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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2019-CA-000499-MR

DEAN L. MARDIS

APPELLANT

v. APPEAL FROM CARROLL CIRCUIT COURT
HONORABLE R. LESLIE KNIGHT, JUDGE
ACTION NO. 16-CR-00110

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON, CHIEF JUDGE; DIXON AND GOODWINE, JUDGES.

CLAYTON, CHIEF JUDGE: Dean Mardis appeals from the Carroll Circuit Court's order revoking his probation, arguing that the circuit court did not make a required finding under Kentucky Revised Statute (KRS) 439.3106 concerning whether Mardis could "be appropriately managed in the community[,]" or, in the

alternative, that such finding, if made by the circuit court, was not supported by the evidence. Upon review of the record and applicable legal authority, we affirm.

BACKGROUND

On September 19, 2016, Mardis pled guilty to, among other charges, one count of driving under the influence (DUI), 4th offense, and one count of possession of an open alcohol beverage container in a motor vehicle. Consistent with his guilty plea, Mardis was sentenced to a term of five years; he was ordered to serve 240 days in jail and his remaining sentence was probated. Per the court's sentencing order, Mardis was informed that he must meet several standard conditions while on supervised probation. Among these conditions, the circuit court ordered that Mardis shall "not commit or be convicted of another offense during the period of probation. Specifically, [Mardis] shall have no violation of the Penal Code or the Controlled Substances Act." The order also set forth the following condition:

While on probation, [Mardis] shall not use any . . . alcohol[.] In the event [Mardis] tests positive for . . . alcohol, same shall constitute immediate grounds for revocation.

Mardis served the 240 days' incarceration and was released on probation on February 7, 2017.

On January 29, 2019, Officer Brandon Meredith was driving in the Happy Hollow gated community in Carrollton, Kentucky when he saw Mardis

urinating next to a running pickup truck. Officer Meredith also saw a liquor bottle hanging out of Mardis's jacket pocket, as well as an opened and half-full Busch Light in the cup holder of the truck and an opened 30 pack of Busch Light in the truck bed. Mardis was uneasy on his feet and smelled of alcohol. Further, Mardis was unable to successfully complete a roadside drunk driving test. Officer Meredith was only able to obtain a partial breathalyzer test from Mardis, as Mardis stated that he had reduced lung function due to chronic obstructive pulmonary disease. The results of such partial test showed his blood alcohol content was .117.

On February 7, 2019, the Commonwealth moved to revoke Mardis's probation alleging he had committed new offenses resulting in a probation violation. The new offenses included, among others, a DUI, possession of an open alcohol beverage container, and the probation violation of being in possession of alcohol. On February 25, 2019, the circuit court held a probation revocation hearing wherein Officer Meredith testified to the above facts and a probation officer, who did not supervise Mardis, testified that Mardis had been convicted of a total of six prior DUIs.

At the conclusion of the revocation hearing, the circuit court reviewed Mardis's behaviors and found that Mardis knew that, as a condition of his probation, he was not allowed to drink and drive, yet had every intention of operating the vehicle under the influence at the time of his probation violation.

Further, the circuit court noted that Mardis had possession of alcohol, he smelled of alcohol, and he was manifestly under the influence. The circuit court then stated, “I’m not going to wait until you kill several people before I decide that you can’t be properly managed in the community” and granted the Commonwealth’s motion to revoke his probation. The circuit court entered a written order on February 25, 2019 stating that it found that Mardis’s “failure to comply with the conditions of supervision constitute[d] a significant risk to the community at large,” that Mardis could not be “appropriately managed in the community,” and again stating that it was revoking his probation. Thereafter, Mardis filed the current appeal.

ANALYSIS

a. Standard of Review

An appellate court reviews a trial court’s decision to revoke probation 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 the abuse of discretion standard of review, this Court will reverse a trial court’s ruling only upon finding that such decision was “arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” *Id.* (quoting *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999)). An appellate court will not find a trial court to have abused its discretion unless its decision falls outside “the range of permissible

decisions.” *Miller v. Eldridge*, 146 S.W.3d 909, 915 n.11 (Ky. 2004) (internal quotation marks and citation omitted).

b. Issues on Appeal and Applicable Law

On appeal, Mardis alleges three errors: (1) that neither the circuit court’s statements at the revocation hearing nor the circuit court’s subsequent written order were sufficient to constitute a finding under KRS 439.3106(1)(a) that Mardis could not be “appropriately managed in the community;” (2) that any finding by the circuit court that Mardis could not be appropriately managed within the community was unsupported by the evidence; and (3) that the circuit court failed to consider or impose graduated sanctions prior to incarceration.

KRS 439.3106(1) states that defendants on probation 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 . . . 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 trial court's consideration of whether a probationer is a significant risk to the community at large and whether a probationer cannot be appropriately managed in the community is a mandatory prerequisite to revocation. *Andrews*, 448 S.W.3d at 780. The *Andrews* Court stated that such findings "allow[] the trial court to conclude with some certainty that the imposition of some other accountability measure would be fruitless[.]" *Id.* at 779. Further, in *Andrews*, the Court held that the combination of both written and oral findings concerning each factor of KRS 439.3106(1) was sufficient under KRS 439.3106. *Id.* at 780.

