

Commonwealth of Kentucky
Court of Appeals

NO. 2017-CA-001342-MR

TIMOTHY BUIS

APPELLANT

v. APPEAL FROM PULASKI CIRCUIT COURT
HONORABLE JEFFREY THOMAS BURDETTE, JUDGE
ACTION NO. 15-CR-00403

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
VACATING AND REMANDING

** ** * ** * **

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

COMBS, JUDGE: Appellant, Timothy Buis (Buis), appeals from the trial court's order revoking his probation. After our review, we vacate and remand.

Buis was indicted for Trafficking in a Controlled Substance, First Degree, First Offense (greater than 2GMS Methamphetamine) under KRS¹ 218A.1412(1)(b), a Class C felony. He entered a plea of guilty on April 20, 2017.

¹ Kentucky Revised Statutes.

On May 18, 2017, Buis appeared before the court with counsel. The trial court's May 22, 2017, Final Judgment and Order reflects that Buis was sentenced to ten years, probated for five years, after an additional 90 days of home incarceration and "on the condition that the defendant shall not commit another offense during the period for which the sentence remains subject to supervision." Buis's probation was also subject to compliance with additional conditions set forth in the order, which is attached to Appellant's Brief as Appendix 1. Pursuant to the order, Buis was to refrain from any further violation of the law and to avoid injurious or vicious habits.

On July 7, 2017, the Commonwealth filed a motion to revoke Buis's probation based upon his Facebook posts. In its entirety, the Motion provided as follows:

Comes now the Commonwealth of Kentucky, by counsel, and moves the Court to revoke the probation of the above-named defendant based on the attached facebook posts made by said defendant.

Based on the above the Commonwealth request [*sic*] that a warrant be issued for the defendant and set for a hearing at the convenience of the Court.

The Commonwealth attached copies of Buis's Facebook posts to its motion, some of which were highlighted. The highlighted entries are set forth below:²

[May 18] Big time gansta up in this bitch[.] [Showing Buis had been at the Pulaski County Judicial Center).]

...

No but when he asked me if I wanted drug rehab I said No I don't use drugs your honor. I just sell them. I got a big laugh from the crowd...Even the judge liked it[.] [In response to a post asking what Buis had said in court.]

...

I'm not done. So what. I'm a convicted felon. I don't vote... Never have to do jury duty.. Good deal. Can't own a gun. Never needed one. I have a brain.. I talk my out of s**t... Don't need a job.. I'm retired... So f**k you Somerset police department... Ooh big punishment I got... You f**ked with the wrong gansta... Told you bitches I wouldn't do any hard time.... I'll be on my beach enjoying life in 90 days.. While I'm laughing at you f**king inbred hillbillies of a police department.

[May 22] Damn... No wonder I'm a genius... I have 9 months of clean urine for sale to you drug addicts that need clean urine.... Inbox me for prices and delivery.... I should go on that sharks show....I'm going to be a millionaire.

[July 5, 2017] He hurt my kids. I destroy his family Alls fair.

² Also attached to the Commonwealth's motion is copy of an update to Buis's cover photo showing him kneeling outside a Sheriff's vehicle giving it the finger and holding what appears to be a can of beer. The signage on the vehicle, which is only partially visible, is "obee County." The cover photo was updated on June 20; however, the photograph of the vehicle appears to be undated.

...

I have a lawyer and money

...

No he came there with no warrant.. But I got away...because he[]didnt know who he was F**king with....Now he pays or his family will

...

Yep. But I'm free. Haha lifetime of me F**king with roger dumbass estep now

...

Hey somerset police department. Your roger estep daughter³ is c*****r of the month at my new whore house in Tampa Bay Florida ..were so proud of her

I always win [JVP⁴]

...

See the police suck... And always have a great lawyer

...

He came to my house without a warrant. War is hell

On July 20, 2017, the trial court conducted a hearing on the

Commonwealth's motion. The Commonwealth contended that Buis had made direct threats against Roger Estep, the officer on the case. The court asked if there were any stipulations. Defense counsel stipulated that the Facebook page was Buis's and that he had made the posts. However, defense counsel explained that Buis did *not* stipulate that the posts were threats or that he was "commenting to" Roger Estep in the posts. Defense counsel acknowledged the stupidity of Buis's

³ Mr. Estep is the officer who worked the case. According to the Commonwealth, his daughter is a minor and a cancer patient.

⁴ JVP are the initials of an individual with whom Buis was communicating on Facebook.

comments, but it requested that the court shut down Buis's Facebook page instead of revoking his probation and bar him from Facebook for the duration.

The court stated:

Its [*sic*] always stupid to make threats against somebody whether you did it in a letter ... or a Facebook post and that's a crime and one of the conditions of your probation was that you should make -- do nothing unlawfully, and abide by the law, to be on good behavior, not to participate in anything that would be vicious or bad habits, and this is completely contrary to the order of probation.

Defense counsel argued that there was no intent to make a threat. The court advised that "it looks like a threat to me." The court gave short shrift to Buis's request to explain that he was just telling a story, trying to be a little funny, and ordered him to "serve your time."

