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Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-000131-MR

MICHAEL O'BANION — APPELLANT

v.

APPEAL FROM MEADE CIRCUIT COURT
HONORABLE BRUCE T. BUTLER, JUDGE
ACTION NO. 14-CR-00133

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON CHIEF JUDGE; DIXON AND JONES, JUDGES.

DIXON, JUDGE: Appellant, Michael O'Banion, appeals from a judgment of the Meade Circuit Court voiding his pretrial diversion and sentencing him to three years' imprisonment in accordance with a plea agreement. Finding no error, we affirm.

In July 2014, Appellant was indicted by a Meade County Grand Jury on multiple drug offenses, all enhanced because he was a felon in possession of a firearm. Pursuant to a plea agreement, the Commonwealth dropped the firearm enhancements and Appellant pled guilty to amended charges of first-degree trafficking in a controlled substance and first-degree possession of a controlled substance. In November 2015, Appellant was granted pretrial diversion for a period of five years, with a sentence of three years' imprisonment to be imposed if he failed to complete the terms and conditions of the diversion agreement.

On September 19, 2016, the Commonwealth filed a motion to void the diversion agreement. At a subsequent hearing on November 3, 2016, Teresa Marling, the Probation and Parole Officer supervising Appellant, testified that on July 29, 2016, Appellant tested positive for methamphetamine. He signed an admission sanctions form admitting to having used the drug the day before. As a result, Marling referred Appellant to a social services clinician for a drug assessment, as well as directed him to attend three AA/NA meetings a week and provide verification of his attendance. She also ordered him to report to her on August 16, 2016. Appellant failed to show for both the drug assessment appointment and the August 16th meeting. On August 17th, Appellant contacted Marling and told her that he did not report the day before because he had a flat tire and his cell phone was broken. Marling then instructed Appellant to report to her

on August 19th. Again, Appellant neither appeared nor contacted Marling concerning his failure to do so. Marling testified that on August 22nd, she attempted to conduct a home visit, but Appellant was not there. She left a note in the door requesting that Appellant contact her immediately and advising him that he was to report to her on August 30th. Appellant did not report or contact Marling about his failure to do so. On August 31st, Marling made one last attempt to contact Appellant by phone to no avail. She testified during the hearing that "all efforts to locate him had been futile."

On September 12, 2016, Marling filed a Violation of Supervision Report indicating that Appellant had been placed on graduated sanctions following his July 29, 2016 positive drug test. The report stated that Appellant had violated his supervision by failing to show for the scheduled drug assessment after testing positive for methamphetamine and for absconding probation supervision as a result of his failure to report to or contact Marling. Marling explained that after Appellant received notice of the report and the Commonwealth's motion to void the diversion agreement, he suddenly "showed up" on September 26, 2016. When asked by defense counsel whether Appellant had provided an explanation as to why he had not been reporting, Marling testified that Appellant "said he really didn't have any good reason." On that same day, Marling subjected Appellant to a drug test and he again tested positive for methamphetamine. He initially denied

using the drug, but eventually admitted to having used three days before the test. Marling further testified that on October 6, 2016, she conducted a home visit of Appellant's residence. During a consensual search of the premises, Marling found a box containing ammunition. Appellant was also given a drug test at that time and tested positive for amphetamines. Appellant denied having used any controlled substances and his urine sample was sent to a lab for confirmation. Apparently, however, the sample leaked in transit, and no further testing could be conducted. Marling stated that she filed an amended Violation of Supervision Report on October 19, 2016, adding the subsequent violations for use of controlled substances-methamphetamine and possession of ammunition.

Appellant also testified at the hearing and admitted to repeated drug use. He claimed that he had "stuff going on," and gave various excuses that he either forgot some of the meetings, was not able to make others, or that he did not receive notice of such. With respect to the ammunition, Appellant stated that it had been there for years and he had forgotten about it. Appellant further testified that he had a new appointment scheduled with a social service clinician and that he planned to attend that meeting.

At the close of the hearing, the trial court made oral findings that Appellant had tested positive for controlled substances on at least two occasions, had repeatedly failed to report to Marling, had failed to attend the drug assessment

program, and had ammunition in his home. The trial court expressed concern that Appellant's failure to comply with the conditions of the diversion agreement was either due to his continued drug use or simply his refusal to obey Probation and Parole. The trial court ultimately concluded that in either instance, Probation and Parole had been unable to manage him in the community and that his continuing drug use/failure to comply could be considered a significant risk to the community. As a result, the trial court voided the diversion agreement. In its subsequent written order, the trial court stated, "The Court finds that the Defendant is in fact in violation of the terms and conditions of his diversion by having failed drug tests and not complying with Probation and Parole." On December 8, 2016, the trial court entered a judgment sentencing Appellant to three years' imprisonment in accordance with the plea agreement. This appeal ensued.

On appeal, Appellant argues that the trial court's decision to void his diversion was erroneous because there was no evidence that he posed a risk to the community and that he could not be appropriately managed in the community. Specifically, Appellant contends that the trial court failed to explain how nonviolent violations of failing to attend his appointments and two positive drug tests equated to findings that he could not be managed in the community and that he posed a significant risk to the community. Appellant further argues that even if further punishment was warranted, the trial court erred in voiding the diversion

agreement rather than imposing graduated sanctions. He points out that Kentucky Revised Statutes (KRS) 439.3106(1) does not mandate incarceration even upon a finding that a probationer poses a significant risk to the community and cannot be appropriately managed. We must disagree.