Of equal significance, the Supreme Court in *Andrews* rejected the idea that the language of KRS 439.3106 somehow weakened the trial court's traditional discretion over probation revocation. *Id.* To the contrary, the Court affirmed that while the statute "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.*

c. The Trial Court's Findings and Sufficiency of the Evidence

Our analysis now turns to two related questions: whether the evidence of record supported the required finding that Mardis could not be appropriately managed within the community and whether the circuit court, in fact,

made that required finding. Mardis contends that the answer to both questions is in the negative.

The record does not support Mardis's argument that the circuit court failed to enter a sufficient finding that Mardis could not be appropriately managed in the community. In addressing this argument, as the Supreme Court did in *Andrews*, we look to both the written and video record for evidence of whether the trial court "specifically considered the criteria in KRS 439.3106." *Id.* Under this analysis, we disagree with Mardis's assertion that the circuit court failed to make a finding as to his manageability within the community.

As a preliminary matter, in contrast to Mardis's contention that the circuit court's statements at the end of the revocation hearing constituted a refusal to make a finding of his manageability within the community, we understand the circuit court's statements to demonstrate that the court considered the gravity of Mardis's actions and the danger posed by his obvious addiction and evidenced the court's refusal to delay its finding of unmanageability. The court conveyed its clear intent that it would *not* wait for Mardis to commit "some heinous act" before it found that he was unmanageable within the community, and thereby – in essence – making such a finding. *See McClure v. Commonwealth*, 457 S.W.3d 728, 733 (Ky. App. 2015). Moreover, on the written order revoking Mardis's probation, the circuit court expressly found that Mardis could not be appropriately managed in

the community. The evidence of record that Mardis had accumulated six DUI charges over the years, the circuit court's verbal refusal to wait until Mardis killed someone before finding him unable to be appropriately managed within the community, and the circuit court's written finding in its order that Mardis could not be appropriately managed in the community, were enough, as "[n]either KRS 439.3106 nor *Andrews* require anything more than a finding to this effect supported by the evidence of record." *Id.* The circuit court fulfilled such requirements.

Mardis further claims that the evidence of record does not support a finding that he could not be appropriately managed within the community because he had successfully been on probation for two years prior to his violation in 2019. We disagree. The testimony at the revocation hearing established that Mardis had been convicted of six prior DUIs, that he was granted the privilege of probation, and that he consumed and was in possession of alcohol in violation of the terms of his probation near a running vehicle. These facts constituted substantial support for the conclusion that a person who would go to such lengths to continue using a substance he knew that he was forbidden to use, and to continue to operate a motor vehicle while using such substance, under penalty of a return to imprisonment, could not be appropriately managed within the community.

Mardis further argues that, under *Commonwealth v. Alleman*, due process requires that a trial court make written findings as to the evidence relied on and the reasons for revoking probation. 306 S.W.3d 484, 487-88 (Ky. 2010). However, the *Alleman* Court held that “a recorded oral recitation by the trial court of findings and reasons for revocation, if otherwise sufficient, satisfies applicable due process requirements.” *Id.* at 486. As previously discussed, in this case the record is sufficiently complete for us to determine the evidence relied upon by the circuit court and its reasons for revoking probation. The circuit court’s oral statement from the bench at the conclusion of the revocation hearing provided its findings and reasoning for revoking Mardis’s probation. At the hearing, the Commonwealth presented evidence and testimony that Mardis had consumed and was in the possession of alcohol and Mardis presented no countervailing evidence. The circuit court, in turn, made findings that the evidence of Mardis using and possessing alcohol indicated that he had violated the terms of his probation. This finding matches with the condition of probation that Mardis shall not use any alcohol. Thus, the circuit court’s statements during the probation revocation hearing in this matter provided an adequate record of the reasons for revocation and the evidence in support thereof. Further, the reasons given by the circuit court to support the revocation order provide sufficient grounds to revoke Mardis’s probation. Since Mardis was fully notified of the court’s findings and the basis of

the revocation at the hearing, the due process requirement, as expressed in *Alleman*, was satisfied.

d. Imposition of Graduated or Lesser Sanctions

Mardis next argues that KRS 439.3106 was enacted to encourage sanctions other than revocation, and that the circuit court failed to consider graduated sanctions in this case. However, as stated in *McClure v.*

Commonwealth:

KRS 439.3106 permits, but does not require, a trial court to employ lesser sanctions; and, as even McClure concedes on appeal, incarceration remains a possibility. 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. Hence, the statute did not require the present trial court to impose a lesser sanction on McClure.

457 S.W.3d at 732 (citation omitted). Consequently, nothing in the statute nor in the Supreme Court’s analysis in *Andrews* mandated that the circuit court impose lesser sanctions before revoking Mardis’s probation. We therefore conclude that the circuit court did not abuse its discretion in deciding against sanctions other than incarceration.

CONCLUSION

For the foregoing reasons, we affirm the Carroll Circuit Court's order revoking Mardis's probation.

ALL CONCUR.

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