

RENDERED: DECEMBER 4, 2015; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2014-CA-000894-MR

NICHOLAS BLAIR

APPELLANT

v. APPEAL FROM BOYD CIRCUIT COURT  
HONORABLE GEORGE DAVIS, JUDGE  
ACTION NO. 09-CR-00244

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
REVERSING AND REMANDING

\*\* \*\* \* \*\* \* \*\*

BEFORE: CLAYTON, NICKELL, AND THOMPSON, JUDGES.

CLAYTON, JUDGE: Nicholas Blair appeals the April 30, 2014 Boyd Circuit Court's order revoking his probation. After careful review of the record, we reverse and remand.

## FACTUAL AND PROCEDURAL BACKGROUND

In July 2009, Blair was arraigned on charges of first-degree trafficking in a controlled substance, first offense. In September 2009, Blair pled guilty to two counts of first-degree trafficking in a controlled substance and was sentenced to five years. Two years were designated to be served with the remainder probated.

In October 2013, probation and parole alerted the trial court that Blair had pled guilty to third-degree burglary, a Class D felony. Probation and parole recommended that Blair's sentence be revoked. Blair stipulated to a violation of his probation. Thereafter, the trial court found him guilty of contempt and sentenced him to 94 days of incarceration.

Next, in February 2014, probation and parole notified the trial court that Blair failed to report to them for two weeks after his release from the 94-day incarceration. He was required to report immediately upon release. When Blair finally reported, he was given a drug test for which he tested positive for Suboxone. Blair then signed a form admitting to the violation. Once again, probation and parole requested that the trial court revoke Blair's probation.

A revocation hearing was held on April 25, 2014. After the hearing, the trial court revoked Blair's probation and entered a written order. Blair now appeals the trial court's order revoking his probation.

Blair argues that the trial court erred by failing to consider graduated sanctions, and therefore, abused its discretion. The Commonwealth counters that the trial court properly revoked his probation.

#### STANDARD OF REVIEW

The appellate standard of review of a decision to revoke a defendant's probation is whether the trial court abused its discretion. *Lucas v. Commonwealth*, 258 S.W.3d 806, 807 (Ky. App. 2008). To amount to an abuse of discretion, the trial court's decision must be "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Clark v. Commonwealth*, 223 S.W.3d 90, 95 (Ky. 2007), quoting *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). An appellate court will not hold a trial court to have abused its discretion unless its decision cannot be located within the range of permissible decisions allowed by a correct application of the facts to the law. *Miller v. Eldridge*, 146 S.W.3d 909, 915, n. 11 (Ky. 2004).

#### ANALYSIS

Returning to Blair's contention that the trial court erred by failing to consider graduated sanctions, and therefore, abused its discretion, he begins his argument by proposing that Kentucky Revised Statutes (KRS) 439.3106 applies to the trial court. In fact, Blair's argument is supported by *Commonwealth v. Andrews*, 448 S.W.3d 773,780 (Ky. 2014), wherein the Kentucky Supreme Court stated that "KRS 439.3106(1) requires trial courts to consider 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.” In fact, the Commonwealth now concurs with Blair as to the application of this statute applied to trial courts during revocation hearings.

However, notwithstanding the applicability of KRS 439.3106, the Commonwealth maintains that Blair did not properly preserve the issue. Blair counters that the issue was preserved since he contended at the hearing that the trial court must consider “graduated sanctions.” The record provides that Blair, during cross-examination of the probation officer, asked the officer whether he was aware of graduated sanctions for probation and parole violations. The officer said he was aware of graduated sanctions. The Commonwealth claims that the cross-examination mention of graduated sanctions was insufficient to preserve the issue for appellate review. Hence, it suggests that the trial court’s responsibility under KRS 439.3106 was not raised or mentioned during the revocation hearing, and according to the Commonwealth, this renders the issue unpreserved.

We disagree. KRS 439.3106, as noted by the Commonwealth, applies to trial courts as well as to the Department of Corrections (hereinafter “DOC”). In *Andrews*, the Court not only held the “new criteria” in KRS 439.3106 applies to a trial court, but also, in clear and certain terms, mandates that the trial court and the DOC’s officers proceed in accordance with that statute. *Andrews*, 448 S.W.3d at 777. Therefore, preserving the issue is irrelevant since the statute’s application is

required under the authority of the legislature, and according to case law, pertinent to both the DOC and the trial court.

Next, the Commonwealth recognizes that as authorized under KRS 439.3106 in 2011, a trial court must consider when revoking probation, a danger to the defendant's victim or the community and the possibilities of rehabilitation in the community. It notes that the trial court orally found that the department of probation and parole followed its matrix and gave Blair numerous opportunities to no avail. The trial court then revoked probation and imposed the remainder of his term. Although the trial court does highlight Blair's failure to abide by a condition of supervision, it does not consider in its decision concerning the revocation of probation whether he constitutes a significant risk to prior victims or the community at large and whether he can be managed in the community.

The Commonwealth, citing *Southwood v. Commonwealth*, 372 S.W.3d 882 (Ky. App. 2012), avers that it is not necessary for the trial court to make specific findings of fact. *Southwood*, however, has been abrogated by *McClure v. Commonwealth*, 457 S.W.3d 728 (Ky. App. 2015), which relied on *Andrews*. In *McClure*, our Court held that under KRS 439.3106(1) a trial court must make findings of fact concerning whether a party poses a risk to the community and is not manageable in the community. The role of the appellate court is merely to evaluate the sufficiency of the evidence and whether the trial court abused its discretion. *Id.* at 734. Therefore, because the trial court failed to

make essential findings of fact and, in essence ignored the issue of graduated sanctions, it abused its discretion.

## CONCLUSION

The decision of the Boyd Circuit Court is reversed and remanded for the trial court's entry of further findings that comply with this opinion and KRS 439.3106.

ALL CONCUR.

### BRIEF FOR APPELLANT:

Lisa Roberts Horsman  
Frankfort, Kentucky

### BRIEF FOR APPELLEE:

Jack Conway  
Attorney General of Kentucky

David B. Abner  
Assistant Attorney General  
Frankfort, Kentucky