

RENDERED: NOVEMBER 2, 2018; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2017-CA-000357-MR

ANDREW C. TESCH

APPELLANT

v.

APPEAL FROM GRAYSON CIRCUIT COURT
HONORABLE ROBERT A. MILLER, JUDGE
ACTION NO. 14-CR-00151

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * * * * *

BEFORE: ACREE, D. LAMBERT AND THOMPSON, JUDGES.

ACREE, JUDGE: Andrew Tesch appeals the Grayson Circuit Court's findings of fact, conclusions of law, and order revoking his probation and remanding him to serve the fifteen-year sentence previously imposed. After review, we reverse and remand for entry of further findings which comply with this opinion and with KRS¹ 439.3106.

¹ Kentucky Revised Statutes.

FACTUAL AND PROCEDURAL BACKGROUND

Andrew Tesch pleaded guilty and was sentenced to: (1) fifteen years' imprisonment for theft by unlawful taking or disposition of property (auto) valued at \$500 or more but less than \$10,000 enhanced by his status as a Persistent Felony Offender (PFO) in the first degree; (2) five years imprisonment for a second crime of theft by unlawful taking or disposition of property valued at \$500 or more but less than \$10,000 enhanced by first-degree PFO status; and (3) five years on receiving stolen property valued under \$10,000 enhanced by first-degree PFO status. The sentences ran concurrently for a total sentence of fifteen years.

Pursuant to the plea deal, Tesch was placed on probation, and accordingly, agreed to an offer of probation containing conditions. The court entered the probation order on February 16, 2016. Tesch's probation was supervised and required him to regularly report to his probation officer. Tesch was further ordered and agreed to pay restitution of \$5,000 with a 5% administrative service fee. Payments were to be made at the rate of \$150 per month until the amount was paid in full.

Susan Sullivan, Tesch's probation officer, filed a special supervision report on April 13, 2016, indicating Tesch had absconded supervision. The report provided:

Mr. Tesch reported to Probation and Parole on March 28, 2016 and was verbally given a next report day of April

12, 2016. Mr. Tesch also endorsed a Division of Probation and Parole Release Report acknowledging a next report day of April 12, 2016. Mr. Tesch failed to report on April 12, 2016, nor did he call to explain his whereabouts. On his last report day of April 12, 2016, Mr. Tesch stated he was living at Wayside Christian Mission at 432 E. Jefferson Street, Louisville, Kentucky. On April 11, 2016, this officer spoke with Mark Viner, Work Therapy Case Manager at Wayside Christian Mission, who stated Mr. Tesch was no longer living at the shelter and had not been since March 2, 2016. A check of JusticeXchange reveals he is not currently in custody and a call to University of Louisville Hospital indicated he is not currently a patient. This officer had previously attempted to reach Mr. Tesch on his last reported telephone number of [redacted] April 6, 2016 and April 18, 2016. Messages were left on both dates instructing Mr. Tesch to call immediately. A final call was placed on April 12, 2016, there was no answer and there was not an option to leave a message as the voice mailbox was full. Mr. Tesch's whereabouts are unknown and it is this officer's belief that he is intentionally concealing his whereabouts.

(R. 219). Shortly thereafter, the Commonwealth filed a motion for the revocation of Tesch's probation, and the court entered an order directing that a warrant be issued for his arrest.

Tesch was arrested on September 23, 2016, and counsel was subsequently appointed to represent him. On November 7, 2016, the Commonwealth filed an affidavit providing that Tesch had not made a single restitution payment as directed by his order of probation.

A probation revocation hearing was held on December 6, 2016. A supervisor from the Office of Probation and Parole, not Tesch's reporting officer, testified as to Tesch's officer's report over counsel's objection. Tesch also testified.

Tesch stated he was hospitalized at the University of Louisville Hospital from March 3, 2016 through March 26, 2016 and underwent several surgeries for a staph infection in his arm. He reported to his probation officer on March 28, 2016. Tesch claims he told Officer Sullivan at that time that he was no longer staying at Wayside Christian Mission because of the staph infection and the risk he presented to others staying there. Tesch also claimed he told Officer Sullivan he was staying at his sister's house in New Albany, Indiana, because he had nowhere else to go and needed help getting to and from his follow-up appointments for his arm. Tesch further claimed that his phone was lost or stolen when he was admitted to the hospital. When questioned as to why he did not contact his probation officer since March 28, 2016, or employ the means he used to get to doctor's appointments to go to the probation office, Tesch responded he "didn't feel like it was that important at the time because I had told Ms. Sullivan where I would be if she needed to get a hold of me." (VR: 12/6/2016; 11:18:36-47).

