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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2018-CA-001837-MR

RODNEY NEWCOMB

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE PHILLIP J. SHEPHERD, JUDGE
ACTION NO. 16-CI-00848

KENTUCKY PAROLE BOARD

APPELLEE

OPINION
VACATING AND REMANDING

** ** * * * **

BEFORE: CLAYTON, CHIEF JUDGE; JONES AND LAMBERT, JUDGES.

CLAYTON, CHIEF JUDGE: Rodney Newcomb appeals *pro se* from a Franklin Circuit Court order denying his motion for relief, motion to hold a hearing, and motion to hold in abatement. He contends the Kentucky Parole Board made insufficient findings pursuant to Kentucky Revised Statutes (KRS) 439.3106

before revoking his parole. We agree and consequently vacate and remand for further proceedings.

Newcomb was convicted of assault under extreme emotional distress in 2000 and released on parole in February 2013. He was deemed to be a moderate risk which required monthly contact with his parole officer. The special conditions of his parole included no contact with the victim and victim's family without advance approval, completion of a substance abuse evaluation in the community, and following all treatment recommendations. The general conditions included not using or possessing any alcoholic beverages or narcotics/controlled substances not currently prescribed by a licensed physician and not violating any law or ordinance. Newcomb signed the form assenting to these conditions and indicating he realized that failure to abide by these conditions could be grounds for revocation of his release.

On December 7, 2015, Newcomb entered a plea of guilty to misdemeanor charges of driving under the influence first offense, possessing drug paraphernalia, and possession of a controlled substance second degree. Following a preliminary parole revocation hearing before an administrative law judge, the case was referred to the Parole Board. A final parole revocation hearing was held on May 19, 2016, and the Board imposed a twenty-four-month deferment on Newcomb for violating the conditions of parole.

Newcomb filed a motion for mandamus in Franklin Circuit Court, arguing the Board had failed to consider KRS 439.3106(1) and (2) in revoking his parole and asking the court to order the Board to do so. The circuit court entered an order dismissing the motion, on the basis that mandamus was not an appropriate remedy. Newcomb successfully sought reconsideration. The circuit court granted the writ of mandamus, noting that *Murrell v. Kentucky Parole Board*, 531 S.W.3d 503 (Ky. App. 2017), which held that KRS 439.3106 is applicable to parole as well as probation revocation proceedings, was applicable to the case. The circuit court remanded the matter back to the Board to make express findings in accordance with the revocation criteria in KRS 439.3106.

On remand, the Board issued an amended order stating as follows:

Based upon: 1.) Preliminary Parole Revocation Hearing, 2.) Admitted guilt at the Final Parole Revocation Hearing and 3.) Per KRS 439.3106(1), the Board has determined that the Offender's failure to comply with the conditions of supervision constitutes a significant risk to prior victims or the community at large and Offender cannot be appropriately managed in the community. Rodney Newcomb is guilty of violating the conditions of parole and Parole is hereby Revoked for the following:

- 1.) Receiving misdemeanor conviction for Driving Under the Influence
- 2.) Receiving misdemeanor conviction for Possession of Drug Paraphernalia
- 3.) Receiving misdemeanor conviction for Possession of Controlled Substance.

Parole Board Action: Deferred 24 months

Newcomb filed a motion for relief, a motion to hold a hearing, and a motion to hold in abatement, arguing that the Board had not adequately complied with the circuit court's order. The circuit court denied the motion, holding that the Board's decision to supplement the record with a statement considering Newcomb's case in light of KRS 439.3106 was sufficient to comply with *Murrell* and the circuit court's prior order. It rejected Newcomb's argument that the Board's amended order merely quoting the language of KRS 439.3106 was not sufficient to meet the statutory requirements, stating as follows: "The decisions of the Parole Board to revoke post-incarceration supervision are discretionary and are not subject to judicial review except for compliance with Chapter 439. KRS 439.330(3). The Board brought the revocation into compliance with Chapter 439 when it amended its order demonstrating consideration of KRS 439.3106 on the record." This appeal followed.

KRS 439.3106 was enacted in furtherance of the Public Safety and Offender Accountability Act, commonly referred to as House Bill 463 ("HB 463"). 2011 Ky. Acts 4. *Commonwealth v. Andrews*, 448 S.W.3d 773, 776 (Ky. 2014). The Act created a sentencing policy intended to "maintain public safety and hold offenders accountable while reducing recidivism and criminal behavior and improving outcomes for those offenders who are sentenced." *Id.* (quoting KRS 532.007(1)).

Before revoking probation, a trial court must consider KRS

439.3106(1), which provides that “[s]upervised 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 Kentucky Supreme Court has held that the statute “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 780. By requiring the trial court to make such a determination, “the legislature furthers the objectives of the graduated sanctions schema to ensure that probationers are not being incarcerated for minor probation violations.” *Id.* at 779.

