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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-000780-MR
AND
NO. 2014-CA-000789-MR

JOSHUA MENDOZA

APPELLANT

v.

APPEALS FROM HARLAN CIRCUIT COURT
HONORABLE DANIEL BALLOU, JUDGE
ACTION NOS. 12-CR-00148 & 12-CR-00152

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * * * * *

BEFORE: D. LAMBERT, MAZE AND THOMPSON, JUDGES.

THOMPSON, JUDGE: Joshua Mendoza appeals from an order of the Harlan Circuit Court revoking Mendoza's probation. We agree with Mendoza that the circuit court made insufficient findings of fact to revoke his probation and reverse and remand.

In August 2013, Mendoza entered a guilty plea to one count of third-degree burglary and one count of receiving stolen property over \$500 and was sentenced to two-years' imprisonment and ordered pay \$3,200 restitution at \$250 per month. Under a separate indictment, Mendoza entered a guilty plea to three counts of second-degree possession of a forged instrument and three counts of theft by deception under \$500 and was sentenced to three-years' imprisonment and ordered to pay \$1,100 in restitution. The sentences were ordered to run consecutively but probated for five years so that Mendoza could pay restitution.

On January 29, 2014, the Commonwealth moved to revoke probation in both cases stating that Mendoza had not paid court costs and paid nothing toward restitution in either case. The motion also stated Mendoza had been arrested on two new felonies.

The trial court afforded Mendoza until April 21, 2014, to begin restitutions payments. When Mendoza appeared before the court on April 21, 2014, and had not made any restitution payments, the trial court conducted a revocation hearing.

Probation and Parole Officer Zachary Goins testified at the hearing. Although he testified that Mendoza had been arrested on two new felony charges, the trial court stated it would not consider these arrests in determining whether to revoke probation.

Officer Goins testified that Mendoza had not made any restitution payments but had paid \$55 on drug testing fees and restitution in an unrelated case.

Officer Goins also testified that he had to search for Mendoza several times when he was scheduled to report. He testified that graduated sanctions were available in parole cases but not used in probation cases, which he believed was in the trial court's discretion.

Mendoza's counsel pointed out that Mendoza had been incarcerated for three months and requested the matter be held in abeyance to give Mendoza an opportunity to make payments. Additionally, counsel argued that the trial court should consider his recent incarceration resulting from the motion to revoke probation as an adequate sanction. Finally, defense counsel pointed out that only five months had elapsed since Mendoza was probated and ordered to pay restitution and the motion to revoke his probation was filed. During that time, Mendoza was attending school and he had made payments in an unrelated case.

At the conclusion of the revocation hearing, the trial court stated "it appears to me like there's been no effort" to make restitution payments. The trial court then orally sustained both motions to revoke.

The complete written order states as follows:

This matter having been called before the Court on the 21st day of April, 2014, for a Probation Revocation hearing, and the Court having heard testimony of Probation Officer Zach Goins and being otherwise sufficiently advised, hereby finds that the Defendant has not complied with the terms and conditions of his probation by failing to pay any restitution in this case as ordered.

IT IS HEREBY ORDERED that the Defendant's probation is revoked, and he is remanded to the custody

of the Department of Corrections to begin serving his sentence.

Based on its oral and written findings, the trial court revoked probation based on Mendoza's failure to make restitution. The initial question is whether the trial court's findings of fact are sufficient to support its revocation of probation. We conclude reversal and remand is required.

Prior to 2011, once the Commonwealth met its burden to prove by a preponderance of the evidence that a defendant violated a condition of probation, the decision to revoke was within the trial court's discretion subject to reversal only when that discretion was abused. *Tiryung v. Commonwealth*, 717 S.W.2d 503, 504 (Ky.App. 1986). However, in 2011, the statutory law concerning probation revocation underwent substantial changes when the General Assembly enacted the Public Safety and Accountability Act, commonly referred to as House Bill 463. KRS 439.3106(1), a part of the new statutory scheme, 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.

