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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NOS. 2016-CA-001639-MR AND 2016-CA-001653-MR

MARCUS IVY

APPELLANT

v.

APPEALS FROM HENDERSON CIRCUIT COURT
HONORABLE KAREN LYNN WILSON, JUDGE
ACTION NOS. 15-CR-00435 AND 16-CR-00244

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING IN PART, REVERSING IN PART,
AND VACATING AND REMANDING IN PART

** ** * * * * *

BEFORE: ACREE, COMBS, AND MAZE, JUDGES.

COMBS, JUDGE: Marcus Ivy appeals the judgment and sentence entered by the Henderson Circuit Court in case number 16-CR-00244 and the order of the Henderson Circuit Court revoking his probation in case number 15-CR-00435. Following our review of the record as well as the applicable legal authority, we

affirm the judgment but reverse the imposition of a fine at sentencing in case number 16-CR-00244, and we vacate and remand the revocation order in case number 15-CR-00435.

Prior to addressing the merits of the case, we must first resolve a procedural issue. On October 18, 2017, after briefing had been completed, the Commonwealth filed a motion to hold this case in abeyance until the Supreme Court of Kentucky rendered an opinion in the case of *Commonwealth v. Moore*, 2016-SC-00275-DG, because the Supreme Court was likely to rule on an issue that is involved in this case. Ivy filed a response. Although he agreed that there was a similar issue involved, he still requested that the motion be denied. We passed the motion to the merits panel for a ruling. Before this Court had the opportunity to rule on the motion, the Supreme Court issued its opinion in *Moore*. Accordingly, by separate order, we denied the Commonwealth's motion to hold in abeyance as moot, and we shall now consider the merits of Ivy's appeal.

In case number 15-CR-00435, Ivy pled guilty to second-degree burglary in Henderson Circuit Court. He was sentenced to ten years, probated for a period of five years. Not long after final judgment was entered in that case, Ivy was arrested after law enforcement searched his motel room and found pipes containing methamphetamine and marijuana residue. That incident formed the basis for case number 16-CR-00244, in which Ivy had a jury trial. He testified that he was responsible for the marijuana pipe and residue but not for the methamphetamine pipe and residue. The jury found Ivy guilty of possession of

marijuana and possession of drug paraphernalia; it found him not guilty of first-degree possession of a controlled substance (methamphetamine). In accordance with the jury recommendation, the trial court sentenced him to a total of three months in jail and a fine of \$250.00.

Ivy's probation officer, Carrie Phillips, filed an affidavit requesting that Ivy's probation be revoked in case number 15-CR-00435. The grounds for the revocation were as follows: that Ivy failed to cooperate with his probation officer; that he had contact with the victim; that he left the area of supervision without permission; that he possessed ammunition; that he was arrested for new felony and misdemeanor offenses; that he failed to avoid persons or places of disreputable or harmful character; that he failed to remain on home incarceration; that he used marijuana; that he possessed drug paraphernalia; and that he had altered or attempted to alter the results of a drug screen. The trial court held a probation revocation hearing and entered an order revoking Ivy's probation and reinstating his ten-year sentence. These consolidated appeals followed.

Ivy makes three claims on appeal: (1) that the trial court erred when it allowed trial witnesses to refer to his criminal history and other bad acts; (2) that the trial court improperly imposed misdemeanor fines upon him after he was adjudged an indigent defendant; and (3) that the trial court erred in revoking his probation without complying with KRS¹ 439.3106. The first two claims relate to

¹ Kentucky Revised Statutes.

case number 16-CR-00244. The remaining claim relates to case number 15-CR-00435.

