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TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2012-CA-000064-MR

RODNEY CARTER

APPELLANT

v. APPEAL FROM CRITTENDEN CIRCUIT COURT
HONORABLE C. RENE WILLIAMS, JUDGE
ACTION NO. 2007-CR-00022

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
VACATING AND REMANDING

** ** * * * * *

BEFORE: CAPERTON, COMBS, AND DIXON, JUDGES.

COMBS, JUDGE: Rodney Carter appeals an order of the Crittenden Circuit Court that revoked his probation. After our review, we vacate and remand.

On June 11, 2009, Carter pleaded guilty to one count of theft by deception (over \$300).¹ He received a five-year sentence, probated for five years. Two of the conditions of his probation required that he “report to the probation officer as directed” and that he “not commit another offense.” On July 27, 2010, Carter’s

¹ In 2007, theft by deception over \$300 was a class D felony. In 2009, KRS 514.040(8) was amended, and the felony threshold became \$500. The amendment is immaterial in this case because Carter was charged with theft of items valued over \$700.

probation officer, Paul Newman, filed an affidavit in which he stated that he had not had contact with Carter since March 16, 2010. The last contact was a letter from Carter's wife. Officer Newman also informed the court that Carter had been charged with bigamy in McLean County.

The court held a probation revocation hearing on December 8, 2011. Officer Newman stated that Carter last reported to his office in November 2009. Carter was informed that he needed to report in December 2009 but that he never did. Again, the only contact that Officer Newman had with Carter after November 2009 was peripheral: a letter that Carter's wife wrote in March 2010. Carter testified that since November 2009, he had been in and out of the hospital because of colon cancer and unspecified mental issues. He testified that he thought that his "reporting" consisted of sending in a form, which he did for several months. Carter told the court that although he had asked his wife to contact Officer Newman during one of his hospitalizations, she did not follow through for him.

The trial court acknowledged that Carter had been charged with bigamy. Nevertheless, the court stated that it would not revoke his probation because of the bigamy charge. Instead, it indicated that it would revoke Carter's probation because he had absconded. The court declared that reporting to a probation officer is *the most important condition of probation*. Carter asked the court to consider

alternative sanctions -- such as treatment, but it declined to do so and reinstated his sentence of five-years' incarceration. This appeal follows.

Our standard of review for revocation of probation is whether the trial court abused its discretion. *Lucas v. Commonwealth*, 258 S.W.3d 806, 807 (Ky. App. 2008). "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).

On appeal, Carter argues² that the trial court erred by not considering relevant statutory factors when it revoked his probation. After our review of those factors, we are compelled to agree.

Kentucky Revised Statute[s] (KRS) 439.3106 was enacted by the General Assembly in 2011. It provides the following guidelines for individuals subject to supervision:

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. (Emphases added.)

² The Commonwealth argues that Carter did not preserve the error. However, even though Carter's counsel did not quote the statute directly to the court, counsel requested the court to consider the substance of the statute. We hold that the error was preserved for our review.

KRS 439.3106 is a relatively new statute that has not often been reviewed by this Court. We have not found a case in which our Supreme Court has applied it. Two of our cases have been published – *Jarrell v. Commonwealth*, 384 S.W.3d 195 (Ky. App. 2012), and *Southwood v. Commonwealth*, 372 S.W.3d 882 (Ky. App. 2012). In both cases, this Court held that while the trial courts had not made specific findings, their findings nonetheless conformed to the requirements of KRS 439.3106. In *Jarrell*, the trial court determined that Jarrell was at high risk to commit another felony and that he needed correctional treatment. In *Southwood*, the trial court was concerned about the violent nature of Southwood’s alleged criminal behavior and the risk he would likely commit another felony. Southwood had incurred new charges that were violent in nature. *Southwood v. Commonwealth*, 372 S.W.3d at 884.

In the case before us, the court made no such findings. It merely found that because Carter failed to report, he should be incarcerated. The court did not address *any* of the factors in KRS 439.3106 as the General Assembly has directed courts to do. In this case – as distinguished from *Southwood* – Carter’s new alleged criminal behavior was not violent. The court refused to take Carter’s mental issues into account, stating that his failure to report was the *only* fact that it would consider. We are persuaded that the trial court’s conviction that reporting is the most important condition of probation is unsupported by the law. Numerous other statutory factors are recited, none of which the court considered. The General Assembly did not prioritize the element of reporting as set forth in KRS

439.3106; rather, it emphasized the necessity of analyzing the severity and risks of a person's crime before committing him to jail without probation. We conclude that the trial court erred in failing to evaluate the other statutory criteria set forth in KRS 439.3106 and in relying solely on the element of failure to report.

Therefore, we vacate the order of the Crittenden Circuit Court and remand in order for the court to make findings that comport with the substantive requirements of KRS 439.3106.

CAPERTON, JUDGE CONCURS.

DIXON, JUDGE, DISSENTS.

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