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NOT TO BE PUBLISHED

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2017-CA-001866-MR

DONALD THOMPSON

APPELLANT

v. APPEAL FROM TAYLOR CIRCUIT COURT  
HONORABLE SAMUEL TODD SPALDING, JUDGE  
ACTION NO. 13-CR-00181-002

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: DIXON, D. LAMBERT, AND SMALLWOOD,<sup>1</sup> JUDGES.

LAMBERT, D., JUDGE: Donald Thompson (“Donald”) appeals the decision of the Taylor Circuit Court to revoke his parole. After thorough review of the record, we affirm.

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<sup>1</sup> Judge Gene Smallwood concurred in this opinion prior to the expiration of his term of office. Release of the opinion was delayed due to administrative handling.

## I. FACTUAL AND PROCEDURAL HISTORY

On October 22, 2013, Donald was indicted on six counts of Fraudulent Use of a Credit Card over \$500 and under \$10,000,<sup>2</sup> two counts of Fraudulent Use of a Credit Card under \$500 within six months,<sup>3</sup> and one count of being a First-Degree Persistent Felony Offender.<sup>4</sup> The charges resulted from Donald using a Walmart credit card belonging to the Central Kentucky Community Action Center, without authorization, to buy several thousand dollars' worth of items. In exchange for a guilty plea on three counts of Fraudulent Use of a Credit Card over \$500 and under \$10,000, the Commonwealth agreed to drop all the remaining charges. Donald was sentenced to a total of eight years with five years probated and ordered to pay \$3,352 in restitution to Walmart. He was to be on supervised probation until his restitution to Walmart was paid in full.

On September 26, 2017, the Commonwealth filed a motion with the Taylor Circuit Court to revoke Donald's probation. A revocation hearing was held on the matter on October 27, 2017. At that hearing, the Commonwealth presented evidence that sometime around July 2017, Donald's girlfriend Kori Posey ("Kori") opened a credit card in her grandmother's name without permission. On July 13,

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<sup>2</sup> Kentucky Revised Statute ("KRS") 434.650.

<sup>3</sup> KRS 434.650.

<sup>4</sup> KRS 532.080(3).

2017, Donald went to a local cellphone store and used said credit card to pick up a repaired cellphone and buy a new one. He signed for the charges and was identified by the store's cashier. There was additional evidence that the same credit card was used on July 11<sup>th</sup> to make one of Donald's restitution payments to Walmart, though there was no proof that Donald himself made the payment. It was also used to pay for cable and other services at Donald and Kori's residence. Again, there was no proof presented that Donald made those payments.

The trial court found that the Commonwealth proved by a preponderance of the evidence that Donald violated his probation by participating in felony conduct, *i.e.* Fraudulent Use of a Credit Card or being complicit in that activity. Orally, the court found the following:

At the defense's request, I reviewed previously the preliminary hearing conducted in this particular case, so I have that information . . . . I've heard the testimony. This is not a beyond a reasonable doubt standard. This is not a beyond clear and convincing evidence standard. This is whether or not I think by a preponderance of the evidence this defendant has violated the terms of his probation. I do think he has done that. I do find that he's done that by a preponderance of the evidence by new felony conduct of fraudulent use of a credit card, theft of identity, or being complicit in such activity. Revocation order entered, judgment of eight years imposed. We'll see him back on his other dates on the new cases. That concludes the matter.

The court's written revocation order parroted the foregoing language in its "Findings of Fact" section. The order's "Conclusions of Law" section included pre-written

lines with blank spaces meant for checkmarks, if appropriate. The trial court checked the following lines: “Defendant has failed to comply with the conditions of supervision, and this failure constitutes a significant risk to the community at large”; “[i]t has been further noted that Defendant cannot be appropriately managed in the community by Probation and Parole”; “[t]he Court finds that there is a high risk of future criminal behavior by Defendant and incarceration is an appropriate sanction”; and “[t]he Court finds that there are not appropriate interventions in the community which may assist the Defendant in remaining compliant and crime-free.” The court therefore revoked Donald’s parole, and this appeal followed.

