

Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-001105-MR

DANIEL FAIR

APPELLANT

v.

APPEAL FROM CASEY CIRCUIT COURT
HONORABLE JUDY D. VANCE, JUDGE
ACTION NO. 13-CR-00101

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING
** ** ** ** **

BEFORE: JONES, STUMBO, AND TAYLOR, JUDGES.

JONES, JUDGE: Daniel Fair appeals the Casey Circuit Court's order revoking his probation. Fair contends the circuit court revoked his probation without considering whether he posed a significant risk to, and could not be managed in, the community as required by Kentucky Revised Statute (KRS) 439.3106.

Because the record indicates the circuit court considered the factors of KRS 439.3106, and because its findings are supported by sufficient evidence, we affirm.

I. BACKGROUND

Fair pleaded guilty to facilitation to manufacture methamphetamine¹ and being a second-degree persistent felony offender after he was discovered in a vehicle that contained a mobile methamphetamine lab. He was sentenced to eight years in prison, with 180 days to serve, and the remainder probated for a period of five years. The circuit court entered a formal sentencing order on February 2, 2015.

At the time of sentencing, Fair was on parole in Pulaski County for flagrant nonsupport.² As a condition of that parole, Fair was required to complete long-term inpatient drug treatment through the Owensboro Regional Recovery Center. Fair began drug treatment on January 19, 2016, but was discharged on February 6, 2016, after he chose to drop out of the program. Two days later, Fair's probation officer contacted Fair and demanded he report to the probation and parole office immediately. However, Fair did not report as directed and his whereabouts became unknown thereafter. As a result, the officer filed a violation of supervision report alleging Fair failed to report and absconded probation supervision.

The Commonwealth subsequently moved to revoke Fair's probation. Meanwhile, the circuit court issued a warrant for Fair's arrest. After Fair was apprehended, the court held a probation revocation hearing, at which a probation

¹ Fair was originally charged with first-offense manufacturing methamphetamine first offense.

² Pulaski Circuit Court Action No. 13-CR-00201.

officer provided the only testimony. The officer testified that Fair did not complete the substance abuse program (a condition of parole in his Pulaski County case), failed to report, and absconded supervision. On cross-examination when asked whether Fair had, up until now, reported regularly, the officer told the court that Fair had had some “slip ups,” but had never totally absconded. At the close of the probation officer’s testimony, Fair asked the judge for a referral to drug court in lieu of revocation. The circuit court denied the request and revoked Fair’s probation. This appeal followed.

II. STANDARD OF REVIEW

We review a circuit court's decision to revoke probation for an abuse of discretion. *Lucas v. Commonwealth*, 258 S.W.3d 806, 807 (Ky. App. 2008). “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).

III. ANALYSIS

Recently, in *Commonwealth v. Andrews*, 448 S.W.3d 773 (Ky. 2014), the Kentucky Supreme Court held 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.” *Id.* at 780. By requiring such a determination, “the legislature furthers the objectives of the graduated sanctions schema to ensure that

probationers are not being incarcerated for minor probation violations.” *Id.* at 779. This Court has concluded “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 Court in *Andrews* cautioned, however, that its holding did “not upend the trial court's discretion in matters of probation revocation, provided that discretion is exercised consistent with statutory criteria.” *Andrews*, 448 S.W.3d at 780. Accordingly, “KRS 439.3106 permits, but does not require, a trial court to employ lesser sanctions . . . incarceration remains a possibility.” *McClure*, 457 S.W.3d at 732.

At the conclusion of Fair’s revocation hearing, the circuit court concluded in its verbal findings:

The language has been met, that as stated before there’s not a way to adequately supervise them in the community, if they abscond, if they’re not around to come in and report, then obviously they can’t be supervised. The mere fact that his plea was to facilitating manufacturing methamphetamine. The original charge was manufacturing. He was given a chance at a drug treatment center, he left that. I believe that Mr. Fair has been given adequate opportunity, and he’s failed to take advantage of it.

Thereafter, using a form order, the circuit court made the following handwritten findings of fact:

Defendant violated the terms of his supervision as set forth in the VOS report including but not limited to leaving Owensboro Regional Recovery (Rehab Center) before completing, Absconding from Supervision, Failure to Report to Probation Officer.

