RENDERED: SEPTEMBER 27, 2019; 10:00 A.M.
NOT TO BE PUBLISHED

# Commonwealth of Kentucky

# Court of Appeals

NO. 2018-CA-000739-MR

RASHAWN L. YOUNG — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE DARRYL LAVERY, JUDGE
ACTION NOS. 11-CR-001778 AND 12-CR-002726

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON, JONES, AND LAMBERT, JUDGES.

DIXON, JUDGE: Rashawn Young appeals from the Jefferson Circuit Court's final judgment and sentence of imprisonment, following the court's order revoking his probation. We affirm.

The events of this case began with Young's arrest in 2010 for drug trafficking and his subsequent arrest in 2012 on charges relating to an incident of domestic violence. Following his two indictments by the Jefferson County grand

jury, Young entered a comprehensive *Alford* plea[1] to resolve his charges. Pursuant to his negotiated plea, the Jefferson Circuit Court convicted Young of first-degree possession of a controlled substance (cocaine),[2] second-degree assault,[3] first-degree wanton endangerment,[4] tampering with physical evidence,[5] theft by unlawful taking (under $10,000),[6] and third-degree terroristic threatening.[7] On October 17, 2013, the trial court sentenced Young to ten years' imprisonment on all charges, probated for five years.

Unfortunately, within a few months, Young began to violate the conditions of his probation in a pattern which continued over several years. Young would frequently miss his drug screens, test positive for marijuana, or test positive for cocaine. Probation Officer Amber Ulanowski filed a report on January 6, 2014, alleging that Young had failed to report for drug testing as directed. In another

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[1] *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L.Ed.2d 162 (1970). An *Alford* plea "permits a conviction without requiring an admission of guilt and while permitting a protestation of innocence." *Wilfong v. Commonwealth*, 175 S.W.3d 84, 103 (Ky. App. 2004). "The entry of a guilty plea under the *Alford* doctrine carries the same consequences as a standard plea of guilty." *Id*. at 102 (internal quotation marks and citation omitted).

[2] Kentucky Revised Statutes (KRS) 218A.1415, a Class D felony punishable by up to three years' incarceration.

[3] KRS 508.020, a Class C felony.

[4] KRS 508.060, a Class D felony.

[5] KRS 524.100, a Class D felony.

[6] KRS 514.030(2)(d), a Class D felony.

[7] KRS 508.080, a Class A misdemeanor.

report filed February 10, 2014, Officer Ulanowski asserted that Young tested positive for marijuana in one test and failed to report for a test the next day. As a result of these violations, the trial court held a hearing and sanctioned Young, ordering him to serve ten days' incarceration with work release. Nevertheless, Young's violations continued. Officer Ulanowski filed a report on May 1, 2014, alleging that Young had used marijuana and failed to attend substance abuse treatment. The Commonwealth subsequently moved the trial court to revoke Young's probation, but the prosecutor failed to appear for the hearing. Officer Ulanowski filed a report on March 23, 2015, alleging that Young had received a new felony drug arrest. She also filed reports on April 9, 2015; June 11, 2015; July 9, 2015; August 14, 2015; and September 10, 2015, all of which asserted that Young had admitted to cocaine use, marijuana use, or both. Pursuant to an agreed order entered on October 23, 2015, the court sanctioned Young for these violations by placing him on home incarceration for ninety days with work release.

Less than one year later, beginning on September 15, 2016, and continuing through January 11, 2018, Officer Ulanowski filed another series of reports alleging that Young had violated probation. These reports would form the basis for the current action to revoke Young's probation. In the September 15, 2016 report, Young admitted using marijuana and cocaine. In a report filed November 7, 2016, Young admitted using marijuana. On February 3, 2017,

Officer Ulanowski reported that Young had used marijuana, cocaine, and alcohol. On March 8, 2017, Officer Ulanowski reported that Young had failed to complete his substance abuse program and was discharged as noncompliant. In her report of June 16, 2017, Officer Ulanowski reported that Young admitted to cocaine and marijuana use. On October 27, 2017, the officer filed a report alleging that Young used marijuana and failed to report. On November 13, 2017, Officer Ulanowski filed a report alleging that Young had used marijuana, cocaine, and alcohol. On December 28, 2017, Officer Ulanowski filed a report asserting that Young had used alcohol and marijuana, failed to submit to drug testing as ordered, and failed to seek substance abuse treatment. Finally, on January 11, 2018, Officer Ulanowski filed a report alleging that Young had used marijuana and cocaine.

The trial court held a probation revocation hearing on April 4, 2018. Young stipulated to all but one of the violation reports between September 15, 2016, and January 11, 2018. Young disputed the report of March 8, 2017, in which Officer Ulanowski characterized his discharge from the substance abuse outpatient facility as a failure to complete treatment. Young's discharge letter pronounced him as having "reached maximum therapeutic benefits." Young asserted this meant he had completed the program. However, the discharge letter also indicated that Young had five positive drug screens while enrolled at the facility. Officer Ulanowski also received a discharge summary from Young's

primary therapist. As described by the officer, the discharge summary portrayed Young as not responsive to treatment because he believed the "disease of addiction" meant he should be able to continue using drugs without consequences. The summary also specified that Young would be better suited for a higher level of care at an inpatient facility. Based on the positive screens noted in the discharge letter, the discharge summary, and notes from facility personnel, Officer Ulanowski believed that Young was discharged because he was confrontational, disruptive in groups, and continued to use drugs—not because he had successfully completed the program.