## **II. ANALYSIS**

### **A. STANDARD OF REVIEW**

We review a lower court’s decision to revoke parole for abuse of discretion. *Commonwealth v. Andrews*, 448 S.W.3d 773, 780 (Ky. 2014). To constitute an abuse of discretion the trial court’s decision must be “arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” *Id.* (quoting *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999)).

### **B. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY REVOKING DONALD’S PAROLE**

We begin with some introductory information about the parole revocation statute: KRS 439.3106. “In 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. The goal of HB 463 is to focus “on rehabilitation rather than incarceration, [and] the policy [now is] to ‘maintain public safety and hold offenders accountable while reducing recidivism and criminal behavior and improving outcomes for those offenders who are sentenced[.]’” *Helms v. Commonwealth*, 475 S.W.3d 637, 641 (Ky. App. 2015) (quoting KRS 532.007(1)). HB 463 enacted several new statutes, including KRS 439.3106, which provides in its entirety:

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.

Prior to KRS 439.3106, a defendant’s probation could be revoked if it was established by a preponderance of the evidence that the defendant violated a term of his probation. *See Rasdon v. Commonwealth*, 701 S.W.2d 716 (Ky. App. 1986). Now, before a trial court may revoke a defendant’s probation, it must find by a preponderance of the evidence that a violation of the defendant’s probation

occurred, and “the probationer’s failure to comply with the terms of probation constitutes a significant risk to [his] prior victims . . . or the community at large, and that the probationer cannot be appropriately managed in the community.” *Andrews*, 448 S.W.3d at 777 (internal quotations omitted).

Donald argues the circuit court’s decision to revoke his parole was an abuse of its discretion for two reasons: (1) because it did not specifically state the evidence it relied on in making its decision; and (2) because there was no evidence to support its finding that Donald’s violation constituted a significant risk to the community. We will address each of these arguments in turn.

Donald’s first contention is that the trial court was required to state the specific evidence upon which it relied in deciding to revoke his probation, and merely putting checks next to pre-written lines on its order was insufficient. To address this argument, we first note that there is nothing on the face of the statute that requires a court to state the specific evidence it relied upon in making a parole revocation decision. However, Donald uses two cases to support his argument: *Commonwealth v. Alleman*, 306 S.W.3d 484 (Ky. 2010), and *Helms, supra*.

Donald uses *Alleman* to argue that a trial court is required to make specific findings as to the evidence it relied on to revoke someone’s probation. We disagree. In *Alleman*, a pre-KRS 439.3106 case, the sole question addressed by the Kentucky Supreme Court was whether a trial court’s findings of fact and reasons

for revocation entered orally on the record, rather than written, were sufficient to satisfy the defendant's due process rights. *Id.* The court concluded that:

oral findings and reasons for revocation as stated by the trial court from the bench at the conclusion of a revocation hearing satisfy a probationer's due process rights, presuming the findings and reasons support the revocation, when they are preserved by a reliable means sufficiently complete to allow the parties and reviewing courts to determine the facts relied on and the reasons for revoking probation.

*Id.* at 484-85. Therefore, the holding was not that the trial court must make explicit findings as to the evidence it relied on in making a decision to revoke a defendant's parole. Rather, it was simply that if a court chooses to make those findings orally, the defendant's due process rights are not violated.

In a similar vein, Donald cites *Helms* to denounce the circuit court's use of a pre-written, check-the-box form. In *Helms*, a post-KRS 439.3106 case, the defendant agreed to plead guilty to drug charges in exchange for being placed in a pretrial diversion program for two years. *Helms*, 475 S.W.3d at 639. His pretrial diversion agreement contained a zero-tolerance provision: any violation of the agreement would automatically terminate it. *Id.* The defendant violated the agreement by failing a drug test. *Id.* at 640. The trial court revoked the defendant's agreement and, although it stated it was enforcing the zero-tolerance provision, its ultimate opinion included the required considerations under KRS

439.3106. *Id.* at 645. Therefore, this court addressed the question of “whether within our new statutory scheme of rehabilitation versus incarceration, a zero-tolerance provision can be reconciled with the statutory mandate.” *Id.* at 643.