The court's conclusions of law were contained in the preprinted portion of the form order and stated:

The court now being sufficiently advised,

IT IS HEREBY ORDERED AND ADJUDGED AS FOLLOWS:

This court finds by clear and convincing evidence that the Defendant has violated the terms and conditions of his probation, and,

That the Defendant is a significant risk to Defendant's prior victims or the community at large, and

That the Defendant cannot be managed in the community.

(R. at 88). Fair contends the circuit court improperly revoked his probation because it "used a form order to make a finding that Fair constituted a significant risk to the community at large and could not be properly managed in the community, but it did not add any of its own thoughts or findings to the form language."

In support of his argument, Fair relies on our decision in *Helms v. Commonwealth*, 475 S.W.3d 637 (Ky. App. 2015). In *Helms*, the defendant, charged with first-degree possession of a controlled substance and having a prescription controlled substance not in its original container, entered a pretrial

diversion agreement containing a zero-tolerance provision. That provision provided that any deviation from its terms would result in automatic revocation. Helms eventually violated the terms of his agreement when he failed a random drug screen, failed to mail in a release report, and failed to pay supervision fees. A revocation hearing was held, after which the circuit court orally, and in its written order, expressed it was enforcing the zero-tolerance provision. The written order however, contained the statutory language of KRS 439.3106.

On appeal, we determined that the circuit court's parroting of the statutory language in its order indicated it was aware of the criteria in KRS 439.3106. We noted, however, that:

If the penal reforms brought about by HB³463 are to mean anything, perfunctorily reciting the statutory language in KRS 439.3106 is not enough. There must be proof in the record established by a preponderance of the evidence that a defendant violated the terms of his release and the statutory criteria for revocation has been met.

Id. at 645. We ultimately concluded that the circuit court abused its discretion when it voided Helms's diversion agreement because the record did not indicate Helms presented a danger to the community or could not be managed in the community.

Here, despite the revocation order being preprinted, the statutory language contained in the form indicates that, similar to *Helms*, the circuit court was aware of the criteria contained in KRS 439.3106. Unlike *Helms*, however, the

³ House Bill.

record here, both video and written, indicates that the circuit court actually evaluated the evidence in light of the statutory factors and made the appropriate findings before revoking Fair's probation.⁴

As part of the hearing, the circuit court noted that Fair could not be managed in the community if he absconded. It also determined that Fair had previously been afforded the opportunity to participate in drug treatment, but voluntarily left without finishing treatment. Likewise, the circuit court considered that Fair's prior offense, manufacturing methamphetamine, coupled with his decision to leave drug treatment caused it concern.

The grave danger manufacturing methamphetamine presents to the public, coupled with Fair's unwillingness to deal with his drug problem and his refusal to be monitored supports the circuit court's conclusion that Helms is a danger to the public. Likewise, Fair's refusal to report to probation and parole, refusal to finish drug treatment, and his absconding supervision supports the conclusion that he cannot be managed in the community.

Fair argues the evidence could not sufficiently show he could not be managed in the community because graduated sanctions were never attempted. However, KRS 439.3106 does not require the circuit court to attempt graduated sanctions before it can conclude a defendant cannot be managed in the community. "Nothing in the statute or in the Supreme Court's interpretation of it requires the

⁴We consider the circuit court's written order in conjunction with its oral findings as contained in the video record as did the Kentucky Supreme Court in *Andrews*. See *Andrews*, 448 S.W.3d at 780.

trial court to impose lesser sanctions prior to revoking probation.” *McClure*, 457 S.W.3d at 732. Here, the circuit court considered the criteria of KRS 439.3106 and its decision to revoke was supported by the record. That is all that is required. *Helms*, 475 S.W.3d at 645.

IV. CONCLUSION

Because the circuit court made the requisite findings under KRS 439.3106 and those finding are supported by sufficient evidence in the record, the circuit court did not abuse its discretion when it revoked Fair’s probation. Accordingly, the order of the Casey Circuit Court is affirmed.

ALL CONCUR.

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