

RENDERED: AUGUST 21, 2015; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-002098-MR

KEVIN E. MARCUM

APPELLANT

v. APPEAL FROM PULASKI CIRCUIT COURT
HONORABLE DAVID A. TAPP, JUDGE
ACTION NO. 10-CR-00423

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * * * * *

BEFORE: ACREE, CHIEF JUDGE; DIXON AND STUMBO, JUDGES.

STUMBO, JUDGE: Kevin Marcum appeals from an Order of the Pulaski Circuit Court revoking his probation and reinstating a sentence. He argues that the trial court erred when it failed to follow Kentucky Revised Statute (KRS) 439.3106 before revoking his probation by failing to articulate how Marcum's violation constituted a significant risk to prior victims or the community. We conclude that probation revocation under KRS 439.3106 requires an express finding 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. Because no such finding was made below, we REVERSE the Order on appeal and REMAND the matter to the Pulaski Circuit Court.

The facts are not in dispute. On December 16, 2009, the Pulaski County grand jury indicted Marcum on one count of Manufacturing Methamphetamine, First Offense. On April 6, 2011, Marcum entered an *Alford* plea,¹ and received a 15-year suspended sentence and 5 years probation pursuant to a Judgment rendered on June 1, 2011.

The following year, Marcum violated the terms of his probation by using a controlled substance, failing to seek substance abuse evaluation, and failing to follow treatment plans. Marcum acknowledged ingesting Oxycodone and failing to attend AA/NA meetings as ordered. He also admitted to using marijuana and Valium, and tested positive for these substances. A hearing on the matter was conducted, whereupon the Pulaski Circuit Court revoked Marcum's probation on October 26, 2012, and ordered him to serve his original 15-year sentence.

On February 14, 2013, Marcum moved for shock probation. Thereafter, the court rendered an Order granting shock probation on the condition that Marcus refrain from using controlled substances and from consuming excessive amounts of water which could interfere with accurate drug testing.

¹ *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970).

On April 5, 2013, Marcum failed to produce a urine specimen for a drug test monitored by his probation officer. The officer also learned that Marcum had associated with Marcum's former co-defendant and convicted felon, Cherish Sizemore, in violation of the terms of his probation. In the months that followed, Marcum tested positive for hydrocodone and amphetamine. Marcum also attempted to dilute a urine sample by consuming excessive water.

The Commonwealth then moved to revoke Marcum's probation, and the court conducted a hearing on the matter. After proof was heard, the court rendered oral and written findings of fact, and determined that Marcum had violated the terms of his probation. The court sentenced Marcum to his original 15-year sentence. This appeal followed.

Marcum now argues that the Pulaski Circuit Court erred in revoking his probation. Specifically, he contends that the court improperly failed to follow KRS 439.3106, which subjects an individual to revocation when his failure to comply with the conditions of probation constitutes a significant risk to prior victims or the community at large. Marcum argues that the trial court failed to articulate how Marcum's violation constituted such a risk, and in so doing did not comply with KRS 439.3106. Marcum maintains that this is especially relevant considering he was not given a chance at rehabilitation. The focus of his argument is that the revocation constituted an abuse of discretion as there was no proof tendered and no finding made that he posed a significant threat to prior victims or the community at large. He seeks an Opinion reversing the revocation order, and

remanding the matter for further proceedings. In response, the Commonwealth asserts that the Pulaski Circuit Court properly made comprehensive oral findings in support of Marcum's probation revocation, that these findings are supported by the record and the law, and that the Order on appeal should be affirmed.

Marcum, through counsel, acknowledges that this issue is not preserved for appellate review. Accordingly, he seeks review pursuant to the palpable error standard of Kentucky Rules of Criminal Procedure (RCr) 10.26. Pursuant to RCr 10.26, an appellate court may correct an unpreserved error only if 1) there is error, 2) the error is palpable or plain, 3) the error affects the substantial rights of the party, and 4) manifest injustice has resulted from the error. *Puckett v. U.S.*, 556 U.S. 129, 135, 129 S.Ct. 1423, 173 L.Ed.2d 266 (2009).

KRS 439.3106 states that,

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.

In its Order revoking Marcum's probation and the oral findings which preceded it, the Pulaski Circuit Court recounted Marcum's prior probation

violations, including that he allowed a convicted felon to sign him out of jail, used illegal drugs in violation of his probation on at least two occasions, diluted a urine sample by consuming excessive water for the purpose of altering a drug test, and associated with a drug dealer. However, the court did not expressly find that Marcum's failure to abide by a condition of supervision constituted a significant risk to prior victims or the community, and that Marcum could not be managed in the community.

The dispositive question for our consideration is whether the Pulaski Circuit Court was required to make a specific finding prior to revoking Marcum's probation that Marcum's failure to abide by a condition of supervision constituted a significant risk to prior victims or the community, and that Marcum could not be managed in the community. We must answer this question in the affirmative.

The Kentucky Supreme Court addressed this issue in *Commonwealth v. Andrews*, 448 S.W.3d 773 (Ky. 2014). After considering KRS 439.3106 and the associated case law, the high court expressly held that probation revocation must be grounded on a specific finding 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. "We agree that KRS 439.3106(1) 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." *Andrews*, 448 S.W.3d at 781.

In the matter at bar, while the Pulaski Circuit Court made comprehensive oral findings in support of probation revocation before rendering its written Order, it did not expressly find that Marcum's failure to abide by a condition of supervision constituted a significant risk to prior victims or the community, and that Marcum could not be managed in the community.² Based on KRS 439.3106(1) and *Andrews*, we conclude that this finding is a necessary prerequisite to the revocation of Marcum's probation. The failure to make such a finding constitutes reversible error. Additionally, this error is palpable as it affects Marcum's substantial rights, and otherwise comports with RCr 10.26 and *Puckett, supra*.

For the foregoing reasons, we REVERSE the Order of the Pulaski Circuit Court revoking Marcum's probation, and REMAND the matter for further proceedings.

ALL CONCUR.

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² It merits noting that while KRS 439.3106(1) predated the Order on appeal, *Andrews* was rendered after the Pulaski Circuit Court revoked Marcum's probation.