

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2011-CA-002106-MR

ANDREW JAMES KUNTZ

APPELLANT

v. APPEAL FROM BOYD CIRCUIT COURT  
HONORABLE C. DAVID HAGERMAN, JUDGE  
ACTION NO. 09-CR-00408

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
VACATING AND REMANDING

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BEFORE: CLAYTON, LAMBERT, AND VANMETER, JUDGES.

LAMBERT, JUDGE: Andrew James Kuntz has appealed from the order of the Boyd Circuit Court revoking his diversion and sentencing him to three years' imprisonment due to his failure to comply with the terms of his diversion agreement by making child support payments as ordered following the entry of his guilty plea to flagrant non-support. After careful review of the record, we hold that

the circuit court failed to make specific findings supporting its ruling. Therefore, we must vacate the circuit court's order.

The underlying case arose as a result of a 1997 child support order entered by the Boyd Circuit Court in action No. 96-CI-00126, in which Kuntz was ordered to pay child support in the reduced amount of \$200.00 per month to Diana Menshouse for their daughter, born in 1995, as well as an additional \$100.00 per month toward a \$3,933.12 arrearage. The first payment was due by September 10, 1997, and Kuntz was to make a regular payment every two weeks. The order noted that Kuntz was employed at a golf and country club in Grayson, Kentucky, where he worked 40 hours per week earning minimum wage. Twelve years later, in August 2009, Ms. Menshouse filed a criminal complaint against Kuntz, stating that he had failed to pay child support regularly as ordered by the circuit court in the 1996 action. By affidavit attached to the complaint, Barsha Imel, the Child Support Enforcement Agency caseworker assigned to the case, indicated that Kuntz's child support arrearage totaled \$17,126.75 through July 31, 2009. An arrest warrant was issued, and Kuntz was served with the warrant and arrested on August 23, 2009.

Kuntz agreed to waive indictment by the grand jury in exchange for a bond agreement, and the Commonwealth, through the Boyd County Attorney, filed a criminal information on September 10, 2009, charging Kuntz with flagrant non-support for persistently failing to provide support for his minor child pursuant to a court order. He was then released on a \$20,000.00 unsecured bail bond

conditioned on his payment of at least \$250.00 per month in child support. In July 2010, Kuntz moved the court to enter a guilty plea and permit him to enter into a diversion agreement. The court accepted the plea and entered a judgment. The court then sentenced Kuntz to 36 months' imprisonment, but diverted the sentence on the condition that he must pay his court ordered child support to Ms.

Menshouse beginning August 1, 2010. The diversion agreement provided that Kuntz's failure to abide by its terms would result in the assignment of the matter for final sentencing upon the filing of a motion by the county attorney's office. Finally, the court scheduled an evidentiary hearing to determine the amount of the arrearage, which was in dispute.

The court held the evidentiary hearing on September 9, 2010. Kuntz claimed that he did not owe any past-due child support. He testified that his tax refunds were intercepted for several years, and when he finally received a refund, he believed his arrearage had been paid. He never received anything from the child support office notifying him that he owed any child support. Furthermore, he stated that the child support office confirmed what Ms. Menshouse told him that she had "signed away" any remainder due to her, but he did not present any documentary evidence to establish this or remember the name of the person who told him this. The person at the child support office refused to give him a copy of the form documenting this "waiver."

In its order entered shortly after the hearing, the court stated that the Commonwealth had provided detailed evidence regarding its calculation of the

arrearage amount and that while Kuntz stated that there was an arrearage, he had no idea what the amount would be. The court noted Kuntz's testimony that he had been living in the same home with Ms. Menshouse and their daughter as well as providing support, but went on to note that he had not provided any evidence to support this position and that it found his testimony "thoroughly lacking in credibility." Based upon the evidence presented from the Commonwealth, the court found that the arrearage totaled \$17,724.38 as of August 31, 2010, of which \$400.00 was owed to the Commonwealth. The court ordered Kuntz to satisfy this arrearage by paying 60 monthly installments of \$295.40 through the Division of Child Support.

