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Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-001442-MR

TEFLON HOGAN[1] APPELLANT

v.

APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE KEN M. HOWARD, JUDGE
ACTION NO. 14-CR-00357

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: D. LAMBERT, NICKELL, AND TAYLOR, JUDGES.

LAMBERT, D., JUDGE: Teflon Hogan appeals from the Hardin Circuit Court's final judgment and sentence of imprisonment, following the court's order revoking his probation. Finding no error, we affirm.

[1] The record refers to the appellant as both "Teflon" and "Telfon." We refer to him as "Teflon" because that is how he is designated in the Notice of Appeal.

On January 23, 2014, Hogan and an accomplice robbed a Dollar General retail store in Radcliff, Kentucky. In the course of the robbery, Hogan pointed a handgun at the store clerk and threatened to shoot her. Hogan and his accomplice fled the scene but were apprehended shortly thereafter. Hogan was fifteen years old at the time of the incident, and the Hardin District Court initially charged him as a juvenile offender. However, because Hogan used a firearm in the commission of a felony, he was transferred to circuit court to be tried as an adult pursuant to KRS[2] 635.020(4). Hogan negotiated a conditional guilty plea with the Commonwealth in which he reserved the right to challenge the constitutionality of the transfer statute. A previous panel of this Court upheld the statute and affirmed the circuit court's judgment and sentence. *See Hogan v. Commonwealth*, 2014-CA-001933-MR, 2016 WL 3147792 (Ky. App. May 27, 2016). Pursuant to his guilty plea, Hogan faced ten years' imprisonment on charges of first-degree robbery[3], first-degree wanton endangerment[4], first-degree fleeing or evading[5], and

[2] Kentucky Revised Statutes.

[3] KRS 515.020.

[4] KRS 508.060.

[5] KRS 520.095.

possession of a handgun by a minor.[6] The circuit court remanded Hogan to the Department of Juvenile Justice (DJJ) until he reached majority age.

When Hogan turned eighteen years old, after more than two years in DJJ custody, the Hardin Circuit Court held a hearing to determine whether he would be probated or if he would serve the remainder of his sentence with the Department of Corrections. Noting Hogan's incredibly difficult childhood, his completion of a substance abuse program, and the positive reports he received from his time at DJJ, the circuit court probated the remainder of Hogan's sentence. Hogan's probation was highly structured. As part of the conditions for his release, Hogan would attend Kentucky State University (KSU), where he would be required to take sixteen hours of classes per week, get a part-time job, maintain A and B grades, maintain regular contact with one of his sisters, report to his probation officer weekly, and keep regular monthly telephonic court dates. The circuit court also required Hogan to not have alcohol or drugs in his possession and to attend regular meetings of Alcoholics Anonymous and Narcotics Anonymous. Accepting these terms, Hogan enrolled at KSU for the fall semester of 2016.

Unfortunately, Hogan's time at KSU was short-lived. Hogan's probation officer spoke to him by telephone on December 22, 2016, asking him to report in person the following week, on December 27. Hogan agreed but then

[6] KRS 527.100.

failed to appear. The probation officer called Hogan's sisters, but they did not know where he was. The probation officer then spoke to Hogan's advisor at KSU, who said Hogan had not been seen on campus since December 2, he had not completed his final examinations, and he had not registered or applied for financial aid for the spring semester. In a hearing held January 3, 2017, the circuit court found Hogan had absconded from probation and issued a bench warrant for his arrest. On June 12, 2017, Hogan was apprehended in Jefferson County, Kentucky, following an arrest for shoplifting.

The Hardin County Commonwealth's Attorney moved the circuit court to revoke Hogan's probation. In a revocation hearing held July 31, 2017, the circuit court heard testimony from Hogan's probation officer supplying the aforementioned narrative. On direct examination, the probation officer also explicitly testified, based on her experience, as follows: Hogan was a danger to himself or others by not being supervised; he was a danger to the community by absconding and not being supervised for six months; and, based on his disappearance and failure to report for six months, probation and parole had exhausted all means in attempting to supervise him.

The only other witness to testify at the revocation hearing was Hogan. He testified he was at KSU for five or six weeks before he began using drugs and alcohol, and he never attended Alcoholics Anonymous or Narcotics Anonymous

meetings while there. Hogan also testified about his problem with drug addiction, admitting his *daily* drug consumption at college amounted to the following: two Xanax (alprazolam) pills, approximately three grams of powder cocaine, and a quarter-ounce of marijuana. Upon leaving KSU, Hogan began living on the street and going to various places where he could obtain drugs. His consumption of Xanax increased to ten pills daily, and he continued to consume cocaine and marijuana. When questioned on cross-examination, Hogan was unclear as to how he acquired the funds to pay for his habit, saying only he would "ask" for the drugs. Hogan testified he did not report to the probation officer on December 27, 2016, because he was afraid he would not pass a drug test.

Following the testimony at the hearing, the circuit court made oral findings, stating there was no dispute Hogan had violated his probation by absconding from supervision for six months. Even so, the court was troubled by the outcome. Everyone knew Hogan was at risk, and therefore "everyone took great care to craft an environment that would give him the best chance to be successful." Hogan had the advantage of "the most sophisticated and complete support system that we could put together." Nonetheless, Hogan lasted only five or six weeks at KSU before getting involved with drugs. The court found Hogan could have gotten help from many people who had invested in his future, but he chose not to reach out. The court was also troubled by how Hogan could offer no

adequate explanation for what had happened. Finally, the court stated it had no "real options here," but would take the matter under submission.