To that end, a panel of this Court stated 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.” *Helms v. Commonwealth*, 475 S.W.3d

637, 645 (Ky. App. 2015). Instead, “[f]or purposes of review, rather than speculate on whether the court considered KRS 439.3106(1), we require courts to make specific findings of fact, either written or oral, addressing the statutory criteria.” *Lainhart v. Commonwealth*, 534 S.W.3d 234, 238 (Ky. App. 2017) (citing *McClure v. Commonwealth*, 457 S.W.3d 728, 733-34 (Ky. App. 2015)).

These mandatory findings must also be made in parole revocation proceedings. “Since KRS 439.3106 makes no distinction between probation or parole, . . . the requirements of KRS 439.3106 must apply to the Board as well as to the courts.” *Murrell*, 531 S.W.3d at 507.

The Board argues that Newcomb is seeking something beyond the requirements of *Murrell*: that the Board not just demonstrate that it considered the requirements of KRS 439.3106, but that it take each criterion and make explicit findings in the record as to each. The Board contends that asking it to state specifically how the offender poses a significant risk, and why he could not be managed in the community, is well beyond anything mandated by the statute or *Murrell*. We disagree.

“[T]he General Assembly intended the task of considering and making findings regarding the two factors of KRS 439.3106(1) to serve as the analytical precursor to a trial court’s ultimate decision: whether revocation or a lesser sanction is appropriate.” *McClure*, 457 S.W.3d at 732. A requirement that

the Board make these express findings on the record not only helps ensure reviewability of the decision, but it also helps ensure that the decision was reliable. *Lainhart*, 534 S.W.3d at 238. “Findings are a prerequisite to any unfavorable decision and are a minimal requirement of due process of law.” *Id.* (quoting *Rasdon v. Commonwealth*, 701 S.W.2d 716, 719 (Ky. App. 1986)).

Although there may indeed be sufficient evidence to support the revocation of Newcomb’s parole in light of the KRS 439.3106 factors, such a determination is solely within the purview of the Board’s discretion. His DUI and drug convictions might mean that he poses a significant risk to his prior victims or the community at large, or that he cannot be managed in the community, but such a conclusion would be speculative on our part and an intrusion on the role of the Board. “[T]he importance of certain facts is not ours to weigh on appeal, but is properly left to the [Board’s] exclusive discretion. . . . To hold, or to do, otherwise would be to invade the province of fact finding best occupied by [the Board].” *McClure*, 457 S.W.3d at 734.

Newcomb argues he is entitled to a new hearing because the Board did not consider the statutory factors at his original hearing. He does not, however, point to any evidence bearing on the revocation that was improperly excluded at the original hearing. Consequently, a new hearing is not necessary in order for the

Board to make specific findings regarding why the statutory factors are met in this case, unless the Board determines that such a hearing is necessary.

Finally, Newcomb argues that two members of the Board should be removed from his case because their presence violates his right to due process. He contends they are biased as evidenced by the fact they voted to revoke his parole in the initial proceedings and again upon remand from the Franklin Circuit Court. This argument is without merit. An unfavorable ruling does not equate to impermissible bias warranting recusal. *Bissell v. Baumgardner*, 236 S.W.3d 24, 29 (Ky. App. 2007).

We vacate the order of the Franklin Circuit Court and remand this matter to the Parole Board to make the appropriate mandatory findings that comport with KRS 439.3106.

LAMBERT, JUDGE, CONCURS.

JONES, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

JONES, JUDGE, DISSENTING: Respectfully, I dissent. I believe the Board's amended order complies with both KRS 439.3106 and *Murrell*. I do not interpret *Murrell* as placing a higher burden on the Board with respect to parole revocation than on a circuit court with respect to probation revocation. The majority's opinion requires the Board to issue specific findings *explaining* its rationale. This requirement exceeds what is required of a circuit court considering probation

revocation. We explained in *McClure v. Commonwealth*, 457 S.W.3d 728, 733 (Ky. App. 2015):

The statute requires a trial court to consider “whether a probationer’s failure to abide by a condition poses a significant risk to prior victims or the community at large.” *Andrews* at 776. Neither KRS 439.3106 nor *Andrews* require anything more than a finding to this effect supported by the evidence of record. *The trial court complied with this requirement and it owed McClure no further explanation.*

Id. (emphasis added).

The majority indicates that affirming the Franklin Circuit Court requires an act of speculation by this Court. The speculation *Andrews*, *McClure*, and *Murrell* were concerned with combatting was speculation regarding whether the fact finder *considered* revocation in the context of KRS 439.3106(1). “[R]ather than speculate on whether the court *considered* KRS 439.3106(1), we require courts to make specific findings of fact, either written or oral, addressing the statutory criteria.” *Lainhart v. Commonwealth*, 534 S.W.3d 234, 238 (Ky. App. 2017) (emphasis added).

The Board found that Appellant admitted guilt at the revocation hearing insomuch as while on parole he committed the offenses of driving under the influence, possession of drug paraphernalia, and possession of controlled substances. The Board further indicated that it considered KRS 439.3106(1) and determined that Appellant could not be appropriately managed in the community

as demonstrated by his failure to abide by multiple conditions of his parole. The order demonstrates that the Board considered revocation in the context of KRS 439.3106(1), and its decision to revoke is supported by substantial evidence of record. Accordingly, I would affirm the Franklin Circuit Court.

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