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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2018-CA-001478-MR

JAMES G. MOORE

APPELLANT

v. APPEAL FROM LAWRENCE CIRCUIT COURT
HONORABLE JOHN DAVID PRESTON, JUDGE
ACTION NOS. 15-CR-00118 AND 16-CR-00021

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * ** ** *

BEFORE: GOODWINE, SPALDING, AND L. THOMPSON, JUDGES.

SPALDING, JUDGE: James G. Moore appeals from the Lawrence Circuit Court's September 28, 2018 orders revoking his probation. For the following reasons, we reverse and remand.

On December 11, 2015, Moore was indicted for failure to comply with sex offender registration. On February 25, 2016, Moore was separately indicted for another count of failure to comply with sex offender registration and for being a second-degree persistent felony offender (PFO). Moore was evaluated and found competent to stand trial for the charges. On October 18, 2016, Moore pleaded guilty to both charges for failure to comply with sex offender registration and was sentenced to “[t]hree (3) years to serve to be probated supervised for five (5) years” conditioned upon residing at Destined 4 Destiny Inc. in Lexington. The trial court dismissed the PFO charge. The trial court amended the order of probation on November 28, 2016, allowing him to “reside at any location in the supervision area approved by the Department of Corrections.” The trial court again amended the conditions of Moore’s probation on February 14, 2017, ordering his probation to be unsupervised.

On March 19, 2018, the Kentucky State Police filed a Kentucky Sex Offender Registry Notification of Non-Compliance form, alleging Moore did not complete and return a required address verification form. The Commonwealth then filed motions to revoke Moore’s probation and special supervision reports in both cases. The trial court held a probation revocation hearing and allowed Moore one month to put together an alternative sentencing plan and to find a suitable living placement because he was essentially homeless at the time of the hearing.

At the next hearing the defense had no plan to propose other than not to revoke probation or punish the defendant. The trial court entered an order on September 28, 2018 revoking Moore's probation for each case. This appeal followed.

On appeal, Moore argues the trial court (1) palpably erred in failing to order a competency evaluation prior to the probation revocation hearing and (2) did not make sufficient findings to revoke his probation. Moore argues the trial court should have ordered a competency evaluation based on the Commonwealth's description of Moore as "very low mentally functioning" at the revocation hearing and trial counsel's statement that Moore had difficulty complying with the sex offender registry due to his "mental status and his communication difficulty." Moore concedes this issue was not properly preserved below, and we review "unpreserved claims of error on direct appeal only for palpable error." *Martin v. Commonwealth*, 207 S.W.3d 1, 3 (Ky. 2006); *see also Padgett v. Commonwealth*, 312 S.W.3d 336 (Ky. 2010). Moore "must show that the error resulted in 'manifest injustice'" to prevail on his claim. *Martin*, 207 S.W.3d at 3. Kentucky Rules of Criminal Procedure ("RCr") 10.26 provides: "A palpable error which affects the substantial rights of a party may be considered . . . by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that *manifest injustice* has resulted from the error." (Emphasis added.)

RCr 8.06 requires that a defendant be competent during all critical stages of the proceedings against him.

If upon arraignment or during the proceedings there are reasonable grounds to believe that the defendant lacks the capacity to appreciate the nature and consequences of the proceedings against him or her, or to participate rationally in his or her defense, all proceedings shall be postponed until the issue of incapacity is determined[.]

The Supreme Court of Kentucky has held that a criminal defendant has a non-waivable constitutional right to a competency hearing “[i]f there is substantial evidence that a defendant is incompetent[.]” *Padgett*, 312 S.W.3d at 348. If the trial court is presented with “reasonable grounds to believe the defendant is incompetent to stand trial” pursuant to KRS 504.100(1), a defendant has a waivable statutory right to a competency hearing. *Id.*

Here, Moore failed to present substantial evidence that he was incompetent at the time of the probation revocation hearing. Prior to pleading guilty to the underlying charges, the trial court ordered a competency evaluation and held a competency hearing. The trial court found Moore was competent to enter the guilty pleas. Moore points to no evidence indicating his mental state declined in the two years between pleading guilty and the revocation hearing. Moore consulted with counsel and made a decision to testify at his hearing for the probation revocation. There was no substantial evidence of incompetency nor

reasonable grounds to believe Moore was incompetent. Thus, we hold the trial court did not palpably err in failing to order *sua sponte* a competency evaluation.

Second, Moore argued the trial court abused its discretion in revoking his probation because revocation was not supported by sufficient factual findings of the circuit court. We review a “decision to revoke probation . . . for an abuse of discretion.” *Commonwealth v. Andrews*, 448 S.W.3d 773, 780 (Ky. 2014). “The test for abuse of discretion is 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).

KRS 439.3106(1) provides the criteria for revoking probation:

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

The Commonwealth asserts the trial court was not required to make specific findings of fact as to the requirements of the statute pursuant to *Southwood*

v. Commonwealth, 372 S.W.3d 882 (Ky. App. 2012). More recent case law requires trial courts to “make specific findings under KRS 439.3106(1) regarding the risk posed to prior victims or the community and whether the probationer can be managed in the community.” *Andrews*, 448 S.W.3d at 775. Written findings are not required if oral findings were made and are sufficient. *Commonwealth v. Alleman*, 306 S.W.3d 484, 487 (Ky. 2010).

In *McClure v. Commonwealth*, 457 S.W.3d 728, 733 (Ky. App. 2015), this Court held sufficient evidence supported revocation, and the trial court made sufficient findings as to the first statutory requirement. However, as to the second statutory requirement, this Court held “the record is devoid of any express written or oral finding concerning whether McClure could be managed within the community While evidence existed in the record to support it, the trial court failed to make a finding on this essential second element.” *Id.* The court, therefore, reversed the decision of the trial court.

Later in 2015, this Court held that 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. *Helms v. Commonwealth*, 475 S.W.3d 637, 645 (Ky. App. 2015).

There is a tension in this Court's holdings between *McClure* and *Helms*. *McClure* appears to require a technical review of the court's findings of fact. *Helms* indicates this Court should look more to the substance of the hearing reviewing whether there is proof in the record that the requirements to revoke probation have been met and the court has considered the factors it must in order to revoke probation. The latter would seem to be more appropriate, especially in light of RCr 9.24 which holds that no defect in an order is grounds for setting the order aside unless it appears that the result would be inconsistent with substantial justice.

In reviewing this case in this light, we still must hold that the court below did not make a sufficient finding of fact to support its revocation of probation in this matter. The court essentially made no oral findings of fact in this matter except to hold it had no choice but to revoke his probation. Its written finding states that the violations constitute a significant risk to prior victims and/or the community at large and Moore cannot be appropriately managed in the community. The trial court was open to other options other than revocation based on its statements. The defect in this matter is the court below did not make any specific factual findings as to how the defendant violated his probation nor any findings in response to the defense made for Moore, which was that he was unable to comply.

At the probation revocation hearing in this matter, Moore was faced with testimony from the Commonwealth of a probation officer who was completely unfamiliar with his case. Moore testified that he had attempted to register as a sex offender at his new address. The court did not specify as to why it found Moore had violated probation. Was it because he was not living at the address he was required to maintain or was it because he had failed to register as a sex offender? It may have been for both reasons. However, the appellant was clearly entitled to a factual finding as to how he violated his probation. Therefore, we hereby reverse and remand this matter back to the Lawrence Circuit Court for further findings of fact as to how the defendant violated his probation and what sanctions, if any, are appropriate for such a violation based on the evidence.

ALL CONCUR.

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