

RENDERED: SEPTEMBER 28, 2018; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2017-CA-000517-MR  
&  
NO. 2017-CA-000533-MR

SHERRY GILMORE

APPELLANT

v. APPEAL FROM PULASKI CIRCUIT COURT  
HONORABLE DAVID A. TAPP, JUDGE  
ACTION NOS. 16-CR-00002 & 16-CR-00171-002

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
REVERSING AND REMANDING

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BEFORE: CLAYTON, CHIEF JUDGE; SMALLWOOD AND TAYLOR,  
JUDGES.

CLAYTON, CHIEF JUDGE: Sherry Gilmore brings these consolidated appeals from a Pulaski Circuit Court order revoking her probation. She argues that the trial court failed to make sufficient findings under Kentucky Revised Statutes (KRS) 439.3106 to support its determination that her failure to abide by the conditions of

her probation posed a significant risk to prior victims or members of the community at large and that she cannot be successfully managed in the community. Because we agree that the trial court's findings were not adequate, we reverse and remand for the trial court to make the requisite findings.

Gilmore entered pleas of guilty under two indictments in Pulaski Circuit Court. Under Indictment No. 16-CR-00002, she pleaded guilty to two counts of trafficking in a controlled substance, first degree, first offense, and was sentenced to serve a total of ten years. Under Indictment No. 16-CR-00171-002, she pleaded guilty to two counts of knowingly exploiting an adult, resulting in a total loss to the adult of more than \$300, and was sentenced to serve a total of twenty years. The final judgments, entered on July 27, 2016, and August 15, 2016, ordered the sentences in both cases to be run consecutively for a total sentence of thirty years. The sentences were suspended, and Gilmore was placed on conditional supervised probation for five years.

The Commonwealth filed motions in both cases to revoke Gilmore's probation, on October 5, 2016, and February 7, 2017. The first motion was based on affidavits submitted by Michael Grigsby, Gilmore's Probation and Parole Officer. According to Grigsby, Gilmore failed a drug screen; lied about using drugs; failed to comply with medical treatment; failed to cooperate with a parole officer; claimed to have several medical conditions during her presentence

investigation without providing documentation or proof of such ailments; and absconded from supervision. The second motion claimed as grounds for revocation that Gilmore had committed the offense of first-degree trafficking in a controlled substance.

The trial court held a consolidated revocation hearing for both cases. Testimony was heard from Officer Grigsby and from Gilmore. Grigsby gave further details about the allegations contained in his affidavit. After Gilmore failed a drug screen, he did not seek revocation but rather offered her inpatient or outpatient treatment. Gilmore refused the treatment and absconded. After she was taken into custody on new trafficking charges, Gilmore reported to Grigsby and to the Somerset Sheriff's Office and Police Department she had been held against her will and forced to sell drugs and engage in prostitution. A detective interviewed Gilmore and a rape crisis intervention was arranged for her. Grigsby did not know the present status of the investigation into her claims.

Gilmore testified that an unidentified man held her against her will and forced her to travel from place to place selling drugs. She claimed she was without a phone and could not contact Grigsby. She also testified that she was forcibly injected with drugs and was unable to recall many of the details of what occurred.

At the conclusion of the hearing, the trial court asked why witnesses were not present to offer any support or credence to Gilmore's assertions and stated:

What I do know is you were using methamphetamine, we've got the lab confirmed positive test for that, and you even admit you were committing other offenses during this period of time. . . . I have no difficulty in concluding that you have violated the terms and conditions of your probation as alleged by using methamphetamine, and by providing false information, by failing to comply with treatment recommendations, failing to cooperate and absconding, in addition, it appears that you have picked up a couple of additional charges we need to arraign you on.

The trial court entered an order revoking probation finding that Gilmore "violated the terms of her probation for absconding probation supervision, use of controlled substance, methamphetamine, providing false information to parole officer, failure to comply with any medical or mental health treatment, failure to cooperate with parole officer and failure to provide proof of medical conditions to the Pulaski County Jail or Probation and Parole." The court further found that "[t]he Commonwealth has convincingly established that [Gilmore's] failure to abide by conditions of supervision constitute a significant risk to prior victims or the community and cannot be successfully managed in the community."

This appeal by Gilmore followed.

