

Commonwealth of Kentucky
Court of Appeals

NO. 2018-CA-000576-MR

CODY A. THOMAS

APPELLANT

v. APPEAL FROM CARROLL CIRCUIT COURT
HONORABLE R. LESLIE KNIGHT, JUDGE
ACTION NOS. 13-CR-00209 AND 16-CR-00136

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON, CHIEF JUDGE; DIXON AND LAMBERT, JUDGES.

LAMBERT, JUDGE: Cody Thomas has appealed from the order of the Carroll Circuit Court revoking his probation, arguing that the trial court failed to follow the dictates of Kentucky Revised Statutes (KRS) 439.3106 or *Commonwealth v. Andrews*, 448 S.W.3d 773 (Ky. 2014), when it did so. We affirm.

On December 2, 2013, Thomas, who at that time was twenty-three years old, was indicted by the Carroll County grand jury on five counts of possession or viewing of matter portraying a sexual performance by a minor in violation of KRS 531.335 (a Class D felony) and five counts of distribution of matter portraying a sexual performance by a minor in violation of KRS 531.340 (also a Class D felony).¹ In the Uniform Citation dated November 25, 2013, Detective Kurt Buhts of the Kentucky State Police described the offenses as follows:

In [the] course of an online undercover investigation five (5) video files of child sexual exploitation were distributed from an IP address belonging to the above listed address [in Carrollton, Kentucky] to the Kentucky State Police. A search warrant was obtained for the above listed address. During a preliminary preview of the above listed subject's laptop computer, an excess of 100 video files of child sexual exploitation were located. The above listed subject [Thomas] admitted to downloading and viewing video files of child sexual exploitation on his laptop computer. The above listed subject described the videos of child sexual exploitation as "underage children" (between 8-10 years old) having consensual sexual intercourse with adults.

Thomas consented to speak with Detective Buhts while the search warrant was being executed at the residence where he lived with his father. Thomas told the detective that he had been sexually abused by an older cousin when he was five or

¹ Action No. 13-CR-00209.

six years old and learned how to download videos of underage children having sex when he was in his early teens. He described himself as having a downloading addiction and had unsuccessfully tried to quit this in the past. He said that watching videos of child pornography helped satisfy urges he had to engage in sex with a child, but he denied ever having a sexual relationship with a child. Thomas used a peer-to-peer file sharing program to download these videos onto his computers.

Thomas entered a plea of not guilty, and a public defender was appointed to represent him. The court also ordered Thomas to be evaluated by the Kentucky Correctional Psychiatric Center (KCPC) to determine whether he was competent to stand trial and criminally responsible at the time of the charged crimes. Following a hearing, Thomas was found competent.

In lieu of going to trial, Thomas opted to accept the Commonwealth's offer on a plea of guilty to the charges in the indictment. The Commonwealth recommended a sentence of five years on each count to run concurrently for a total of five years and a fine of \$1,000.00. The Commonwealth did not oppose placing Thomas on a five-year reporting probation, subject to the standard conditions and the additional conditions that he submit to DNA testing and enroll and complete a community-based sex offender treatment program; not have contact with anyone under the age of 18 without authorization of his probation and parole officer; not

use or access any social networking websites, instant messaging, or chatroom programs that allow access to a person under the age of 18; abide by the terms of the Computer Use Agreement for Sex Offenders from the Kentucky Department of Corrections, Probation and Parole; have no expectation of privacy regarding any computer use or electronic media use, or with any information stored on a computer device of which he had possession; complete a substance abuse evaluation; and not use illegal drugs or alcohol. The court accepted Thomas' plea and sentenced him to five years of probation on August 7, 2014, pursuant to the plea agreement, subject to a list of conditions. By separate order, the court ordered Thomas to register as a lifetime sex offender.

In May 2016, less than two years later, Thomas was arrested on a parole violation warrant, and the Commonwealth moved to revoke his probation the next month. In its motion, the Commonwealth stated that Thomas had violated several conditions of his probation, including being in possession of pornographic material, violating supplemental conditions for sex offenders, associating with a convicted felon, and committing new felony offenses (possession and distribution of matter portraying a sexual performance by a minor). Probation Officer Jonathan Carroll described Thomas' parole violations as follows:

Possession of pornographic material

On May 27, 2016, Officer Stacy Warren received a phone call from the Carroll County Sheriff's Department in reference to Cody Thomas having child pornography

on his cellular device. Deputy Rodney Hawkins and Officer Stacy Warren met with Cody Thomas at Al's mini mart. Mr. Thomas had a smartphone and gave password to the Officers. Officers found 42 pornographic videos on the phone, mostly child pornography and a few with adults. Some children were as young as around 7 years old. Subject also had 7 pornographic photos on the phone and internet access. Mr. Thomas admitted to going to two different websites to file share child pornography. He also admitted that he has been downloading and watching porn since completing the SOTP program.

