pay the \$25 supervision fee, and the drug testing fee. By order entered January 29, 2013, the court noted that the Commonwealth withdrew the motion to revoke probation.

Subsequently, on April 23, 2013, the Commonwealth filed another motion to revoke Isaacs' probation. In support thereof, the Commonwealth claimed that Isaacs admitted to using oxycodone on February 19, 2013, and failed a drug test on April 17, 2013, by testing positive for oxycodone. The circuit court held a revocation hearing.

By order entered October 21, 2013, the circuit court concluded that Isaacs' probation should be revoked:

This matter came on for Hearing upon Motion of the Commonwealth to Revoke the probated sentence of the Defendant herein. The Commonwealth called as a witness Probation and Parole Office Jason Ruggles who through sworn testimony confirmed that Mr. Isaacs was advised to report to Catlettsburg Probation and Parole Officer by 8:30 and failed to appear until 1:15 p.m.; that on February 19, 2013, Mr. Isaacs self admitted he would be positive for oxycodone; and that on April 17, 2013, Mr. Isaacs was positive for oxycodone in violation of this Court's probation order. Only after the April 17, 2013[.]

violation was reported to the Court and to the Commonwealth Attorney that the Defendant has thrice violated the terms of his probation. The Court also notes that the Defendant had previously violated the terms of his probation in December 2012, by failing to pay for drug testing and obtain employment and the Commonwealth agreed to set aside its Motion based on the Defendant becoming compliant.

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The Defendant is a convicted drug dealer who has consistently violated the terms of his probation and the Court FINDS that the Defendant was in violation of his probation for the allegations stated in the 4/18/2013 Special Supervision Report, and that such violations demonstrate the Defendant constitutes a significant risk to the public and cannot be properly managed within the community and that the defendants [sic] behavior demonstrates that there are no workable alternatives to incarceration available.

October 21, 2013, Order at 1-3. This appeal follows.

To begin, our review of a circuit court's decision to revoke probation is for an abuse of discretion. *McClure v. Com.*, 457 S.W.3d 728 (Ky. App. 2015). Under the abuse of discretion standard, we will not disturb the trial court's ruling unless "the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Com. v. Andrews*, 448 S.W.3d 773, 778 (Ky. 2014) (quoting *Com. v. English*, 993 S.W.2d 941, 945 (Ky. 1999)). Our review proceeds accordingly.

Isaacs contends that the circuit court committed error by revoking his probation. Isaacs believes that the circuit court should have considered "graduated

sanctions as required by KRS 439.3106 and KRS 439.3107.”<sup>1</sup> Isaacs’ Brief at 5.

Additionally, Isaacs argues that no evidence was introduced by the Commonwealth demonstrating that he was a “threat either to a victim or the community.” Isaacs’ Brief at 7. Isaacs claims that merely failing two drug tests is insufficient cause to revoke probation under KRS 439.3106(1).

KRS 439.3106 provides:

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.

And, KRS 439.3107 provides:

- (1) The department shall, by January 1, 2012, adopt a system of graduated sanctions for violations of conditions of community supervision. Notwithstanding KRS Chapter 533, the system shall set forth a menu of presumptive sanctions for the most common types of supervision violations, including but not limited to: failure to report; failure to pay fines, fees, and victim restitution; failure to participate in a required program or service; failure to complete community service; violation of a protective or no

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<sup>1</sup> The statutory provisions were enacted in 2011 by the Kentucky General Assembly in the Public Safety and Offender Accountability Act, commonly referred to as House Bill 463 (HB 463). 2011 Ky. Acts. 4.

contact order; and failure to refrain from the use of alcohol or controlled substances. The system of sanctions shall take into account factors such as the severity of the current violation, the supervised individual's previous criminal record, the number and severity of any previous supervision violations, the supervised individual's assessed risk level, and the extent to which graduated sanctions were imposed for previous violations. The system also shall define positive reinforcements that supervised individuals may receive for compliance with conditions of supervision.

- (2) The department shall establish by administrative regulation an administrative process to review and approve or reject, prior to imposition, graduated sanctions that deviate from those prescribed.
- (3) The department shall establish by administrative regulation an administrative process to review graduated sanctions contested by supervised individuals under [KRS 439.3108](#).

