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Commonwealth of Kentucky
Court of Appeals

NO. 2017-CA-000337-MR

LAURA HUGHES

APPELLANT

v. APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE KELLY MARK EASTON, JUDGE
ACTION NO. 16-CR-00084

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON, CHIEF JUDGE; ACREE AND J. LAMBERT, JUDGES.

ACREE, JUDGE: The issue before us is whether the Hardin Circuit Court abused its discretion when it revoked Appellant Laura Hughes's probation. Hughes argues the circuit court's decision cannot stand because the Commonwealth failed to prove her violations were a significant risk to her prior victim or the community at

large and that she could not be appropriately managed in the community. We disagree and affirm.

In early 2016, Hughes stole over \$700 worth of merchandise from Wal-Mart. She pleaded guilty to Theft by Unlawful Taking over \$500. The circuit court sentenced her to five years' imprisonment, probated for five years. Because Hughes's record indicated a drug problem,¹ the circuit court imposed the following conditions of probation: (1) she undergo a substance abuse evaluation and follow the recommended treatment; (2) submit to periodic drug testing; and (3) participate in the Hardin County Mental Health Court (MHC) Program.²

Seven months later, Hughes's probation officer filed a violation of supervision with graduated sanctions report. That report stated that Hughes had tested positive for opiates. Hughes denied any drug use, but a lab test confirmed the presence of morphine. She was taken into custody for two weeks and then ordered to report to Lifeskills Park Place Recovery Center for residential treatment. She successfully completed the inpatient treatment program.

On January 27, 2017, the MHC's recovery coordinator filed an affidavit of Hughes's violations. The coordinator stated Hughes had been

¹ Hughes tested positive at a prior court appearance for amphetamine and hydrocodone; a lab verification indicated a positive result only for the amphetamine.

² Hughes was determined ineligible for drug court.

terminated from MHC due to her non-compliance with “treatment requirements including reported dishonesty and manipulation.” The coordinator further explained that Hughes’s “failure to comply with MHC requirements specifically being [sic] not allowing staff at the pain management clinic and lying about it, and failing to comply with MHC rules when it comes to medication because she was seeking out narcotic pain medication.” (R. 60).

The Commonwealth filed a motion to revoke Hughes’s probation. The circuit court held a revocation hearing on January 31, 2017. Erin Young, Hughes’s probation officer, testified first. Young’s testimony revealed a pattern of violations, infractions, half-truths, and falsehoods. Young testified Hughes was ordered to complete the MHC program as a condition of her probation but was terminated on January 9, 2017, for non-compliance and lying.

Hughes first violated MHC protocols when she tested positive in September 2016 for hydrocodone. Young ran a KASPER report and discovered that on September 2, 2016, Hughes had obtained a prescription for ninety hydrocodone pills contrary to the orders of the MHC and without providing the required medical verification form to her physician. By September 21, 2016, all ninety pills were gone. Hughes also failed to attend mandatory meetings and group sessions. Instead of revocation and at Young’s recommendation, the court elected the graduated sanction of seven days’ incarceration for this violation.

On October 12, 2016, Hughes tested positive for opiates. A lab report verified the test was positive for morphine. She served two weeks in custody and was referred to the Lifeskills Park Place treatment program. Young confirmed that Hughes successfully completed that twenty-two-day inpatient program.

Hughes was then given permission to seek treatment at a pain management clinic³ on the condition that a peer support person – Samantha Simpson – attend the appointment. MHC guidelines required Simpson to be present in the treatment room. Simpson attended the visit with Hughes, but Hughes refused to allow Simpson to accompany her to the treatment room. Back in MHC, Hughes denied that Simpson was not invited into the treatment room. As part of her probation supervision, Young contacted those involved and confirmed with medical staff at the pain management clinic that Hughes asked Simpson to “leave.” The physician ultimately refused to treat Hughes, citing “drug seeking behaviors.” Young learned, and later testified, that Hughes continued to be late for meetings and group sessions and failed to follow through with peer support employment appointments. At one point, Hughes was sanctioned with five hours of community service for missing meetings and appointments.

