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TO BE PUBLISHED

# Commonwealth of Kentucky

## Court of Appeals

NO. 2016-CA-001404-MR

BYRON HOWARD

APPELLANT

v. APPEAL FROM KNOX CIRCUIT COURT  
HONORABLE GREGORY A. LAY, JUDGE  
ACTION NO. 11-CR-00128

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: MAZE, TAYLOR AND THOMPSON, JUDGES.

THOMPSON, JUDGE: Byron Howard appeals from an order of the Knox Circuit Court revoking his probation. He argues the trial court abused its discretion because it did not consider the mandatory criteria for probation revocation set forth in Kentucky Revised Statutes (KRS) 439.3106. Concluding that the probation revocation was part of an agreement with the Commonwealth, we affirm.

On March 6, 2015, Howard entered a guilty plea to first-degree manufacturing methamphetamine pursuant to *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970). He was sentenced to ten years' imprisonment, conditionally probated for three years. As a condition of his probation, he was not to commit another offense during the period of probation. Three months after his sentencing, new criminal charges were filed against Howard consisting of second-offense driving under the influence, possession of drug paraphernalia, and first-degree possession of a controlled substance.<sup>1</sup> A motion to revoke Howard's probation was filed on July 27, 2015.

A probation revocation hearing was held on August 27, 2016. At that hearing, it was announced to the trial court an agreement had been reached to resolve the pending probation violation and the new charges. The Commonwealth stated as follows:

I think we've got a resolution to all three cases. I believe, and correct me if I get the details wrong, Mr. Howard will stipulate as to the violation in Knox Circuit Court 11-CR-128 where there is a revocation pending at this time.... In exchange for that, the Commonwealth would agree to dismiss 15-CR-183 and 15-CR-203.<sup>2</sup>

Both of Howard's attorneys, one representing him in the Knox Circuit Court case and the other representing him in Laurel Circuit Court cases, and Howard

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<sup>1</sup> The Laurel Circuit Court and the Knox Circuit Court are located in the same judicial circuit.

<sup>2</sup> 15-CR-203 was an additional indictment for bail jumping in the Laurel Circuit Court.

confirmed the agreement. The trial court then asked for and received additional confirmation that a hearing was not required on the probation revocation.

Having heard the terms of the agreement and verification that a hearing was not required, the trial court stated:

The defendant having stipulated to the allegations in the Commonwealth's motion to revoke, the court does hereby make a finding the defendant violated the terms and conditions of the previously imposed order on probation. That order is hereby set aside, the probation order, and the defendant is hereby sentenced to a period of ten years' confinement in the penitentiary. The court has considered all factors the court is required to consider pursuant to statute, and that is the sentence that the court will impose on the revoked sentence. I will direct that Corrections provide the defendant with his jail time credit.

The trial court asked if there was anything further, to which Howard's counsel replied, "Nothing further, your honor."

Pursuant to the stated agreement, the Commonwealth moved to dismiss the Laurel Circuit Court cases. When asked if Howard had any objection, his counsel responded "no." The trial court entered a judgment and sentence of imprisonment finding that Howard "willfully and without excuse violated the conditions of his probation." Howard appealed.

Howard argues that despite his probation being revoked as part of the agreement to dismiss the new charges against him, the trial court was required to make written findings in accordance with KRS 439.3106. We disagree.

Prior to 2011, probation revocation was a decision within the trial court's discretion if the Commonwealth met its burden to prove by a preponderance of the evidence that a defendant violated a condition of probation. *Tiryung v. Commonwealth*, 717 S.W.2d 503, 504 (Ky.App. 1986). However, in 2011, the statutory law concerning probation revocation underwent substantial changes when the General Assembly enacted the Public Safety and Accountability Act, commonly referred to as House Bill (HB) 463. 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.

In *Andrews v. Commonwealth*, 448 S.W.3d 773, 777 (Ky. 2014), our Supreme Court held KRS 439.3106 establishes new criteria that trial courts are required to consider in probation revocation proceedings. Under the statute, probation is not to be revoked without finding that a probationer's violation constitutes a significant risk to the prior victims or the community at large and the

probationer cannot be effectively managed in community. *Id.* at 780. As the Court pointed out, the statutory findings promote the objectives of the HB 463 by ensuring “that probationers are not being incarcerated for minor probation violations.” *Id.* at 779.

The Commonwealth argues Howard cannot complain about a lack of findings when he entered into an agreement with the Commonwealth that in exchange for the dismissal of the new charges against him, he agreed to a revocation of his probation without a hearing. Howard argues he did not enter into an agreement for the revocation of his probation in exchange for dismissal of the new charges but only agreed to stipulate to the allegations in the Commonwealth’s motion to revoke in exchange for dismissal of the charges. Moreover, while he acknowledges that he did not request findings under KRS 439.3106, he contends that even if he failed to properly preserve the issue of the trial court’s lack of findings, this Court must reverse the revocation of his probation and remand to the trial court for appropriate findings.

We do not need to address whether a defendant’s failure to request findings under KRS 439.3106 precludes this Court from reversing on that same ground. Here, it is not Howard’s silence on the issue that compels us to affirm, but his affirmative statements.

The statements at the revocation hearing are conclusive that Howard not only agreed he violated his probation but he also agreed to the revocation of his probation without a hearing and, consequently, findings under KRS 439.3106. The terms of the agreement in this case were expressly set forth at the revocation hearing when the Commonwealth specifically announced that Howard stipulated to the probation violations in exchange for the dismissal of the new charges. Howard's counsel then confirmed that a revocation hearing was unnecessary because of the agreement with the Commonwealth.

We see no reason to distinguish this case from any other where there is a plea agreement. This agreement, like any plea agreement, "is a contract which, upon performance, is binding on the Commonwealth and entitles a criminal defendant to the benefit of his bargain, subject to approval by the trial court." *Hensley v. Commonwealth*, 217 S.W.3d 885, 886 (Ky.App. 2007). Howard received the benefit of his bargain, specifically, the dismissal of the new charges against him.

The order of the Knox Circuit Court revoking Howard's probation is affirmed.

ALL CONCUR.

**BRIEFS FOR APPELLANT:**

Steven Nathan Goens  
Assistant Public Advocate  
Dept. of Public Advocacy  
Frankfort, Kentucky

**BRIEF FOR APPELLEE:**

Andy Beshear  
Attorney General of Kentucky

Joseph A. Beckett  
Assistant Attorney General  
Frankfort, Kentucky