Violation of supplement conditions of supervision for sex [offenders]

As part of the Sex Offender supplemental conditions, Cody Thomas was ordered by Probation and Parole to not access the internet in any way. Mr. Thomas was also ordered to specifically not own or possess a smartphone device with the capability of internet or file sharing.

Associating with a convicted felon

On May 27, 2016, Cody Thomas was found parked at Al's Mini mart in Carrollton, Kentucky. Mr. Thomas was found with another convicted felon who is on supervision riding in the vehicle. Mr. Thomas signed conditions of supervision which specifically states that anyone on supervision may not associate with any other convicted felons.

New felony arrest

On May 27, 2016, Officer Stacy Warren received a phone call from the Carroll County Sheriff's Department in reference to Cody Thomas having child pornography on his cellular device. Deputy Rodney Hawkins and Officer Stacy Warren met with Cody Thomas at Al's mini mart. Mr. Thomas had a smartphone and gave password to the Officers. Officers found 42 pornographic videos on the phone, mostly child pornography and a few with adults. Some children were

as young as around 7 years old. Subject also had 7 pornographic photos on the phone and internet access. Mr. Thomas signed a consent to search form on this date. Officers went to Mr. Thomas' residence where he admitted to going to two different websites to file share child pornography. Mr. Thomas gave officers the names of the sites [sic] and explained how to trade files with other people using these sites. He also admitted that he has been downloading and watching porn since completing the SOTP program. Officers arrested Mr. Thomas and he will be charged with a new felony and probation violations.

Establishing a dating, intimate, sexual relationship
w/adult

Mr. Thomas admitted to using the website Craigslist to find other men for sexual relationships to Officer Stacy Warren and Officer Deputy Rodney Hawkins. Mr. Thomas, as part of the signed supplemental conditions for sex offenders was advised to not answer any personal advertisements that may lead [to] personal contact.

The probation officer recommended that graduated sanctions were not appropriate “due to his documented pattern of failure to comply with conditions of supervision” and that his probation be revoked “due to the severity and nature of the crimes and violations committed.”

While the motion to revoke was pending, the Carroll County grand jury returned a new indictment, charging Thomas with one count each of possession or viewing of matter portraying a sexual performance by a minor and of distribution of matter portraying a sexual performance by a minor.² He was also

² Action No. 16-CR-00136.

charged with the status offense of being a second-degree persistent felony offender (PFO II) pursuant to KRS 532.080. Thomas entered a not guilty plea at his arraignment, and he hired an attorney to represent him in both cases. A second competency evaluation from KCPC was ordered in August, and the court again found Thomas competent to stand trial and assist in his defense following a competency hearing and the introduction of a follow-up report by order entered April 13, 2017.

The same month, the court held a revocation hearing related to the 2013 case in conjunction with a guilty plea hearing related to the 2016 case. The court accepted Thomas' plea of guilty to the possession and distribution charges, and it entered a judgment on April 26, 2017, finding him guilty and dismissing the PFO II charge. On the docket order, the court wrote that it was instituting a zero-tolerance policy and that any violation would result in immediate grounds for revocation. In the final judgment entered June 20, 2017, the court sentenced Thomas to two five-year terms of imprisonment to be served concurrently, a fine of \$1,000.00, and court costs. The court then probated Thomas' prison sentence, subject to an extensive list of conditions, including that he serve 365 days in prison; commit no more offenses; report to his Probation and Parole officer; not use illegal drugs or alcohol or be around anyone using or possessing such items; abide by the terms of the Kentucky Supplemental Conditions for Sex Offenders

(noting that “any violation of any of said conditions will constitute immediate grounds for full revocation”); enroll in and complete an approved, community-based sex offender treatment program; have no unsupervised contact with any person under the age of 18; not use a computer, tablet, or cellular phone; not use or access any social media networking websites or instant messaging or chatroom programs; reside with his father and be on an 8:00 pm curfew, with any violation of the curfew constituting immediate grounds for full revocation; and comply with treatment recommendations from Dr. David Breeding’s latest assessment. Thomas was accepted in the Kentucky Sex Offender Treatment Program on May 23, 2017.