The trial court's written Order entered July 26, 2017, provides in relevant part as follow:

Upon motion of the Commonwealth, the defendant came before the Court for revocation of his/her probation on July 20, 2017. The defendant was represented by the Honorable Andrea Simpson and the Court called this case for hearing. **The defendant stipulated that he/she had violated the terms of his/her probation by threatening of a police officer on facebook; therefore, the Court hereby orders that probable cause for revocation is found.** The Commonwealth has shown by a preponderance of evidence that the probationer poses a significant threat to the citizenry at large and cannot be managed in the community.

(emphasis added). The court revoked Buis’s probation and imposed his sentence of ten-years’ imprisonment.

On July 27, 2017, Buis, by counsel, filed a Notice of Appeal. He argues that: 1) the trial court failed to engage in the fact finding and conclusions required by KRS 439.3106 and *Commonwealth v. Andrews*, 448 S.W.3d 773 (Ky. 2014); and 2) the trial court erred by determining that Appellant violated his probation by committing a crime.

The Commonwealth's burden is to prove by a preponderance of the evidence that the defendant violated the conditions of his or her probation. Historically, once this burden was met, the decision to revoke probation has been within the trial court's discretion and not reversed unless that discretion had been abused. On appellate review, the traditional test was simply whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.

Helms v. Commonwealth, 475 S.W.3d 637, 641 (Ky. App. 2015) (citations and internal quotation marks omitted).

Before probation may be revoked, “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....”

Commonwealth v. Andrews, 448 S.W.3d 773, 780 (Ky. 2014). Enacted in 2011 as

part of the Public Safety and Offender Accountability Act, KRS 439.3106

mandates 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.

The trial court **must** make express findings as to **both** elements of

KRS 439.3106(1) -- either in writing or orally. *McClure v. Commonwealth*, 457

S.W.3d 728 (Ky. App. 2015).

[R]equiring 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 ... furthers the objectives of the graduated sanctions schema to ensure that probationers are not being incarcerated for minor probation violations.

Andrews, at 779. “[P]erfunctorily reciting the statutory language in KRS 439.3106

is not enough. There must be proof in the record established by a preponderance

of the evidence that a defendant violated the terms of his release and the statutory criteria for revocation has [*sic*] been met.” *Helms* at 645.

In the case before us, Buis argues that the trial court failed to “earnestly consider graduated sanctions” and failed to specify the facts leading to its finding that Buis could not be managed in the community. Buis also maintains that the court’s written order “relies on a stipulation that does not exist.”

The Commonwealth concedes that the trial court’s order does not “accurately reflect” the stipulation, but it submits that “any perceived defects in the order are cured by the trial court’s oral findings during the hearing.” We cannot agree. This is not a case where the court’s written findings are merely sparse. Indeed they are conclusory and virtually non-existent.

The written order reflects that the trial court revoked Buis’s probation based upon its finding that “[t]he defendant stipulated that he/she had violated the terms of his/her probation by threatening of a police officer on facebook.” Courts speak through their written orders. *Oakley v. Oakley*, 391 S.W.3d 377 (Ky. App. 2012). “When there is a conflict between a court’s oral statements and the written judgment, the written judgment controls.” *Machniak v. Commonwealth*, 351 S.W.3d 648, 652 (Ky. 2011); *See Williams v. Commonwealth*, 2015-CA-001404-MR, 2017 WL 129118 (Ky. App. Jan. 13, 2017) (Although court mentioned defendant’s failure to pay court costs as a basis for revoking probation during

revocation hearing, court did not include it as a basis for revocation in its written order. Therefore, failure to pay court costs was not a basis for the revocation of his probation, and claim was moot). In the case before us, the trial court's oral findings cannot "cure" the defect in its written order as the Commonwealth suggests. They simply do not address the statutorily mandated criteria with any degree of specificity.

The trial court revoked Buis's probation based upon a clearly erroneous factual finding; *i.e.*, that he stipulated violating the terms of his probation when he clearly did not. Thus, that improperly founded revocation constitutes an abuse of discretion. *Epperson v. Commonwealth*, 437 S.W.3d 157, 162 (Ky. App. 2014) (Court abuses its discretion where its decision is based upon a clearly erroneous factual finding). It is true that Buis did not preserve the error by filing a motion under CR⁵ 52.02.⁶ *Helphenstine v. Commonwealth*, 423 S.W.3d 708 (Ky. 2014) (Where defendant essentially argued that findings differed in measurable degree from facts he had stipulated, it was incumbent that he move court for additional findings of fact and conclusions of law under CR 52.02).

⁵ Kentucky Rules of Civil Procedure.

⁶ The rule provides in relevant part that "Not later than 10 days after entry of judgment the court of its own initiative, or on the motion of a party made not later than 10 days after entry of judgment, may amend its findings or make additional findings and may amend the judgment accordingly.

However, Buis has requested that we review any unpreserved error under RCr⁷10.26, which provides as follows:

A palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error.

