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Commonwealth of Kentucky
Court of Appeals

NO. 2013-CA-000255-MR

JIMMY POSTON

APPELLANT

v. APPEAL FROM WAYNE CIRCUIT COURT
HONORABLE VERNON MINIARD, JR., JUDGE
ACTION NOS. 11-CR-00162, 11-CR-00182, AND 11-CR-00182-001

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * ** * **

BEFORE: CLAYTON, COMBS, AND STUMBO, JUDGES.

CLAYTON, JUDGE: Jimmy Poston appeals from the order entered January 24, 2013, by the Wayne Circuit Court revoking his probation pursuant to Kentucky Revised Statutes (KRS) 439.3106. He alleges that the trial court abused its discretion by revoking his probation and that the findings of fact and conclusions of law were inadequate to satisfy due process. Poston argues that the trial court

failed to properly apply KRS 439.3106. This matter was held in abeyance pending the decision by the Kentucky Supreme Court in *Commonwealth v. Andrews*, 448 S.W.3d 773 (Ky. 2014). As the *Andrews* case is now final, Poston's case is returned to the active docket. After careful consideration of the record, the arguments of counsel and the holding in *Andrews*, we agree with Poston that the trial court did not properly apply KRS 439.3106. We therefore reverse and remand this case for proper application of KRS 439.3106.

BACKGROUND

On May 8, 2012, Poston entered a guilty plea to the offenses charged in indictment 11-CR-00162 of Possession of a Controlled Substance, first degree, first offense; Drug Paraphernalia-Buy/Possess, first offense; and, Possession of Marijuana. Poston also entered a guilty plea to the offenses in indictment 11-CR-00182-001 of Manufacturing Methamphetamine, first offense, and Drug Paraphernalia-Buy/Possess, first offense. The charge of Persistent Felony Offender, second degree, was dismissed. By order entered July 9, 2012, Poston was sentenced to a total of ten (10) years on the charges. The sentence was probated for a period of five (5) years after Poston served 365 days in jail. Probation was to be supervised. The conditions of Poston's probation were indicated by a check mark on the judgment by the trial judge. Among the conditions marked were "refrain from the use of any alcohol or drugs unless prescribed by a doctor;...answer all reasonable inquiries by the probation officer and promptly notify the probation officer of any change of address or employment;

submit to periodic testing for use of controlled substances or alcohol and pay a reasonable fee;....” There was no requirement for drug treatment in the order, and the record does not contain any requirement for drug treatment to be arranged by Probation and Parole.

Poston served the 365 days in jail and then was released on probation. Several months after his release, the probation officer received information that Poston had left home without notifying probation of his change of address. It was later revealed that on December 8, 2012, Poston and his wife had an argument. After the argument, Poston’s wife dropped him off at the Monticello Motel. On December 10, 2012, Poston went to work, and on that same day the probation officer went to Poston’s job at Wendy’s Restaurant. The probation officer took Poston into custody at that time and administered a drug test to him. Poston tested positive for methamphetamine. He also admitted to using methamphetamine.

Poston testified at the hearing on December 18, 2012, that he used methamphetamine on December 8th and that he spent one night at the hotel. This was his first positive test since being on probation. Poston had attended AA/NA meetings, and testified that he was also willing to participate in drug treatment. Poston also testified that he had not changed his address and that, except for a few personal items that he had with him, the rest of his property was still at his home. The probation officer also testified.

At the December hearing, defense counsel cited *Andrews v. Commonwealth*, 2012 WL 5986527 (Ky. App. 2012)(2011-CA-001360-MR), for

the proposition that one positive drug test was an insufficient basis for revoking a defendant's probation. The court noted that *Andrews* was an unpublished case. Additionally, the court did not find that the *Andrews* case and Poston's case were similar. The court continued the hearing to January 22, 2013, and informed counsel that in the interim they could file any other information that they deemed important.

Poston's counsel filed a brief on January 2, 2013, requesting that he continue on probation. On January 22, 2013, a second hearing was held. No additional testimony was presented; however, counsel was allowed to make additional arguments. The trial court had not finished reading Poston's brief and the Commonwealth had not read the brief at all. The court allowed the Commonwealth to file a response to the brief and then took the matter under submission. On January 24, 2013, the court entered its order revoking Poston's probation. In the order, the court found that Poston had checked into the Monticello Motel on December 8, 2012; that he tested positive for methamphetamine on December 10, 2012, and admitted to using it; and then stated:

That the Court finds the Defendant to be a significant risk to the community in that his past actions and repeat actions while under indictment and repeat actions while on probation prove to the Court that the Defendant cannot conform his future actions to the norm of a law abiding citizen in the community. Further that the Defendant cannot be appropriately managed in the community by the fact that he was on supervised

probation and ended up being found working at a restaurant while admittedly on methamphetamine.