The court determined that Tesch was granted reasonable extensions to report for supervision after treatment of his staph infection, but he did not engage in a course of behavior to subject himself to supervision. The court found he was intentionally avoiding supervision and had made no restitution payments. The court also noted that Tesch failed to establish a disability preventing him from obtaining employment. The court found Tesch's behavior and violations did not fall within the regulations for graduated sanctions and granted the Commonwealth's motion to revoke his probation. This appeal followed.

STANDARD OF REVIEW

We review a circuit court's decision to revoke probation for an abuse of discretion. *Lucas v. Commonwealth*, 258 S.W.3d 806, 807 (Ky. App. 2008). We will not disturb a revocation order absent an abuse of that discretion. *Commonwealth v. Lopez*, 292 S.W.3d 878, 881 (Ky. 2009). "The test for abuse of discretion is 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).

ANALYSIS

Tesch's first argument on appeal is that his due process rights were violated when the trial court shifted the burden of proof to him to demonstrate why

his probation should not be revoked for violating its terms and conditions instead of requiring the Commonwealth to prove Tesch violated his probation.

This alleged error is unpreserved, and Tesch requests review for palpable error under RCr² 10.26. A palpable error is one resulting in “manifest injustice,” *i.e.* a “probability of a different result or error so fundamental as to threaten a defendant’s entitlement to due process of law.” *Martin v. Commonwealth*, 207 S.W.3d 1, 3 (Ky. 2006).

Probation revocation proceedings are less formal and require less proof than a criminal trial. *Hunt v. Commonwealth*, 326 S.W.3d 437, 439 (Ky. 2010) (citation omitted). “However, probation revocation is a sufficient deprivation of liberty for certain requirements of due process to apply.” *Id.* The United States Supreme Court has established the minimum due process requirements for probation and parole revocation, which include

- (a) written notice of the claimed violations of (probation or) parole;
- (b) disclosure to the (probationer or) parolee of evidence against him;
- (c) opportunity to be heard in person and to present witnesses and documentary evidence;
- (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation);
- (e) a ‘neutral and detached’ hearing body . . . and
- (f) a written statement by the factfinder[] as to the evidence relied on and reasons for revoking (probation or) parole.

² Kentucky Rules of Criminal Procedure.

Gagnon v. Scarpelli, 411 U.S. 778, 786, 93 S.Ct. 1756, 1761-62, 36 L.Ed.2d 656 (1973) (quoting *Morrissey v. Brewer*, 408 U.S. 471, 489, 92 S.Ct. 2593, 2604, 33 L.Ed.2d 484 (1972)).

The standard of proof for revocation of probation is preponderance of the evidence that a violation has occurred. *Rasdon v. Commonwealth*, 701 S.W.2d 716, 719 (Ky. App. 1986) (citing *Murphy v. Commonwealth*, 551 S.W.2d 838 (Ky. App. 1977)). By this standard, it is the Commonwealth's burden to prove that the probationer committed "at least one probation violation." *Lucas v. Commonwealth*, 258 S.W.3d 806, 807-08 (Ky. App. 2008); *Lopez*, 292 S.W.3d at 881.

The "show cause" language that Tesch asserts shifted the burden to him appears in a few places throughout the record. First, it appears in an April 19, 2016 order. The circuit court ordered Tesch to appear to show cause why his probation should not be revoked for failure to pay court costs. The order went on to state that if the costs were paid prior to the date provided, no appearance was required. Tesch's whereabouts were then unknown.

Next, the Commonwealth's April 26, 2016 motion provides:

Comes the Commonwealth, by counsel, and it having been brought to the Commonwealth Attorney's attention that the Defendant has violated the conditions of his probation, the Commonwealth moves the Court to require the Defendant to show cause why his probation should not be revoked for reasons delineated in the

attached Special Supervision Report, Division of Probation and Parole.

(R. 218).³ This was the Commonwealth's motion and not a court order shifting the burden to Tesch.

Additionally, the circuit court's order revoking Tesch's probation includes the statement: "The Defendant failed to show good cause why his probation should not be revoked." (R. 249). The court then pointed out that Tesch failed to explain why he did not contact his probation officer from April 2016 until he was arrested in September 2016. However, prior to this, the six-page order cites several other facts developed through the December 2016 revocation hearing pertaining to Tesch's probation violations.

