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Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-000944-MR
NO. 2018-CA-000945-MR
NO. 2018-CA-000946-MR

JACOB R. WALKER

APPELLANT

v. APPEALS FROM UNION CIRCUIT COURT
HONORABLE C. RENÉ WILLIAMS, JUDGE
ACTION NOS. 13-CR-00026, 13-CR-00027, AND 14-CR-00020

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION VACATING AND REMANDING

** ** * * * * *

BEFORE: LAMBERT, MAZE, AND TAYLOR, JUDGES.

LAMBERT, JUDGE: In these consolidated appeals, Jacob Robert Walker has sought review of the orders of the Union Circuit Court revoking his probation and sentencing him to combined total of twenty years' imprisonment. Because the circuit court failed to make the mandatory findings pursuant to Kentucky Revised

Statutes (KRS) 439.3106(1) prior to revoking Walker's probation, we vacate the orders on appeal.

These appeals arose from three separate indictments returned by the Union County grand jury. In Indictment 13-CR-00026, the grand jury charged Walker with third-degree burglary, either acting alone or with another, pursuant to KRS 511.040 and with theft by unlawful taking or disposition, by complicity, pursuant to KRS 514.030. These charges arose from his action on March 19, 2013, when Walker entered a building owned by Rick Adamson and took property valued over \$500.00. In Indictment 13-CR-00027, the grand jury charged Walker with first-degree burglary pursuant to KRS 511.020 and with theft by unlawful taking over \$10,000.00, for entering a business office from which he fled while armed with a deadly weapon and from which he took personal property. These offenses took place between November 25 and December 22, 2012. And in Indictment No. 14-CR-00020, the grand jury charged Walker with theft by deception pursuant to KRS 514.040 for issuing or passing a check in the amount of \$3,000.56 knowing it would not be honored. This offense took place on October 7, 2013.

In July 2014, Walker opted to enter guilty pleas in the three cases. For the first case, Walker was found guilty as charged in the indictment, sentenced to concurrent five-year sentences, and ordered to pay restitution in the amount of

\$2,700.00 to the Estate of Rick Adamson. For the second case, he was found guilty of the amended charge of second-degree burglary and theft by unlawful taking, sentenced to concurrent five- and ten-year sentences, and ordered to pay \$50,000.00 in restitution to Slaton Sprague. For the third case, Walker was found guilty of an amended charge of theft by unlawful taking under \$10,000.00, sentenced to five years' imprisonment, and ordered to pay Bud's Country Corner \$3,000.56 in restitution. The sentences were ordered to run consecutively for a total of twenty years' imprisonment.

By agreement of the parties, the circuit court released Walker on shock probation in October 2014. He was placed under the supervision of the Division of Probation and Parole for five years and was required to abide by a list of conditions. These conditions were that he not commit another offense, avoid injurious or vicious habits, avoid disreputable people or places, work at suitable employment, support his dependents, pay costs of the proceedings as ordered by the court, contact Probation and Parole within 48 hours of his release, permit his probation officer to visit him at home or elsewhere, answer the probation officer's reasonable questions and promptly notify the officer of any change in address or employment, pay a \$500.00 supervision fee at a rate of \$25.00 per month, and possess no weapons.

In June 2017, a probation officer filed a violation of supervision report, indicating that Walker had been discharged from CenterPoint Recovery for Men for misconduct. Walker left the program on his own and against advice of staff, and he failed to contact his probation officer regarding the discharge. In addition, Walker had been under investigation for abusing prescription medication and for having a cell phone in violation of the program rules. A bench warrant was issued, and Walker was arrested shortly thereafter. Following a hearing the next month, the court revoked Walker's probation for absconding from supervision and for his failure to complete the treatment program as directed. The court re-imposed Walker's original sentence.

In August 2017, the court again released Walker on shock probation by agreement of the parties. He was placed on probation for five years under conditions that this time included that he report directly to and complete the Adult Drug Court program. He was to follow all of the rules and regulations of the program, permit staff to visit him at home or elsewhere, and answer staff members' reasonable inquiries and notify them of any change in his address or employment. The order specifically stated that if Walker were to be terminated from the program for any reason or if he voluntarily withdrew from the program, a motion to revoke his probation would be filed.

