

Commonwealth of Kentucky
Court of Appeals

NO. 2016-CA-001633-MR

TYLER BERTSCH

APPELLANT

v. APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE JULIE REINHARDT WARD, JUDGE
ACTION NO. 15-CR-00182 & 15-CR-00400

COMMONWEALTH OF KENTUCKY

APPELLEE

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

BEFORE: COMBS, D. LAMBERT, AND NICKELL, JUDGES.

COMBS, JUDGE: Tyler Bertsch appeals an order of the Campbell Circuit Court revoking his probation. Bertsch challenges the sufficiency of the evidence supporting the circuit court's findings of fact and conclusions of law under KRS¹ 439.3106. After our review, we conclude that the court did not abuse its discretion. Hence, we affirm.

¹ Kentucky Revised Statutes.

Bertsch pled guilty to two amended counts of facilitation to first-degree robbery² and in a separate case to one count of theft of identity of another. He was sentenced to five years' imprisonment and was ordered to serve one year with the remainder probated for five years on the SMART Probation program.³

Approximately six months after Bertsch began the probated portion of his sentence, he tested positive for cocaine. He denied using the drug, asserting to his probation officer that someone had broken into his house and used a spoon to cook cocaine, which he (Bertsch) unwittingly used to stir his coffee. Probation and parole conducted a search of Bertsch's residence on the same day and discovered opiates, methamphetamines, benzodiazepines, digital scales, a needle, and other drug paraphernalia. A convicted felon was also found in the home. Bertsch's probation officer subsequently filed in the circuit court a violation-of-supervision report alleging that Bertsch had violated the terms of his probation by using and possessing drugs and paraphernalia and by associating with a convicted felon. (R. at 37).

At a subsequent probation revocation hearing, Bertsch stipulated to the allegations contained in the violation-of-supervision report. Bertsch offered no testimony, but he asked the court to have him evaluated for drug abuse treatment in lieu of revocation. He argued that it was his first time before the court, that he had

² Bertsch was indicted on two counts of first-degree robbery (complicity).

³ SMART is an acronym for "Supervision, Monitoring, Accountability, Responsibility and Treatment." *Commonwealth v. Goff*, 472 S.W.3d 181, 184 n.4 (Ky. 2015). "Hallmarks of the program launched in 2011 . . . are swift recognition and punishment of probation violations with expedited hearings." *Id.*

been reporting as directed, and that his violation did not show that he could not be managed in or was a threat to the community. The Commonwealth objected, arguing that by doing drugs and associating with felons so soon after being released from custody, Bertsch had shown that he was a danger to—and that he could not be managed in—the community.

At the conclusion of arguments, the circuit court agreed with the Commonwealth and revoked Bertsch's probation. The court stated it believed Bertsch had initially been sentenced too leniently. However, it believed that SMART probation would cause Bertsch to realize the seriousness of his offenses and that he would do everything in his power to stay out of trouble. Nevertheless, the court noted that Bertsch jumped right back into associating with felons and using drugs. Based on the underlying offenses and Bertsch's activities, the court concluded that Bertsch was a danger to the community and that he probably would not follow through with drug treatment.

In its written order, the court took judicial notice of Bertsch's previous conviction and adopted the facts as stipulated to by Bertsch. The court made the following conclusions of law:

The Defendant, Tyler Bertsch, violated the terms and conditions of his probation when he used cocaine; possessed opiates and methamphetamines; possessed drug paraphernalia and associated with a convicted felon. Although the Defendant requested treatment, the Court does not believe that treatment outside of the department of corrections is appropriate. On February 8, 2014, the Defendant stole the identity of another. On January 12, [2015] the Defendant was with several other individuals.

The first stop of the evening was to a residence in Newport, Kentucky to buy marijuana. That did not go as planned. As a result, one of the individuals with the Defendant fired a gun into a home. After the failed attempt to get marijuana, Facebook was used to lure an individual to a location for the purpose of robbing him. That person was robbed. Although the Defendant did not fire or hold the gun, there was evidence that he knew what was going to take place. The Defendant ultimately plead [sic] guilty to two counts of attempted robbery. The Court was very concerned about placing the Defendants on probation despite the split sentence. The Defendant was placed on Smart probation which is intensive supervision. Despite the intense supervision and a split sentence, the Defendant continues to associate with people who are not a good influence. He continues to use drugs. The Defendant may need drug treatment but if he remains out of custody the Court believes that the Defendant will continue to violate the terms of his supervision and is a threat to the Community.