Ivy argues that the trial court erred in allowing witnesses to make reference to Ivy's prior criminal history and other bad acts in violation of KRE² 404(b). Ivy concedes that this issue is not preserved and requests palpable error review pursuant to RCr³ 10.26. We review and reverse an alleged error as "palpable" when it "affects the substantial rights of a party." RCr 10.26. "When we engage in palpable error review, our 'focus is on what happened and whether the defect is so manifest, fundamental and unambiguous that it threatens the integrity of the judicial process.'" *Baumia v. Commonwealth*, 402 S.W.3d 530, 542 (Ky. 2013) (quoting *Martin v. Commonwealth*, 207 S.W.3d 1, 5 (Ky. 2006)). Furthermore, "[a] party claiming palpable error must show a probability of a different result or error so fundamental as to threaten a defendant's entitlement to due process of law." *Newman v. Commonwealth*, 366 S.W.3d 435, 442 (Ky. 2012) (citing *Martin*, 207 S.W.3d at 3).

It is Ivy's contention that some of the testimony at trial violated KRE 404(b) and improperly influenced the decision of the jury. KRE 404(b) is "exclusionary in nature." *Clark v. Commonwealth*, 223 S.W.3d 90, 96 (Ky. 2007). It prohibits "[e]vidence of other crimes, wrongs, or acts" from being presented to

² Kentucky Rules of Evidence.

³ Kentucky Rules of Criminal Procedure.

the jury for the purpose of showing a defendant's propensity to act in a certain manner. KRE 404(b)(1).

Before any witnesses testified, the Commonwealth informed the trial court and defense counsel that the witnesses had been instructed to refrain from referring to Ivy's probationary status or his prior criminal history and that leading questions would be utilized to steer witnesses away from such territory.

Ivy claims that the following instances of testimony were violations of KRE 404(b). Officer Phillips testified that during the search of the room, she found a bag of liquid and asked if that is what Ivy used to pass his drug tests. Detective Bob Mills referred to Officer Phillips as Ivy's probation officer, requiring the Commonwealth to instruct Detective Mills during his testimony to avoid saying probation officer. Detective Mills also implied that he was acquainted with Ivy through prior criminal incidents, and he stated that he saw some scales in the room. These references are in clear violation of KRE 404(b)'s proscription, nonetheless, we cannot conclude that they rise to the level of palpable error.

According to law enforcement testimony, while the room was being searched, Ivy admitted to using marijuana. He admitted the marijuana use again when he testified at trial. Ivy claims that he was forced to take the stand because of the KRE 404(b) violations and that his due process rights were violated by having to do so. However, it is clear from the record that Ivy's testimony was integral to his trial strategy of taking responsibility for the marijuana in order to

avoid conviction for the methamphetamine. Thereafter, the jury convicted him of the offenses related to the marijuana and marijuana pipe found in the room; it found him not guilty of the offenses involving the methamphetamine.

Thus, the references to his prior bad acts had no effect on the jury because they only found him guilty of the offenses to which he admitted several times. Though these references arguably may have violated KRE 404(b), they do not constitute palpable error when viewed in light of the outcome of the trial. Accordingly, relief is not warranted pursuant to RCr 10.26.

The second claim relates to the Commonwealth's motion to hold in abeyance as discussed previously. Ivy contends that the indigency exemption provided by KRS 534.040(4) applies to him for his misdemeanor convictions in case number 16-CR-00244. Therefore, he contends that the trial court should have waived his misdemeanor fines as he had already been classified as indigent. We agree.

In the recent opinion of *Commonwealth v. Moore*, 545 S.W.3d 848 (Ky. 2018), the Supreme Court of Kentucky interpreted KRS 534.040. That statute provides in pertinent part as follows:

(2) Except as otherwise provided for an offense defined outside this code, a person who has been convicted of any offense other than a felony shall be sentenced, in addition to any other punishment imposed upon him, to pay a fine in an amount not to exceed:

(a) For a Class A misdemeanor, five hundred dollars (\$500); or

(b) For a Class B misdemeanor, two hundred fifty dollars (\$250); or

(c) For a violation, two hundred fifty dollars (\$250).

...

(4) Fines required by this section shall not be imposed upon any person determined by the court to be indigent pursuant to KRS Chapter 31.

