

RENDERED: NOVEMBER 8, 2019; 10:00 A.M.  
NOT TO BE PUBLISHED

# Commonwealth of Kentucky

## Court of Appeals

NO. 2018-CA-000916-MR

DOMINQUE LYTTLE

APPELLANT

v.

APPEAL FROM PERRY CIRCUIT COURT  
HONORABLE ALISON C. WELLS, JUDGE  
ACTION NO. 17-CR-00101

COMMONWEALTH OF KENTUCKY

APPELLEE

### OPINION AFFIRMING

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BEFORE: CLAYTON, CHIEF JUDGE; ACREE AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Dominique Lyttle brings this appeal from a May 18, 2018, Judgment and Sentence on Probation Violation by the Perry Circuit Court, revoking his probation and imposing a seven-year sentence of imprisonment. We affirm.

On May 1, 2017, Lyttle was indicted by a Perry County Grand Jury upon first-degree trafficking in a controlled substance and with being a second-degree persistent felony offender. Lyttle subsequently pleaded guilty to the

indicted offenses. By judgment entered December 5, 2017, Lyttle was sentenced to seven-years' imprisonment probated for a period of five years. As a condition of his probation, Lyttle was to undergo weekly drug testing. Less than a week after Lyttle was probated, he tested positive for cocaine. The Commonwealth requested that Lyttle's probation be revoked due to the positive drug test. By order entered December 22, 2017, the circuit court sentenced Lyttle to time served. The court also ordered that Lyttle undergo drug testing twice weekly, be evaluated by a social services clinician, and follow the clinician's recommendations. Shortly thereafter, Lyttle submitted a diluted urine sample that again tested positive for cocaine. As a result, the Commonwealth requested that Lyttle's probation be revoked. By order entered January 24, 2018, Lyttle was sentenced to serve 15 days' incarceration. He was further ordered to be drug tested twice weekly, complete the Intensive Outpatient Program, and complete the Substance Abuse Program.

In March of 2018, Lyttle submitted yet another diluted sample that was positive for cocaine. The Commonwealth again requested that Lyttle's probation be revoked. At an April 12, 2018, revocation hearing, the Commonwealth recommended that Lyttle be referred to drug court. Lyttle requested a continuance to consider participation in drug court; the court granted the continuance. Then, on May 17, 2018, Lyttle appeared before the circuit court

and declined participation in drug court. Lyttle refused to complete an inpatient drug rehabilitation program, which was a prerequisite to his acceptance into drug court. By Judgment and Sentence on Probation Violation entered May 18, 2018, Lyttle's probation was revoked, and the seven-year sentence of imprisonment was imposed. This appeal follows.

Lyttle contends the circuit court erred by revoking his probation and sentencing him to serve the seven-year sentence of imprisonment. More particularly, Lyttle asserts that graduated sanctions should have been imposed rather than his probation bring revoked.

Kentucky Revised Statutes (KRS) 439.3106<sup>1</sup> addresses the sanctions that supervised individuals are subject to when a probation violation occurs. And, KRS 439.3107 addresses graduated sanctions and provides, in relevant part:

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<sup>1</sup> Kentucky Revised Statutes 439.3106 provides:

- (1) Supervised individuals shall be subject to:
  - (a) 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
  - (b) 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

(1) [T]he system [for graduated sanctions] shall set forth a menu of presumptive sanctions for the most common types of supervision violations, including but not limited to: failure to report; failure to pay fines, fees, and victim restitution; failure to participate in a required program or service; failure to complete community service; violation of a protective or no contact order; and failure to refrain from the use of alcohol or controlled substances. 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. The system also shall define positive reinforcements that supervised individuals may receive for compliance with conditions of supervision.

KRS 439.3107(1).

Interpretation and application of KRS 439.3106 and KRS 439.3107 in relation to probation revocation was addressed by the Kentucky Supreme Court in *Commonwealth v. Andrews*, 448 S.W.3d 773 (Ky. 2014). In *Andrews*, the Court concluded that KRS 439.3106 set forth a new criteria that must be considered by a circuit court in a probation revocation proceeding. *Id.* Regarding graduated sanctions, the *Andrews* Court stated:

The language of KRS 439.3106(2) regarding "other sanctions" loosely tracks KRS 439.3107, which directs the DOC to adopt a system of graduated sanctions for "the most common types of supervision violations." Under 439.3108(1)(a), the DOC,

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the offender to remain compliant and crime-free in the community.

“notwithstanding any administrative regulation or law to the contrary,” has the authority to modify the conditions of probation “for the limited purpose of imposing graduated sanctions[.]” The guidelines for applying graduated sanctions are set forth in 501 Kentucky Administrative Regulations (“KAR”) 6:250. . . .

The probation officer may then proceed to reviewing “the circumstances of the offender and the violations at issue to determine if the violation behavior is appropriately responded to with graduated sanctions.”

Certain violations, such as absconding or receiving a new felony conviction, require the probation officer to submit the matter to the trial court without the possibility of imposing graduated sanctions. Otherwise, the probation officer, having considered the circumstances surrounding the probationer and the violation, must make a determination as to whether graduated sanctions are appropriate. If graduated sanctions are determined to be an inappropriate response to a violation, “then the officer shall report the violation” to the trial court.

By requiring trial courts to determine that a probationer is a danger to prior victims or the community at large and that he/she cannot be appropriately managed in the community before revoking probation, the legislature furthers the objectives of the graduated sanctions schema to ensure that probationers are not being incarcerated for minor probation violations.

*Andrews*, 448 S.W.3d at 778-79 (citations omitted).

In the case *sub judice*, the circuit court specifically considered the mandate of KRS 439.3106(1) and (2) before it revoked Lyttle’s probation. In the May 18, 2018, judgment, the court concluded that Lyttle had violated the terms of his probation by using drugs and failing the drug tests. Consistent with KRS

439.3106, the circuit court found that Lyttle constituted a significant risk to the community and could not be appropriately managed in the community.

Additionally, the court found that Lyttle had refused the opportunity to participate in drug court. We also observe that the circuit court was more than tolerant of Lyttle's intentional pattern of violating the terms of his probation by repeated positive drug test results. Lyttle had been before the court on several occasions for probation violations before the circuit court finally revoked his probation.

In Kentucky, a trial court's decision to revoke probation is reviewed on appeal for an abuse of discretion. *Andrews*, 448 S.W.3d at 780. We will disturb the trial court's ruling on this issue only upon finding that the ruling below was "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Id.* (citation omitted). In this case, we find no abuse of discretion by the circuit court in revoking Lyttle's probation under KRS 439.3106(1).

For the foregoing reasons, the Judgment and Sentence on Probation Violation of the Perry Circuit Court is affirmed.

ALL CONCUR.

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