

Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-000106-MR

HILLARY ADAMS

APPELLANT

v.

APPEAL FROM BRACKEN CIRCUIT COURT
HONORABLE STOCKTON B. WOOD, JUDGE
ACTION NO. 09-CR-00019

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
VACATING AND REMANDING

** ** * * * * *

BEFORE: ACREE, DIXON AND JONES, JUDGES.

DIXON, JUDGE: Hillary Adams appeals from an order of the Bracken Circuit Court revoking her probation. We vacate and remand.

FACTUAL AND PROCEDURAL BACKGROUND

Adams was indicted in September 2009 on one felony count of welfare fraud under \$10,000 (Kentucky Revised Statute (KRS) 194A.505(6)) involving the receipt of \$18,805.80 in Child Care Assistance benefits. On May 20,

2010, she entered a plea of guilty to an amended count of welfare fraud under \$10,000. In exchange for the plea, the Commonwealth recommended supervised pretrial diversion for a period of five years or until restitution was paid, whichever was longer, with a prison sentence of five years if diversion was unsuccessful. On May 24, 2010, the circuit court entered an order in accordance with this recommendation with Adams being required to pay \$100.00 per month to the Cabinet for Health and Family Services. On August 20, 2010, the circuit court entered another order granting diversion with conditions. The order specifically stated that if the court found Adams failed to successfully complete pretrial diversion, it could impose a sentence equal to or less than the five years recommended by the prosecutor.

On April 27, 2012, the probation officer filed a violation of supervision report stating that Adams had failed to make the required restitution payments and had tested positive for use of cocaine and marijuana. Following a hearing, the circuit court entered an order in June 2012, voiding her pretrial diversion based on finding that she had violated the conditions of pretrial diversion. On July 21, 2012, the circuit court entered a Judgment sentencing her to five years in prison probated for a period of five years. The conditions of probation included avoiding injurious or vicious habits, avoiding persons or places of disreputable or harmful character, undergoing available substance abuse or psychiatric treatment, promptly notifying the probation officer of any change of address or employment, and obeying all rules imposed by Probation and Parole.

On October 4, 2012, the probation officer filed another violation of supervision report stating that Adams again failed to make restitution payments. Before a hearing could be held on the report, the probation officer filed another violation of supervision report on December 5, 2012, stating that Adams had failed to report to the probation officer as directed, failed to report a change of her home address, and had absconded from supervision. After a hearing on the two reports on January 17, 2013, the circuit court found that Adams had violated the terms of probation but imposed an alternative sentence of incarceration in the county detention center every weekend from 7:00 p.m. on Saturday to 7:00 p.m. on Sunday until March 31, 2013, in lieu of revocation.

On May 30, 2013, the probation officer filed another violation of supervision report stating that Adams had absconded from supervision, had failed to report to the probation officer as directed, and had failed to make restitution as ordered. On July 1, 2013, after conducting a hearing at which Adams stipulated to violating the conditions of her probation, the circuit court entered an order revoking her probation and sentencing her to serve the original five-year sentence.

On August 6, 2013, Adams filed a Motion for Shock Probation, which stated that she had been accepted into the Drug Court Program. On August 15, 2013, following a hearing, the circuit court granted the motion and placed her on probation for a period of five years with the same conditions as her earlier probation with the addition that she complete the Drug Court Program. The circuit

court transferred Adams to the drug court and ordered that she be transferred from the detention center to the Brighton Center for drug treatment.

On November 13, 2015, the Commonwealth filed a Motion to Revoke Probation stating that Adams had failed to complete the court-ordered drug treatment because she had been terminated from drug court for violations. On November 23, 2015, the circuit court conducted a probation revocation hearing. After hearing testimony from a drug court representative and Adams, the circuit court delayed ruling on the motion until after it could receive records from the Brighton Center concerning its actions in discharging Adams from the Center. On December 4, 2015, the prosecutor filed supplemental information consisting of a letter from a Case Manager explaining the basis for Adams' discharge, which involved her alleged contact with her fiancé. On December 15, 2015, the circuit court entered a form Order Revoking Probation, which merely stated that Adams had violated her probation by failing to successfully complete the Brighton Center program. The court further found that Adams' failure to complete the conditions of supervision constituted a significant risk to the community at large which could not be appropriately managed in the community. This appeal followed.

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. *Commonwealth v. Lopez*, 292 S.W.3d 878, 881 (Ky. 2009); *Lucas v. Commonwealth*, 258 S.W.3d 806, 807-08 (Ky. App. 2008). Under the abuse of discretion standard, the trial court's

decision must be “arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” *Commonwealth v. Andrews*, 448 S.W.3d 773, 780 (Ky. 2014) (quoting *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999)). *See also Miller v. Commonwealth*, 329 S.W.3d 358, 359-60 (Ky. App. 2010).

