

Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-001388-MR

HENRY KIZER

APPELLANT

v. APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE KELLY MARK EASTON, JUDGE
ACTION NO. 15-CR-00325

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * **

BEFORE: ACREE, DIXON AND NICKELL, JUDGES.

ACREE, JUDGE: Henry Kizer appeals the orders of the Hardin Circuit Court removing him from pretrial diversion and sentencing him to one year's imprisonment. We affirm.

In 2015, Kizer pleaded guilty to first-degree illegal possession of a controlled substance (methamphetamine). The circuit court granted him

supervised pretrial diversion for three years subject to numerous conditions, including that Kizer obey all rules and regulations imposed by the Division of Probation and Parole, and he not commit another offense during the diversion period.

In April 2016, the Commonwealth filed a motion to revoke Kizer's diversion. In a violation of supervision report attached to that motion, the Commonwealth stated that Kizer's girlfriend had recently obtained an EPO/DVO against Kizer. Kizer then violated the terms of that EPO/DVO and, when officers went to arrest him, Kizer chose to flee. Officers chased, struggled, and eventually arrested Kizer. During the struggle, one officer sustained minor injury. Kizer was charged with violating an EPO/DVO and third-degree felony assault.

The circuit court held a diversion revocation hearing on June 28, 2016. Kizer's probation officer, Meredith Livers, testified that an EPO was issued against Kizer on April 8, 2016. That EPO was later converted to a DVO valid until April 2018. Livers acknowledged Kizer has mental health issues, a learning disability, and a low IQ.

Livers maintained that Kizer was a danger to himself, his girlfriend, and the community. She testified Kizer was evaluated for mental health issues and instructed to go to CommuniCare, but he failed to follow through with his

appointments. Kizer was prescribed medication, but would stop taking it and never took his medication regularly while supervised by Probation and Parole.

Livers also testified she was unaware of any alternative where Kizer might be appropriately managed in the community. She explained she had previously arranged for a transfer of Kizer's diversion supervision to Illinois. Kizer has family in Illinois and a strong support system. But Kizer refused to go. Livers canceled the transfer.

Jason Vance with the Radcliff Police Department testified next. Officer Vance stated that he was dispatched to Kizer's girlfriend's residence upon information that Kizer was violating an EPO/DVO. Officer Vance discovered Kizer at the girlfriend's home. When Officer Vance notified Kizer he was under arrest, Kizer said he did not know what the officer was talking about. Kizer then fled down the hallway. Officer Vance gave chase, tackling Kizer and causing them both to fall onto the bed and the floor. Kizer had his hands underneath him digging for something in the bed, and moving his elbows back and forth. After a short struggle Officer Vance was able to place Kizer under arrest. Officer Vance sustained a minor injury to his knee and bruises on his forearms.

The circuit court made oral findings on the record. The court was not convinced that Kizer, despite his low IQ, failed to understand that the EPO/DVO prevented him from having contact with his girlfriend. Even more concerning to

the court was Kizer's decision to flee from a uniformed officer despite being told he was under arrest. Orally and in its subsequent written order revoking Kizer's diversion, entered July 15, 2016, the circuit court found Kizer violated conditions of his diversion by obtaining two new criminal charges and fleeing from law enforcement, constituted a risk to the community at large, and could not be appropriately managed in the community. The circuit court explained that a danger to the community is shown when a person violates an EPO/DVO and resists arrest; that Kizer knew better than to flee from an officer; and there are no sufficient community alternatives to manage Kizer when he refuses to comply with his mental health treatment and medication regimen. The circuit court voided Kizer's pretrial diversion, and subsequently sentenced to him one year's imprisonment. Kizer appealed.

Kizer contends the circuit court erroneously voided his diversion and sentenced him to prison. He argues there was no evidence supporting the circuit court's findings that he posed a risk to the community and that he could not be appropriately managed in the community.

A circuit court's decision to void pretrial diversion uses the same criteria as a decision to revoke probation. *Richardson v. Commonwealth*, 494 S.W.3d 495, 498 (Ky. App. 2015); KRS¹ 533.256(2). "A decision to revoke

¹ Kentucky Revised Statutes.

probation is reviewed for an abuse of discretion.” *Commonwealth v. Andrews*, 448 S.W.3d 773, 780 (Ky. 2014) (citing *Commonwealth v. Lopez*, 292 S.W.3d 878 (Ky. 2009)). “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.’” *Id.* (quoting *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999)). “Put another way, we will not hold a trial court to have abused its discretion unless its decision cannot be located within the range of permissible decisions allowed by a correct application of the facts to the law.” *McClure v. Commonwealth*, 457 S.W.3d 728, 730 (Ky. App. 2015) (citing *Miller v. Eldridge*, 146 S.W.3d 909, 915 n.11 (Ky. 2004)).