On December 14, 2016, Hughes tested positive for benzodiazepines and was taken into custody. The lab verification of that test was negative for all

³ Hughes has a physical ailment that allegedly requires pain management.

substances. However, because of her dishonesty and lack of cooperation, Hughes was terminated from MHC on January 9, 2017. Young testified Hughes could not be adequately supervised in the community and knew of no other programs that would be suitable for Hughes. Young thought Hughes a danger to herself and others. Young admitted long term intensive treatment programs existed that could be a possibility for Hughes if she remained on probation.

Hughes testified in her own defense. She stated she was unaware of MHC's procedures had nothing in writing regarding the peer support person attending her medical appointment. Hughes then admitted she requested Simpson not be permitted in the treatment room but testified she did not know Simpson was required to attend that part of the appointment. Hughes clarified that she asked to first meet with the doctor alone to explain her circumstances while Simpson waited in the waiting room. She said that, at no point, did she request Simpson leave the building.

Hughes testified that she lost visitation with her children in August 2016 and that her parental rights would be terminated if her probation was revoked. When asked if she used prescription medication to self-medicate, Hughes stated, "apparently so," and was "open" to a long-term intensive treatment program. Hughes testified she lost her way when she lost her children and did not mean to disappoint the court.

Hughes testified she is not currently taking any pain medication. She admitted she has an issue with prescription pain medication and admitted to previously denying having an addiction.

Upon hearing all the evidence, the circuit court made detailed oral findings of fact that Hughes had violated a condition of her probation, was a significant risk to the community, and could not be managed in the community. The circuit court began by reiterating that MHC is one of the most stringent and effective treatment programs available. Hughes's termination from that program for non-cooperation, repeated dishonesty, and manipulation gave the circuit court considerable pause. It found that Hughes failed to comprehend that addiction can occur even when the pain medication is legally prescribed, and her continued denial that she has an addiction problem prohibited successful treatment. It rejected Hughes's suggestion that theft was a victimless crime, and detailed months of resistance to treatment and/or temporary compliance with MHC, as well as her continued dishonesty with others and herself. The circuit court found previously imposed graduated sanctions and attempts to manage Hughes's behavior in the community had failed.

The circuit court then entered an order on February 7, 2017, revoking Hughes's probation and sentencing her to five years' imprisonment. That order echoed many of the circuit court's oral findings. Specifically, it stated Hughes had

failed to abide by the terms and conditions of probation by being terminated “from Mental Health Court [for] repeated dishonesty and manipulation and denial of addiction.” (R. 66). It further stated Hughes’s violations constitute a significant risk to her prior victims and the community at large and she cannot be appropriately managed in the community. In support, the circuit court found that “graduated sanctions have been tried in treatment court. [Hughes] is unwilling to truly engage in treatment for addiction. Thus, no community options remain. Self-deception prohibits successful treatment.” (R. 67). Hughes appealed.

Hughes contends the circuit court erroneously removed her from probation and sentenced her to prison. She argues there was no evidence supporting the circuit court’s findings that she posed a risk to the community and that she could not be appropriately managed in the community. We find otherwise.

“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)). “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 probation, including any decision to revoke[.]” *Andrews*, 448 S.W.3d at 777. Historically, a circuit court could remove a person from probation if there was evidence that the probationer failed to comply with the conditions of probation, or was not making satisfactory progress toward the completion of the provisions of the probation agreement. *Lucas v. Commonwealth*, 258 S.W.3d 806, 807-08 (Ky. App. 2008); KRS 533.020(1). 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 (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 probation.

KRS 439.3106, the statute at issue, provides that supervised individuals, such as Hughes, 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.

Our Kentucky Supreme Court has held that “KRS 439.3106 must be considered [by the circuit court] before probation may be revoked.” *Andrews*, 448 S.W.3d at 778-79. No longer would evidence to support at least one probation violation be sufficient to revoke probation. *See id.* at 780. “By requiring trial courts to determine that a probationer is a danger to prior victims or the community at large and that he/she cannot be appropriately managed in the community before revoking probation, 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. The “new state of the law” does not strip circuit courts of the discretion to revoke probation “provided that discretion is exercised consistent with statutory criteria.” *Id.* at 780.