A few months later, on December 20, 2010, the County Attorney's Office moved to revoke Kuntz's diversion on the ground that he had not made any payments since July. The court issued a bench warrant when Kuntz failed to appear at the January 2011 revocation hearing. Kuntz was arrested on the warrant in September 2011. The court eventually held the revocation hearing on October 14, 2011.

At the hearing, the first witness to testify was Boyd County Child Support caseworker Mary Beth Pickett, who stated that Kuntz had not made any child support payments or any payments to his arrearage since the September 2010 hearing. The current amount of his arrearage was \$20,324.38. She admitted that she did not have any information about Kuntz's ability to pay. Following her testimony, Kuntz argued that the Commonwealth failed in its burden to establish

that he had the ability to pay or whether there were alternative forms of punishment pursuant to *Commonwealth v. Marshall*, 345 S.W.3d 822 (Ky. 2011). After some discussion, Kuntz agreed that the burden would be on him to show that he was unable to pay through no fault of his own once the Commonwealth established that he had not paid what was due.

The first witness to testify for Kuntz was his current wife, Melissa. They had been married for two years. She testified that Kuntz had had some temporary jobs since September 2010, including Kelly Services and odd jobs, and that he continued to look for work. They both were looking for work during this time, and he would go out every other day filling out applications in his quest for employment. Regarding their financial situation, Ms. Kuntz testified that they had no income or money. She applied for and received food stamps for both of them in July and December 2009. Their only other sources of income during the last year were odd jobs, including collecting aluminum cans, and they used this income to purchase gas, which would permit them to look for jobs, as well as hygiene products. She and Kuntz stayed with friends of the family during that time because they had been evicted from their apartment and had no money for rent. They lived on a temporary basis with family members before they moved in permanently with her daughter, Angel Webster. She described their situation as hopeless, but she had recently received a full time job at GC Services earning \$9.75 per hour plus benefits. She reported that the company was hiring and was offering a bonus for referring successful applicants. She planned to refer Kuntz for one of the open

positions. She said she would be able to help with child support payments starting on October 21 and offered to have her wages garnished to pay Kuntz's child support obligation. On cross-examination, she admitted that Kuntz had not made any child support payments when he had been employed when they were together, noting that he had not earned enough to make any payments.

Angel Webster testified next. She had known Kuntz for three years, and he had lived with her for three or four months in a house in Huntington she rented. Ms. Webster took him to interviews, stating that he was always nicely dressed and took paperwork and references. She reported that he tried hard to find a job, but nothing was available. She also works at GC Services, and had referred her mother for the position.

Kuntz was the last witness to testify. When he entered the diversion agreement, he knew he would have to pay \$500.00 per month in child support. He had a part-time job at the time, but that did not work out and he was let go a week after he signed the diversion agreement. He did not know how he was going to pay the support amount, but knew he would lose if he went to trial. Kuntz never stopped looking for a job, stating that he had a good work history until the last three years. He had not worked for more than 20 hours or earned more than \$100.00 per week for the last year. He needed the money to keep his car running and pay for insurance on it, to keep his telephone on, for hygiene products, and to contribute to the household where they were staying. On cross-examination, he

admitted that he had not paid child support while he had been employed, which led to his wages being garnished.

By order entered October 27, 2011, the court found that Kuntz “could have made some payments against the arrearage and has made absolutely no effort to do so. This failure to pay child support as ordered was going on years ago when [Kuntz] was regularly employed.” Based upon this finding, the court revoked Kuntz’s diversion and sentenced him to three years in prison. This appeal now follows.

