

RENDERED: JULY 21, 2017; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2015-CA-001873-MR

DUSTIN HENSLEY

APPELLANT

v. APPEAL FROM BELL CIRCUIT COURT
HONORABLE ROBERT COSTANZO, JUDGE
ACTION NO. 15-CR-00148

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE, JOHNSON AND TAYLOR, JUDGES.

JOHNSON, JUDGE: Dustin Hensley appeals from an order of the Bell Circuit Court revoking his probation. After reviewing the record in conjunction with the applicable legal authorities, we AFFIRM the decision of the Bell Circuit Court.

BACKGROUND

Pursuant to a plea agreement, Dustin Hensley (“Hensley”) pleaded guilty to the charge of Facilitation to Commit Burglary in the Second Degree¹, a Class A Misdemeanor. His plea agreement called for a sentence of twelve (12) months. The sentence was probated and Hensley was placed on supervised probation for twenty-four (24) months. On September 22, 2015, within thirty (30) days of his probation, Hensley was arrested for theft by unlawful taking and taken to jail. Upon his release from jail on October 12, 2015, Hensley began walking from the Bell County Jail to Middlesboro, Kentucky. Deciding that he was thirsty, Hensley entered a Kroger store, removed a bottle of Gatorade off the shelf, consumed the drink, and attempted to leave without paying. Upon being confronted by the store manager, Hensley ran. The police were contacted and Hensley was apprehended, arrested and housed in the Bell County Jail.

The Commonwealth, in response to a Supervision Report filed by the Division of Probation and Parole, filed a motion to set aside his probation based upon his two probation violations of September 22, 2015, and October 12, 2015. On November 2, 2015, Hensley was brought before the court for a probation revocation hearing. After a hearing by the court, wherein it took evidence concerning the October 12, 2015 violation, the court entered an order revoking Hensley’s probation and ordered him to serve the balance of his twelve-month

¹ Kentucky Revised Statutes (KRS) 506.080

sentence in the Bell County Jail. Hensley has appealed from the November 2, 2015 hearing alleging that the court did not consider graduated sanctions pursuant to Kentucky Revised Statutes (KRS) 439.3106, prior to revoking his probation.

STANDARD OF REVIEW

A decision to revoke probation is reviewed for an abuse of discretion. *Commonwealth v. Lopez*, 292 S.W.3d 878 (Ky. 2009). 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)

ANALYSIS

The only issue presented for review is whether the court abused its discretion when it did not formally articulate that it had considered graduated sanctions prior to revoking Hensley’s probation.

The statute states 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 need for, and availability of, interventions

which may assist the offender to remain compliant and crime-free in the community.

KRS 439.3106

As stated in *McClure v. Commonwealth*, 457 S.W.3d 728, 733 (Ky. App. 2015), we may look to both the written and the video record for express findings by the court to determine if it considered the criteria of KRS 439.3106. The role of the appellate court is to evaluate the sufficiency of the evidence and whether the court abused its discretion. *Id.* at 734.

Under the statutory scheme, the court must first satisfy the two requirements of section one. After having heard testimony and reviewing the record, the court in its November 4, 2015 order determined that Hensley's failure to abide by the conditions of his probation constituted a significant risk to the community and that he could not be managed in the community. The court order was based upon the court's finding that Hensley, having committed two violations after being granted probation, would commit another violation during any extended period of probation. The court took special notice of the fact that while the second violation consisted of the shoplifting of a bottle of Gatorade, it required police action to detain him, putting the police at risk. In addition, Hensley's actions put others at risk who were present at the time of the incident, including the store manager who confronted him when he committed the violation.

The court further found that Hensley was in need of correctional treatment that could be most effectively provided by a correctional institution, specifically citing his addiction problem.

Having satisfied the first two requirements of the statute, the court did not need to go any further. “KRS 439.3106 permits, but does not require, a trial court to employ lesser sanctions” prior to revoking probation. *McClure*, 457 S.W.3d at 732. It is noted that at the hearing, Hensley’s attorney proposed lesser sanctions. However, the court considered that proposal and rejected it. The court satisfied the requirements of KRS 439.3106 prior to revoking Hensley’s probation.

CONCLUSION

THEREFORE, based upon the record and the applicable law, we AFFIRM the Order of the Bell Circuit Court revoking Hensley’s probation.

ALL CONCUR.

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