The Court finds that the Defendant is in need of rehabilitation that can only be realized by confinement in an appropriate facility to be determined by the Department of Corrections.

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Poston timely appealed the order.

STANDARD OF REVIEW

As held in *Jarrell v. Commonwealth*, 384 S.W.3d 195,198 (Ky. App. 2012), “We review a circuit court's decision revoking a defendant's probation for an abuse of discretion.” *See Miller v. Commonwealth*, 329 S.W.3d 358, 359–60 (Ky. App. 2010). Under our abuse of discretion standard of review, we will disturb a ruling only upon finding that “the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” [*Commonwealth v. English*, 993 S.W.2d 941, 945 \(Ky. 1999\)](#). *Commonwealth v. Andrews*, 448 S.W.3d at 780.

Probation revocation hearings must be conducted in accordance with minimum requirements of due process of law. KRS 533.050(2) provides that the court may not revoke or modify the conditions of a sentence of probation or conditional discharge except after a hearing with defendant represented by counsel and following a written notice of the grounds for revocation or modification.

Probation revocation is not dependent upon a probationer's conviction of a criminal offense. Instead, the Commonwealth need only prove by a preponderance of the evidence that a probationer has violated the terms of probation.

Miller, 329 S.W.3d at 359 (internal quotation marks and citations omitted).

ANALYSIS

There is no disagreement that KRS 439.3106 is controlling. 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.

Poston argues that the trial court's conclusion that his "past actions and repeated actions while under indictment" are not a rational basis for revocation because the trial court had this information available to it when he was placed on probation.

Further, Poston argues that a single positive drug test is not a "repeated action" and the court did not find that he had changed his home address without notification to probation and parole. Poston also argues that there was no proof that he was under the influence of methamphetamine while at work; he was willing to go for treatment; and, there was no proof that he was a risk to prior victims or the community. Consistent with the language in paragraph two of the statute, Poston argues that he should have been subject to sanctions other than revocation and incarceration.

The Commonwealth argues that the trial court acted within its discretion when considering the facts of the case and applying the statute to those facts; that Poston received due process; that KRS 439.3106 does not require courts to continue defendant on probation when it is apparent that probation is unsuccessful; or, allow defendants to avoid imprisonment because they have not committed the most heinous of new offenses. The Commonwealth states that the defendant is suggesting that only heinous offenses should be used as the standard for determining what is a “significant risk to the community.” The Commonwealth points out that there is no dispute that Poston used methamphetamine and that he did not report to probation and parole that he was not living at home. The Commonwealth argues that despite Poston’s comments at sentencing that he could stay clean without more stringent drug rehabilitation and that he could be successful on probation, it was clear that Poston could not be managed in the community. However, the Commonwealth provided no evidentiary support for this argument. Further, Poston was not initially required to participate in drug treatment.

The *Commonwealth v. Andrews* case provides guidance to us in this matter. In *Andrews*, the Defendant was serving on probation and was given a drug test. The test revealed a positive result for the use of methamphetamine. Andrews denied using the drug, but his wife called probation two days later and explained that he had taken the drug and had lied to probation. He then entered a long-term drug treatment program. Andrews was arrested. At the probation hearing, he

stipulated to the violation. The director of the treatment program testified that Andrews was making progress and that there was a bed available to him if he remained on probation.

The trial court noted that Andrews had been convicted of a serious drug offense, had two previous felonies, had denied that he had a drug problem and had refused treatment at sentencing. Although the trial court was not certain that KRS 439.3106 applied to a judge's decision on a revocation motion, it nevertheless made oral findings that Andrews had violated the conditions of probation, was a significant risk to the community, and could not be managed in the community.

On appeal, Andrews argued that a single positive drug test was insufficient to demonstrate that he was a significant risk to the community or that he could not be managed properly in the community. The Court of Appeals agreed and also stated that the court must make specific findings under KRS 439.3106(1) regarding the risk posed to prior victims or the community and whether the probationer can be managed in the community. The Kentucky Supreme Court granted discretionary review to determine whether KRS 439.3106 applies and whether the statute requires trial courts to make additional findings of fact prior to revoking probation.

