

Commonwealth of Kentucky
Court of Appeals

NO. 2016-CA-001127-MR

BRADLEY KING

APPELLANT

v. APPEAL FROM MCCREARY CIRCUIT COURT
HONORABLE PAUL K. WINCHESTER, JUDGE
ACTION NO. 15-CR-00065

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: KRAMER, CHIEF JUDGE; ACREE AND JONES, JUDGES.

ACREE, JUDGE: Bradley King appeals from the McCreary Circuit Court's July 14, 2016 order revoking his probation. He alleges the circuit court abused its discretion by failing to adequately consider the statutory parameters of Kentucky Revised Statute (KRS) 439.3106. We affirm.

In 2015, King broke into the Pine Knot Intermediate School, stole property, and damaged and destroyed other property. He pleaded guilty to third-degree burglary, theft by unlawful taking over \$500 but less than \$10,000, third-degree criminal mischief, and being a second-degree persistent felony offender. He was sentenced to five years' imprisonment on the burglary and theft by unlawful taking convictions, and two years' imprisonment on the criminal mischief conviction, all to be served consecutively for a total of twelve years' imprisonment, probated for five years subject to several conditions of probation. He was formally sentenced on March 11, 2016, and released from custody that day.

A few weeks later, on March 24, 2016, King tested positive for methamphetamine. The next day, he was arrested for driving on a suspended/revoked license and giving a police officer a false name. The Commonwealth filed a motion to revoke King's probation.

King failed to appear for the probation revocation hearing scheduled on April 11, 2016, and a bench warrant was issued for his arrest. In lieu of revocation, King was given the opportunity to attend drug treatment rehabilitation. He failed to appear. Hill was then given another opportunity to attend drug treatment. The circuit court ordered him to report directly to Hickory Hill Recovery Center for long-term drug rehabilitation by 3:00 PM on June 6, 2016. King reported to Hickory Hill as ordered. But by 3:00 PM the next day, King had left the rehabilitation facility of his own accord and without court approval.

A probation revocation hearing was held on July 11, 2016. King stated, through his attorney, that he left Hickory Hill and immediately checked himself into Baptist Health Hospital in Corbin, Kentucky, for severe anxiety issues. He enrolled directly from there in a short-term drug rehabilitation program at the Trillium Center in London, Kentucky. King admitted at the revocation hearing that he had a drug problem and “can’t seem to do it on his own.” He requested that the circuit court allow him to be admitted into drug court to receive the needed drug treatment or, in the alternative, to consider other lesser sanctions.

The Commonwealth reiterated King had twice been offered drug rehabilitation and he failed to complete treatment. It noted that King left a long-term drug treatment program at Hickory Hill, without court approval, in favor of a short-term drug treatment program at the Trillium Center. The Commonwealth noted that Hickory Hills is the closest rehabilitation option available through the Department of Corrections.

The circuit court, by order entered July 14, 2016, revoked King’s probation and ordered him to serve his full sentence. The order, after stating King had violated at least two conditions of probation, also found King posed a significant threat to the citizenry at large and could not be managed in the community. King now appeals. Additional facts will be discussed as needed.

Whether to revoke probation is a matter largely left to the discretion of the trial court. *See* KRS 533.020(1). We will not disturb a revocation order

absent an abuse of that discretion. *Commonwealth v. Lopez*, 292 S.W.3d 878, 881 (Ky. 2009).

King argues the circuit court abused its discretion when it superficially applied KRS 439.3106 and failed to consider graduated sanctions prior to revocation. We are not persuaded.

It has long been the rule in Kentucky that a trial court could revoke probation at any time prior to the expiration or termination of the period of probation if there was evidence that the probationer violated at least one condition of probation. *Lucas v. Commonwealth*, 258 S.W.3d 806, 807-08 (Ky. App. 2008); KRS 533.020(1). That rule changed in 2011 when the Kentucky legislature enacted House Bill 463, which made substantial changes to our probation revocation laws by, *inter alia*, creating several new statutes, including KRS 439.3106. That statute provides that 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.

KRS 439.3106.

Now, post HB 463, to revoke probation, the trial court must find: (1) that the probationer violated a condition of probation; (2) that the violation constitutes a significant risk to prior victims or to the community at large; and (3) that the probationer cannot be appropriately managed in the community. KRS 439.3106; *Commonwealth v. Andrews*, 448 S.W.3d 773, 778-79 (Ky. 2014).