On appeal, Kuntz contends that the circuit court violated his constitutional due process rights and abused its discretion in revoking his diversion without considering alternatives to incarceration or providing specific findings to support its decision. The Commonwealth argues that there was sufficient evidence to support the circuit court’s finding that Kuntz had not paid any child support since entering diversion and had not made bona fide efforts to do so.

Kentucky Revised Statutes (KRS) 533.256 provides the proper standard courts must apply when addressing a defendant’s failure to comply with or complete the conditions of diversion: “In making a determination as to whether or not a pretrial diversion agreement should be voided, the court shall use the same criteria as for the revocation of probation, and the defendant shall have the same rights as he or she would if probation revocation was sought.” KRS 533.256(2). Generally, our standard of review in probation revocations appeals “is limited to a determination of whether, after a hearing, the trial court abused its discretion in

revoking the appellant's [probation].” *Tiryung v. Commonwealth*, 717 S.W.2d 503, 504 (Ky. App. 1986). “The test for abuse of discretion is whether 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).

In the present appeal, Kuntz is not disputing that he failed to make any child support payments after entering into the diversion agreement. Rather, his argument relates to the circuit court’s finding that he could have made some payments against the arrearage. And we must agree with Kuntz that the circuit court did not adequately support its ruling by making specific findings on the record.

This Court recently addressed the impact *Marshall* has had on cases involving motions to revoke based upon nonpayment of support:

In *Commonwealth v. Marshall*, 345 S.W.3d 822 (Ky. 2011), the Supreme Court considered appeals in two separate actions arising from motions to revoke for failure to comply with conditions requiring the payment of child support. The Supreme Court conducted an extensive review of the existing authority, including *Bearden* and *Gamble* as well as other recent Kentucky precedent. Relying in part on *Bearden*, the Court held:

[D]ue process requires that the trial court considering revocation for nonpayment of support (1) consider whether the probationer has made sufficient bona fide efforts to pay but has been unable to pay through no fault of his own and (2) if so, consider whether alternative forms of punishment might serve the interests of punishment and deterrence. This holding is consistent with existing Kentucky and United States Supreme Court



precedent concerning motions to revoke probation for failure to pay fines or restitution.

*Marshall*, 345 S.W.3d at 823–24. Based upon this holding, a trial court must complete a *Bearden* analysis before revoking a defendant's probation or conditional discharge for failure to comply with child support payments, confirming that *Bearden* extends beyond the payment of fines and restitution.

The *Marshall* Court then reconfirmed that the trial court is required to “make clear findings on the record specifying the evidence relied upon and the reasons for revoking probation.” *Marshall*, 345 S.W.3d at 824. The trial court must include “findings about whether the defendant made sufficient bona fide efforts to make payments.” *Id.* These findings do not necessarily have to be made in writing, *id.*, although it would be good practice to do so as a court speaks by its written orders. Importantly for the case before us, “[t]hese due process requirements apply regardless of whether child support payment conditions were imposed by the trial court or whether the defendant agreed to these conditions as part of a plea agreement.” *Id.* In cases such as *Bowlin*'s, where the defendant's plea agreement was conditioned on his agreement to make child support payments, “the trial court may properly focus its inquiry on post-plea financial changes without revisiting whether the defendant was able to make payments at the time the guilty plea was entered.” *Id.*

Finally, the Court confirmed the relative burdens in probation revocation hearings:

As with all probation revocation hearings, the Commonwealth has the burden of proving a probation violation by a preponderance of the evidence. But if the Commonwealth has shown that payment conditions were violated by the defendant's failure to make the required payments, the probationer bears the burden of persuading

the trial court that he made bona fide efforts to comply with payment conditions but was unable to do so through no fault of his own. The trial court must afford the probationer an opportunity to present evidence of reasons for nonpayment but may focus consideration on post-plea changes if defendant entered a guilty plea to flagrant nonsupport, particularly where he agreed to make payments under a plea agreement. The trial court must specifically find whether the probationer made sufficient bona fide efforts to comply with payment obligations. If so, the trial court must then consider whether alternative measures might accomplish interests in punishment and deterrence or if imprisonment is necessary to accomplish these objectives.

