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Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-000896-MR

EARL FLETCHER APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE ANN BAILEY SMITH, JUDGE
ACTION NO. 13-CR-001767

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KRAMER, CHIEF JUDGE; ACREE AND D. LAMBERT, JUDGES.

D. LAMBERT, JUDGE: Earl Fletcher (Earl) brings this appeal from the Jefferson County Circuit Court's revocation of his probation. He argues that the trial court abused its discretion when it revoked his probation after he was arrested for a felony charge and a misdemeanor charge that were both ultimately dismissed. After a careful review of the record and the applicable law, we affirm.

Relevant Facts

Earl entered a guilty plea to criminal attempt to commit arson in the second degree, two counts of arson in the third degree, five counts of wanton endangerment in the first degree, and four counts of criminal mischief in the second degree. On April 14, 2014, he was sentenced to terms of imprisonment of ten years, one year, five years, and twelve months, respectively. His ten-year sentence and his one-year sentence were run consecutively, and the remainder of his sentences were run concurrently for a total sentence of eleven years. Earl was initially denied probation, but was later granted shock probation for a period of five years.

On March 17, 2015, the Commonwealth filed a motion to revoke Earl's probation, alleging that he had a new felony arrest for wanton endangerment in the first degree and a new misdemeanor arrest for assault in the fourth degree.

The arrest summary stated that Earl's wanton endangerment charge arose from an incident in which Earl struck his wife, Jaketa Fletcher (Jaketa), with a vehicle moving at approximately 5-12 miles per hour after she had moved behind the vehicle to prevent Earl from leaving. Earl's assault charge arose from an incident in which Earl struck Jaketa in the face several times with a closed fist.

At Earl's revocation hearing, the Commonwealth presented four witnesses. The first witness was Detective Sarah McHugh (Detective McHugh). She testified that she talked with Jaketa after she had been admitted to the hospital. Detective McHugh also testified that Jaketa told her that she had tried to stop Earl

from leaving the shared vehicle by holding onto the steering wheel, but that Earl pushed her down in the snow two or three times. Jaketa also told Detective McHugh that she had moved behind the vehicle to prevent Earl from leaving, but that when Earl saw her behind the vehicle he hit the accelerator. Later, when Detective Hughes saw Jaketa in district court, Jaketa told her that none of that had happened and that she didn't want to press charges against Earl.

The second witness, Detective Allen Wines (Detective Wines), an officer who triages domestic violence cases, never had any contact with either Earl or Jaketa. He read into the record several incidents of domestic violence from police reports field by Jaketa. The first report read by Detective Wines described an incident in which Earl hit Jaketa several times in the face with a closed fist. Detective Wines testified he had thumbnail photos of her injuries. The second report read by Detective Wines described an incident where Earl poured juice on Jaketa, struck her several times in the face and "slung [Jaketa] around the house" causing Jaketa's hip to strike the bedpost. Again, photos of the incident were made, though the photographs were apparently never introduced into the record. The third witness, Officer Brandon Watkins (Officer Watkins), Earl's probation officer, testified as to Fletcher's employment history.[1]

Finally, Jaketa Fletcher testified that Earl did not hit her with the car, but that the car slid down the driveway on its own because the driveway was icy. Jaketa testified that she and Earl had been fighting on the day in question, and that

[1] Officer Watkins and the Commonwealth both erroneously stated that Jaketa had been a victim in Earl's arson conviction. Defense counsel caught and corrected this mistake.

she grabbed Earl by the shirt when he would not give her the keys to the vehicle. She also testified that in one of the instances in which she had called the police on Earl, she had actually sustained the injuries to her face from fighting with another woman. She testified that on the other incident in question, Jaketa and Earl were "slinging each other around and throwing juice on each other." She also stated that she would call the police when she was mad at Earl and that sometimes she would embellish the truth, in order to make it seem worse than it actually was.

Following the hearing over Earl's probation revocation, the circuit judge in this case made the following oral remarks:

> You know, the testimony that I have heard, and while I wouldn't go quite so far as the prosecutor went, I mean it sounds to me that there's some mutual fighting going on in this relationship and that there's not somebody who's just totally the victim and somebody who's totally the perpetrator. But it sounds like just a very violent, dysfunctional relationship between the two of these
>
> people. But, Mr. Fletcher, you're the one who is on probation, and I'm going to revoke your probation…

The trial court revoked Earl's probation. This appeal follows.

