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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2015-CA-001792-MR

TOMMY L. UPTON

APPELLANT

v. APPEAL FROM BELL CIRCUIT COURT
HONORABLE ROBERT COSTANZO, JUDGE
ACTION NO. 14-CR-00008

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
VACATING AND REMANDING

** ** * ** * ** *

BEFORE: CLAYTON, STUMBO AND THOMPSON, JUDGES.

THOMPSON, JUDGE: Tommy L. Upton appeals from the Bell Circuit Court's revocation of his probation. He argues the circuit court abused its discretion when it revoked his probation after he failed to report to his probation officer, failed to pay restitution and failed to pay his supervision fee. After a careful review of the record and the applicable law, we vacate and remand for additional findings.

Upton entered a guilty plea to an amended misdemeanor charge of theft by unlawful taking under \$500. The circuit court sentenced Upton to twelve months in jail, probated for two years. As a condition of his probation, Upton was ordered to pay restitution in the amount of \$2,814.38 and a monthly supervision fee of \$10.00. Approximately six months later, the Commonwealth filed a motion to revoke Upton's probation. The circuit court held a hearing on the matter.

Michelle Hensley, a probation and parole officer, testified that Upton had not made any payments on his restitution or paid his supervision fee. Officer Hensley also testified that Upton had last reported one year earlier, on October 14, 2014, and did not report thereafter, even though he was required to report monthly.

Alma Upton, Upton's mother, testified that Upton was born with a tumor on his head, which required medical treatment during the time he was on probation. She testified that, after Upton was admitted to the University of Tennessee Hospital in Knoxville, she called Upton's probation officer to tell him of Upton's medical treatment. Alma also testified Upton had not been hospitalized in the last year. She further testified that Upton had been working with his father but stopped after his medical condition worsened.

Upton testified he went to the probation office for "two or three months." However, he stated that his probation officer was never at the office, and he left. Upton also said that, at one point, his probation officer called to tell him to report within 25 minutes or Upton would violate his probation. Upton responded that he did not have transportation, but invited his probation officer to come to his

residence instead; his probation officer did not come to his residence. Upton called back the next day but again did not go to the probation office. Upton also testified that when he gets a headache from his tumor, he must lie flat in a dark room for seven to ten days straight. He further testified he had been working at his father's herb business, but the work eventually "died out."

During the hearing, the circuit court explained its reasoning that Upton violated his probation as follows:

Well, Mr. Upton, you were given the privilege of probation. Just a basic thing, call in, go once a month, and we're talking over a ten or twelve-month period. I understand you've got a medical condition, but I've seen you out in the community. Any of that time you could have . . . reported to probation and parole, you could have called, you could make some effort. Let them know why you couldn't make payments, or make minimal payments. You could have done a bunch of things, especially over a one-year period and you didn't. So, I can't overlook that you've already been granted the privilege of probation and failed to do even the most basic of things. So, the court will find that you violated the terms and conditions of your probation.

The circuit court noted in its written order that Upton was "guilty of violating the express terms of his Probation by failing to make any payments toward his restitution as ordered by the Court, by failing to make any of his monthly supervision fees as ordered by the Court, and by failing to report to his Probation Officer as directed." The circuit court also found that Upton was a significant risk to the community and that he could not be managed in the community under Kentucky Revised Statutes (KRS) 439.3106. This appeal follows.

Generally, our standard of review in probation revocations appeals “is limited to a determination of whether, after a hearing, the trial court abused its discretion in revoking the appellant’s [probation].” *Tiryung v. Commonwealth*, 717 S.W.2d 503, 504 (Ky.App. 1986). “The test for abuse of discretion is whether the trial judge’s decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

Upton argues the circuit court erred in failing to make findings of fact as to whether he was able to pay restitution and supervision fees prior to revoking his probation as required by *Bearden v. Georgia*, 461 U.S. 660, 103 S.Ct. 2064, 76 L.Ed.2d 221 (1983). In *Bearden*, the United States Supreme Court held as follows:

[I]n revocation proceedings for failure to pay a fine or restitution, a sentencing court must inquire into the reasons for the failure to pay. 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. 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, 103 S.Ct. at 2073 (footnote omitted).

