Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-000007-MR

TODD BONDS   APPELLANT

                 APPEAL FROM CAMPBELL CIRCUIT COURT
v.   HONORABLE JULIE REINHARDT WARD, JUDGE
                       ACTION NO. 15-CR-00244

COMMONWEALTH OF KENTUCKY   APPELLEE

OPINION
AFFIRMING

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BEFORE: ACREE, MAZE, AND NICKELL, JUDGES.

MAZE, JUDGE: Todd Bonds appeals from an order of the Campbell Circuit

Court revoking his pretrial diversion. Bonds argues that, considering the evidence,

the trial court's findings under KRS[1] 439.3106 were an abuse of discretion. He

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[1] Kentucky Revised Statutes.

also argues that the court erred when it failed to consider sanctions other than revocation. For the reasons we explain below, we affirm.

Background

Bonds entered into an agreement to rent a camera, tripod, and memory cards. Though he was required to return the items, he sold them to a pawn shop instead. Following a police investigation, Bonds was indicted for failure to make a required disposition of property over $500.[2]

Thereafter, Bonds and the Commonwealth entered into a plea agreement. In exchange for Bonds's plea of guilty, the Commonwealth offered to recommend a sentence of one year in the felony diversion program. Bonds pled guilty, and the trial court sentenced him in accord with the Commonwealth's recommendation.

Nine days after the circuit court entered the final judgment, Probation and Parole Officer Michael Jansen filed an affidavit stating he had reasonable grounds to believe Bonds violated the terms of his diversion. The court held a hearing on the matter. During the hearing, Officer Jansen testified he was assigned to supervise Bonds's pretrial diversion. Though Bonds was scheduled to appear at the Probation and Parole Office on November 9, 2015, he informed the front office personnel he had a medical emergency and needed to go to the hospital. After

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[2] Bonds was originally indicted on failure to make required disposition of property $300 or more. The parties later agreed to amend the charge to failure to make required disposition of property $500 or more.

Officer Jansen called and instructed Bonds to report, he appeared at the office the following day.

On that day, Bonds completed his release report. Officer Jansen informed Bonds the Probation and Parole Office would attempt to locate him at the address he listed on the report. Bonds listed his residence as 5316 Mary Ingles Highway, Apartment 101, Melbourne, Kentucky, the same address he had provided in his pre-sentence investigation (PSI) report. Bonds also completed a urine test. Prior to doing so, he informed Officer Jansen he believed he would test positive for marijuana.[3] When Officer Jansen received the results, however, Bonds tested positive for marijuana and cocaine. After Officer Jansen informed Bonds of the results, Officer Jansen told Bonds to disclose whether he would test positive for cocaine. Bonds denied any cocaine use. Officer Jansen then sent the results to a laboratory for additional testing; the laboratory results were also positive for cocaine and marijuana. After Officer Jansen informed Bonds of the laboratory results, Bonds continued to deny using cocaine.

On November 13, 2015, Officers Eric Heck and Sorrell[4] went to the address Bonds provided on his release report. After they were unable to locate Bonds, they contacted the apartment complex manager. The manager informed them that Bonds had not lived in the complex since 2011. Following the officers'

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[3] The circuit court declined to consider Bonds's marijuana use in determining whether to revoke his diversion because the court was aware of it before Bonds was placed on diversion.

[4] Officer Sorrell's first name is not stated in the record.

home visit, Officer Jansen asked Bonds if he wanted to correct his address. He provided the same one. After Officer Jansen informed Bonds that the officers did not believe Bonds lived at that location, Bonds was silent. He was arrested thereafter. At the date of the hearing, Bonds had still not provided Officer Jansen with an updated address.

Bonds also testified at the hearing. He stated he receives medication for diabetes and hypertension, and he didn't report on the originally scheduled date because he was sweating and his heart was pounding. He testified he had suffered a heart attack three weeks prior. Bonds also insisted he didn't knowingly consume cocaine while on diversion. He speculated that the person with whom he had smoked marijuana had laced it with cocaine without his knowledge.

Bonds admitted he does not live at the residence he provided in his release report. Instead, he testified he was staying at his mother's residence.[5] Bonds revealed he was "essentially homeless" until he moved in with his mother. He asserted that he told this information to the author of his PSI and Officer Jansen. At the time he completed his PSI, however, Bonds admitted he could not have talked with his mother because she was out of town traveling and she doesn't know how to use a cell phone. Prior to moving in with his mother, Bonds had been living in his car adjacent to the address he provided and was staying with friends at other times.