On May 1, 2018, an arrest warrant for Walker was issued based upon a violation of the terms of his probation, and he was arrested the same day. On May 14, 2018, the circuit court held a probation revocation hearing. Krista Massey testified that she worked as a case specialist for the Drug Court, and she stated that Walker had been terminated from the program. Walker had been sent to Men's Addiction Recovery Campus (MARC) in Bowling Green as a sanction for several dirty drug screens. He was discharged from the program for falsely stating that he had been diagnosed with cancer and refusing to sign the documents to permit staff members to access his medical records to prove that assertion. The Drug Court program then terminated him when it received the medical records that did not show any cancer diagnosis. On cross-examination, Ms. Massey stated that she knew the medical provider informed Walker and another MARC staff member who had accompanied him to the office that he had thirty days to provide his medical records. And while Walker originally was going to permit the staff member to attend his next appointment with him, he later changed his mind, stating it was none of his business. Ms. Massey got updates through a liaison, not from contact from Walker. She knew he was supposed to have a bronchoscopy on May 2, 2018, but he had been discharged from the program the day before that when he was arrested. Walker did not get to attend the appointment.

In his own testimony, Walker denied that he told anyone that he had cancer. Rather, he had been told that if he continued to cough up blood, he may have cancer. He said he signed a release so that the MARC staff member could get the medical records. He also explained that his mother planned to accompany him to the bronchoscopy. Because he could only have one person accompany him, he told the staff member that he could not accompany him.

At the conclusion of the hearing, counsel for Walker asked the court to “rewind” and to permit the Drug Court to hold a hearing regarding his termination from the program. The Commonwealth argued that Walker had had four or five different compliance issues, and the issue here was his honesty. Walker, it asserted, wanted to set up a case to be medically discharged so that he would not have to finish the program. The Commonwealth pointed out that there is no due process requirement in the Drug Court program or any other treatment facility. The court began its oral findings by stating its belief that honesty is the most important thing for a Drug Court participant. It went on to review the records from Sahetya Medical Group, noting that none of the records mentioned a possibility that Walker might have cancer.¹ The history he provided, the court

¹ The record contains medical reports from March and April of that year showing complaints of spitting up blood and shortness of breath.

observed, did not match the history he provided to the treatment facility.² The court could not deal with Walker's dishonesty, recognized his past sanctions and the resources he was provided, and stated the MARC center was his last chance. The court ultimately found that, based upon his termination from Drug Court, Walker had violated the terms of his probation and remanded him to the custody of the Department of Corrections.

On May 15, 2018, the circuit court entered a notice of violations in each case and terminated Walker from Drug Court. The same day, the court revoked Walker's probation and re-sentenced him to twenty years' imprisonment in accordance with the original judgments. These appeals now follow.

On appeal, Walker contends that the circuit court failed to comply with the mandatory criteria set forth in KRS 439.3106(1) and that, therefore, its orders revoking his probation constituted an abuse of discretion.

In *Helms v. Commonwealth*, 475 S.W.3d 637, 641 (Ky. App. 2015), this Court set forth 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

² These records are not included in the record.

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 House Bill 463, a corrections reform bill that brought about significant changes to this area of statutory law. The legislation included the addition of KRS 439.3106,³ 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.

³ The current version, which became effective June 27, 2019, includes a provision for a supervision continuation sanction.

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.

The *Helms* Court went on to observe that “[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 remarked on the mandatory nature of the court’s inquiry in *Commonwealth v. Andrews*, 448 S.W.3d 773, 781 (Ky. 2014), emphasizing 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.

In the present case, Walker does not dispute the circuit court’s finding that he violated the terms of his probation when he was terminated from the Drug Court program. He does dispute that the circuit court made the necessary findings pursuant to the statute that he constituted a significant risk to prior victims or the community at large and could not be appropriately managed in the community, or that the Commonwealth presented any evidence to establish these criteria.