With respect to the first prong, the standard in Kentucky has not changed. The Commonwealth must prove, by a preponderance of the evidence, that the probationer committed “at least one probation violation.” *Lucas v. Commonwealth*, 258 S.W.3d 806, 807-08 (Ky. App. 2008); *Commonwealth v. Lopez*, 292 S.W.3d 878, 881 (Ky. 2009). As conditions of his probation, King was ordered to “refrain from violating the law in any respect” and to not “use any alcohol or controlled substances.” (R. 48-49). The Commonwealth alleged King violated the terms of his probation by testing positive for methamphetamines and being arrested on a new misdemeanor charge. King does not dispute these violations. The Commonwealth also submitted evidence at the probation hearing that King failed to appear for drug rehabilitation treatment despite being told to do so. Another condition of King’s probation was that he “comply with the directions of the Probation Officer.” (R. 48). He arguably violated that condition. There is evidence in the record to support at least two, if not three, probation violations; the circuit court’s decision in this regard does not amount to an abuse of discretion.

Next, the circuit court must consider the statutory factors contained in KRS 439.3106 prior to revoking probation. Those factors include: whether King’s

failure to comply with the conditions of probation constitutes a significant risk to the community at large, and whether King cannot be appropriately managed in the community. KRS 439.3106. King argues the circuit court's perfunctory findings indicate it failed to fully consider the statute.

In *Andrews, supra*, the Kentucky Supreme Court settled the law that KRS 439.3106 applies to a trial court. Before revoking probation, the trial court must consider both statutory factors. *Andrews*, 448 S.W.3d at 780. "By requiring trial courts to determine that a probationer is a danger to prior victims or the community at large and that he/she cannot be appropriately managed in the community before revoking probation, the legislature furthers the objectives of the graduated sanctions scheme to ensure that probationers are not being incarcerated for minor probation violations." *Id.* at 779.

In its July 14, 2016 order revoking King's probation, the circuit court parroted the statutory language and reiterated King had tested positive for illegal substances and obtained a new misdemeanor charge. This coupled with the record as a whole is dispositive. The evidence at the probation hearing revealed that, despite receiving probation only a few weeks before, King chose to utilize drugs, drive on a suspended license, and offer a police officer a false name. He refused to appear for drug treatment despite being told to do so, and when he did eventually comply, he only remained in treatment for less than twenty-four hours. King also chose not to appear at the initial probation revocation hearing despite being ordered to attend. King complies as he sees fit; his conduct demonstrates a total

lack of respect for the law and a foolish belief in his freedom to disregard a court's orders, as well as the lawful instructions of his probation officer. His actions as a whole put at risk the community at large and indicate he is unmanageable in the community. King's lack of candor, unsuccessful stint at rehabilitation, drug use, and poor decision making all support the circuit court's findings related to the statutory factors outlined in KRS 439.3106.

King also contends the circuit court abused its discretion when it failed to consider graduated sanctions prior to revoking probation. He faults the circuit court for not offering long-term inpatient drug intervention treatment in lieu of probation revocation. But it did offer that exact treatment. It ordered King to attend long-term drug treatment at Hickory Hill in June 2016. King left that program of his own accord. In fact, the circuit court twice ordered King to attend drug rehabilitation treatment as an alternative sanction to revocation. King failed to appear the first time it was offered and, as noted, on the second occasion King unilaterally left treatment without court approval after less than twenty-four hours. The circuit court declared at the probation-revocation hearing that its prior attempts at lesser sanctions had not worked and, based on those failures and the history of the case, it was not inclined to offer additional alternative sanctions.

In *McClure v. Commonwealth*, 457 S.W.3d 728 (Ky. App. 2015), this Court said:

KRS 439.3106 permits, but does not require, a trial court to employ lesser sanctions; and, as even McClure concedes on appeal, incarceration remains a possibility.

The elective language of the statute as a whole creates an alternative employed and imposed at the discretion of the trial court—discretion the Supreme Court insisted the trial court retained in light of the new statute. *Andrews* at 780. Nothing in the statute or in the Supreme Court’s interpretation of it requires the trial court to impose lesser sanctions prior to revoking probation. Hence, the statute did not require the present trial court to impose a lesser sanction on McClure.

Id. at 732. In light of King’s history and recent failures at lesser sanctions, the circuit court’s decision not to offer King a *third* chance to succeed at appropriate treatment as an alternative, graduated sanction was neither unreasonable nor an abuse of its discretion.

We affirm the McCreary Circuit Court’s July 14, 2016 Order revoking King’s probation.

ALL CONCUR.

BRIEF FOR APPELLANT:

Karen Shuff Maurer
Assistant Public Advocate
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Andy Beshear
Attorney General of Kentucky

Jesse L. Robbins
Assistant Attorney General
Frankfort, Kentucky