A circuit court has “broad discretion in overseeing a defendant’s [diversion], including any decision to revoke[.]” *Andrews*, 448 S.W.3d at 777. Historically, a circuit court could remove a person from diversion if there was evidence that the diversioner failed to comply with the conditions of diversion, or was not making satisfactory progress toward the completion of the provisions of the diversion agreement. KRS 533.256; *Ballard v. Commonwealth*, 320 S.W.3d 69, 73 (Ky. 2010). The Kentucky General Assembly qualified the circuit court’s discretion when it enacted the Public Safety and Offender Accountability Act, commonly referred to as House Bill 463 (HB 463), in 2011. *Andrews*, 448 S.W.3d at 776. With that package and the creation of KRS 439.3106, the General

Assembly provided new criteria for voiding diversion. Specifically, KRS 439.3106 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.

After HB 463, to void diversion the trial court must find: (1) that the diversioner violated a condition of diversion; (2) that the violation constitutes a significant risk to prior victims or to the community at large; and (3) that the diversioner cannot be appropriately managed in the community. KRS 439.3106; KRS 533.256(1); *Andrews*, 448 S.W.3d at 778-79; *Richardson*, 494 S.W.3d at 499.

Regarding the first prong, the standard in Kentucky has not changed. The Commonwealth must prove, by a preponderance of the evidence, that the diversioner violated at least one condition of diversion. *See* KRS 533.256(1). It is undisputed that Kizer received two new criminal charges while on diversion. He violated that term of his diversion. The evidence also suggested that Kizer failed

to follow his parole officer's instructions to take his medication and comply with mental health treatment.

That takes us to the second and third prongs. Kizer argues that the isolated incident involving Officer Vance did not inherently demonstrate he was a danger to the community at large, and the evidence established he could be appropriately managed in Illinois. The statutory criteria found in KRS 439.3106, Kizer asserts, has not been satisfied. We disagree.

“[W]hile HB 463 reflects a new emphasis in imposing and managing [diversion], it does not upend the trial court's discretion in matters of [diversion], provided that discretion is exercised consistent with statutory criteria.” *McClure*, 457 S.W.3d at 731-32 (quoting *Andrews*, 448 S.W.3d at 780). In its order revoking diversion, the circuit court explicitly considered the criteria under KRS 439.3106, finding Kizer posed a significant risk to the community at large and could not be appropriately managed in the community. The court based its conclusions upon substantial evidence that Kizer: (1) continued to accumulate new criminal charges while on diversion; (2) violated an EPO/DVO; (3) resisted arrest, causing a police officer injury, however slight; (4) was unsuccessful with mental-health treatment measures; (5) failed to comply with medication requirements; and (6) refused transfer to Illinois where family and an established support system could assist him. Kizer's inability to comply with the law, including a police

officer's directions and a court-ordered EPO/DVO, demonstrate he is a danger to the community. Further, Kizer's refusal to follow through with his mental-health appointments and take his medication regularly and as prescribed prevents him from being successfully managed in the community. Kizer's probation officer specifically testified she was unaware of any alternative means in the community to manage Kizer. The circuit court found the probation officer's testimony credible and convincing.

The circuit court's order was based upon its weighing of the testimony presented at the evidentiary hearing and issued after considering the statutory criteria of KRS 439.3106. We decline to second-guess the circuit court's decision. "[T]he importance of certain facts is not ours to weigh on appeal, but is properly left to the trial court's exclusive discretion." *McClure*, 457 S.W.3d at 734. Even though "another judge may have opted for a lesser sanction, the trial court's decision . . . was neither arbitrary nor unreasonable." *Andrews*, 448 S.W.3d at 781.

We affirm the Hardin Circuit Court's orders removing Kizer from the pretrial diversion program and sentencing him to one year's imprisonment.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Molly Mattingly
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Andy Beshear
Attorney General of Kentucky

Jesse L. Robbins
Assistant Attorney General
Frankfort, Kentucky