*Id.* at 834 (footnotes omitted).

*Bowlin v. Commonwealth*, 357 S.W.3d 561, 565-66 (Ky. App. 2012).

As the Supreme Court made clear in *Marshall*,

The trial court must specifically identify the evidence it relies upon in making these determinations [whether each defendant made sufficient bona fide attempts to make payments but was unable to make the required payments through no fault of his own and, if so, whether alternative punishment might accomplish the Commonwealth's punishment and deterrence objectives] on the record, as well as the specific reason(s) for revoking probation on the record.

*Id.* at 833. Furthermore, the *Marshall* Court declared that “[i]t is not enough that an appellate court might find some evidence in the record to support a reason for revoking probation by reviewing the whole record. Stating ‘general conclusory

reasons' for revoking probation is not enough, as we recognized in *Alleman*.” *Id.* at 833-34 (footnote omitted).

In the present case, the circuit court did not make any oral findings on the record, and the only findings in its written order are as follows: “After considering the testimony and reviewing the exhibits, the Court finds that the Defendant could have made some payments against the arrearage and has made absolutely no effort to do so. This failure to pay child support as ordered was going on years ago when the Defendant was regularly employed.” These two sentences are certainly “general conclusory reasons” that *Marshall* confirmed were not enough to support probation revocation. Accordingly, these “findings” are not sufficient to support the circuit court’s decision to revoke Kuntz’s diversion.

In addition, while the circuit court mentioned that it had considered the exhibits and testimony, the only time period it appeared to consider was prior to the entry of the guilty plea and diversion agreement by referencing that Kuntz had failed to pay child support “years ago” when he had been “regularly employed.” Again, as the Supreme Court pointed out in *Marshall*, “[i]t is entirely appropriate for the trial court to consider a defendant's agreement to payment conditions under the plea agreement and a defendant's representation that he could make such payments when entering his guilty plea and *to focus on post-plea financial changes to the extent possible*.” *Id.* at 834 (emphasis added). The Court went on to explain this statement in a footnote:

Obviously, the defendants' guilty pleas to flagrant nonsupport implicitly represent their past and current ability to make payments (as of the time of the guilty plea proceedings); but the defendants would not necessarily be able to predict their future ability to make payments in light of unexpected changes in the general economy or their employers' business (such as employers going out of business, companies being sold, etc.). However, we recognize that sometimes, as a practical matter, it may be difficult to pinpoint exactly when such changes occurred.

*Id.* at 834 n.47.

Here, the circuit court did not address any of the testimony Kuntz presented at the revocation hearing regarding his efforts to find and retain employment subsequent to his entering into the diversion agreement. Rather, the court focused solely on his previous failure to pay while he was employed, which led to the garnishment of his wages. The Commonwealth argues that the circuit court simply did not find Kuntz's testimony credible regarding his attempts to make payments, just as it stated in its order regarding the arrearage amount following the evidentiary hearing: "His testimony was thoroughly lacking in credibility." However, the testimony presented at the two hearings addressed different issues; in the evidentiary hearing, Kuntz was attempting to establish that he had paid more child support in the past than the Child Support office had calculated, but he failed to introduce any documentary evidence supporting his claims, while in the revocation hearing, the testimony addressed whether he had made bona fide efforts to pay his child support obligation and whether there was a valid alternative to incarceration. These are two different considerations.

Therefore, we must vacate the circuit court's order revoking Kuntz's diversion to permit the court to make specific findings supporting its decision. The court should not focus solely on evidence relating to Kuntz's pre-diversion status, but should also consider post-diversion evidence.

For the foregoing reasons, the order of the Boyd Circuit Court revoking Kuntz's diversion is vacated, and this matter is remanded for further proceedings in accordance with this opinion.

ALL CONCUR.

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