Panels of this Court have addressed whether KRS 439.3106 requires trial courts to enter express findings as to the factors in subsection (1). As noted in *McClure v. Commonwealth*, 457 S.W.3d 728, 731 (Ky. App. 2015):

Various panels of this Court have come to various conclusions. In both *Jarrell v. Commonwealth*, 384 S.W.3d 195 (Ky.App. 2012), and *Southwood v. Commonwealth*, 372 S.W.3d 882 (Ky.App. 2012), the Court of Appeals affirmed revocation despite a lack of express findings as to both elements of the new statute. A separate panel of this Court reversed revocation because the trial court “fail[ed] to evaluate the other statutory criteria set forth in KRS 439.3106 [and relied] solely on the element of failure to report.” *See Carter v. Commonwealth*, 2013 WL 645829 (Ky.App. 2013) (2012–CA–000064–MR), *discretionary review granted*, 2013–SC–000176–DG (Ky. April 17, 2013).

Any possible debate on the matter was resolved when our Supreme Court rendered its opinion in *Commonwealth v. Andrews*, 448 S.W.3d 773 (Ky. 2014).

In *Andrews*, our Supreme Court held KRS 439.3106 establishes a new criteria that trial court’s are required to consider in a probation revocation proceeding. *Id.* at 777. The Court’s directive was clear that probation is not to be revoked without consideration of whether a probationer’s violation constitutes a significant risk to prior victims or the community at large and the ability to manage the probationer effectively in the community. *Id.* As the Court pointed out, the statutory findings promote the objectives of the HB 463 by ensuring “probationers are not being incarcerated for minor probation violations.” *Id.* at 779.

The trial court made no findings as to whether Mendoza’s failure to pay restitution constitutes a significant risk to prior victims or the community or

whether he could be managed in the community. The trial court made no findings regarding Mendoza's risk to others or why a sanction other than incarceration would not be feasible when revocation was based solely on the failure to pay restitution. Due to the absence of findings in relation to the specific criteria provided in KRS 439.3106(1), the revocation of probation was an abuse of discretion as not in conformity "under the new state of the law." *Id.* at 780.

The Commonwealth asserts that despite the trial court's error, reversal is not required because Mendoza did not properly preserve his argument that the trial court failed to make appropriate findings under KRS 439.3106. The record demonstrates Mendoza's counsel requested the court to consider sanctions other than revocation and incarceration. Even if we assume that the issue was not preserved, we conclude the palpable error rule is applicable.

Pursuant to Kentucky Rules of Criminal Procedure (RCr) 10.26, this Court may reverse when it concludes an unpreserved issue constitutes palpable error. A palpable error is one that affects a party's substantial rights, is prejudicial, and results in manifest injustice. *Martin v. Commonwealth*, 207 S.W.3d 1, 3 (Ky. 2006). Our Supreme Court has explicitly directed that in probation revocation matters, a trial court shall consider sanctions other than imprisonment. The trial court's failure to consider KRS 439.3106 constitutes palpable error.

A second and distinct error occurred when the trial court revoked Mendoza's probation for his failure to pay restitution without making sufficient findings of fact. In *Bearden v. Georgia*, 461 U.S. 660, 103 S.Ct. 2064, 76 L.Ed.2d 221 (1983),

the Supreme Court addressed the constitutional implications of revoking probation based solely upon the failure to pay court-ordered restitution. *Bearden* set forth the analysis to be completed by the trial court:

If the probationer willfully refused to pay or failed to make sufficient bona fide efforts legally to acquire the resources to pay, the court may revoke probation and sentence the defendant to imprisonment within the authorized range of its sentencing authority. If the probationer could not pay despite sufficient bona fide efforts to acquire the resources to do so, the court must consider alternate measures of punishment other than imprisonment. Only if alternate measures are not adequate to meet the State's interests in punishment and deterrence may the court imprison a probationer who has made sufficient bona fide efforts to pay.