The Commonwealth contends that Walker failed to preserve the trial court’s lack of consideration of KRS 439.3106 and is therefore not permitted to raise this issue except for palpable error pursuant to Kentucky Rules of Criminal

Procedure (RCr) 10.26. In support of this argument, the Commonwealth relies upon this Court's 2013 opinion in *Kaletch v. Commonwealth*, 396 S.W.3d 324, 329 (Ky. App. 2013), which addressed the preservation issue:

As for Kaletch's claim under KRS 439.3106, the Commonwealth contends that it is unpreserved. Upon our review of the record before us and the video recording of the probation revocation hearing, it is apparent that the Commonwealth is correct, and Kaletch did not raise his claim under KRS 439.3106 in the circuit court. Therefore, this claim is not preserved for review on appeal. *See Kennedy v. Commonwealth*, 544 S.W.2d 219, 222 (Ky. 1976) ("The appellants will not be permitted to feed one can of worms to the trial judge and another to the appellate court."). Consequently, we may only review this claim for palpable error pursuant to RCr4 10.26[.]

Because Walker only argued that he should have been afforded a hearing before being terminated from Drug Court, the Commonwealth contends that this issue is not preserved for our review.

On the other hand, Walker argues that he opposed revocation and cites to this Court's 2017 opinion in *Burnett v. Commonwealth*, 538 S.W.3d 322 (Ky. App. 2017), in which we concluded that the trial court's failure to make the mandatory statutory findings constituted palpable error:

The Commonwealth argues that Burnett did not preserve this issue on appeal because his counsel only asked that alternative sanctions be considered, not that the circuit court make specific findings pursuant to KRS 439.3106. Regardless, even if we were to find that the issue unpreserved, we must nevertheless conclude that

the circuit court's failure to make the statutory findings required by KRS 439.3106 constitutes palpable error under Kentucky Rules of Criminal Procedure (RCr) 10.26. Though the circuit court made a finding that Burnett cannot be managed in the community, it did not make a finding that he was a significant risk to the community. Both findings are required.

Burnett, 538 S.W.3d at 324-25.

Our review of the record establishes that the circuit court did not make any specific oral findings related to the mandatory criteria in KRS 439.3106.

Rather, the court focused on Walker's dishonesty in relation to whether he had cancer and touched on his past violations. The only mention of the statutory criteria can be found in the written orders revoking Walker's probation. These were preprinted forms that the circuit court completed in writing, and each provided, in relevant part, as follows:

Upon the Motion to set aside the defendant's probation before the Court, and the defendant and attorney being present for the hearing and being sufficiently advised, after considering KRS 439.3106 & 533.020 & .030. The Court finds and adjudges that the defendant has violated his probation by:

termination from drug court [in handwriting]
Attorney present – Hearing held [in handwriting]

The Court further finds that due to his/her failure to comply, he/she [check mark] constitutes a significant risk to prior victims, [check mark] constitutes a significant risk to the community at large, and [check mark] cannot be appropriately managed in the community, [check mark] other sanctions will not protect

the public or prior victims or properly manage the defendant within the community.

The court did not include any other findings, other than the conclusory statements on the preprinted forms, related to the criteria in KRS 439.3106(1). This is not sufficient to meet the mandatory statutory findings necessary to revoke a defendant's probation.

Accordingly, we must agree with Walker that the circuit court did not make any findings, in either its written or oral rulings, related to whether his violation constituted a significant risk to the prior victims or the community at large, and that he could not be appropriately managed in the community, pursuant to KRS 439.3106(1). Therefore, we hold that under either an abuse of discretion or palpable error standard of review, the circuit court's decisions must be vacated for full consideration of the statutory criteria and the entry of appropriate findings, as we held in *Burnett, supra*.

For the foregoing reasons, the orders of the Union Circuit Court revoking Walker's probation are vacated, and this matter is remanded for further proceedings in accordance with this opinion.

ALL CONCUR.

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