The court ruled on the motion to revoke in an order entered August 17, 2017, wherein it noted that Thomas admitted to the allegations. It ultimately declined to revoke his probation, reinstated his probation with his term of probation tolled from the date of his violation until the date of his reinstatement, and credited him with time served for violating the terms of his probation. The order was entered *nunc pro tunc* April 17, 2017.

On November 27, 2017, Probation and Parole Officer Connor Jeffries completed a violation of supervision report, noting Thomas had been placed on supervision in May of 2017. After listing his prior violations as detailed above, Officer Jeffries described his current violation as follows:

Termination for KY Sex Offender Treatment Program

On 11/20/2017 this Officer received a termination letter from SOTP for Cody Thomas. Mr. Thomas was terminated from the program for violations of provisions of treatment contract, being disruptive in group therapy and refusal to change unhealthy pre-offense behavior(s). It was noted by Ms. Debbie Roth that Mr. Thomas is not amenable to treatment.

The termination notice completed by Social Services Clinician I Debbie Roth described in more detail the reasons that Thomas was terminated from the Sex Offender Treatment Program, noting that he had lied to the treatment team on several occasions and that his treatment team had addressed his lies after each occasion. These lies involved whether he was permitted to have alcohol in his home, whether he could go to Dave and Busters, and whether he could go to Indiana where minor children would be present. Thomas claimed to be confused and that he had trouble telling the truth. The report concluded that “[h]is continued lying and behavior demonstrates his failure to change high-risk pre-offense behavior, and he is not amenable to treatment.” Thomas was arrested for the parole violation, and the Commonwealth filed a motion to revoke his probation due to his termination from the sex offender treatment program.

The court held a revocation hearing on March 5, 2018, and heard testimony from several witnesses. Debbie Roth, called by the Commonwealth, is the Social Services Clinician for the Sex Offender Treatment Program. She runs groups for the program. Thomas was referred to the program on May 23, 2017, by

his probation and parole officer to enroll in and complete the sex offender treatment program. She met with and interviewed Thomas on June 9, 2017, at which time he was enrolled into the program and signed the treatment contract. Treatment sessions did not begin until August 30, 2017, although Thomas maintained weekly telephone contact with her until that date, when he began meeting with her for hour-and-a-half weekly sessions at the probation and parole office.

Roth discussed Thomas' termination from the program in November 2017. Thomas had lied to her and the treatment team multiple times, when honesty was an essential part of the program. He would go back and forth between the team members, including his probation officer, saying one had given him permission to do something when that was not the case. His lies were addressed after each incident, and he stated that he had problems remembering what he was and was not supposed to do and with his ability to comprehend. Team members told him to write things down so that he would remember the information. Roth stated that the treatment providers were having to take time out from the programs to address Thomas' behavior, which was not beneficial to anyone. Roth did not believe Thomas was amenable to treatment, and Thomas was not able to re-enroll in her program. His pre-offense behavior of looking at pornography and his

continued lying to the treatment group indicated that he was not taking the program seriously.

On cross-examination, Roth agreed there were approved private providers that could provide sex offender treatment, and that he could enter one of those programs. She also agreed that Thomas had reported at his intake interview that he had a traumatic brain injury. This was addressed with suggestions that he take notes during sessions and ask for help. He would repeat back in his own words what he heard in the program, and he appeared to know what the information meant. His parents were welcome to come to treatment sessions every three months, but not on a weekly basis.

Roth believed that Thomas knew the difference between the truth and a lie, and he was intentionally bending the truth to get what he wanted. Roth referred Thomas to Sallie Ingram at Triad for counseling due to his anxiety after he had talked about his anxiety during the first few weeks of the program and did not feel his medications were working. Roth did not have time to deal with Thomas' anxiety in the sex offender treatment program. However, she believed he was compliant with his treatment plan with Ingram. Roth agreed that Thomas had been viewing pornography after his first offense, but before he started treatment with her; he had not visited any minors in Indiana; she was not aware that there was a home visit made related to alcohol in the house because that was not her

responsibility to discover; and she did not know whether he went to Dave and Busters. Roth testified that Thomas continued to fail to comply with the supplemental conditions he signed with his parole officer or to change his pre-offense behavior, and that he was not amenable to treatment. He would still have to complete sex offender treatment, although not in her program.