Analysis

"A decision to revoke probation is reviewed for an abuse of discretion ... Under our abuse of discretion standard of review, we will disturb a ruling only upon finding that the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. Andrews*, 448 S.W.3d 773, 780 (Ky. 2014) (internal quotation marks and citation omitted). In *Andrews*,

our Supreme Court stated that except for "[c]ertain violations, such as absconding or receiving a new felony conviction … KRS [Kentucky Revised Statutes] 439.3106 must be considered before probation may be revoked." *Id.* at 778-79.

KRS 439.3106 provides that "[s]upervised individuals shall be subject to[]" the following:

> (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.

Furthermore, "[b]y requiring trial courts to determine that a probationer is a danger to prior victims or 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." *Andrews,* 448 S.W.3d 773 at 779.

First, Earl argues that the trial court erred when it failed to make a finding of fact that a sanction other than revocation would be inappropriate. However, making such a finding is unnecessary when the trial court makes statutory findings of fact as to both factors contained in KRS 439.3106(1). As this

Court previously stated, "the General Assembly intended the task of considering and making findings regarding the two factors of KRS 439.3106(1) to serve as the analytical precursor to a trial court's ultimate decision: whether revocation or a lesser sanction is appropriate." *McClure v. Commonwealth*, 457 S.W.3d 728, 732 (Ky. App. 2015). The trial court is not required to impose a sanction other than revocation. *Id.* The trial court is only required to make findings of fact supported by the statutory criteria in KRS 439.3106(1).

Next, Earl argues that the trial court's written findings of fact were insufficient. Under *Andrews*, *supra*, the trial court was required to make specific findings as to "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..." *Id.* at 780. The trial court made express findings of fact in the present case in regards to both of the statutory factors required by *Andrews*, *supra*, finding that Earl's arrest for the new felony and misdemeanor make him a danger to his prior victims and others. The findings of fact in the present case stated, in pertinent part, as follows:

> On April 8, 2014, this Court sentenced the Defendant to ten (10) years as to the offense of Criminal Attempt Arson II (as amended), one (1) year on each of the two counts of Arson III, five (5) years on each of the five counts of Wanton Endangerment I, and twelve (12) months on each of the four counts of Criminal Mischief II.
>
> On July 18, 2014, this Court granted the Defendant's Motion for Shock, the sentences in this case were

> withheld for a period of five (5) years, and the Defendant was placed on supervised probation.
>
> Based upon the findings of the evidentiary hearing, and the Court being otherwise sufficiently advised;
>
> IT IS THEREFORE ORDERED AND ADJUDGED that the Court finds that the Defendant has violated the following conditions of his probation:
>
> 1. New felony arrest
> 2. New misdemeanor arrest
>
> Further, the Court finding that the Defendant's failure to comply with his conditions of probation constitute a significant risk to prior victims or the community at large, and that the Defendant cannot be appropriately managed in the community.

In *McVey v. Commonwealth*, 467 S.W.3d 259 (Ky. App. 2015), the trial court revoked the appellant's diversion agreement when the police discovered that the appellant had had access to firearms. *Id.* at 260-61. This Court ultimately concluded that the circumstances supported the trial court's finding that McVey posed a significant risk to the community, stating that

> The evidence presented at the hearing supported a finding that McVey was in possession of three rifles, in violation of his diversion agreement, and that he was not merely the victim of a robbery, but was also involved with trafficking in drugs. The fact that he was not charged with trafficking is not dispositive. The evidence was sufficient for the court to conclude that McVey's activities posed a significant risk to the community.

Id. at 262.

In *McClure v. Commonwealth*, 457 S.W.3d 728 (Ky. App. 2015), a panel of this Court stated that

> McClure alternatively contends that the trial court's finding of significant risk was insufficient because it did not include an explanation of "how attempting to alter a drug screen posed a danger to society." However, this argument lacks legal support. The statute 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." Neither KRS 439.3106 nor *Andrews* require anything more than a finding to this effect supported by the evidence of record. The trial court complied with this requirement and it owed *McClure* no further explanation.