Id. at 672, 103 S.Ct. at 2073. As observed by the Supreme Court, its directive that trial courts conduct a two-part inquiry is constitutionally required:

To do otherwise would deprive the probationer of his conditional freedom simply because, through no fault of his own, he cannot pay the fine. Such a deprivation would be contrary to the fundamental fairness required by the Fourteenth Amendment.

Id. at 672-73.

This Court adopted the *Bearden* standard in *Clayborn v. Commonwealth*, 701 S.W.2d 413 (Ky.App. 1985). More recently, in *Commonwealth v. Marshall*, 345 S.W.3d 822 (Ky. 2011), the Kentucky Supreme Court held that the requirements of *Bearden* apply to probation revocation proceedings whether restitution is made part of a plea bargain or through the imposition of a court

sentence. “[O]nce a defendant is probated, he then acquires an interest in remaining on probation rather than going to prison.” *Id.* at 832-33.

The *Marshall* Court instructed that the trial court must make two factual findings:

(1) whether [the probationer] had made sufficient bona fide attempts to make payment but was unable to make the required payments through no fault of his own and, if so, (2) whether alternative punishment might accomplish the Commonwealth’s punishment and deterrence objectives.

Id. at 833. The Court further instructed that a “trial court must specifically identify the evidence it relies upon in making these determinations on the record, as well as the specific reason(s) for revoking probation on the record.” *Id.*

Although such findings are not required to be in writing, “the trial court must make such findings specifically on the record.” *Id.* Upon review of the adequacy of the trial court’s findings, the question for an appellate court is whether the trial court made the appropriate findings and not whether the record supports a reason for revoking probation. *Id.*

Contrary to the directives in *Marshall*, the trial court’s findings consisted of its oral statement that “it appears” Mendoza made “no effort” to pay restitution. Its written order does not include any factual findings. Clearly, the stated law requires more than mere conclusory statements. *Id.* at 833-34.

We are aware that the trial court may reach the same conclusion upon remand. However, because the trial court failed to properly follow *Andrews*,

Bearden and *Marshall* and make the required factual findings, we must reverse and remand.

Based on the forgoing, the trial court's order revoking is reversed and the case remanded for proceedings consistent with this opinion.

LAMBERT, D., JUDGE, CONCURS IN RESULT ONLY.

MAZE, JUDGE, CONCURS WITH SEPARATE OPINION.

MAZE, JUDGE, CONCURRING: I fully agree with the reasoning and the result of the majority opinion. However, I disagree with the majority's dicta that a trial court's failure to make specific findings under KRS 439.3106 constitutes palpable error. In *Commonwealth v. Andrews*, 448 S.W.3d 773 (Ky. 2014), our Supreme Court held that trial court's must consider the statutory factors prior to revoking probation. *Id.* at 779-80. Clearly, the best way to satisfy this requirement would be for the trial court to expressly set out its findings either on the record or in its written order of revocation.

However, the Court in *Andrews* also emphasized that KRS 439.3106 does not "upend the trial court's discretion in matters of probation revocation, provided that discretion is exercised consistent with statutory criteria." *Id.* at 780. Even though the trial court in *Andrews* did not make written findings required by the statute, the trial court made oral findings which were consistent with the statutory requirements. The Supreme Court held that such findings were sufficient to establish that the trial had properly acted within its discretion in revoking probation. *Id.*

In the current case, Mendoza's counsel asked the trial court to consider sanctions other than revocation and incarceration. The trial court failed to address this issue either in its oral or written findings. Furthermore, unlike in *Andrews*, the trial court revoked Mendoza's probation based only upon his failure to pay restitution, without reference to any of the other statutory factors. Under the circumstances, Mendoza properly preserved the sufficiency of the trial court's findings for appellate review. I do not believe that it is necessary to address whether the trial court's failure to make express findings would constitute palpable error, nor do I agree that the omission will always constitute palpable error.

BRIEFS FOR APPELLANT:

Brandon Neil Jewell
Assistant Public Advocate
Department of Public Advocacy
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Courtney J. Hightower
Assistant Attorney General
Frankfort, Kentucky