In deciding whether to void pretrial diversion, a trial court applies the same criteria used in probation revocation proceedings. KRS 533.256(2); *Richardson v. Commonwealth*, 494 S.W.3d 495, 498 (Ky. App. 2015). "A decision to revoke 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)). Therefore, 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)).

Enacted in 2011 as part of the Public Safety and Offender Accountability Act, commonly referred to as HB 463, 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.

"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." *Commonwealth v. Andrews*, 448 S.W.3d 773, 780 (Ky. 2014). As noted by a panel of this Court in *McClure v. Commonwealth*, 457 S.W.3d 728, 732 (Ky. App. 2015), "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." By requiring the

trial court to make 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." *Andrews*, 448 S.W.3d at 779. Significantly, however, our Supreme Court in *Andrews* also emphasized that "[w]hile HB 463 reflects a new emphasis in imposing and managing probation, it does not upend the trial court's discretion in matters of probation revocation, provided that discretion is exercised consistent with statutory criteria." *Id.* at 780. *See also Richardson*, 494 S.W.3d at 498 ("[W]hile trial courts retain discretion in [voiding diversion], consideration of the criteria provided in KRS 439.3106 is a mandatory prerequisite to revocation.").

In its oral findings at the close of the hearing, the trial court herein explicitly considered the criteria set forth in KRS 439.3106(1). The trial court also made the following conclusions of law specifically in compliance with the directive of *Andrews*: that Appellant had failed to report to Probation and Parole as instructed; that he posed a significant risk to the community at large due to his known use of methamphetamine; that his refusal to cooperate with Probation and Parole officers established that he could not be managed in the community. Indeed, our review of the evidence presented at the hearing was that Appellant essentially absconded from supervision by choosing not to make his whereabouts known to Marling until he received notice that the Commonwealth had filed a

motion to void his diversion. That he chose to begin cooperating with Probation and Parole at that point rings a little hollow. There was no indication that Appellant had any intention of following the conditions of the diversion agreement until such was in jeopardy of being voided.

Appellant complains that the trial court was required to explain how his violations satisfied the criteria set forth in KRS 439.3106(1). We rejected a similar argument in *McClure*, wherein a panel of this Court observed,

> McClure alternatively contends that the trial court's finding of significant risk was insufficient because it did not include an explanation of "how attempting to alter a drug screen posed a danger to society." However, this argument lacks legal support. The statute requires a trial court to consider "whether a probationer's failure to abide by a condition poses a significant risk to prior victims or the community at large." *Andrews* at 776. Neither KRS 439.3106 nor *Andrews* require anything more than a finding to this effect supported by the evidence of record. The trial court complied with this requirement and it owed McClure no further explanation.

Id. at 733. Furthermore, we unquestionably agree with the sentiment expressed in *McClure* that although KRS 439.3106(1) mandates a finding of "significant risk," "surely it cannot be further read to require a probationer to commit some heinous act before he can be found to be a risk to someone other than himself. We sincerely doubt the General Assembly intended to set so high, and potentially injurious, an evidentiary burden." *Id.*

Nor do we find any merit in Appellant's contention that the trial court was required to consider lesser sanctions.[1] We would observe that Appellant received the benefit of graduated sanctions following his first positive drug test. Nevertheless, as the *McClure* Court noted,

> 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.

We are of the opinion that the record supported a finding that Appellant posed a "significant risk" and could not be managed within the community. Appellant entered guilty pleas to amended charges of first-degree trafficking in a controlled substance and first-degree possession of a controlled substance; he was granted the privilege of diversion; he used a controlled substance in violation of the terms of that diversion on at least two occasions and

[1] Interestingly, 501 KAR 6:250 § 2(2)(b) includes within the list of violations for which graduated sanctions are not available, "absconding supervision" and a "demonstrated pattern of failure to comply with conditions of supervision[.]"

was ordered to attend a drug assessment and AA/NA meetings. In response to this increased supervision, he went to great lengths to undermine the efforts of those supervising him by absconding from supervision and failing to make his whereabouts known until he became aware of the Commonwealth's motion to void diversion. "These facts constituted substantial support for the conclusion that a person who would go to such lengths to continue using a substance he was forbidden to use under penalty of [three] years in prison posed a significant risk to, and was unmanageable within, the community in which he lived." *McClure*, at 733.

As previously noted, while KRS 439.3106(1) requires two essential findings of fact, it does not do so at the expense of the trial court's discretion over the broader matter of revocation. *Andrews* at 780.

> Accordingly, 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. To hold, or to do, otherwise would be to invade the province of fact finding best occupied by our trial courts.

McClure, 457 S.W.3d at 734. Appellant's history of methamphetamine use and his repeated failures to cooperate with Probation and Parole officers until threatened with revocation all constitute evidence fully supporting the trial court's conclusion that he represents a risk to the community and that he cannot be effectively

managed in the community. Although another trial court may have opted for a lesser sanction, the trial court's decision to void Appellant's diversion was neither arbitrary nor unreasonable. The trial court acted within its discretion in voiding Appellant's diversion under KRS 439.3106(1).

For the reasons set forth herein, the judgment of the Meade Circuit Court is affirmed.

ALL CONCUR.

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