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TO BE PUBLISHED

# Commonwealth of Kentucky

## Court of Appeals

NO. 2012-CA-000903-MR

RAYCHEL STILGENBAUER

APPELLANT

v.

APPEAL FROM BOYD CIRCUIT COURT  
HONORABLE GEORGE DAVIS, JUDGE  
ACTION NO. 07-CR-00256

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: ACREE, CHIEF JUDGE; TAYLOR AND VANMETER, JUDGES.

VANMETER, JUDGE: Raychel Stilgenbauer appeals from the Boyd Circuit Court's order revoking her diversion, adjudicating her guilty of first-degree possession of a controlled substance, and imposing a five-year sentence of imprisonment. For the following reasons, we affirm.

In July 2007, Stilgenbauer was indicted by a Boyd County grand jury for one count of first-degree trafficking in a controlled substance, a Class C felony.

After negotiations with the Commonwealth, Stilgenbauer agreed to plead guilty to an amended charge of first-degree possession of a controlled substance, a Class D felony. The five-year sentence for that offense was diverted for five years of supervised diversion, during which Stilgenbauer was to violate no laws, have no felony charges, and pay a \$25.00 monthly supervision fee. Under the terms of the diversion agreement, the trial court retained authority to revoke or modify any condition set forth in the agreement during the diversion period.

In May 2008, six months after entering into the diversion agreement, the Commonwealth filed a motion to set it aside due to Stilgenbauer being charged with the felony offense of receiving stolen property over \$300. The trial court held a hearing on the matter during which Stilgenbauer admitted to violating the agreement. At that time, the court chose not to set aside the agreement, but instead ordered Stilgenbauer to serve 30 days in jail and then return to active diversion.

About a year and a half after the first violation, Stilgenbauer violated the terms of the diversion agreement a second time by committing multiple violations. Probation and Parole Officer Billy Slone filed a Special Supervision Report alleging that Stilgenbauer had failed to report an arrest within 72 hours, left the state without permission, used controlled substances, and failed to pay her supervision fees. Despite these violations, the trial court chose to impose a 30-day sentence for contempt, credit for time served of 132 days, and ordered Stilgenbauer to enter and complete the Boyd County drug court program as a modified condition of the diversion agreement.

In January 2012, a notice of violations and termination from drug court was filed against Stilgenbauer, notifying the trial court that she had been expelled from the drug court program for failure to comply with the terms of the program; specifically, her urine screen tested positive for alcohol and she had consorted with another program participant. The Commonwealth filed a motion to revoke Stilgenbauer's diversion due to her failure to complete drug court as ordered.

During the revocation hearing that followed, the trial court heard testimony from the drug court program supervisor, William Church, who detailed the violations Stilgenbauer had committed which led to her termination from the program. Ultimately, the court found that Stilgenbauer had violated her diversion agreement and entered a final judgment adjudicating her guilty of first-degree possession of a controlled substance and sentencing her to five years in prison. This appeal followed.

On appeal, Stilgenbauer first argues the trial court lacked authority to revoke her diversion because completing drug court was not a valid condition of the diversion agreement since it was not set forth in writing and signed by the parties, as required by RCr<sup>1</sup> 8.04(1). Accordingly, Stilgenbauer claims the trial court's order revoking her probation for failure to comply with that condition is void and must be vacated. Stilgenbauer concedes this issue was not preserved for review on appeal, but nonetheless maintains that a void order or judgment is "a legal nullity, and a court has no discretion in determining whether it should be set aside."

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<sup>1</sup> Kentucky Rules of Criminal Procedure.

*Cabinet for Health & Family Servs. v. J.T.G.*, 301 S.W.3d 35, 39 (Ky. App. 2009)

(quotations and citations omitted). Stilgenbauer emphasizes that an appellate court has inherent authority to correct an illegal sentence regardless of preservation.

*Jones v. Commonwealth*, 382 S.W.3d 22, 27 (Ky. 2011).

RCr 8.04, entitled “Pretrial diversion” provides:

(1) Generally. The attorney for the Commonwealth and the defendant may agree, subject to the approval of the trial court, that the prosecution will be suspended for a specified period after which it will be dismissed on the condition that the defendant not commit a crime during that period, or other conditions agreed upon by the parties. **The agreement (or any mutually agreed upon subsequent modifications to the agreement) must be in writing and signed by the parties.**

RCr 8.04(1) (emphasis added).

Neither party disputes that the diversion agreement was in writing and signed by the parties. The court’s subsequent modification of the agreement, imposing completion of drug court as a condition of Stilgenbauer’s diversion, was not signed by the parties. Rather, the condition was set forth in a court order. The Commonwealth asserts that RCr 8.04(1) does not apply to Stilgenbauer’s diversion agreement because that rule only applies to diversion of misdemeanors in district court. Since Stilgenbauer’s agreement was for felony diversion entered in circuit court, the Commonwealth argues it is covered under the diversion program authorized by KRS<sup>2</sup> 533.250–260.

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<sup>2</sup> Kentucky Revised Statutes.

KRS Chapter 533 addresses Probation and Conditional Discharge. The Commonwealth directs us to KRS 533.262(1), which provides: “The pretrial diversion program authorized by KRS 533.250 to 533.260 shall be the sole program utilized in the Circuit Courts of the Commonwealth except for drug court diversion as approved by the Supreme Court and the Department of Corrections.” The Commonwealth claims the distinction between diversion under KRS 533.250–.260 and diversion pursuant to RCr 8.04(1) was recognized in *Flynt v. Commonwealth*, 105 S.W.3d 415 (Ky. 2003), and in *Tucker v. Commonwealth*, 295 S.W.3d 455 (Ky. App. 2009).

