

RENDERED: OCTOBER 13, 2017; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2016-CA-000832-MR

GERALD WILLIAMS

APPELLANT

v. APPEAL FROM MAGOFFIN CIRCUIT COURT  
HONORABLE THOMAS M. SMITH, JUDGE  
ACTION NO. 11-CR-00022

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: MAZE, STUMBO, AND TAYLOR, JUDGES.

MAZE, JUDGE: This appeal arises from the Magoffin Circuit Court revoking Gerald Williams's probation. As the record shows the trial court did not abuse its discretion, we affirm.

## Background

Williams plead guilty in Magoffin Circuit Court to second-degree rape and first-degree unlawful imprisonment. He was sentenced to ten years for second-degree rape and five years for unlawful imprisonment, to run consecutively for a total of fifteen years. However, his sentence was suspended and he was given five years supervised probation. As part of his probation, he was to “have no contact, directly or indirectly, with the victim in this case.” He also had to register as a sex offender and be subject to “any and all conditions and/or restrictions that may be reasonably placed upon him by the Department of Probation and Parole.”

The Commonwealth moved to revoke Williams’s probation in 2013 due to him having missed some of his sex offender classes. He was given thirty days to produce medical documentation as proof justifying why he missed his classes. He did produce the documentation, and therefore his probation was not revoked, but was reinstated with “zero tolerance.” Then, in 2016, the Commonwealth again moved to revoke his probation due to marijuana use, an alleged contact with the victim in the rape case, and a misdemeanor arrest in which his charges were eventually dismissed.

At the revocation hearing, the court revoked his probation finding that Williams violated his probation. At the sentencing hearing, the court found “that imprisonment is necessary for the protection of the public because (1) [t]he defendant cannot be managed within the community. (2) [t]he defendant is perceived to be a threat to the complaining witness/victim and her family.”

He was sentenced to ten years on the rape charge and five years on the unlawful imprisonment charge to run consecutively. He was credited 556 days. This appeal follows.

### Standard of Review

We review a trial court's decision to revoke probation for an abuse of discretion. *Tiryung v. Commonwealth*, 717 S.W.2d 503, 504 (Ky. App. 1986). To amount to an abuse of discretion, the trial court's decision must be "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Clark v. Commonwealth*, 223 S.W.3d 90, 95 (Ky. 2007), citing *Commonwealth v. English*, 933 S.W.2d 941, 945 (Ky. 1995). Absent a "flagrant miscarriage of justice," the trial court will be affirmed. *Gross v. Commonwealth*, 648 S.W.2d 853, 858 (Ky. 1983).

### Analysis

On appeal, Williams contends that KRS<sup>1</sup> 439.3106 requires a court to apply graduated sanctions each time a probationer comes before a court on a motion to revoke, increasing in severity until intervention resources in the community are no longer available. He argues that there was a lack of proof that he posed a significant and unmanageable danger to the community and "there is nothing in KRS 439.3106 that allows a court to send a person to prison when a more restrictive in-patient drug program is available that 'may assist the offender to remain compliant and crime-free in the community.'"

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<sup>1</sup> Kentucky Revised Statutes.

The Kentucky Supreme Court in *Commonwealth v. Andrews*, 448 S.W.3d 773 (Ky. 2014), interpreted KRS 439.3106. There, the court emphasized that “[w]ithout question, the power to revoke probation is vested in the trial courts and in the trial courts alone.” *Id.* at 777. The Court held that to revoke an individual’s probation, trial courts are required to find that a “probationer’s failure to abide by a condition of supervision constitutes a significant risk to prior victims or the community, and that the probationer cannot be managed in the community before probation may be revoked.” *Id.* at 781.

In *McClure v. Commonwealth*, 457 S.W.3d 728 (Ky. App. 2015), we applied *Andrews* and explained that “KRS 439.3106 permits, but does not require, a trial court to employ lesser sanctions...[n]othing in the statute or in the Supreme Court’s interpretation of it requires the trial court to impose lesser sanctions prior to revoking probation.” *Id.* at 732. Additionally, we emphasized that a trial court should make express findings as to KRS 439.3106, but “[w]hile KRS 439.3106(1) indubitably requires entry of two vital findings of fact, it does not do so at the expense of the trial court’s discretion over the broader matter of revocation.” *Id.* at 734, citing *Andrews*, 448 S.W.3d at 780. Lastly, we explained that in finding whether a probationer poses an unmanageable or significant risk to society, “[n]either KRS 439.3106 nor *Andrews* require anything more than a finding to this effect supported by the evidence of record.” *Id.* at 733. There, an individual on probation had attempted to alter the results of a drug test. We stated that,

[t]hese facts constituted substantial support for the conclusion that a person who would go to such lengths to continue using a substance he was forbidden to use under penalty of five years in prison posed a significant risk to, and was unmanageable within, the community in which he lived.

In Williams's case, the trial court found that "[t]he defendant cannot be managed within the community" and that "[t]he defendant is perceived to be a threat to the complaining witness/victim and her family." These findings sufficiently satisfy KRS 439.3106. The finding was supported by proof that Williams had violated his probation. Similar to *McClure*, Williams's violations despite his penalty of fifteen years in prison supported the finding that he was unmanageable in the community and posed a danger to his victim. Lastly, the court is not required to impose lesser sanctions prior to revoking probation, as suggested in Williams's brief. It should be noted, however, that this was not his first probation violation and that he was given a second chance after his first violations in 2013.

#### Conclusion

For the reasons discussed herein, we affirm.

ALL CONCUR.

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