

RENDERED: OCTOBER 4, 2019; 10:00 A.M.  
NOT TO BE PUBLISHED

# Commonwealth of Kentucky

## Court of Appeals

NO. 2018-CA-001721-MR

RUSSELL AMBOREE

APPELLANT

v.

APPEAL FROM HENDERSON CIRCUIT COURT  
HONORABLE KAREN LYNN WILSON, JUDGE  
ACTION NOS. 15-CR-00231 AND 15-CR-00232

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

\*\* \*\* \* \* \* \*\*

BEFORE: COMBS, JONES AND L. THOMPSON, JUDGES.

THOMPSON, L., JUDGE: Russell Amboree appeals from an order revoking his probation. He argues that the trial court abused its discretion in revoking his probation. We find no error and affirm.

## **FACTS AND PROCEDURAL HISTORY**

On June 18, 2015, Appellant was indicted on two counts of first-degree trafficking in a controlled substance<sup>1</sup> for criminal activity that occurred in 2013. He was also charged with being a persistent felony offender (PFO) in the first degree.<sup>2</sup> This was in case number 15-CR-00231. On that same day, he was also indicted on first-degree trafficking in a controlled substance for criminal activity which occurred in 2014. He was also charged with being a PFO in the first degree. This was in case number 15-CR-00232.

On October 19, 2015, Appellant pleaded guilty to two charges of first-degree trafficking, but the first-degree PFO enhancement was amended to second-degree PFO. This was for indictment 15-CR-00231. He also pleaded guilty to an amended offense of complicity to first-degree trafficking in a controlled substance<sup>3</sup> in indictment number 15-CR-00232. Appellant was sentenced to five years' incarceration.

On April 8, 2016, Appellant filed motions for shock probation in both cases. Those motions were granted the same day. The court imposed the standard conditions for probation. Additionally, the court ordered that the Department of Probation and Parole evaluate Appellant and impose any additional conditions

---

<sup>1</sup> Kentucky Revised Statutes (KRS) 218A.1412.

<sup>2</sup> KRS 532.080.

<sup>3</sup> KRS 502.020.

necessary. The Department of Probation directed Appellant to enroll in a drug treatment program. On April 22, 2016, Appellant enrolled in Dismas Charities. On April 26, 2016, Appellant voluntarily left the program. Appellant claimed he left because other patients there were using drugs.

After leaving Dismas Charities, Appellant met with his probation officer, Carrie Phillips. Officer Phillips allowed Appellant to enroll in another program. On May 9, 2016, Appellant enrolled in Community Transitional Services (CTS) Russell, a halfway house that provides drug treatment. On June 30, 2016, Appellant again voluntarily left the facility prior to completing the program. He again claimed there was rampant drug use at the facility. Upon leaving the facility, Appellant was directed to contact his probation officer. He did not. Appellant absconded from supervision.

A motion to revoke Appellant's probation was filed in July of 2016, and a bench warrant was issued for his arrest. On February 8, 2017, Appellant was indicted on two more charges of trafficking in a controlled substance, first degree. The alleged crimes referenced in these indictments occurred in 2015. Appellant was finally arrested in February of 2018.

On October 1, 2018, a probation revocation hearing was held. Probation Officer Phillips and Appellant both testified. Officer Phillips testified about Appellant's not completing a drug treatment program and absconding from

supervision for almost two years. No evidence was introduced regarding the new 2017 indictments. At the end of the hearing, the trial court revoked Appellant's probation based on his failure to complete a drug treatment program and for absconding from supervision. On October 16, 2018, the court entered the probation revocation order. The order mentioned Appellant's absconding and the fact that he committed a new offense.<sup>4</sup> The order also found that Appellant was a significant risk to the community, that he could not be appropriately managed within the community, and that there were no less restrictive means available to supervise other than revocation. Appellant was then ordered to serve out the remainder of his sentence. This appeal followed.

### **ANALYSIS**

Before we begin our discussion of the issues raised on appeal, we must first address a preliminary matter. The Commonwealth asks us to take judicial notice of the 2017 indictments as no evidence of them was entered into the record at the revocation hearing. The Commonwealth has included certified copies of the indictments in the appendix to its brief. Appellant has no objection to the Commonwealth's request. We will, therefore, take judicial notice of the 2017 indictments.

---

<sup>4</sup> The language concerning the new offense is minimal, so we are assuming it was referring to the 2017 indictments.