Before revoking probation, a trial court must consider KRS 439.3106, which 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.

The Kentucky Supreme Court has held that the statute “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). 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.” *Id.* at 779. The Court also cautioned, however, that its holding “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.

The trial court’s findings need not be written; the Kentucky Supreme Court has held that oral findings may satisfy due process requirements “where . . . we possess a video record that is sufficiently complete to allow the parties and us to determine the evidence relied on and the reasons for revoking probation.”

*Commonwealth v. Alleman*, 306 S.W.3d 484, 487 (Ky. 2010) (internal citations and quotation marks omitted).

Gilmore contends that neither the trial court’s verbal nor written findings are sufficient to satisfy the requirements of KRS 439.3106(1) and (2).

The trial court made no written findings under subsection (1), merely setting forth the statutory language in a conclusory manner. It made no written findings under subsection (2). Its verbal findings do not specifically address either subsection.

The Commonwealth has summarized the procedural history of Gilmore’s case, describing in detail the trial court’s repeated but ultimately unsuccessful efforts to assist Gilmore by reducing her bond and encouraging her to take advantage of drug treatment programs. The Commonwealth argues that Gilmore’s repeated and flagrant violations of the terms of her probation and her indictment for another drug offense fully support a finding that she poses a

significant risk and cannot be appropriately managed in the community. Although we may agree that there is more than sufficient evidence in the record to support such a determination, our Supreme Court has instructed that this task is solely within the purview of the trial court: “[T]he 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).

For the foregoing reasons, the judgment revoking Gilmore’s probation is reversed and the matter is remanded for the trial court to make specific findings regarding whether Gilmore’s failure to abide by the terms of her probation constitutes a significant risk to prior victims or the community, and whether she cannot be appropriately managed in the community.

TAYLOR, JUDGE, CONCURS.

SMALLWOOD, JUDGE, DISSENTS AND FILES SEPARATE  
OPINION.

SMALLWOOD, JUDGE, DISSENTING: Although I agree with the majority’s excellent legal analysis, I respectfully disagree with the conclusion drawn therefrom. As noted, *Andrews* requires the court to consider: (1) whether a probationer’s failure to abide supervision considers a significant risk to prior

victims or the community at large and (2) whether the probationer can be managed in the community.

In determining whether to revoke probation, a video recording evincing the trial court's oral findings may satisfy due process requirements and the requirements of KRS 439.3106. *Commonwealth v. Andrews*, 448 S.W.3d 773, 780 (Ky. 2014); *Commonwealth v. Alleman*, 306 S.W.3d 484, 487 (Ky. 2010); *McClure v. Commonwealth*, 457 S.W.3d 728, 733 (Ky. App. 2015). It is this totality of the circumstances of the ruling and not the written order alone. Herein Judge Tapp stated: (a) that the defendant's testimony was not credible and was wholly unsupported; (b) that upon being arrested for committing additional felonies, she gave the arresting officer a false name; (c) that the defendant absconded from probation and admitted so; (d) that the lab tests demonstrated that the defendant was on methamphetamine and she so admitted in court; and (e) that the defendant committed additional felonies for which she was arrested while absconding.

Thereafter, Judge Tapp stated specifically that as a result of these factors, the defendant was "in need of incarceration" which certainly indicates that he constituted a significant risk to the community at large and that she could not be left unsupervised in the community. His statements on the record satisfied the Court's ruling in *Andrews* and *Allman*. Nothing else should be required.

However, we also have Judge Tapp’s written order revoking probation. That order sets forth the legal requirements of KRS 439.3106 and the findings he made orally on the record supporting those requirements. After setting forth his findings of fact, Judge Tapp states in his written order that “[t]he Commonwealth has convincingly established that the Defendant’s failure to abide by the conditions of supervision constitute a significant risk to prior victims or the community and cannot be successfully managed in the community.”

In this case we have both oral and written findings which support the trial court’s conclusion that Ms. Gilmore was a danger to the community at large and could not be managed in the community. We should not reverse a revocation of probation simply because the trial court did not use the magic words of “these facts support *Andrews* factor one and these facts support *Andrews* factor two.” The trial court set forth the legal requirements of KRS 439.3106 and stated, both orally and in writing, the facts supporting the revocation. *Andrews* requires nothing more.

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