The Supreme Court interpreted that statute as follows:

By its plain language, the fines that KRS 534.040 requires for misdemeanor offenses do not apply to crimes that are defined outside the penal code. By its own clear language, the indigency exemption of subsection (4) applies only to “fines required by” KRS 534.040. In other words, the plain language of the statute grants an indigency exemption *only* for misdemeanors defined within the penal code and for which KRS 534.040 establishes the applicable fines.

Moore, at 850 (emphasis original).

In *Moore*, the defendant was convicted of operating a motor vehicle while under the influence (DUI), first offense, which is governed by KRS Chapter 189A -- as distinguished from the Kentucky Penal Code (KRS Chapters 500 through 534). *Id.* at 849. The penalties, including fines, associated with such offenses are also contained in that chapter. KRS 189A.010(5). Based on its interpretation of KRS 534.040, the Court held that Moore’s DUI fine fell “outside the parameters that KRS 534.040(4) sets for the indigency exemption” and, therefore, that “the exception [was] unavailable to him.” *Moore*, at 851.

Here, Ivy’s misdemeanor fine was based on convictions for

possession of marijuana and possession of drug paraphernalia pursuant to KRS 218A.1422 and KRS 218A.500, respectively. Although the Supreme Court did not address this particular chapter of the Kentucky Revised Statutes with respect to the application of KRS 534.040(4), the same analysis applies. Although those offenses are defined outside the Kentucky Penal Code, the penalties applicable to them are defined by KRS 534.040 -- in contrast to DUI offenses where the penalties are specifically set forth in KRS 189A.010(5). Thus, the indigency exemption for misdemeanor fines **does** apply to Ivy, and the trial court erred in imposing fines on Ivy in case number 16-CR-00244.

Finally, in case number 15-CR-00534, Ivy argues that the trial court erred in revoking his probation because it did not comply with KRS 439.3106 and *Commonwealth v. Andrews*, 448 S.W.3d. 773 (Ky. 2014). With respect to an order revoking probation, the standard governing our review is abuse of discretion. *Andrews*, 448 S.W.3d at 780 (citation omitted). On appellate review, we must determine 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).

“[T]he power to revoke probation is vested in the trial courts and in the trial courts alone.” *Andrews*, 448 S.W.3d at 777. However, pursuant to KRS 439.3106, enacted in 2011, a trial court is required to make two vital findings of fact prior to considering the revocation of probation. 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.

Under that statute, probation can only be revoked after a finding that the defendant's failure to abide by the probation conditions constitutes a significant risk **and** that the defendant cannot be safely managed in the community. The Court in *Andrews* held the trial court's discretion is not "upend[ed]" but rather that it must be "exercised consistent with statutory criteria." 448 S.W.3d at 780.

Although the trial court found that Ivy was impossible to supervise in light of his probation violations, there was no finding made as to the other requirement of KRS 439.3106(1); *i.e.*, that Ivy was a significant risk to the community. **Both** findings must be made on the record. Accordingly, we must vacate the order of the trial court revoking Ivy's probation. On remand, the trial court shall enter findings as to both requirements of KRS 439.3106(1) and determine in its discretion whether revocation or a lesser sanction is appropriate.

It should be noted that the Commonwealth claims that Ivy did not preserve this claim for appellate review even though he asked for palpable error

review pursuant to RCr 10.26 in his reply brief. In *Burnett v. Commonwealth*, 538 S.W.3d 322, 324 (Ky. App. 2017), we addressed this same argument, as follows: “even if we were to find . . . the issue unpreserved, we must nevertheless conclude that the circuit court’s failure to make the statutory findings required by KRS 439.3106 constitutes palpable error[.]” We are compelled to come to the same conclusion here.

To recapitulate, in case number 15-CR-00435, we vacate the order of the Henderson Circuit Court revoking probation and remand for further proceedings as set forth in this opinion. In case number 16-CR-00244, we affirm the judgment but reverse the Henderson Circuit Court’s erroneous imposition of a \$250.00 fine on Ivy, who is an indigent defendant. By separate order, we deny as moot the Commonwealth’s motion to hold the appeal in abeyance.

ALL CONCUR.

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