Id. at 733 (citation omitted). While Earl's previous arson was not perpetrated against Jaketa, the Court notes that Earl was previously charged with a violent offense. Though wanton endangerment in the first degree is not classified as a "violent offense" under KRS 532.200, the incident did allegedly result in injury to another person. S*ee* KRS 532.200 (defining arson in the first, second and third degrees as "violent offenses"). The trial court's finding that Earl is "a threat to the community and is not able to [be] managed in the community[,]" therefore, was not clearly erroneous, assuming that the finding was supported by sufficient evidence.

Earl next argues that the circuit court had insufficient evidence in order to revoke his probation. In *Barker v. Commonwealth*, 379 S.W.3d 116 (Ky. 2012), our Supreme Court explained that "An individual's probation may be revoked any time before the expiration of the probationary period when the trial court is satisfied by a preponderance of the evidence presented in a revocation hearing that the probationer violated a condition of probation." *Id.* at 123. In *Williams v. Commonwealth*, 462 S.W.3d 407 (Ky. App. 2015), this Court

reaffirmed that the trial court's burden of proof is still "beyond a preponderance of the evidence" in light of *Andrews*, *supra*. *Id.* at 410.

We believe that the evidence in the present case was sufficient to support the trial court's findings under *Barker, supra*. Our Supreme Court has held that "Although new charges may form the basis for revocation proceedings, a conviction on those charges is not necessary in order to revoke probation." *Id.* at 123. Additionally, the Court notes that the Kentucky Rules of Evidence (KRE) do not apply to probation revocation proceedings. KRE 1101(d)(5). Indeed, the trial court was permitted to rely on the substance of the police reports in the present case because hearsay is acceptable in a probation revocation proceeding. *See Barker*, 379 S.W.3d at 129-30 (holding that the trial court did not err in relying on a police officer's testimony who read from a police citation describing an assault during which the testifying officer was not present). Indeed, our Supreme Court has found that there was sufficient evidence in the record to satisfy the "beyond a preponderance of the evidence" burden when the *only* witness who testified gave entirely hearsay statements. *Id.* at 119; 129-30.

Additionally, we find that this case is similar to *Sullivan v. Commonwealth*, 476 S.W.3d 260 (Ky. App. 2015). In *Sullivan*, this Court considered a situation in which Officer Ritchie, a probation officer who was not the appellant's probation officer, testified that the appellant had violated his probation. *Id.* at 262. This Court found that Officer Ritchie's testimony was

sufficient to support the trial court's finding that the appellant had violated his probation, stating that

> Here, Officer Ritchie, a sworn witness, testified as to the claimed violations based upon Officer Haubry's sworn affidavit and the routine violation report. The violation report upon which Officer Ritchie based her testimony contained a detailed account of the underlying events, including the date, time and place at which Sullivan was alleged to have passed counterfeit federal reserve notes. Officer Ritchie's testimony was within the scope of her employment as a trained probation officer and Sullivan has pointed to no evidence demonstrating that her testimony was in any way unreliable or not credible… Officer Ritchie's testimony and the documentary evidence upon which she relied is credible evidence sufficient to support the trial court's finding that Sullivan had violated his probation by committing a new offense…

Id. at 264 (footnote and citations omitted). Here, Officer Watkins, Earl's probation officer, actually did testify at Earl's hearing even though Officer Watkins did not testify as to whether he believed Earl violated his probation. However, Detective McHughes did testify that she talked to Jaketa shortly after the incident in question, that Jaketa had suffered injuries and that Jaketa had said that Earl was responsible. Furthermore, Detective Wines read police reports detailing previous incidents of domestic violence between Earl and Jaketa. Together, this evidence was sufficient to support the trial court's findings under *Barker*, *supra*, and *Sullivan*, *supra*. Because the evidence presented at Earl's hearing was sufficient to satisfy the preponderance of the evidence standard, the trial court did not abuse its discretion in revoking Earl's probation.

Conclusion

In sum, we hold that Earl has failed to prove that the trial judge abused her discretion when she revoked Earl's probation after he received new felony and misdemeanor charges.

For the foregoing reasons, the judgment of the Jefferson Circuit Court is AFFIRMED.

ALL CONCUR.

BRIEF FOR APPELLANT:

Kathleen K. Schmidt
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

J. Hays Lawson
Assistant Attorney General
Frankfort, Kentucky