The court declined to completely bar the use of zero-tolerance provisions in diversion agreements, fearing such a holding would run afoul of the separation of powers doctrine. *Id.* at 644 (citing *Knox v. Commonwealth*, 361 S.W.3d 891, 899 (Ky. 2012)).<sup>5</sup> However, it did find that “a judge’s commitment to a predetermined outcome upon a violation of a condition of diversion without consideration of KRS 439.3106 is an abuse of discretion.” *Id.* The court went on to say:

If 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.

*Id.* at 645. The court held that there was insufficient evidence in the record to support the trial court’s revocation. *Id.* The court found that the fact that the defendant failed a drug test was insufficient to revoke his pretrial diversion: it was his first drug-related offense, and there was no evidence that he would not

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<sup>5</sup> “While the courts have the authority to accept or reject a plea agreement . . . the making of an agreement whereby the Commonwealth binds itself to recommend a particular sentence is a power of the executive branch.” *Knox*, 361 S.W.3d at 899 (internal citations omitted).

cooperate with, and benefit from, drug treatment as opposed to incarceration. *Id.* Therefore, he was exactly the kind of defendant that the General Assembly envisioned would benefit from the rehabilitative focus of KRS 439.3106. *Id.*

Donald argues that the circuit court's findings in this case are akin to those this court found lacking in *Helms*. We disagree. The shortcoming of the trial court in *Helms* was not that it mechanically repeated the language of KRS 439.3106. Rather, it was that it revoked the defendant's diversion agreement without sufficient evidence to satisfy the requirements of KRS 439.3106. We read *Helms* to mean that as long as there is proof in the record established by a preponderance that the defendant violated the terms of his release, and that the statutory criteria are met, a trial court does not abuse its discretion by revoking a defendant's parole.

In this case, the trial court found by a preponderance that the defendant violated the terms of his parole. Preponderance of the evidence means that it is more likely than not that the violation occurred. *Burke v. Commonwealth*, 506 S.W.3d 307, 315 (Ky. 2016). The evidence presented was that Donald's girlfriend illegally opened a credit card in her grandmother's name, and Donald used that credit card to make purchases at a local cell phone store. There was further evidence that the card was used to make one of Donald's restitution payments to Walmart, and to pay for services at Donald's residence. Therefore,

we cannot find the court abused its discretion in finding that Donald violated his parole. But, as discussed above, finding a violation is no longer the end of a trial court's analysis. It must also find that said violation poses a risk to the prior victim or community at large and that the defendant cannot be properly managed in the community. In this case, the court made both of those findings by checking the pre-written lines on its order. We note it is preferable for trial courts not to use pre-written forms, but the fact that the court checked the required findings means that it considered them, and found their presence, as it was required to do. We therefore cannot find it abused its discretion.

This brings us to Donald's second claim of error: that there was no evidence to support the trial court's finding that his violation constituted a danger to the community. But we believe there was ample evidence to support that conclusion. Donald's original charges were several counts of Fraudulent Use of a Credit Card at Walmart, a store in the community. He violated his parole by fraudulently using a credit card at Hometown Wireless, another store in the community. There was also evidence that the credit card was used to pay one of Donald's restitution payments to Walmart and pay bills at his residence. Donald also has at least two prior felony convictions. Given that Donald's original charges and his probation violation were extremely similar, and that the violation occurred around a year after he was released, there's a high likelihood that he would

continue to perpetrate similar fraudulent schemes on other stores if permitted to remain in the community. Thus, we cannot find that the trial court abused its discretion.

### **III. CONCLUSION**

For the forgoing reasons, we conclude that the trial court did not abuse its discretion in revoking Donald's parole. We therefore affirm the Taylor Circuit's ruling.

ALL CONCUR.

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