

Commonwealth of Kentucky

Court of Appeals

NO. 2019-CA-000228-MR

GERALD MOORE

APPELLANT

v.

APPEAL FROM OWEN CIRCUIT COURT
HONORABLE R. LESLIE KNIGHT, JUDGE
ACTION NO. 14-CR-00028

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
VACATING AND REMANDING

** ** * * * * *

BEFORE: DIXON, MAZE, AND SPALDING, JUDGES.

DIXON, JUDGE: Gerald Moore appeals from the Owen Circuit Court's order revoking his probation and sentencing him to five years' imprisonment. Because the trial court failed to make both findings required under KRS¹ 439.3106(1), we vacate the order and remand for further proceedings.

¹ Kentucky Revised Statutes.

On January 6, 2015, Moore entered a guilty plea to a charge of first-degree sexual abuse of a child under age twelve.² Thereafter, the trial court sentenced him to a probated term of five years' imprisonment, with three hundred days to serve and credit for time spent in custody. As part of his probation, Moore was under standard conditions of supervision common to all probationers, as well as several additional conditions prescribed for sex offenders. Among these additional conditions of probation were restrictions on Moore's contact with minor children and his use of computers to access the internet. A few months later, in October 2015, Moore served a thirty-day sanction for violating one of the conditions of his supervision when he had unsupervised contact with a minor. Moore then spent the next three years of his probation period without a violation.

On November 16, 2018, Probation Officer Emily Robinson filed a report alleging four separate violations of Moore's probation, all of which were predicated on a search of Moore's cellphone. First, Officer Robinson found a text message indicating that Moore had eaten dinner at a restaurant with his friend, Nancy Stidham, in a gathering which included minors. According to the report, Moore admitted to the incident, but thought he was not in violation because other adults were present. Second, Officer Robinson found photographs of several people, including juveniles, on Moore's cellphone. The items in question appeared

² KRS 510.110, a Class C felony.

to be family photographs, including graduation pictures. According to the report, Moore thought the photographs were permissible because they were of his family members. Third, Officer Robinson found evidence of an active social media account on his cellphone. Fourth, and finally, Officer Robinson found text messages to Moore from three people she knew to be convicted felons. According to the report, Moore asserted that he did not know the individuals were felons when he communicated with them. Officer Robinson concluded her report by recommending revocation of Moore's probation. In response to the officer's report, the trial court issued a bench warrant for Moore's arrest on the alleged violations.

The trial court held a probation revocation hearing on January 29, 2019. The Commonwealth presented testimony from Officer Robinson, who testified about the events comprising the substance of her report. In response to direct questioning by the Commonwealth, Officer Robinson testified as to her opinion that Moore had exhausted all efforts at community supervision and was a danger to the community. Moore presented testimony from Nancy Stidham in his defense. Ms. Stidham explained to the court that she and Moore had gone by themselves to the restaurant when they happened upon a friend who was there with her grandchildren. According to Ms. Stidham, the two groups merely ate and socialized at adjacent tables in the restaurant.

At the conclusion of the revocation hearing, the trial court found the testimony showed that Moore had violated the conditions of his probation. The trial court did not believe Moore's assertions of being unaware that he was violating conditions of his release, noting Moore had used the same excuse the last time he had appeared before the court. The trial court then orally revoked Moore's probation. When asked by defense counsel whether Moore could qualify for shock probation or medical furloughs, the trial court stated that Moore was "a danger to the community."

On January 29, 2019, the same day as Moore's hearing, the trial court entered a written order granting the Commonwealth's motion to revoke Moore's probation. The order specifically found that Moore had associated with convicted felons and had violated the supplemental conditions of supervision for sex offenders. Significantly, the trial court's order made no findings regarding whether Moore was a risk to the community at large, nor whether he could be appropriately managed in the community. This appeal followed.

Moore presents two arguments on appeal. First, he argues that the trial court failed to make sufficient findings to revoke his probation as required by KRS 439.3106(1). Second, Moore argues that the trial court should have imposed a lesser sanction than revocation. We agree with Moore's first argument; consequently, we need not consider his second argument at this time.

“A decision to revoke probation is reviewed for an abuse of discretion.” *Commonwealth v. Andrews*, 448 S.W.3d 773, 780 (Ky. 2014) (citing *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.’” *Id.* (quoting *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999)). “Put another way, we will not hold a trial court to have abused its discretion unless its decision cannot be located within the range of permissible decisions allowed by a correct application of the facts to the law.” *McClure v. Commonwealth*, 457 S.W.3d 728, 730 (Ky. App. 2015) (citing *Miller v. Eldridge*, 146 S.W.3d 909, 915 n.11 (Ky. 2004)).

For his first argument, Moore contends that the trial court failed to make the required findings under KRS 439.3106(1) before revoking his probation. A trial court traditionally has “broad discretion in overseeing a defendant’s probation, including any decision to revoke[.]” *Andrews*, 448 S.W.3d at 777. This traditional deference was slightly qualified when, “[i]n 2011, the Kentucky General Assembly enacted the Public Safety and Offender Accountability Act, commonly referred to as House Bill 463 (HB 463).” *Id.* at 776 (internal quotation marks omitted). Included as part of this legislation, KRS 439.3106(1)(a) provides as follows:

Supervised individuals shall be subject to . . . [v]iolation 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[.]

A trial court must make findings regarding both risk and the inability to be managed in the community before revoking probation. “[W]hile trial courts retain discretion in revoking probation, consideration of the criteria provided in KRS 439.3106 is a mandatory prerequisite to revocation.” *Richardson v. Commonwealth*, 494 S.W.3d 495, 498 (Ky. App. 2015). The essential questions are “[w]hether the evidence of record supported the requisite findings that [the appellant] was a significant risk to, and unmanageable within, his community; and whether the trial court, in fact, made those requisite findings.” *McClure*, 457 S.W.3d at 732.

In its written order revoking probation, the trial court found that Moore had violated his probation but inexplicably failed to make any findings under KRS 439.3106(1). The trial court *did* make an *oral* finding that Moore was “a danger to the community” during the last moments of his hearing, but the trial court made no similar finding as to whether Moore could be managed in the community. The trial court must make both findings prior to revocation. “[T]rial courts must consider and make findings—*oral or written*—comporting with KRS

439.3106(1).” *Blankenship v. Commonwealth*, 494 S.W.3d 506, 509 (Ky. App. 2015) (emphasis added). Because the trial court failed to make both findings required by KRS 439.3106(1), the trial court’s revocation order may not stand. *See, e.g., Hall v. Commonwealth*, 566 S.W.3d 578 (Ky. App. 2018); *Burnett v. Commonwealth*, 538 S.W.3d 322 (Ky. App. 2017).

For the foregoing reasons, we vacate the Owen Circuit Court’s order revoking probation and remand for entry of a new order with findings as to both prongs outlined in KRS 439.3106(1). After making the statutory findings, the court should conclude its order by determining whether it should revoke probation or issue a lesser sanction.

ALL CONCUR.

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