

Commonwealth of Kentucky
Court of Appeals

NO. 2018-CA-000863-MR

JOHNNIE JACKSON

APPELLANT

v. APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE DANIEL J. ZALLA, JUDGE
ACTION NO. 15-CR-00668

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * * * * *

BEFORE: DIXON, LAMBERT, AND L. THOMPSON, JUDGES.

LAMBERT, JUDGE: Johnnie Jackson has appealed from the May 7, 2018, order of the Campbell Circuit Court revoking his probation and sentencing him to three years' imprisonment for his 2016 conviction for first-degree possession of a controlled substance. Because we agree with Jackson that the circuit court failed

to follow the requirements of Kentucky Revised Statutes (KRS) 439.3106(1), we reverse the order on appeal.

In June 2015, Jackson was arrested by Officer G. Adkisson of the Cold Spring Police Department after the vehicle in which he was a rear passenger was stopped on the AA Highway. After the driver gave consent to search, the officer found a plastic bag containing a large number of oxycodone pills taped to the inside of the engine compartment on the passenger side of the car. The occupants of the car denied ownership of the pills. The Campbell County grand jury returned an indictment in August 2015, charging Jackson with first-degree trafficking in a controlled substance, more than ten dosage units oxycodone, in violation of KRS 218A.1412. His two co-defendants later entered guilty pleas. In June 2016, Jackson moved to enter a guilty plea on the Commonwealth's recommendation that the charge be amended to first-degree possession of a controlled substance with a recommended three-year sentence probated for three years. The circuit court accepted Jackson's plea and sentenced him in accordance with the Commonwealth's recommendation. His probated sentence was subject to the requirements that he successfully complete a substance abuse evaluation and all recommended treatment by Probation and Parole and that he abide by the standard conditions of probation.

On September 19, 2016, Probation and Parole Officer Taliyah

Jefferson filed a violation of supervision report. The report noted that Jackson had signed his conditions of supervision on June 15, 2016, and that he had requested to transfer his probation to Ohio. Officer Leann McDonald completed the necessary paperwork for his transfer through the Interstate Compact, but his request was denied on August 30, 2016. Jackson's sponsor, Tracie Maynard, would not permit the officer to conduct an inspection of her residence, did not give the officer her telephone number, and did not follow up to schedule a home placement visit. Because Jackson had failed to contact his Ohio officer as he was requested to do and attempts to contact Jackson had been unsuccessful, Officer Jefferson recommended that Jackson's probation be revoked and requested that a warrant be issued for absconding from probation supervision. An arrest warrant was issued on September 20, 2016.

Jackson was not arrested on the warrant until April 5, 2018, and a revocation hearing was conducted later that month. Jackson's attorney informed the court that he stipulated to the information in the affidavit but would be arguing for mitigation and that Jackson should be permitted to remain on probation. Jackson's attorney went on to explain Ms. Maynard's actions the day the officer went to her residence, stating that she had been on her way to seek treatment for her daughter, and that Jackson had tried to contact the office for several days but

never heard back. He did acknowledge that Jackson knew he should have done more to make himself available, including contacting probation and parole in both states. He noted Jackson had experienced an element of confusion as to the supervision aspect of his probation. The Commonwealth requested that his probation be revoked for absconding and his failure to cooperate. The court noted that Jackson had not followed the rules of probation and parole or the court when he failed to report, when he knew he was supposed to do so and had some familiarity with criminal procedures. Therefore, the court found he could not be managed appropriately in the community and revoked Jackson's probation, concluding that anything other than revocation would not be appropriate because of the seriousness of absconding. The court imposed the three-year sentence in the original judgment and remanded Jackson into custody.

The court entered an order on May 7, 2018, memorializing its oral ruling. The court found that Jackson had been sentenced in June 2016 to a three-year sentence probated for three years pursuant to certain conditions, that his probation officer filed an affidavit in September 2016 stating that Jackson had absconded probation, that Jackson had stipulated to the information in the affidavit at the revocation hearing and asked to remain on probation, and that Jackson "is a risk to the community and cannot be managed in the community because he violated the terms and conditions of his probation by absconding supervision for an

extended period of time.” It concluded that “[t]he record demonstrates that [Jackson] has been given the opportunity to show the Court that he can be managed within the community. [Jackson’s] violation demonstrates that he is a significant risk to the community and that [he] cannot be managed in the community.” The court revoked Jackson’s probation and sentenced him in accordance with the final judgment. This appeal now follows.¹

On appeal, Jackson contends that the court failed to follow KRS 439.3106 when it revoked his probation while the Commonwealth argued that the court did not abuse its discretion in doing so.

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 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

¹ Jackson filed a *pro se* motion to vacate the order, which the court denied as untimely shortly after the notice of appeal was filed.

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. This bill brought about significant changes to this area of statutory law and included the addition of KRS 439.3106, which at the time of the events in this case provided:

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.

In *Helms*, the 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 observed, “[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 *Commonwealth v. Andrews*, 448 S.W.3d 773, 781 (Ky. 2014), stating that “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 recognized 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.

We must agree with Jackson that the circuit court did not make any findings, in either its written or oral rulings, related to whether Jackson’s violation constituted a significant risk to the prior victims or the community at large pursuant to the second criteria set forth in KRS 439.3106(1). In the written order, the court merely stated that Jackson’s violation demonstrated that he was “a significant risk to the community[.]” We also agree with Jackson that the Commonwealth failed to offer any evidence that he was a risk at all to any prior victims or the community. The Commonwealth contends that, because Jackson stipulated to the fact that he had absconded from supervision, it followed that he posed a significant risk to the community. We disagree with the Commonwealth because to do so would vitiate the intent of the statute in that, not only must the violation be proven by a preponderance of the evidence, but both statutory criteria must be met prior to revoking an individual’s probation. In the present case, there was no evidence presented that Jackson had committed another crime during the

time he had absconded from supervision and there was certainly some confusion surrounding Jackson's attempts to have his supervision transferred to Ohio and to contact the probation and parole office. Under these circumstances and in light of the circuit court's lack of findings related to the second prong of KRS 439.3106(1), we must hold that the circuit court abused its discretion in revoking Jackson's probation.

For the foregoing reasons, the Campbell Circuit Court's order revoking Jackson's probation is reversed, and this matter is remanded for further proceedings in accordance with this opinion, including the imposition of an appropriate remedy for his probation violation and the consideration of KRS 439.3106(2).

ALL CONCUR.

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