ANALYSIS

Adams contends that the circuit court did not comply with the probation revocation statutes, KRS 439.3106 and KRS 439.3107. She argues that the record does not indicate that the court properly considered and made sufficient factual findings that she could not be managed in the community with alternative sanctions and that she posed a significant risk to the victim or community at large. Adams requests that the case be remanded to the circuit court with instructions to impose an alternative sanction or to make additional findings consistent with the statutory requirements. The Commonwealth contends that Adams did not properly preserve the issues for appellate review and the circuit court did not abuse its discretion in revoking her probation.

The traditional, long-standing rule in Kentucky applicable to probation revocation permitted revocation if there was evidence that the probationer violated at least one condition of probation. *Lucas, supra* at 807-08; KRS 533.020(1). In 2011, the General Assembly enacted the Public Safety and Offender Accountability Act, commonly referred to as House Bill 463, which significantly amended the penal sentencing provisions including probation

revocation by creating several new statutes and new criteria, as reflected in KRS 439.3106 and KRS 439.3107. KRS 439.3106 provides:

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.

In *Commonwealth v. Andrews, supra*, the Kentucky Supreme Court declared that House Bill (HB) 463 modified the traditional approach by imposing additional considerations and standards relevant to the revocation of probation. In essence, the Supreme Court recognized that under KRS 439.3106 and KRS 439.3107, a trial court must find that (1) the probationer violated a condition of probation; (2) that the violation constitutes a significant risk to prior victims or the community at large; and (3) that the probationer cannot be appropriately managed in the community. 448 S.W.3d at 778-79. However, in *McClure v. Commonwealth*, 457 S.W.3d 728, 731 (Ky. App. 2015), this Court held that consistent with the Supreme Court's opinion in *Andrews*, the circuit court must make adequate findings of fact concerning each factor of KRS 439.3106. As the

Court stated in *Blankenship v. Commonwealth*, 494 S.W.3d 506, 509 (Ky. App. 2015),

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.

We concur with *McClure*, which in applying *Andrews* made clear trial courts must consider and make findings—oral or written—comporting with KRS 439.3106(1).

Moreover, in *Helms v. Commonwealth*, 475 S.W.3d 637, 645 (Ky. App. 2015), the Court indicated that summary findings merely referencing the statute was insufficient. “If the penal reforms brought about by HB 463 are to mean anything, perfunctorily reciting the statutory language in KRS 439.3106 is not enough.” In *Pettis v. Commonwealth*, 2017 WL 244867, at *4 (Ky. App. January 20, 2017), the Court said: “The legislature did not intend for trial courts to issue bare recitations without a supporting factual basis for the trial court’s decision.”

In the current case, the only evidence discussed and introduced at the revocation hearing involved the circumstances related to Adams’ conduct at the drug treatment center. At the hearing, the Program Supervisor for Drug Court testified that Adams was going to be terminated from the Brighton Center because she had contact with her fiancé, who is the father of her five children, after being instructed not to do so. Adams testified that she had had approved contact with her

fiancé for several months while at Brighton, but she denied having had contact after being told not to do so without any explanation from the Brighton Center's employees for the change. She stated that she had maintained employment and had no drug use during the approximately one year at the Brighton Center.

Following the hearing, a Case Manager submitted a letter explaining that Adams had been discharged from the Brighton Center after another resident reported having seen her with her fiancé. No other hearings were conducted before the court revoked Adams' probation.

In this case, the circuit court made no oral findings on the record at the hearing. The only findings by the court consisted of the handwritten statement on the form order that Adams had violated her probation because she "failed to successfully complete the Brighton Recovery Center for women," and the printed findings that "her failure to comply with the conditions of supervision constitute a significant risk to the community at large which cannot be appropriately managed in the community." The court made no specific findings or explanation for the factual premise for its general findings under KRS 439.3106(1).

We conclude that to facilitate adequate review, it is best for the circuit court to identify the factual evidence and basis for its decision that Adams poses a significant risk to and cannot be managed in the community. The court should enter express findings on both elements of KRS 439.3106(1) with an analysis and conclusion whether revocation or a lesser sanction is most appropriate. *See e.g., McClure*, 457 S.W.3d at 734.

For the foregoing reasons, we vacate and remand the case to the
Bracken Circuit Court for further proceedings consistent with this opinion.

ALL CONCUR.

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