Now onto the main issue at hand. Appellant argues on appeal that the trial court abused its discretion in revoking his probation. He argues that the drug usage at the facilities necessitated his leaving. He also claimed that he did not report to his probation officer in order for him to find employment and support his children. In addition, he argues that the court only found that he would be a risk to the community, not a “significant risk” as required by statute. Finally, he argues that there were less restrictive alternatives than revoking his probation. He contends that the trial court could have assigned him to go to another rehab, considered electronic monitoring, or imposed a short period of jail time. We believe Appellant’s arguments are without merit.

A decision to revoke probation is reviewed for an abuse of discretion. *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.” *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

*Commonwealth v. Andrews*, 448 S.W.3d 773, 780 (Ky. 2014). The applicable probation revocation statute in this case is KRS 439.3106(1). “KRS 439.3106(1) requires trial courts to consider whether a probationer’s failure to abide by a condition of supervision constitutes a significant risk to prior victims or the community at large, and whether the probationer cannot be managed in the community before probation may be revoked.” *Andrews*, 448 S.W.3d at 781.

Here, Appellant believes that the trial court did not find him to be a “significant risk” to the community. Appellant is incorrect. During the revocation hearing, the trial court orally revoked Appellant’s probation. The court found him to be a “risk” to the community for failing to complete a drug treatment program and for absconding from supervision for almost two years. The court did not use the term “substantial risk” when speaking on the record; however, the term “substantial risk” was used in the court’s written order. This was proper and we find no error.

Appellant’s argument that he should not be faulted for leaving the two treatment centers is also without merit. This argument might hold water if Appellant had contacted his probation officer after leaving the second facility and sought a new rehabilitation program. Instead, he absconded from supervision for almost two years.

Finally, the court clearly considered lesser sanctions, but found that they were inappropriate in this case. During the revocation hearing the court found that Appellant’s probation should be revoked because he evaded supervision for around two years.

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. Nothing in the statute

or in the Supreme Court's interpretation of it *requires* the trial court to impose lesser sanctions prior to revoking probation.

*McClure v. Commonwealth*, 457 S.W.3d 728, 732 (Ky. App. 2015) (Emphasis in original) (citation omitted).

The trial court did not abuse its discretion in revoking Appellant's probation. Appellant failed to complete a drug treatment program, absconded from supervision for around two years, and was indicted on a new charge.

One final issue that must be addressed. In Appellant's reply brief, he argues that his probation revocation should be reversed because he was not given notice that the 2017 indictments were being considered as probation violations. Appellant is correct. It appears from the record that he was only provided notice that the failure to complete a drug treatment program and his absconding from supervision were the issues to be considered at his revocation hearing. When the court orally revoked his probation, the new indictments were not mentioned; however, the written order indicated that his probation was being revoked in part because Appellant committed new offenses.

Written notice of the violations of probation are required in order to meet minimum due process for revocation hearings. *Commonwealth v. Alleman*, 306 S.W.3d 484, 486 (Ky. 2010). Unfortunately, this issue was never raised before the trial court; therefore, we cannot address it. "The Court of Appeals is without

authority to review issues not raised in or decided by the trial court.” *Regional Jail Authority v. Tackett*, 770 S.W.2d 225, 228 (Ky. 1989); *see also Shelton v. Commonwealth*, 928 S.W.2d 817, 818 (Ky. App. 1996). “[E]rrors to be considered for appellate review must be precisely preserved and identified in the lower court.” *Skaggs v. Assad, by and through Assad*, 712 S.W.2d 947, 950 (Ky. 1986) (citation omitted). *See Jarrell v. Commonwealth*, 384 S.W.3d 195 (Ky. App. 2012), *overruled on other grounds by Commonwealth v. Andrews*, 448 S.W.3d 773 (Ky. 2014), for another probation revocation hearing appeal in which a defendant did not receive notice and did not raise the issue before the trial court.

In addition, the lack of notice issue was not raised until Appellant’s reply brief. “The reply brief is not a device for raising new issues which are essential to the success of the appeal.” *Milby v. Mears*, 580 S.W.2d 724, 728 (Ky. App. 1979). This is another reason why this Court cannot address this issue.

### **CONCLUSION**

Based on the foregoing, we affirm the judgment of the trial court.

COMBS, JUDGE, CONCURS.

JONES, JUDGE, CONCURS IN RESULT ONLY.



**BRIEFS FOR APPELLANT:**

Robert C. Yang  
Assistant Public Advocate  
Frankfort, Kentucky

**BRIEF FOR APPELLEE:**

Andy Beshear  
Attorney General of Kentucky

James P. Judge  
Assistant Attorney General  
Frankfort, Kentucky