

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-001791-MR

RAY PAUL WILDER

APPELLANT

v. APPEAL FROM BELL CIRCUIT COURT
HONORABLE ROBERT COSTANZO, JUDGE
ACTION NO. 15-CR-00076

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: JONES, KRAMER, AND D. LAMBERT, JUDGES.

LAMBERT, D., JUDGE: Ray Paul Wilder appeals from the Bell Circuit Court's revocation of his probation. He argues that the trial court abused its discretion when it revoked his probation after he failed to make restitution payments. After careful consideration, we vacate and remand.

Wilder entered a guilty plea to theft by unlawful taking over \$10,000. On July 20, 2015, he was sentenced to ten years' imprisonment, probated for five years. During his probationary period, he was required to pay restitution to the victim, Wal-Mart, in the amount of \$50,271. His monthly payment obligation was \$837.85.

On July 6, 2017, the Commonwealth moved to revoke his probation for failure to make restitution payments. At the time the motion was made, Wilder had arrearages of \$13,661.55, which Wilder stipulated to during the subsequent hearing. Prior to this motion, no probation violation reports had been filed and no graduated sanctions had been imposed.

During the brief probation revocation hearing, Wilder informed the trial court that he had been laid off but was now making better money. The Commonwealth inquired into his monthly pay but still asked for revocation. The trial court found that Wilder was not in compliance with the terms of his probation and revoked his probation. A month later, the trial court entered a written ruling revoking Wilder's probation and stated that it had considered the requirements of KRS¹ 439.3106. This appeal followed.

On appeal, Wilder makes two arguments as to why his probation should not have been revoked: (1) the trial court erred by failing to comply with *Bearden v. Georgia*, 461 U.S. 660, 103 S. Ct. 2064, 76 L. Ed. 2d 221 (1983), and *Commonwealth v. Marshall*, 345 S.W.3d 822, 828 (Ky. 2011); and (2) there was

¹ Kentucky Revised Statutes.

not sufficient evidence in the record to make the required findings under KRS 439.3106.

The standard of review for a trial court's decision to revoke a defendant's probation is whether the trial court abused its discretion. *Tiryung v. Commonwealth*, 717 S.W.2d 503, 504 (Ky. App. 1986). "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).

In accordance with *Bearden*,² the Supreme Court of Kentucky in *Marshall* held that in determining whether to revoke probation for failure to pay (whether it be for child support, restitution, or fines), the trial court must consider:

(1) whether the probationer made sufficient bona fide attempts to make payments but [had] been unable to do so through no fault of his own and, if so, (2) whether alternatives to imprisonment might suffice to serve interests in punishment and deterrence.

345 S.W.3d at 828 (footnote omitted). Further, "once a defendant is probated, he then acquires an interest in remaining on probation rather than going to prison."

Id. at 832-33 (footnote omitted).

Applying Kentucky case law and *Bearden* to Wilder's situation, we conclude that the trial court abused its discretion. There was not any evidence

² In *Bearden*, the United States Supreme Court held that a court should not sentence a probationer "to imprisonment simply because he could not pay the fine, without considering the reasons for the inability to pay." 461 U.S. at 674. The Court's decision was based upon probationers' Fourteenth Amendment right to due process, which is violated when they are deprived of their freedom through no fault of their own.

presented at the hearing showing that Wilder was unwilling to pay the full amount of the monthly restitution payment, only that he failed to do so. The trial court must adequately inquire and expressly find whether Wilder made sufficient bona fide attempts to pay the restitution.

When determining if revocation or a lesser sanction is appropriate after a probation violation occurs, the trial court is required to make express findings on the record in accordance with KRS 439.3106. *McClure v. Commonwealth*, 457 S.W.3d 728, 732 (Ky. App. 2015). Pursuant to KRS 439.3106, there are two vital findings of fact a trial court is required to make prior to considering the revocation of probation. KRS 439.3106 provides 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.

There is no evidence in the record from the revocation hearing that would support either finding. Failure to pay does not conclusively determine that a person is a public safety risk or cannot be managed in the community. The trial court, here, simply parroted the language of the statute without pointing to any evidence to

support those findings. *See Helms v. Commonwealth*, 475 S.W.3d 637, 645 (Ky. App. 2015) (holding that it was an abuse of the trial court’s discretion to parrot the statutory requirements where there was a “complete lack of evidence in the record” to support such findings).

On remand, the trial court is directed to determine whether Wilder made sufficient bona fide efforts to pay restitution but was unable to do so through no fault of his own. The trial court must also inquire whether alternative forms of punishment would be more appropriate for the failure to make restitution payments. If the trial court still decides that imprisonment is the appropriate punishment, it must make specific findings as to the evidence supporting the requirements of KRS 439.3106.

For the foregoing reasons, we vacate the order of the Bell Circuit Court revoking Wilder’s probation and remand for further proceedings consistent with this opinion.

JONES, JUDGE, CONCURS.

KRAMER, JUDGE, CONCURS IN RESULT ONLY.

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