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[5] Bonds was incarcerated at the time of the hearing. It is unclear whether Bonds meant he was staying at his mother's residence prior to the revocation hearing or whether he would stay there if he was released.

At the conclusion of the hearing, the court stated that Bonds had been dishonest with the court on multiple occasions and that the court did not believe he had been honest during the hearing. Specifically, the court believed that Bonds knowingly used cocaine and that he had not informed the PSI's author or Officer Jansen that he was living at his mother's residence. The court found Bonds violated his diversion "when he used cocaine, falsified a release report, failed to report a change in home address, and provided false information to [a] parole officer." The court revoked Bonds's diversion, finding that Bonds was a significant risk to the community and that he could not be managed in the community. This appeal follows.

Standard of Review

When a trial court makes a decision "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." KRS 533.256(2). Therefore, we use the same standard of review for a voided diversion as we do for a decision to revoke probation. *McVey v. Commonwealth*, 467 S.W.3d 259, 262 (Ky. App. 2015), *citing Lucas v. Commonwealth*, 258 S.W.3d 806, 807 (Ky. App. 2008). We review a trial court's decision to revoke probation for an abuse of discretion. *Tiryung v. Commonwealth*, 717 S.W.2d 503, 504 (Ky. App. 1986). To amount to an abuse of discretion, the trial court's decision must be "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Clark v.* Commonwealth, 223 S.W.3d 90, 95 (Ky. 2007), *citing Commonwealth v. English*, 933 S.W.2d 941, 945 (Ky. 1999).

Absent a "flagrant miscarriage of justice," the trial court will be affirmed. *Gross v. Commonwealth*, 648 S.W.2d 853, 858 (Ky. 1983).

<center>Analysis</center>

On appeal, Bonds contends that the trial court was required to consider alternative sanctions and erred by revoking his diversion without first providing a lesser sanction. Bonds also appears to argue that the trial court did not adequately support its finding that Bonds was a significant risk to the community and could not be managed in the community.

The Kentucky Supreme Court in *Commonwealth v. Andrews*, 448 S.W.3d 773 (Ky. 2014), interpreted KRS 439.3106. There, the court emphasized that "[w]ithout question, the power to revoke probation is vested in the trial courts and in the trial courts alone." *Id.* at 777. The Court held that to revoke an individual's probation, trial courts are required to find that a "probationer's failure to abide by a condition of supervision constitutes 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.* at 781.

In *McClure v. Commonwealth*, 457 S.W.3d 728 (Ky. App. 2015), we applied *Andrews* and explained that "KRS 439.3106 permits, but does not require, a trial court to employ lesser sanctions . . . [n]othing in the statute or in the Supreme Court's interpretation of it requires the trial court to impose lesser sanctions prior to revoking probation." *Id.* at 732. Additionally, we emphasized

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that a trial court should make express findings as to KRS 439.3106, but "[w]hile

KRS 439.3106(1) indubitably requires entry of two vital findings of fact, it does

not do so at the expense of the trial court's discretion over the broader matter of

revocation." *Id*. at 734, *citing Andrews*, 448 S.W.3d at 780. Lastly, we explained

that in finding whether a probationer poses an unmanageable or significant risk to

society, "[n]either KRS 439.3106 nor *Andrews* require anything more than a

finding to this effect supported by the evidence of record." *Id*. at 733. There, an

individual on probation had attempted to alter the results of a drug test. We stated

that,

> [t]hese facts constituted substantial support for the
> conclusion that a person who would go to such lengths to
> continue using a substance he was forbidden to use under
> penalty of five years in prison posed a significant risk to,
> and was unmanageable within, the community in which
> he lived.

Id.

As explained in *McClure*, the trial court was not required to impose a

lesser sanction, and therefore did not err in its decision to void Bonds's diversion.

Lastly, the trial court made the specific finding that Bonds "is a risk to the

community and cannot be managed in the community." Similar to *McClure,* the

court's findings in the present case were supported by evidence in the record, and

its decision to void Bonds's diversion was not an abuse of discretion.

Conclusion

For the reasons expressed herein, we affirm.

ALL CONCUR.

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