On August 14, 2017, the circuit court entered a written order, partially preprinted with checkboxes, containing the following findings of fact:

> The defendant failed to abide by the terms and conditions of probation by committing the following violations: absconding supervision; use of controlled substances; failing to attend Kentucky State University as ordered; failure to report to Probation Officer since December 2016; failure to attend [Alcoholics Anonymous and Narcotics Anonymous meetings] as ordered.

The court continued, in its conclusions of law, as follows:

> The Defendant was afforded the opportunity for a hearing pursuant to KRS 533.050. In determining whether to revoke the Defendant's probation or to assess a penalty or conditions other than revocation, the Court has considered the requirements of KRS 439.3106 and finds: such violation(s) constitute a significant risk to . . . the community at large (including the Defendant) and cannot be appropriately managed in the community. Absconded from probation supervision for approx. 6 months with admitted use of [X]anax, cocaine, and [marijuana] daily.

The court concluded its order by revoking Hogan's probation and remanding Hogan to the custody of the Department of Corrections to finish his ten-year sentence. This appeal follows.

Hogan presents two related arguments on appeal identical to those presented by the appellant in *McClure v. Commonwealth*, 457 S.W.3d 728 (Ky.

App. 2015): "Whether the evidence of record supported the requisite findings that [Hogan] was a significant risk to, and unmanageable within, his community; and whether the trial court, in fact, made those requisite findings." *Id*. at 732.

"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*, 457 S.W.3d at 730 (citing *Miller v. Eldridge,* 146 S.W.3d 909, 915 n.11 (Ky. 2004)).

Hogan contends the circuit court did not have sufficient evidence to support its decision to revoke his probation. We disagree. "Revocation of probation does not require proof beyond a reasonable doubt. The Commonwealth's burden is to prove by a preponderance of the evidence that the defendant violated the conditions of his or her probation." *Helms v. Commonwealth*, 475 S.W.3d 637, 641 (Ky. App. 2015) (citation omitted). A lesser

sanction than revocation may be given for a violation, but it is not required. *McClure*, 457 S.W.3d at 732.

At the close of the revocation hearing, there was no dispute Hogan had thoroughly violated his probation in almost every way conceivable. Not only did he fail to report as ordered to his probation officer, but he also failed to attend Alcoholics Anonymous and Narcotics Anonymous meetings, failed to complete his examinations, and failed to register as a student for the following semester. By his own admission, Hogan began abusing drugs after only five weeks at college. Hogan then absconded for six months and consumed large quantities of illicit drugs for the entire duration. He did not seek help for his addiction, but instead continued in this course of conduct until he was apprehended for shoplifting. There was sufficient evidence in the record supporting the trial court's decision to revoke Hogan's probation.

Next, we consider the more difficult question of whether the circuit court sufficiently complied with KRS 439.3106. A trial court traditionally has "broad discretion in overseeing a defendant's probation, including any decision to revoke[.]" *Andrews*, 448 S.W.3d at 777. This traditional deference was somewhat qualified when, "[i]n 2011, the Kentucky General Assembly enacted the Public Safety and Offender Accountability Act, commonly referred to as House Bill 463

(HB 463)." *Id*. at 776 (internal quotation marks omitted). Included as part of this legislation, KRS 439.3106(1) provides as follows:

> Supervised individuals shall be subject to . . . [v]iolation 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[.]

A trial court must make both statutory findings, regarding risk and the inability to be managed in the community, before revoking probation. "[W]hile trial courts retain discretion in revoking probation, consideration of the criteria provided in KRS 439.3106 is a mandatory prerequisite to revocation." *Richardson v. Commonwealth*, 494 S.W.3d 495, 498 (Ky. App. 2015). "[T]rial courts must consider and make findings—oral or written—comporting with KRS 439.3106(1)." *Blankenship v. Commonwealth*, 494 S.W.3d 506, 509 (Ky. App. 2015).

In its form order revoking probation, the circuit court explicitly considered the criteria under KRS 439.3106, finding Hogan posed a significant risk to the community at large and could not be appropriately managed in the community. In the written portion of the order following this recitation, the circuit court explained its rationale: Hogan had absconded from probation supervision for approximately six months, with daily usage of Xanax, cocaine, and marijuana.

Because the circuit court used a form order, Hogan attempts to compare this case to *Helms*, *supra*, in which we said,

> [i]f the penal reforms brought about by HB 463 are to mean anything, perfunctorily 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 been met.

Helms, 475 S.W.3d at 645. However, in *Helms*, we noted the circuit court had "orally and in its written order expressed that it was enforcing [a] zero-tolerance provision" and only "parroted" the statutory language of KRS 439.3106. *Id*. Here, although the circuit court used a form order, this was not a perfunctory recitation as denounced in *Helms* but was supported by the evidence in the record as to Hogan's behavior. Furthermore, the probation officer offered unrefuted testimony during the hearing that Hogan's conduct presented a danger to himself and the community by not being supervised, and that probation and parole had "exhausted all means" in attempting to supervise him. In short, there was sufficient evidence presented to the trial court to support revocation under KRS 439.3106.

Finally, Hogan also argues the circuit court findings were insufficient because they did not specifically state *why* he could not be managed in the community through a lesser sanction. However, as we discussed in *McClure*, the trial court is not required to explain its findings:

> 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. 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.

McClure, 457 S.W.3d at 733 (citation and internal quotation marks omitted).

For the foregoing reasons, we affirm the Hardin Circuit Court.

ALL CONCUR.

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