

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-001360-MR

JOSEPH ANDREWS

APPELLANT

v. APPEAL FROM PULASKI CIRCUIT COURT
HONORABLE DAVID A. TAPP, JUDGE
ACTION NO. 10-CR-00347

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * * * * *

BEFORE: ACREE, CHIEF JUDGE; MOORE AND THOMPSON, JUDGES.

THOMPSON, JUDGE: Joseph Andrews appeals from an order revoking his probation pursuant to KRS 439.3106. He alleges that the circuit court abused its discretion when it found his single positive drug test made him a significant risk to the community and that he could not be managed within the community. We agree and reverse and remand.

Andrews pled guilty to unlawful possession of a methamphetamine precursor, second offense and was sentenced to ten-years' incarceration, probated for five years. As a condition of his probation, Andrew was required to refrain from using any drugs. On May 3, 2011, Andrews tested positive for methamphetamines. Andrews denied that he had used illegal drugs but admitted that he had taken his wife's prescription diet medication. Two days later, Andrews's wife informed his probation officer that Andrews confessed to taking methamphetamines, and that he had enrolled in an inpatient treatment program at Lake Cumberland Rescue Mission (LCRM). Andrews continued with his treatment program until he was arrested for violating probation.

At Andrews's probation revocation hearing, he stipulated to the violation. He presented mitigating testimony from his probation officer, David Rogers, and from the head of LCRM, Gary Warick. Rogers testified that Andrews had fully complied with the terms of his probation and was doing well on probation until his positive drug test. Andrews continued to report to probation while in treatment and had no further violations.

Warick testified that the LCRM treatment program is a faith-based long term residential program and that treatment for nine months to a year is recommended. Warick testified that Andrews participated in the LCRM treatment program from May 5, 2011 until June 7, 2011, when he was arrested. He had demonstrated a desire to change, progressed steadily and met all requirements. Warick testified that LCRM still had a bed available for him.

During the probation revocation hearing, the circuit court found that Andrews was convicted of a serious offense. He was a three-time convicted felon, had violated probation before for his previous felonies and admitted that he violated his probation. It further noted that in his PSI, Andrews stated he did not have a problem with methamphetamines and, when offered treatment, stated that he did not need drug treatment. The court made oral findings that Andrews had violated his probation, was a significant risk to the community for reoffending and committing drug-related crimes, and could not be managed appropriately in the community.

In 2011, the General Assembly embarked on a comprehensive overhaul of the criminal justice system to respond to a crisis of rapidly rising rates of incarceration and concurrent costs through the adoption of the Public Safety and Offender Accountability Act, commonly referred to as House Bill 463. *See* Commonwealth of Ky. Legislative Research Commission, *Report of the Task Force on the Penal Code and Controlled Substances Act*, Research Memorandum No. 506 at 6 (2011). The General Assembly's adoption of new purpose statutes indicate that the primary objective of sentencing and purpose of the Department of Corrections is to "maintain public safety and hold offenders accountable, while reducing recidivism and criminal behavior and improving outcomes for those offenders who are sentenced." KRS 532.007; KRS 196.003. A particular emphasis is placed on using treatment to rehabilitate offenders and decrease overall costs. The General Assembly found that "[s]uccessful, community-based

treatment can be used as an effective tool in the effort to reduce criminal risk factors . . . [and appropriate treatment plans] offer a potential alternative to incarceration in appropriate circumstances and shall be used accordingly.” KRS 218A.005. The General Assembly encouraged the use of treatment over incarceration to generate savings while reducing criminal risk factors. KRS 196.286. However, it restrained the discretion of trial courts to revoke probation. KRS 439.3106.

The Commonwealth bears the burden of establishing a violation of probation by a preponderance of the evidence. *Commonwealth v. Marshall*, 345 S.W.3d 822, 834 (Ky. 2011). When a trial court determines that the evidence supports a breach of a condition of probation, its decision will not be disturbed unless its decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). Under the prevailing interpretation of our penal code prior to 2011, generally, a trial court’s discretion would not be disturbed if there was evidence to support at least one probation violation. *Lucas v. Commonwealth*, 258 S.W.3d 806, 807-808 (Ky.App. 2008). Moreover, our Supreme Court held that written findings of fact were not required. *Commonwealth v. Alleman*, 306 S.W.3d 484, 488 (Ky. 2010).

With the enactment of KRS 439.3106 in 2011, a failure to comply with a condition of probation is no longer sufficient to automatically justify revocation of probation. KRS 439.3106 provides:

Supervised individuals shall be subject to:

(1) 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

(2) 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.

Under KRS 439.3106(1), probation cannot be revoked simply upon a finding that a probationer failed to abide by a condition of supervision. Instead, to revoke probation, the trial court is now required to make two additional findings: 1) that the probationer's failure to abide by a condition of supervision constitutes a significant risk to prior victims or the community; and 2) that the probationer cannot be managed in the community. KRS 439.3106(1).

Andrews claims that he does not pose a threat to the community based on one positive drug test because he sought treatment. Further, he claims that his participation in a treatment program and good progress shows that he can be managed in the community.

Prior to House Bill 463, the Commonwealth's only responsibility was to prove by a preponderance of the evidence that a condition of probation was violated; more is now required to justify revocation and incarceration. Under KRS 439.3106(1), the Commonwealth must also prove by a preponderance of the

evidence that the probationer poses a significant threat to prior victims or the community and cannot be managed in the community.

The evidence before the circuit court consisted of testimony that, except for his positive drug test, Andrews had done well on probation and, after his positive drug test, he did well in a community-based treatment program. Andrews's one positive drug test and the same operative facts that were known to the trial court at the time Andrews was placed on probation are not sufficient to support the trial court's findings. Andrews's prior criminal history is an insufficient basis for revocation of probation because the trial court had access to that same history previously, and that history did not prevent his placement on probation. Andrews should not be barred from accessing treatment now simply because he previously denied he had a substance abuse problem or needed treatment. If we were to allow revocation of probation under these circumstances, it would negate the entire statutory change to the probation revocation process and the purposes underlying House Bill 463. Therefore, the circuit court's decision to revoke Andrews's probation was arbitrary and must be reversed.

Because Andrews's probation cannot be revoked pursuant to KRS 439.3106(1), he is subject to other sanctions which should be determined based upon 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." KRS 439.3106(2). It is within the circuit court's purview to chose from a variety of

options in crafting an appropriate response to Andrews's violation, including ordering drug treatment as a new condition of probation, increasing reporting requirements, or ordering the Department of Corrections to impose graduated sanctions pursuant to KRS 439.553 and 501 KAR 6:250.

Accordingly, we reverse and remand the revocation of Andrews's probation by the Pulaski Circuit Court for it to impose an alternative to revocation and incarceration.

ACREE, CHIEF JUDGE, CONCURS.

MOORE, JUDGE, CONCURS IN RESULT ONLY.

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