Officer Connor Jeffries testified next. He is a probation officer in the LaGrange office and supervised Thomas' probation. He discussed the three instances that constituted lying behavior by Thomas. He believed Thomas understood what he had said to him. Jeffries went on to testify that Thomas regularly reported to him and was straightforward. He was not aware that Thomas had a traumatic brain injury or that he had been referred for counseling to Triad. He believed there were sex offender treatment programs in which Thomas could enroll in the Northern Kentucky area.

Sallie Ingram was the last witness to testify.³ She is a licensed clinical social worker in the area of mental health therapy at Triad Health Services. She began seeing Thomas in September 2017, when he was concerned with his depression and anxiety attributed to his sex offender status. He was worried about doing the wrong thing and being put back in jail, and that people would find out

³ Thomas had previously filed a letter dated November 23, 2017, from Ingram related to his medical and mental health conditions as well as his honesty and ability to comprehend.

about his status as a sex offender. Thomas had asked if his parents could come in to ensure that he was hearing her correctly. She permitted his parents to come in to the sessions, and this was beneficial. She continued to see him on a weekly basis until he was arrested in November. She noticed that Thomas had problems with comprehension, and he had to repeat what she said or say it in different ways. Thomas needed more in-depth explanation to understand concepts.

Thomas reported to Ingram that he had problems in group settings and completing assignments; she referred him back to the program group leader for that. Related to his lying behavior, Thomas expressed confusion to her about which person he was supposed to ask for permission. Ingram believed his anxiety and depression affected his ability to comprehend and complete his assignments. Ingram believed Thomas needed more individualized attention to get through certain requirements of the sex offender treatment program.

At the conclusion of the testimony, Thomas, through his attorney, requested that he be permitted to complete his treatment program in the community. The individualized treatment he needed would not be available to him while incarcerated. The only allegation set forth in the motion to revoke was that Thomas had lied. He had not viewed pornography, consumed alcohol, been around minors, or used the internet. Thomas asked to be placed on house arrest and for placement in a community-based treatment program that would not be

available to him in the Department of Corrections. The prosecutor acknowledged that this was a hard case because mental health concerns were present, but she recognized that she had a statutory duty to protect the public. The parties and the court had dealt with Thomas differently in the past than others because of his mental health issues, and they worked with him to enter into a plea agreement and set up supervision with probation and parole that was tailored to help him. After he violated his probation the first time, they worked together to address that violation and his second indictment. She did not know any other option for Thomas in this case based upon the entirety of the record. Thomas argued that the pre-offense behavior was not a part of the current revocation proceedings and that he had one more chance at treatment in the community.

The court ultimately decided to revoke Thomas' probation, making oral findings on the record followed by a written order on March 22, 2018. In the order, the court found that Thomas "failed to comply with the conditions of supervision and, therefore, [he] constitutes a significant risk to the community at large and cannot be appropriately managed in the community[.]" The court waived the payment of fines, fees, and costs, and remanded Thomas to the Carroll County Sheriff to transfer him to the Department of Corrections to serve his consecutive five-year prison sentences from the two indictments. This appeal now follows.

On appeal, Thomas contends that the circuit court did not comply with KRS 439.3106 when it revoked his probation. In *Helms v. Commonwealth*, 475 S.W.3d 637, 641 (Ky. App. 2015), this Court addressed the applicable burden of proof and standard for review of a lower court’s decision in a revocation proceeding:

The Commonwealth’s burden [to revoke a defendant’s probation] is to prove by a preponderance of the evidence that the defendant violated the conditions of his or her probation. *Murphy v. Commonwealth*, 551 S.W.2d 838, 841 (Ky. App. 1977). 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. *Tiryung v. Commonwealth*, 717 S.W.2d 503, 504 (Ky. App. 1986). On appellate review, the traditional test was simply 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). Great deference was paid to a trial court’s decision to revoke probation and was not an abuse of discretion if there was evidence to support at least one probation violation. *Messer v. Commonwealth*, 754 S.W.2d 872, 873 (Ky. App. 1988).

In 2011, the General Assembly adopted a corrections reform bill in House Bill 463, which brought about significant changes to this area of statutory law. This legislation included the addition of KRS 439.3106, which currently provides:

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 *Helms* Court explained the statutory changes in more depth:

Faced with an increasing prison population and its associated costs, the General Assembly passed landmark legislation and declared a new sentencing policy of this Commonwealth. Focusing on rehabilitation rather than incarceration, it is now the policy to “maintain public safety and hold offenders accountable while reducing recidivism and criminal behavior and improving outcomes for those offenders who are sentenced[.]” KRS 532.007(1). In cases involving nonviolent drug offenses, “therapeutic intervention and ongoing individualized” treatment plans “shall” be used instead of incarceration. KRS 218A.005. To further this Commonwealth's penal policy, the statutory law regarding probation and other forms of supervised release underwent significant change by creating KRS 439.3107 and companion statutes.