The Supreme Court decided that KRS 439.3106 does apply to trial courts and must be considered in determining if revocation should be granted. The Supreme Court discussed the factors that probation and parole is to consider when imposing graduated sanctions. If graduated sanctions are inappropriate to the

violation, then the violations are to be reported to the court. The Supreme Court quoted 501 Kentucky Administrative Regulations (KAR) 6:250 which states:

When imposing graduated sanctions under this regulation, a probation officer must first consider various factors including:

- (a) Offender's assessed risk and needs level;
- (b) Offender's adjustment on supervision;
- (c) Severity of the current violation;
- (d) Seriousness of the offender's previous criminal record;
- (e) Number and severity of any previous supervision violations; and
- (f) Extent to which graduated sanctions were imposed for previous violations.

Commonwealth v. Andrews, 448 S.W.3d at 778.

The Supreme Court then noted that it “seems particularly illogical that the legislature would place the burden of additional findings on probation officers but allow a trial court to disregard those findings....

In sum, the application of KRS 439.3106(1) allows the trial court to conclude with some certainty that the imposition of some other accountability measure would be fruitless, as the probationer both poses a risk and is not manageable in the community. We conclude that KRS 439.3106(1) requires trial courts to consider whether a probationer's failure to abide by a condition of supervision constitutes a significant risk to prior victims or the community at large, and whether the probationer cannot be managed in the community before probation may be revoked.

Andrews, 448 S.W.3d at 779-80.

The Kentucky Supreme Court further determined that:

a review of the revocation proceedings reflects that the trial court considered more than just Andrews's criminal history and the one drug test.

Testimony at the revocation proceeding focused, in part, on misrepresentations which Andrews had made to both the court and his probation officer. The trial court specifically observed that Andrews had refused drug treatment at the time of sentencing, claiming that he did not suffer from a substance abuse problem. The court also heard testimony that Andrews, having tested positive for methamphetamine, lied to his probation officer and blamed the failed drug test on diet pills. The Commonwealth elicited testimony that Andrews had four previous felony convictions, and had been unsuccessful on probation once before. The trial court was particularly concerned about Andrews's lack of candor with those trying to manage his probation. Although uncertain about the need for a trial court to reference [KRS 439.3106](#), the judge nonetheless revoked probation only after he made oral findings that Andrews's continued drug use posed a risk to the community and that he could not be appropriately managed in the community.

... The trial court found that Andrews's recent drug use and past history strongly suggested that he was at great risk of reoffending and committing future drug crimes in the community. While Andrews's criminal history could not be the sole basis for his revocation, it was appropriately considered when assessing the risk posed by his continued probation. Furthermore, the trial court appropriately questioned whether Andrews's entry into a drug treatment program was truly “voluntary,” considering that he only sought treatment at LCRM after he knew he had been “caught” violating the conditions of his probation. Andrews's entry into a treatment program only after testing positive for methamphetamine, coupled with his initial refusal to accept treatment, support the trial court's conclusion that Andrews could not be properly managed in the community.

Id., 780-781.

In addition, *Andrews* is not at odds with the case of *Southwood v. Commonwealth*, 372 S.W.3d 882 (Ky. App. 2012), which the Commonwealth has cited. In *Southwood* a panel of our Court stated that specific findings were not required by KRS 439.3106 because it was clear from the record that the trial judge had considered a variety of factors.

The trial judge stated on the record that he was concerned about the pending charges in Perry County—specifically, carrying a concealed deadly weapon—given that *Southwood* was a convicted felon. The court expressed its concern about the nature and risk of *Southwood*'s alleged criminal behavior.

Southwood, at 884.

The record in Poston's case is sparse. It does not reflect whether the court considered measures other than incarceration. We have not been given any citation to the record which reflects why Poston was not required to enter into drug treatment during his time on probation. Therefore, it is not clear why Poston could not be managed in the community. The record is also silent as to how Poston was a risk to prior victims or to the community. It is also not clear that the court actually made a finding that Poston had changed his address without notifying probation and parole. There is no evidence in the record that the probation officer had determined that graduated sanctions were inappropriate.

Andrews requires that the court consider whether Poston's use of drugs and failure to report a change of address made him a significant risk to the community and that he could not be managed in the community and by doing so

“furthers the objectives of the graduated sanctions schema to ensure that probationers are not being incarcerated for minor probation violations.” *Id.* 448 S.W.3d at 779. The trial court failed to consider these issues, and therefore, we reverse its decision.

CONCLUSION

Based upon the foregoing reasons, we remand this case to the trial court for the proper application of KRS 439.3106, and for the court to conduct a hearing to consider whether accountability measures other than incarceration would be fruitless.

ALL CONCUR.

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