In *Flynt*, the Kentucky Supreme Court outlined the statutory criteria of pretrial diversion set forth in KRS 533.250, and noted KRS 533.262’s reflection of the legislative determination that district courts may employ other pretrial diversion programs for misdemeanants pursuant to RCr 8.04, but the pretrial diversion program authorized by KRS 533.250 “shall be the sole program utilized in the Circuit Courts of the Commonwealth except for drug court diversion as approved by the Supreme Court and the Department of Corrections.” 105 S.W.3d at 418 (quoting KRS 533.262(1)). The Supreme Court was “unaware of any drug court diversion program, which operates separately from a pretrial diversion program authorized by KRS 533.250–.260, that has been approved by both this Court and the Department of Corrections.” *Id.* at 418 n.11. In *Tucker*, this court similarly noted that felony pretrial diversion is a unique statutory creature and “differs from the less structured pretrial diversion practice authorized by Rules of

Criminal Procedure (RCr) 8.04 (now limited to misdemeanants, KRS 533.262(2))”.  
295 S.W.3d at 458 n.5.

In this case, it appears that Stilgenbauer’s felony pretrial diversion is governed by KRS 533.250-.260. Stilgenbauer cites no authority in support of her contention that a trial court lacks authority to modify a written diversion agreement without the signature of the parties, other than to claim that RCr 8.04’s identification of the “Commonwealth” as the prosecutor, as opposed to the “County” (which prosecutes misdemeanors in district court), conclusively establishes that RCr 8.04 applies to felony diversion agreements. This argument is unpersuasive. Stilgenbauer’s diversion agreement clearly authorizes the trial court to revoke or modify any condition set forth in the agreement during the diversion period. Stilgenbauer makes no argument that any provision of KRS 533.250-.260 precludes the trial court from modifying the conditions of diversion at any point. And at no time did Stilgenbauer object to the imposition of the drug court condition. Upon review of the record and applicable law, we are unable to say that the trial court exceeded its authority by modifying the diversion agreement to include completion of drug court as a condition.

Moreover, the trial court did not abuse its discretion by revoking Stilgenbauer’s diversion for failure to complete drug court as ordered. The standard for reviewing a trial court’s decision to revoke diversion is the same abuse of discretion standard used for reviewing a trial court’s decision to revoke probation. *See* KRS 533.256(2); *Lucas v. Commonwealth*, 258 S.W.3d 806, 807

(Ky. App. 2008). Based on the record in this case, the trial court’s revocation of Stilgenbauer’s diversion due to the results of her urine test was not “arbitrary, unreasonable, unfair or unsupported by sound legal principles” so as to amount to an abuse of discretion. *Woodard v. Commonwealth*, 147 S.W.3d 63, 67 (Ky. 2004) (quotations and citations omitted).

Next, Stilgenbauer argues the trial court erred by revoking her diversion without making the findings required by KRS 439.3106(1) and further, the evidence did not support the requisite findings. Stilgenbauer did not preserve this issue for review, so we will review it for palpable error pursuant to RCr 10.26, which provides:

A palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error.

In other words, palpable error relief is not available unless the error was (1) clear or plain under existing law, (2) more likely than ordinary error to have affected the judgment, and (3) so seriously affected the fairness, integrity or public reputation of the proceeding to have been jurisprudentially intolerable.

*Commonwealth v. Jones*, 283 S.W.3d 665, 668 (Ky. 2009).<sup>3</sup>

KRS 439.3106 was enacted by the General Assembly in 2011. It provides the following guidelines for individuals subject to probation:

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<sup>3</sup> Stilgenbauer’s argument that she preserved this issue by requesting to remain on diversion is without merit. During the revocation hearing, Stilgenbauer made no mention of KRS 439.3106 or request that the trial court make additional findings.

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.

The case law that has emerged since the enactment of KRS 439.3106 makes clear that a trial court's failure to list exhaustively its findings regarding every factor contained in the statute does not conclusively establish error. In fact, "[t]he statutory language of KRS 439.3106 does not require the court to make specific findings of fact." *Southwood v. Commonwealth*, 372 S.W.3d 882, 884 (Ky. App. 2012). Instead, in evaluating a trial court's application of KRS 439.3106, we look to the trial court's oral and written findings to determine whether the court "appropriately considered the General Assembly's wishes[.]" *Jarrell v. Commonwealth*, 384 S.W.3d 195, 203 (Ky. App. 2012).

In this case, Stilgenbauer violated the terms of diversion by being charged with the felony offense of receiving stolen property, failing to report an arrest within 72 hours, leaving the state without permission, using controlled substances, failing to pay her supervision fees, and being expelled from the drug court program for testing positive for alcohol and consorting with another participant. During

Stilgenbauer’s revocation hearing, the trial court went through the history of this case, her numerous violations of the conditions of diversion, and the various chances she received to comply with the conditions. The court expressed its concern about Stilgenbauer’s substance abuse, including alcohol, and stated that if it were to make any other ruling besides revocation, the legal system and the drug court program would “look like a joke.” We agree. Given the facts of this case, Stilgenbauer has not shown that the trial court committed palpable error by revoking her diversion under KRS 439.3106.

The order of the Boyd Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Brandon Neil Jewell  
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Jack Conway  
Attorney General of Kentucky

Jason B. Moore  
Assistant Attorney General  
Frankfort, Kentucky