

Commonwealth of Kentucky
Court of Appeals

NO. 2013-CA-001508-MR

AARON LEDERER

APPELLANT

v. APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE JULIE REINHARDT WARD, JUDGE
ACTION NO. 08-CR-00263

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * ** * **

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

ACREE, CHIEF JUDGE: Aaron Lederer appeals from an order of the Campbell Circuit Court revoking his probation. After careful review of the record, we reverse and remand for additional proceedings consistent with this opinion.

Lederer was indicted on first-degree trafficking in a controlled substance and trafficking in marijuana. He pleaded guilty to both charges and was

sentenced on August 11, 2008, for a term of five years' incarceration for the first offense and twelve months for the second offense, to be served concurrently.

Lederer was granted shock probation on November 12, 2008. He was placed on probation for five years subject to the terms and conditions set forth by the Division of Probation and Parole.

On February 6, 2013, Lederer's probation officer, Ralph Stevens, filed a Violation of Supervision Report. The report alleged that Lederer absconded and failed to report changes in his home address and employment. In an accompanying affidavit, Stevens claimed that Lederer failed to report on two occasions in November 2012. Stevens placed several calls to Lederer until Lederer's telephone was disconnected. On December 2, 2012, Stevens sent a letter to Lederer's last known address in an attempt to reach him. The letter was returned as undeliverable.

A hearing was held on February 28, 2013, regarding Stevens' allegations. Lederer testified that he had been laid off from his job. He explained that he did not receive Stevens' letter because he was avoiding service because his home was in foreclosure. Lederer was ordered to serve 30 days' incarceration for failing to maintain contact with his probation officer.

On July 2, 2013, Stevens filed a second Violation of Supervision Report with an attached affidavit alleging that Lederer had again failed to report.

A hearing was held on July 22, 2013.¹ Stevens testified that Lederer failed to

¹ At the hearing, Stevens corrected an error in his affidavit, which stated that Lederer had failed to report on May 9, 2013. Lederer did in fact report on that date.

report on June 3, 2013, after being told to do so. Stevens testified that he left messages on Lederer's wife's telephone for Lederer to report on June 13 and June 20, 2013, but Lederer also failed to report on both of those occasions.

Lederer testified that he left a message with Stevens to reschedule the June 3, 2013 meeting, and provided an alternate telephone number, in addition to his wife's telephone number, where he could be reached. He testified that he did not receive any messages to report from Stevens on either the alternate telephone or his wife's telephone. Lederer's counsel requested that he be placed on "smart probation" or the imposition of sanctions.

The trial court entered an order finding that Lederer violated the terms and conditions of his probation by failing to report. Lederer's probation was revoked, and he was ordered to serve his previously imposed five-year sentence. This appeal followed.

We review a trial court's decision to revoke probation for an abuse of 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, Lederer argues that the trial court erred in revoking his probation by failing to consider Kentucky Revised Statutes (KRS) 439.3106. Specifically, Lederer claims that the trial court failed to make the required findings under the statute to support revocation. We agree.

KRS 439.3106 provides that 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.

Lederer alleges that the trial court failed to make the requisite findings that his failure to comply with the conditions of his probation constitutes a significant risk to prior victims or the community and that he cannot be appropriately managed in the community. In response, the Commonwealth argues that the trial court properly exercised its authority to revoke probation under KRS 533.020(1).² The Commonwealth claims that KRS 439.3106 applies only to the Department of Corrections and the Executive Branch and does not apply to courts.

² KRS 533.020(1) provides, in pertinent part:

When a person who has been convicted of an offense or who has entered a plea of guilty to an offense is not sentenced to imprisonment, the court shall place him on probation if he is in need of the supervision, guidance, assistance, or direction that the probation service can provide. Conditions of probation shall be imposed as provided in KRS 533.030, but the court may modify or enlarge the conditions or, if the defendant commits an additional offense or violates a condition, revoke the sentence at any time prior to the expiration or termination of the period of probation.

After the parties submitted their briefs in this matter, the Kentucky Supreme Court rendered *Commonwealth v. Andrews*, 448 S.W.3d 773 (Ky. 2014), addressing the applicability of KRS 439.3106 to trial courts prior to revoking probation. Explicitly rejecting the Commonwealth’s claim that the statute applies only to the Department of Corrections, the Court stated that trial courts are required to make express findings regarding the probationer’s conduct in light of KRS 439.3106(1). *Id.* at 780. The Court declared that the statute “requires trial courts to find that the probationer’s failure to abide by a condition of supervision constituted a significant risk to prior victims or the community, and that the probationer cannot be managed in the community before probation may be revoked.” *Id.*

The Campbell Circuit Court, without the benefit of *Andrews*, made no findings as to whether Lederer’s violation constitutes a significant risk to prior victims or the community or whether he could be managed in the community. The trial court revoked Lederer’s probation solely on his failure to report, a violation of a condition of his probation. Due to the absence of findings in relation to the specific criteria provided in KRS 439.3106(1), we must reverse the trial court’s order revoking Lederer’s probation and sentencing him to serve five years’ incarceration.³

³ The Commonwealth asserts Lederer did not properly preserve his argument that the trial court failed to make appropriate findings under KRS 439.3106. The record demonstrates that Lederer’s counsel did ask the court to consider sanctions other than revocation and incarceration based on the common nature of the violation and Lederer’s history while on probation. Even assuming this issue was not properly preserved, the trial court’s failure to consider KRS 439.3106 certainly constitutes palpable error in light of the Supreme Court’s explicit directive to

It certainly remains within the trial court's discretion to revoke probation provided that discretion indicates consideration of the specific components of KRS 439.3106(1). *Id.* But, if the trial court bases its decision solely on the probationer's violation of a condition, that decision does constitute an abuse of discretion "under the new state of the law." *Id.* Accordingly, for these reasons, the order of the Campbell Circuit Court is reversed and remanded for proceedings consistent with this opinion.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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do so under *Andrews*. See Kentucky Rule of Criminal Procedure (RCr) 10.26.