

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-000655-MR

BENJAMIN CAMPBELL

APPELLANT

v.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE KATHLEEN LAPE, JUDGE
ACTION NO. 13-CR-00813

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * ** * ** *

BEFORE: KRAMER, CHIEF JUDGE; COMBS AND THOMPSON, JUDGES.

KRAMER, CHIEF JUDGE: Benjamin Campbell appeals the Kenton Circuit Court's order terminating his pretrial diversion. After a careful review of the record, we reverse and remand because the circuit court failed to enter the requisite findings pursuant to KRS¹ 439.3106.

I. FACTUAL AND PROCEDURAL BACKGROUND

¹ Kentucky Revised Statute.

Benjamin Campbell was indicted on charges of first-degree possession of a controlled substance and possession of drug paraphernalia. The Commonwealth provided him an offer on a plea of guilty, in which the Commonwealth offered to dismiss the charge of possession of drug paraphernalia and recommend that Campbell be placed in pretrial diversion for three years, in exchange for Campbell's guilty plea to the charge of first-degree possession of a controlled substance. Campbell accepted the Commonwealth's offer and moved to enter a guilty plea in accord with the plea agreement. He also moved for pretrial diversion. The circuit court accepted his guilty plea, dismissed the charge of possession of drug paraphernalia, and granted his motion for pretrial diversion. Campbell was ordered to serve three years of pretrial diversion. The conditions of his pretrial diversion included, *inter alia*, that he was to: "obey all rules and regulations imposed by probation and parole"; "pursuant to KRS 439.554, be subjected to a system of graduated sanctions imposed by the Department of Probation and Parole for violations of the terms and conditions of probation"; "commit no criminal acts"; and "submit to random drug testing at his expense."

During the period of diversion, Campbell's probation officer, Paul Sorrell, wrote a violation of supervision report, which stated as follows:

Mr. Campbell reported to the office of Probation and Parole on 5/11/16 and was subject to a drug screen. Mr. Campbell could not produce a sample and was instructed to remain in the lobby until he could. After approximately 15 minutes Officer Sorrell returned to the lobby and Mr. Campbell could not be found. The

surrounding area of the Probation and Parole office was searched and Mr. Campbell could not be located.

Approximately a week after filing the first violation of supervision report, Campbell's probation officer filed another one, which was intended to supplement the first report. The supplemental report stated:

A home visit was conducted on 5/12/16 at Mr. Campbell's last reported address and no contact was made. A card was left instructing Mr. Campbell to report on 5/13/16 at 8:00 am. Mr. Campbell failed to report as directed. . . . Mr. Campbell's current whereabouts are unknown and he has made himself unavailable for supervision.

A diversion revocation hearing was held. The circuit court subsequently entered an order finding that Campbell failed to report to his probation officer and absconded probation supervision. The order also stated that Campbell's "failure to comply with the conditions of supervision constitutes a significant risk to prior victims of the supervised individual or the community at large, and Defendant cannot be appropriately managed in the community." The court concluded the order by terminating Campbell's pretrial diversion and sentencing him to three years of imprisonment.

Campbell now appeals, contending that the circuit court erred in voiding his pretrial diversion because: (a) the court did not comply with KRS 439.3106(1); and (b) the court did not comply with KRS 439.3106(2). In its response brief, the Commonwealth cites *Southwood v. Commonwealth*, 372 S.W.3d 882 (Ky. App. 2012), and *Jarrell v. Commonwealth*, 384 S.W.3d 195 (Ky.

App. 2012), for the proposition that the circuit court is not required to make specific findings of fact pursuant to KRS 439.3106. However, *Southwood* and *Jarrell* were abrogated by the Kentucky Supreme Court's decision in *Commonwealth v. Andrews*, 448 S.W.3d 773 (Ky. 2014), as discussed in *McClure v. Commonwealth*, 457 S.W.3d 728 (Ky. App. 2015). In fact, in *Blankenship v. Commonwealth*, 494 S.W.3d 506 (Ky. App. 2015), the Commonwealth made the same argument concerning *Southwood* that it makes in the present case. In *Blankenship*, this Court noted that “*Southwood* . . . [was] abrogated by *McClure* . . . , which relied on *Andrews*.” The *Blankenship* opinion was rendered almost two years before the Commonwealth filed its response brief in the present case, yet the Commonwealth continues to rely on law that has been abrogated.