Bearden was adopted in Kentucky by *Clayborn v. Commonwealth*, 701 S.W.2d 413, 415 (Ky.App. 1985). In *Commonwealth v. Marshall*, 345 S.W.3d 822, 833 (Ky. 2011), the Kentucky Supreme Court formulated a test as to what findings needed to be made by trial courts before revoking probation for failure to make court-ordered payments: “(1) whether each defendant had made sufficient bona fide efforts to make payments but was unable to do so from no fault of his own and, if so, (2) whether alternatives to incarceration would suffice to accomplish the Commonwealth’s punishment and deterrence objectives.” The Court noted the importance of making these findings on the record, stating that “[i]t is not enough that an appellate court might find some evidence in the record to support a reason for revoking probation by reviewing the whole record.” *Id.*

The Commonwealth concedes that the circuit court failed to make the required findings of fact as required by *Bearden*. The circuit court clearly relied upon Upton’s failure to make restitution in its written order revoking his probation, even though it had not made findings under *Marshall*. However, this error was not properly preserved.

While Upton’s counsel argued to the circuit court that Upton’s inability to pay should not be a basis for his revocation, Upton did not object when the court failed to make findings under *Marshall*. Therefore, we review for palpable error under Kentucky Rules of Criminal Procedure (RCr) 10.26. “In order to demonstrate an error rises to the level of a palpable error, the party

claiming palpable error must show a ‘probability of a different result or [an] error so fundamental as to threaten a defendant’s entitlement to due process of law.’”

Allen v. Commonwealth, 286 S.W.3d 221, 226 (Ky. 2009) (quoting *Martin v. Commonwealth*, 207 S.W.3d 1, 3 (Ky. 2006)).

It is mandatory that findings of fact be made pursuant to *Marshall* and the failure to make such findings violates a probationer’s right to due process, resulting in manifest injustice constituting palpable error. *Allen v. Commonwealth*, No. 2015-CA-001214-MR, 2017 WL 729781, 2 (Ky.App. 2017) (unpublished); *Campbell v. Commonwealth*, No. 2012-CA-001138-MR, 2013 WL 4512069, 2 (Ky.App. 2013) (unpublished).¹ On remand, the circuit court must make specific findings under *Marshall* even if the end result may be the same.

Upton next argues that the circuit court abused its discretion when it found that he met the statutory requirements under *Commonwealth v. Andrews*, 448 S.W.3d 773 (Ky. 2014). KRS 439.3106 provides that defendants on probation 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

¹ We may properly consider these unpublished decisions rendered after January 1, 2003, pursuant to Kentucky Rules of Civil Procedure 76.28(4)(c) because “there is no published opinion that would adequately address the issue before the court.”

need for, and availability of, interventions which may assist the offender to remain compliant and crime-free in the community.

The Kentucky Supreme Court has explained 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.” *Andrews*, 448 S.W.3d at 781.

However, we do not reach the question of whether the circuit court abused its discretion under *Andrews*. Because the circuit court did not make findings under *Marshall*, we cannot review its analysis under *Andrews*. In other words, if the circuit court had found that, for example, Upton had made bona fide efforts to pay restitution and supervision fees but was unable to do so through no fault of his own, the court by extension could not have found that Upton’s failure to pay restitution resulted in a probation violation. *See Mbaye v. Commonwealth*, 382 S.W.3d 69, 72 (Ky.App. 2012) (where trial court failed to make adequate findings under *Marshall*, it could not determine whether alternative forms of punishment rather than revocation would suffice).

Accordingly, the order of the Bell Circuit Court revoking Upton’s probation is vacated, and the matter is remanded for the circuit court to make appropriate findings of fact pursuant to *Marshall*.

ALL CONCUR.

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