Recently, the Kentucky Supreme Court interpreted the application of KRS 439.3106 and KRS 439.3107 in probation revocation proceedings in *Commonwealth v. Andrews*, 448 S.W.3d 773 (Ky. 2014). Therein, the Supreme Court concluded that KRS 439.3106 sets forth a “new criteria” that a circuit court must consider in a probation revocation proceeding. Specifically, the Court held that a circuit court is mandated by KRS 439.3106(1) to determine “whether a probationer’s failure to abide by a condition of supervision constitutes a significant risk to prior victims or the community at large, and whether the probationer cannot be managed in the community before probation may be revoked.” *Andrews*, 448 S.W.3d at 780. As to graduated sanctions under KRS 439.3107, the Supreme

Court clarified that the probation officer may consider graduated sanctions for certain minor probation violations:

“[T]he most common types of supervision violations.” Under 439.3108(1)(a), the DOC [Department of Corrections], “notwithstanding any administrative regulation or law to the contrary,” has the authority to modify the conditions of probation “for the limited purpose of imposing graduated sanctions [.]” The guidelines for applying graduated sanctions are set forth in [501 Kentucky Administrative Regulations \(“KAR”\) 6:250](#). . . .

The probation officer may then proceed to reviewing “the circumstances of the offender and the violations at issue to determine if the violation behavior is appropriately responded to with graduated sanctions.” *Id.* Certain violations, such as absconding or receiving a new felony conviction, require the probation officer to submit the matter to the trial court without the possibility of imposing graduated sanctions. *Id.* Otherwise, the probation officer, having considered the circumstances surrounding the probationer and the violation, must make a determination as to whether graduated sanctions are appropriate. If graduated sanctions are determined to be an inappropriate response to a violation, “then the officer shall report the violation” to the trial court. *Id.*

*Andrews*, 448 S.W.3d at 778 (footnote omitted).

In this case, the circuit court did specifically consider the mandates of KRS 439.3106(1) before revoking Isaacs’ probation and sufficient evidence exists to support the circuit court’s findings thereunder. The record indicates that Isaacs reported to his probation officer for a random drug test on February 19, 2013. At this time, Isaacs admitted to using oxycodone in violation of his probationary terms. Then again, on April 17, 2013, Isaacs was subjected to a random drug test

that showed positive for oxycodone, and Isaacs once more admitted to using oxycodone in violation of his probationary terms. The probation officer also testified that Isaacs failed to timely appear for an appointment at the Catlettsburg Probation and Parole Office. Based upon these probation violations, the probation officer recommended revoking Isaacs' probation.

As is evidenced at the hearing and in the October 21, 2013, order, the circuit court believed that Isaacs repeated use of oxycodone while on probation, coupled with his history of trafficking in oxycodone, evidenced that Isaacs posed a significant risk to the community. And, this conclusion is supported by the facts in the record. Additionally, it is evident that the circuit court did consider lesser sanctions rather than probation revocation but ultimately determined that Isaacs could not be managed in the community.<sup>2</sup> While House Bill 463 presents a new emphasis in addressing probation issues, it does not eliminate the trial court's discretion in matters of probation revocation, provided that discretion is exercised consistent with the statutes. *Andrews*, 448 S.W.3d at 780. Accordingly, we conclude the circuit court properly considered KRS 439.3106 and did not abuse its discretion in revoking Isaacs' probation.

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<sup>2</sup> As to graduated sanctions, Kentucky Revised Statutes 439.3107 directs the Department of Corrections to "adopt a system of graduated sanctions." And, "[b]y requiring trial courts to determine that a probationer is a danger to . . . the community at large and that he/she cannot be appropriately managed in the community before revoking probation, the legislature furthers the objectives of the graduated sanctions schema to ensure that probationers are not being incarcerated for minor probation violations." *Com. v. Andrews*, 448 S.W.3d 773, 779 (Ky. 2014).

Isaacs also maintains that his due process rights were violated by the circuit court's consideration of his alleged probation violations outlined in a December 6, 2012, report without receiving written notice thereof. Isaacs argues that due process requires that he receive written notice of the grounds for revocation of probation. In particular, Isaacs asserts:

Isaacs was given notice of a revocation hearing, but this notice was only regarding violations contained on the supervision report dated 4/18/2013. The earlier violations contained in the supervision report dated 12/04/2012 were addressed in a previous hearing and ultimately resulted in Isaacs becoming compliant with the conditions of his probation. Notwithstanding the lack of notice that the allegations contained in the 12/04/2012 report would be brought up during the hearing, the trial court elicited testimony from the defendant concerning these violations.

Isaacs' Brief at 11 (citations omitted).

A review of the revocation hearing reveals that Isaacs testified that "I've never been late. I've never missed my probations or nothing until this right here. I've been on the straight and narrow." Thereupon, the circuit court questioned Isaacs concerning his past alleged probation violations.

We believe any error in the admission of Isaacs' past probation violations to be merely harmless and was not violative of due process protections. Kentucky Rules of Criminal Procedure 9.24. In the October 21, 2013, order, the circuit court plainly found that Isaacs "was in violation of his probation for the allegations stated in the 4/18/2013 Special Supervision Report." Hence, the circuit



court did not base its decision to revoke Isaacs' probation on any probation violations outlined in the December 6, 2012, report.

In sum, we hold that the circuit court properly revoked Isaacs' probation.

For the foregoing reasons the order of the Boyd Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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