II. ANALYSIS

A. KRS 439.3106(1)

Campbell alleges that the circuit court erred in voiding his pretrial diversion because the court did not comply with KRS 439.3106(1). Kentucky Revised Statute 439.3106 concerns the sanctions that supervised individuals are subject to when they violate the conditions of their supervision. Although awkwardly worded, KRS 439.3106 states:

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 *Helms v. Commonwealth*, 475 S.W.3d 637, 641 (Ky. App. 2015), a panel of this Court discussed a circuit court’s standard for voiding a diversion agreement and the appellate standard for reviewing an order voiding a diversion agreement. The Court noted a

diversion agreement may be voided “[i]f the defendant fails to complete the provisions of the pretrial diversion agreement within the time specified, or is not making satisfactory progress toward the completion of the provisions of the agreement[.]” KRS 533.256(1). Whether to void a pretrial diversion agreement for a violation of its terms is to be determined by “the same criteria as for the revocation of probation, and the defendant shall have the same rights as he or she would if probation revocation was sought.” KRS 533.256(2).

Helms, 475 S.W.3d at 641. The *Helms* Court continued, explaining that:

Revocation of probation does not require proof beyond a reasonable doubt. The Commonwealth’s burden is to prove by a preponderance of the evidence that the defendant violated the conditions of his or her probation. Historically, once this burden was met, the decision to revoke probation has been within the trial court’s discretion and not reversed unless that discretion had been abused. On appellate review, the traditional test was simply whether the trial judge’s decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. Great deference was paid to a trial

court's decision to revoke probation and was not an abuse of discretion if there was evidence to support at least one probation violation.

Helms, 475 S.W.3d at 641 (internal quotation marks and citations omitted).

However, the *Helms* Court also stated:

If the penal reforms brought about by HB^[2] 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.

Helms, 475 S.W.3d at 645. Therefore, a circuit court cannot simply reiterate the language of KRS 439.3106 without making express findings concerning the elements of the statute and expect its decision to revoke to be upheld on appeal. To provide meaningful appellate review, the circuit court must make factual findings that support its decision to revoke pursuant to the elements of KRS 439.3106.

In the present case, at the conclusion of the revocation hearing, the court said to Campbell, “it’s clear to [the court] that you can’t be supervised in the community if you think you can just leave when you’re going to test positive for drugs, so [the court is] going to revoke your diversion.” In its written order terminating Campbell’s diversion, the court found that he was in violation of the felony diversion program due to his “failure to report to [his] probation officer” and “absconding probation supervision.” The court also found “that Defendant’s failure to comply with the conditions of supervision constitutes a significant risk to

² House Bill.

prior victims of the supervised individual or the community at large, and Defendant cannot be appropriately managed in the community.”

Although the circuit court orally entered a finding that Campbell could not be supervised in the community because he absconds when he thinks he will test positive for drugs, the court did not enter findings concerning the remainder of KRS 439.3106(1), other than simply reiterating the language of the statute. This is insufficient. Consequently, the circuit court did not satisfy the elements of KRS 439.3106(1) by making the requisite factual findings to support its decision to revoke Campbell’s diversion. We therefore reverse and remand for the circuit court to enter factual findings supporting its decision to revoke Campbell’s diversion.

B. KRS 439.3106(2)

Campbell also contends that the circuit court erred in voiding his pretrial diversion because the court did not comply with KRS 439.3106(2). We agree. The circuit court entered no findings regarding “whether revocation or a lesser sanction is most appropriate[,]” as required to serve “both the spirit of, and the intent behind, KRS 439.3106.” *McClure*, 457 S.W.3d at 734. Consequently, on remand, the court should enter findings pursuant to KRS 439.3106(2), as well.

Accordingly, the order of the Kenton Circuit Court is reversed and the case is remanded for further proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

Robert C. Yang
Assistant Public Advocate
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Andy Beshear
Attorney General of Kentucky
Frankfort, Kentucky

Gregory C. Fuchs
Assistant Attorney General
Frankfort, Kentucky