KRS 439.3107 instructs the DOC to “adopt a system of graduated sanctions for violations of conditions of community supervision” for the most common types of violations. Common violations include: failure to report, failure to pay fines and fees, and failure to refrain from the use of alcohol or controlled substances. *Id.* The statute instructs that the system of sanctions “shall take into account factors such as the severity of the current

violation, the supervised individual's previous criminal record, the number and severity of any previous supervision violations, the supervised individual's assessed risk level, and the extent to which graduated sanctions were imposed for previous violations." *Id.* (Emphasis added).

Helms, 475 S.W.3d at 641-42.

In addition, the *Helms* court addressed the use of zero-tolerance provisions, observing, "[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." *Id.* at 645. The Supreme Court emphasized the mandatory nature of the court's inquiry in *Andrews*, 448 S.W.3d at 781 ("KRS 439.3106(1) requires trial courts to find that the probationer's failure to abide by a condition of supervision constitutes a significant risk to prior victims or the community, and that the probationer cannot be managed in the community before probation may be revoked."). However, the Court also held that "[w]hile HB 463 reflects a new emphasis in imposing and managing probation, it 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.

In the present case, Thomas argues that the circuit court did not address the statutory standard in either its oral or written rulings. Rather, it only

found he was not amenable to treatment in the oral ruling and perfunctorily recited the statutory language in the written order. Thomas asserted that the circuit court failed to make any findings as to how Thomas was a risk to the community and could not be managed in the community, failed to consider alternative sanctions, and applied the zero-tolerance provision of Thomas' plea agreement. Thomas argued that this lack of findings, coupled with the only basis for revocation being Thomas' lies, as opposed to possessing pornography, being around children, or not reporting to his parole officer, warranted reversal. We find no merit in Thomas' argument.

As the Commonwealth argues in its brief, the record supports the findings of the circuit court that revocation was appropriate in this case. In its oral ruling, the circuit court set forth its specific findings related to the statutory requirements of KRS 439.3106:⁴

I have every reason to believe that there's no other options because we have tried them all, and because you don't have the history with this case that I have, and I don't even go back to the '13 case. I know he was on probation and then got his hands on a phone and downloaded the same kind of matter portraying sex with minors, which is illegal. It is a mental illness, I understand all that, but we have worked very hard on this

⁴ See *Commonwealth v. Alleman*, 306 S.W.3d 484, 487 (Ky. 2010) (“we see no reason why oral findings made from the bench, as long as otherwise adequate, cannot satisfy the due process requirement of [*Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972)], at least where, as here, 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.’”).

case, [the Commonwealth's Attorney], his attorney, and them working with the parents. He's out of options, he's not amenable to treatment. I find that he has violated his probation, and the only way that I can feel certain and sleep at night that he's not going to perpetrate on someone in the community is to revoke his probation.

These findings address both the risk to the community at large and Thomas' inability to be appropriately managed in the community due to his prior and current violations of the conditions of his parole. While his current violation was his termination from the sex offender treatment program for lying, even his attorney agreed that his case could not be viewed in a vacuum. Rather, Thomas was seeking yet another chance to participate in a program that he had completed in the past, after which he returned to the same behavior, and from which he had been terminated while enrolled for a second time. Under these circumstances, we find no abuse of discretion in the circuit court's decision to revoke Thomas' probation and impose a sentence of imprisonment.

Finally, related to the zero-tolerance provision included in his second supervision order, we agree that, while such provisions are still permitted, the lower court is required to consider the factors of KRS 439.3106. *See Helms*, 475 S.W.3d at 644. Thomas argues that the circuit court's finding that it was "out of options" meant that it was implicitly applying the zero-tolerance provision. The court never mentioned this provision, either in court or in its order. Instead, the court carefully considered the facts of Thomas' current violation as well as his

previous violations before concluding that revocation was appropriate in this instance.

For the foregoing reasons, the order of the Carroll Circuit Court revoking Thomas' probation is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Steven J. Buck
Adam Meyer
Assistant Public Advocates
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Andy Beshear
Attorney General of Kentucky

Leilani K. M. Martin
Assistant Attorney General
Frankfort, Kentucky