

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-001775-MR

BEN CROLEY

APPELLANT

v. APPEAL FROM GRAVES CIRCUIT COURT
HONORABLE TIMOTHY C. STARK, JUDGE
ACTION NO. 14-CR-00048

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS, KRAMER AND STUMBO, JUDGES.

STUMBO, JUDGE: Ben Croley appeals from an Order Revoking Probation rendered in Graves Circuit Court. He contends that the court abused its discretion by failing to properly consider if sanctions other than revocation and imprisonment were appropriate pursuant to Kentucky Revised Statute (KRS) 439.3106. For the reasons stated below, we find no error and AFFIRM the Order on appeal.

The facts are not in controversy. In 2013, Croley entered a plea of guilty in McCracken Circuit Court on an amended charge of facilitation to manufacture methamphetamine. Pursuant to the Commonwealth's recommendation, the court sentenced Croley to a term of five years in prison, to be probated if he was accepted into the drug court treatment program. The court probated the sentence for two years or the time necessary to complete drug treatment, whichever was longer. The matter was then transferred from McCracken County to the Graves County Drug Court program.

Thereafter, Croley violated the conditions of drug court on two occasions, resulting in a total of three days served in the Graves County jail. On September 5, 2014, drug court supervisor Kim Brand filed an affidavit indicating that Croley violated the terms of drug court by using a plant-based drug called kratom. Brand indicated that the drug was "synthetic", and that Croley's usage of the drug violated the conditions of drug court.

On September 22, 2014, the Graves Circuit Court conducted a revocation hearing, whereupon Brand testified that Croley tested positive for kratom. On cross-examination, Brand stated that she believed kratom was plant-based, but considered it "synthetic" because of its opiate-like effects on the user. She also stated that Croley would have been made aware that kratom was considered a synthetic drug and that its usage was prohibited in drug court. Croley acknowledged that he had used kratom and tested positive for it. Croley's counsel argued that Croley should not be removed from drug court since kratom was not

synthetic, and in the alternative that Croley was a good candidate for the Centerpoint treatment program in lieu of drug court.

The Graves Circuit Court subsequently rendered an Order revoking Croley's probation and reinstating his five-year sentence. In support of the Order, the court determined at the hearing that drug court was a condition of Croley's probation, and that he violated that term by failing to complete it. The court also noted that Croley had twice been sanctioned before, and that his usage of kratom was serious since it required a special drug screen to detect it. This appeal followed.

Croley now argues that the Graves Circuit Court committed reversible error in failing to properly apply KRS 439.3106 to the revocation analysis. 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.

Croley maintains that the Graves Circuit Court improperly failed to apply this provision to the facts before us. He directs our attention to *Commonwealth v.*

Andrews, 448 S.W.3d 773 (Ky. 2014), which determined that KRS 439.3106(1) was applicable not only to the Department of Corrections, but to trial courts as well. *Andrews* held 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." *Id.* at 780.

Croley contends that the circuit court improperly failed to apply KRS 439.3106(1) and *Andrews*. Specifically, he argues that the court failed to properly consider whether his probation violation makes him a significant risk to prior victims or the community, and whether he can be managed in the community. Additionally, Croley maintains that the circuit court did not consider sanctions other than revocation and incarceration as appropriate to the severity of the behavior. He goes on to argue that this failure constitutes a violation of the Fourteenth Amendment to the United States Constitution. He seeks an Order reversing the revocation and remanding the matter for appropriate relief consistent with KRS 439.3106.

In its Order revoking Croley's probation, the Graves Circuit Court stated that, "The Court has considered KRS 439.3106. The Defendant cannot be appropriately managed in the community, and there is not any other sanction short of revocation and incarceration that would be appropriate." It also found that drug

court was a condition of Croley's probation, that Croley was sanctioned twice while in drug court, and that he was properly terminated from drug court.

The question for our consideration is whether the court's express statement that it considered KRS 439.3106, in conjunction with its conclusion that Croley cannot be appropriately managed in the community and that other sanctions would not be appropriate, is sufficient to satisfy KRS 439.3106 and *Andrews*. We must answer this question in the affirmative. In *McClure v. Commonwealth*, 457 S.W.3d 728 (Ky. App. 2015), a panel of this Court concluded that KRS 439.3106

requires a trial court to consider "whether a probationer's failure to abide by a condition poses a significant risk to prior victims or the community at large." (Citation omitted). Neither KRS 439.3106 nor *Andrews* require anything more than a finding to this effect supported by the evidence of record.

Id. at 733. We cannot conclude from *Andrews* and *McClure* that an order of revocation must contain any particular magic language in order to satisfy KRS 439.3106. Rather, when read in concert, the statutory language and the case law demand that a probationer receive a full and fair consideration of all relevant factors, in addition to the reasonable alternatives to imprisonment, before revocation is ordered. If this is accomplished without a verbatim recitation of the statutory language, the probationer has nevertheless received the statutory protection to which he is entitled.

Such is the case herein. The Graves Circuit Court considered all relevant factors before concluding that Croley's probation must be revoked. Croley

appeared in open court with the assistance of counsel, whereupon the court examined the record, Croley's criminal history, and the Judgment and probated sentence. The court was aware that this was Croley's third violation of drug court rules, and that the completion of drug court was the primary condition of probation. Additionally, it was aware that Croley was not merely a possessor of methamphetamine, but acknowledged facilitating its production. The court expressly considered KRS 439.3106, and determined that Croley could not be appropriately managed in the community and that sanctions other than revocation and incarceration were not appropriate.

While KRS 439.3106 "reflects a new emphasis in imposing and managing probation, it does not upend the trial court's discretion in matters of probation revocation, provided that discretion is exercised consistent with statutory criteria." *Andrews*, 448 S.W.3d at 780. Based on the totality of the record and the law, we cannot conclude that Croley was denied the full statutory consideration to which he was entitled, and nor that the Graves Circuit Court abused its discretion in revoking his probation. We find no error.

For the foregoing reasons, we AFFIRM the Order Revoking Probation of the Graves Circuit Court.

ALL CONCUR.

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