We acknowledge the "show cause" language appears in the record; however, we have reviewed the hearing and disagree with Tesch that the circuit court did not require the Commonwealth to prove he violated his probation. The Commonwealth put on the sworn testimony of a probation supervisor, his supervising officer's report detailing the events, and an affidavit providing that Tesch had not made a single restitution payment. Tesch's counsel cross-examined the probation supervisor. The court also provided Tesch the opportunity to testify on his own behalf to provide explanation for his absence and failure to make

³ The Commonwealth filed a supplemental motion on November 7, 2016 employing the same "show cause" phrase.

payment. The use of the term “show cause” did not have the effect of shifting the burden of proof from the Commonwealth to Tesch to prove that he did not violate the conditions of his probation. Tesch simply did not offer the court a satisfactory explanation for his behavior after the Commonwealth put on its evidence. We find no palpable error.

Next, Tesch asserts that his due process rights were violated when he was not afforded the opportunity to cross-examine his supervising probation officer, who completed the report stating Tesch violated his probation through absconding supervision. We disagree.

Tesch relies on the minimum due process requirements cited in *Gagnon* and *Morrissey*. However, those decisions “did not intend to foreclose the admission of hearsay evidence at these informal type of hearings and there is no absolute right to confront witnesses, especially when the reliability of the witnesses . . . can be easily ascertained.” *Marshall v. Commonwealth*, 638 S.W.2d 288, 289 (Ky. App. 1982). In this case, Officer Sullivan’s supervisor testified to the alleged violation details contained in the routine violation report. Tesch’s counsel cross-examined the witness, but did not demonstrate that the supervisor’s testimony was from an unreliable source of information. Additionally, this argument has been rejected by our Court previously in *Sullivan v. Commonwealth*, 476 S.W.3d 260, 263-64 (Ky. App. 2015) (“[W]e are not persuaded that [the defendant] was denied

due process simply because [another probation officer] testified rather than [the defendant's probation officer]. Reliable hearsay testimony is permissible at probation revocation proceedings and a finding of a witness's unavailability is not required.”).

Tesch next argues that the circuit court's reliance upon a supervision report, without more, is insufficient proof upon which to find a probation violation pursuant to *Commonwealth v. Goff*, 472 S.W.3d 181, 190 (Ky. App. 2015). This argument is without merit. Here, in addition to the report and the sworn testimony about the contents of the report, the Court was provided an affidavit stating that Tesch had not made a single restitution payment, thus violating his order of probation. Moreover, Tesch openly admitted to the court that he had not made any payments and had not reported to his probation officer since March 28, 2016.

In sum, Tesch was afforded the requisite due process.

Lastly, Tesch argues that the court did not make the appropriate findings under KRS 439.3106 as directed by *Commonwealth v. Andrews*, 448 S.W.3d 773 (Ky. 2014). We agree. While there certainly is evidence to support a probation violation, the trial court failed to make the requisite findings pursuant to KRS 439.3106.

Like the Supreme Court did in *Andrews*, we look to both the written and video record for evidence of whether the circuit court “specifically considered

the criteria in KRS 439.3106.” *Id.* at 780. At the hearing, Tesch’s counsel specifically asked the court to make the findings under KRS 439.3106; yet, there is no mention of the statute in the circuit court’s order revoking probation or any language indicating the statute was considered. The court’s order provides:

Defendant was granted reasonable extensions to report for supervision **after** treatment for a staph infection in his hand. Provided a reasonable opportunity to comply, Defendant moved to the State of Indiana. He had not reported his address or telephone number to his probation officer and has engaged in a course of behavior to not subject himself to supervision. He has absconded supervision. His behavior of deceit and dishonesty follows the same type of behavior for which he was sentenced.

(R. 248).

We understand the court’s frustration with Tesch as someone who was potentially facing fifteen years’ incarceration as a penalty for probation violations to declare to the court that he did not feel that reporting to his probation officer was important. However, “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.” *McClure v. Commonwealth*, 457 S.W.3d 728, 732 (Ky. App. 2015). Under the analysis in *Andrews*, the circuit court’s decision to revoke, in the absence of the findings that Tesch posed a “significant risk” and could “not be appropriately managed in the community,” either in writing or from

the bench, constitutes an abuse of discretion. Therefore, the matter must be remanded.

Additionally, “perfunctorily reciting the statutory language in KRS 439.3106 is not enough.” *Helms v. Commonwealth*, 475 S.W.3d 637, 645 (Ky. App. 2015). There must be reference to proof in the record establishing by a preponderance of the evidence that the defendant violated the terms of his release and the statutory criteria for revocation have been met. *Id.*

For these reasons, we reverse and remand the case to the Grayson Circuit Court for entry of further findings which comply with this opinion and with KRS 439.3106.

ALL CONCUR.

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