At the conclusion of the revocation hearing, the trial court made oral findings stating that Young had a drug problem, the depth of which he had failed to acknowledge. The trial court was incredulous at the history of this case, which was replete with positive drug screens and delays. The trial court found that Young did not truly feel accountable for his behavior. Furthermore, the trial court agreed with the Commonwealth that Young was adept at producing explanations and excuses. The trial court acknowledged that Young was doing much better than some in his situation, insofar as Young was able to maintain employment and pay his child support. However, the trial court also found that Young had a "wildly uncontrolled drug problem" which could lead to bad results in the future. The trial court orally revoked Young's probation, stating it would enter an order citing the stipulated

violations and the failure to complete drug treatment as demonstrating that Young had failed to abide by the terms of his probation.

On April 10, 2018, the trial court entered a written order containing the stipulated probation violations in its findings of fact, as well as finding a further violation in how Young had failed to complete treatment for substance abuse as alleged in the March 8, 2017 report. The trial court then granted the Commonwealth's motion to revoke Young's probation, stating "the Defendant's failure to complete drug treatment and repeated failure to comply with the conditions of his supervision constitutes a significant risk to the community at large and . . . he cannot be appropriately managed in the community." This appeal followed.

Before getting into the merits of the appeal, the Commonwealth presents us with a threshold question as to whether this case is moot. The Commonwealth asserts that Young was granted shock probation after the filing of his notice of appeal; therefore, this Court can grant no meaningful relief. We decline to entertain the Commonwealth's mootness argument for two separate reasons. First, the grant of shock probation is not contained within the record. "Matters not disclosed by the record cannot be considered on appeal." *Ray v. Ashland Oil, Inc.*, 389 S.W.3d 140, 145 (Ky. App. 2012) (quoting *Montgomery v. Koch*, 251 S.W.2d 235, 237 (Ky. 1952)). Second, even if we could consider the

grant of shock probation, it would not necessarily result in mootness. In *Bowlin v. Commonwealth*, 357 S.W.3d 561 (Ky. App. 2012), we determined a revocation of conditional discharge was *not* mooted by a grant of shock probation because "the issues involved in the case are 'capable of repetition, yet evading review.'" *Id*. at 565 (quoting *A.C. v. Commonwealth*, 314 S.W.3d 319, 327 (Ky. App. 2010)). Based on these considerations, we will proceed to the merits.

Young presents three related arguments on appeal. First, he argues that the trial court failed to make sufficient findings to revoke his probation as required by KRS 439.3106. Second, he argues that the trial court should have considered an inpatient drug treatment program rather than revocation. Third, he argues that the evidence did not support a finding that Young failed to complete his drug treatment program.

"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 v. Commonwealth*, 457 S.W.3d 728, 730 (Ky. App. 2015) (citing *Miller v. Eldridge*, 146 S.W.3d 909, 915 n.11 (Ky. 2004)).

For his first argument, Young contends that the trial court failed to make the required findings under KRS 439.3106 before revoking his probation. 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). The essential questions are "[w]hether the evidence of record supported the requisite findings that [Young] was a significant risk to, and unmanageable within, his community; and whether the trial court, in fact, made those requisite findings." *McClure*, 457 S.W.3d at 732.

In its order revoking probation, the trial court explicitly considered Young's violations and the criteria under KRS 439.3106 before finding Young posed a significant risk to the community at large and could not be appropriately managed in the community. Young argues that the trial court erred in failing to consider the statutory criteria before *orally* revoking his probation at the conclusion of the revocation hearing. However, the trial court's *written* findings satisfy the statutory requirements. "[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) (emphasis added).

Young also attempts to compare his case to *Helms v. Commonwealth*, 475 S.W.3d 637 (Ky. App. 2015), in which we held the trial court's KRS 439.3106 findings to be insufficient. However, in *Helms* we noted that the trial 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.* at 645. Here, the trial court did not merely parrot the statutory language as

denounced in *Helms*. Instead, the trial court properly cited Young's violations in support of its ruling, and the record shows Officer Ulanowski provided testimony supporting these alleged violations. In short, there was sufficient evidence presented to the trial court to support revocation under KRS 439.3106.

For his second issue, Young argues that the trial court should have considered an inpatient drug treatment program under KRS 439.3106(2) as a lesser sanction, rather than revoking his probation. However, KRS 439.3106 does not require the trial court to consider revocation only as a last resort. *Hall v. Commonwealth*, 566 S.W.3d 578, 581 (Ky. App. 2018). "KRS 439.3106 permits, but does not require, a trial court to employ lesser sanctions . . . . The elective language of the statute as a whole creates an alternative employed and imposed at the discretion of the trial court—discretion the Supreme Court insisted the trial court retained in light of the new statute." *McClure*, 457 S.W.3d at 732 (citing *Andrews*, 448 S.W.3d at 780). Additionally, as in *McClure*, Young had already received the benefit of multiple lesser sanctions before his probation was finally revoked. *Id*. The trial court did not abuse its discretion in declining to grant yet another lesser sanction.

For his final issue on appeal, Young contends that the circuit court did not have sufficient evidence to support a finding that he failed to complete drug treatment. We disagree. An appellate court defers to the factual findings of the

trial court. "Findings of fact . . . shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." Kentucky Rules of Civil Procedure (CR) 52.01. Clearly erroneous findings are those which are unsupported by substantial evidence. *Jones v. Livesay*, 551 S.W.3d 47, 50-51 (Ky. App. 2018); *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003). Despite Young's preferred interpretation of his discharge letter, Officer Ulanowski's testimony provided substantial evidence supporting a different conclusion, and the trial court did not clearly err in choosing to believe this testimony. We note also that the record and the trial court's order reflect how Young had a superabundance of other stipulated violations which would, of themselves, justify a decision to revoke probation. We discern no abuse of discretion.

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

ALL CONCUR.

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