Bertsch's sole argument is that the evidence was not sufficient to support the conclusion that he could not be managed in the community. "A decision to revoke probation is reviewed for an abuse of discretion. Under our abuse of discretion standard of review, we will disturb a ruling only upon finding that the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. Andrews*, 448 S.W.3d 773, 780 (Ky. 2014) (internal quotation marks and citations omitted).

In 2011, the General Assembly enacted KRS 439.3106 as part of House Bill 463.⁴ KRS 439.3106 concerns the sanctions to which supervised

⁴ Also known as the "Public Safety and Offender Accountability Act."

individuals are subject when they violate the conditions of their supervision.

KRS 439.3106 provides as follows:

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 *Andrews, supra*, the Kentucky Supreme Court held:

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 that “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).

Bertsch contends that the trial court was required to employ graduated sanctions before it could find that he could not be managed in the community. However, the *Andrews* Court specifically noted 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.” *Id.* 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.” *McClure*, 457 S.W.3d at 732. Accordingly, “KRS 439.3106 permits, but does not require, a trial court to employ lesser sanctions; . . . incarceration remains a possibility.” *Id.* In the case before us, the record indicates that the circuit court considered and made specific findings regarding both factors of KRS 439.3106(1) before it exercised its discretion and determined that Bertsch should be incarcerated.

Bertsch claims that the prosecution did not provide sufficient proof that he could not be managed in the community. He also contends that the reasons given by the circuit court to support its conclusion were conclusory. In *Helms v. Commonwealth*, 475 S.W.3d 637, 645 (Ky. App. 2015) (footnote omitted), we noted as follows:

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. 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.

Contrary to Bertsch's assertion, the record indicates the circuit court did not simply parrot the language of KRS 439.3106(1). Nor did it give conclusory reasons for its determination. The court identified a sufficient basis for its conclusion. Its decision was based on the facts that: Bertsch received a very generous sentence in relation to his original charge; he was subject to strict intensive supervision in the SMART probation program; he had spent a year in jail as part of a split sentence; but within less than six months into supervision, he was using drugs, possessing drugs, and associating with felons. The court noted that this was the exact behavior that led to the commission of the underlying charge.

In relying on *Andrews*, Bertsch argues that failing a drug screen is only a minor violation and, consequently, that he should have been given graduated sanctions. However, Bertsch did not merely fail one or two drug screens. In addition to failing his drug test, Bertsch—although not charged—committed several felonious offenses and associated with a convicted felon.

In summary, in deciding whether to revoke Bertsch's probation, the circuit court considered a host of factors—including Bertsch's past history, recent drug use, and current violations—in addition to his failed drug screen. After considering those factors in light of the requirements of KRS 439.3106, the court duly determined that continued probation was inappropriate. We have determined that:

the importance of certain facts is not ours to weigh on appeal, but is properly left to the trial court's exclusive discretion. Our proper role is merely to evaluate the

sufficiency of the evidence and whether an abuse of the trial court's discretion occurred.

McClure, 457 S.W.3d at 734. The evidence in this case was more than sufficient to support the court's ultimate conclusion that Bertsch was both a danger to and could not be managed in the community. Therefore, the circuit court did not abuse its discretion in revoking Bertsch's probation.

Bertsch also contends that due process entitled him to retain his status as a probationer unless and until the Commonwealth presented sufficient credible evidence to support his revocation. However, that argument is both moot and unavailing on the merits because we have already determined that the evidence presented at the revocation hearing was sufficient to support the circuit court's findings: that Bertsch violated the terms of his probation, that he posed a significant risk to the community, and that he could not be managed in the community.

We affirm the order of the Campbell Circuit Court revoking Bertsch's probation.

ALL CONCUR.

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