“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.’” *Hunt v. Commonwealth*, 326 S.W.3d 437, 440 (Ky. 2010) citing *Martin v. Commonwealth*, 207 S.W.3d 1, 3 (Ky. 2006) (emphasis original).

[P]robation revocation is a sufficient deprivation of liberty for certain requirements of due process to apply. *Gagnon*, 411 U.S. at 782, 93 S.Ct. 1756. To that end, 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 []

⁷ Kentucky Rules of Criminal Procedure.

as to the evidence relied on and reasons for revoking (probation or) parole.

Id. at 786, 93 S.Ct. 1756 (quoting *Morrissey v. Brewer*, 408 U.S. 471, 489, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972)).

Hunt at 439.

In *Commonwealth v. Alleman*, 306 S.W.3d 484, 487–88 (Ky. 2010),

our Supreme Court explained as follows:

“The basis for requiring a written statement of facts is to ensure accurate fact finding and to provide ‘an adequate basis for review to determine if the decision rests on permissible grounds supported by the evidence.’ ” *Yancey*, 827 F.2d at 89 (quoting *Romano*, 471 U.S. at 613–14, 105 S.Ct. 2254). We believe these goals are satisfied when the oral findings and reasons for revocation as recorded in the video record enable a reviewing court to determine the basis of the judge's decision to revoke probation. *Id.*; see also *Morishita*, 702 F.2d at 210; *Barth*, 899 F.2d at 202.

Of course, we might rule differently were we faced with “**general conclusory reasons** by the [trial] court for revoking probation,” *Barth*, 899 F.2d at 202; *Lacey*, 648 F.2d at 445, or with a record from which we were “unable to determine the basis of the [trial] court's decision to revoke probation.” *Smith*, 767 F.2d at 524....

(Emphasis added).

As discussed above, the trial court’s written order controls in this case. We are wholly unable to determine the basis of the trial court’s decision from the video record. As Buis notes in his brief, the Commonwealth did not

charge him with a new offense – or with any statutorily chargeable offense whatsoever. Although it appears that the trial court **believed that Buis** committed “a crime,” the statute which Buis allegedly violated was never identified.⁸ The court also mentioned other conditions of probation as well; *i.e.*, that Buis was not to participate in anything that constitute vicious or bad habits. The Commonwealth did not identify a particular statute in its motion to revoke probation – although it cites several after the fact in its brief.

Considering the entirety of the proceeding in the case before us, we conclude that the revocation of Buis’s probation based upon a clearly deficient factual finding constitutes palpable error. In light of our determination, we need not reach the remaining issues which Buis raises.

Consequently, we vacate the trial court’s Order Revoking Probation [and] Imposition of Sentence entered July 26, 2017, and remand for a determination as to whether or not Buis violated the conditions of his probation. The trial court is instructed to make sufficient findings based upon the evidence to apprise the parties and a reviewing court of the basis for its determination. If the trial court concludes that Buis indeed violated the conditions of his probation, it shall conduct the proper analysis mandated by KRS 439.3106 and *Andrews, supra*.

⁸ “Although new charges may form the basis for revocation proceedings, a conviction on those charges is not necessary in order to revoke probation.” *Barker v. Commonwealth*, 379 S.W.3d 116, 123 (Ky. 2012). Nevertheless, there must be proof based upon a preponderance of the evidence that a violation of probation occurred. *Id.*

JONES, JUDGE, CONCURS.

CLAYTON, CHIEF JUDGE; CONCURS BY SEPARATE OPINION.

CLAYTON, CHIEF JUDGE; CONCURRING: I concur with the decision of the majority. I write separately because I do not believe that we must engage in a palpable error review. As discussed by the Kentucky Supreme Court in *Anderson v. Johnson*, 350 S.W.3d 453, 456-57 (Ky. 2011), in actions tried without a jury, CR 52.01 requires the trial court to make findings of facts and conclusions of law. *Id.* at 458. A party need not make a request for findings for purposes of review except as provided in CR 52.04. *Id.* The Kentucky Supreme Court reasoned:

If it is mandatory that a court make specific findings of fact and conclusions of law, and state them separately, then it makes sense that it is not necessary to request those findings when a court fails to make them “for purposes of review.” One should not have to ask a court to do its duty, particularly a mandatory one.... CR 52.04 requires a litigant to make a written request of the court or file a motion requesting *a* finding of fact *essential to the judgment* when the court has omitted it. Read as a whole, the rule clearly states that requests for findings are not necessary unless the court fails to include an essential fact that would make a judgment complete ... [a]nd such a reading is in keeping with the intent of CR 52: a judge must make findings of fact and not address the matter in a perfunctory manner, but if he misses only some key fact in his findings, the litigant must assist the court in its good faith efforts to comply with the rule by requesting that specific finding.

Id. (emphasis in original).

In this case, the trial court failed to make any findings as required by CR 52.01. As such, the failure of Buis to request such findings does not preclude appellate examination and need not be reviewed under the palpable error standard.

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