Under the current state of Kentucky law, to revoke probation, the circuit court must find: (1) that the probationer violated a condition of probation; (2) that the violation constitutes a significant risk to prior victims or to the community at large; and (3) that the probationer cannot be appropriately managed in the community. KRS 439.3106; *Andrews*, 448 S.W.3d at 778-79.

Regarding the first prong, the standard in Kentucky has not changed. The Commonwealth must prove, by a preponderance of the evidence, that the probationer committed “at least one probation violation.” *Lucas*, 258 S.W.3d at 807-08; *Commonwealth v. Lopez*, 292 S.W.3d 878, 881 (Ky. 2009). It is undisputed that Hughes was terminated from MHC and failed to complete that program. She violated this term of her probation.

That takes us to the second and third prongs. Hughes argues there is no evidence her failure to complete the MHC program and her continued drug use demonstrated she was a significant risk to her prior victim (Wal-Mart) or the community at large. She also argues the evidence established she could be appropriately managed in the community by way of a long-term treatment program. The statutory criteria found in KRS 439.3106, Hughes argues, has not been satisfied.

We disagree. Again, “while HB 463 reflects a new emphasis in imposing and managing probation, 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). The circuit court made detailed oral findings, which it later incorporated into its written order, that Hughes’s continued drug use, manipulation, and self-

deception posed a risk to the community and that she could not be appropriately managed in the community.

The circuit court heard testimony at the revocation hearing about Hughes's repeated misrepresentations to her probation officer and the MHC. The circuit court observed that Hughes refused to candidly admit she is addicted to pain medication; instead, the circuit court found she qualifies her response or seeks to shift blame to others.

It also heard testimony of the maneuvering and dishonest gamesmanship Hughes displayed to obtain pain medication. Hughes's probation officer testified Hughes furtively obtained a prescription for ninety hydrocodone pills in September 2016, which she then consumed, sold, or lost within three weeks. Shortly after being confronted about the hydrocodone pills, Hughes used and tested positive for another drug – morphine. Despite the positive test, Hughes continued to deny using drugs. This resulted in Hughes being sent to an inpatient treatment program. Despite successfully completing this program, medical personnel subsequently denied Hughes treatment because she continued to display pill-seeking behaviors.

The Commonwealth elicited testimony that Hughes had been subjected to graduated sanctions on at least three prior occasions, including community service and short periods of incarceration, but those sanctions failed to

curtail her behavior. The circuit court was particularly concerned about Hughes's lack of candor with those trying to manage her probation and her continued self-deception concerning her addiction issues. It heard testimony that Hughes was able to function while at rehabilitation and in jail without any pain medication at all. This suggested to the circuit court that Hughes sought medication not for pain management, but because she has an addiction problem.

The circuit court found that Hughes's repeated drug use and continued addiction issues suggested that she was at risk of reoffending and committing future crimes in the community. While Hughes recently completed an inpatient treatment program, the circuit court stated it "spoke volumes" that the pain management clinic refused to prescribe Hughes pain medication or even treat her on the basis that she was still displaying pill-seeking behaviors. It noted that while Hughes's underlying crime was theft, she stole over \$700 worth of merchandise, suggesting the crime was linked to her mental health and pain medication issues.

Furthermore, the circuit court questioned Hughes's dedication to treatment, considering she constantly displayed resistance to treatment and confronting her mental health and addiction issues. Hughes's self-deception, refusal to admit that she has an addiction problem, and history of not being forthright with herself, her treatment providers, and probation and court personnel prohibit successful treatment and support the circuit court's conclusion that

Hughes could not be properly managed in the community. Additionally, Hughes's refusal to regularly attend required group sessions and meetings, and to follow through with peer support appointments, further support that finding. Hughes's probation officer specifically testified she was unaware of any alternative means in the community to manage Hughes. The circuit court found the probation officer's testimony reliable and convincing.

The circuit court's decision 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 order removing Hughes from probation and sentencing her to five years' imprisonment.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Kathleen K. Schmidt
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Andy Beshear
Attorney General of Kentucky

Julie Scott Jernigan
Assistant Attorney General
Frankfort, Kentucky