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Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-001788-MR

HAROLD T. JONES, JR. APPELLANT

v. APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE KEN M. HOWARD, JUDGE
ACTION NO. 12-CR-00284

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KRAMER, CHIEF JUDGE; JOHNSON AND MAZE, JUDGES.

JOHNSON, JUDGE: Harold T. Jones, Jr. ("Jones") appeals from an order of the Hardin Circuit Court sanctioning him with a jail term of 345 days as punishment for violating the terms of his probation a second time. After reviewing the record in conjunction with the applicable legal authorities, we AFFIRM the Hardin Circuit Court.

BACKGROUND

The facts of the case are not in dispute. Jones pleaded guilty to two counts of Wanton Endangerment, First Degree,[1] and a single count of Criminal Mischief, First Degree,[2] on December 4, 2012. Jones was sentenced by the trial court to serve three years each on the two counts of Wanton Endangerment, concurrent with each other but consecutive to one year on the count of Criminal Mischief, for a total of four years with one year to serve with the remaining three years subject to a five-year probation period. One of the conditions ordered by the court for his term of probation included abstaining from drugs and alcohol.

Jones was successful on probation until January 14, 2016, when his parole officer, Heather Meredith, stated on a Violation of Supervision Report that, "Jones reported as directed . . . Upon entry to the office a strong odor of alcohol was apparent . . . Jones . . . admitted he had been drinking beer." Jones was taken into custody and held at the Hardin County Detention Center.

On March 1, 2016, the court held a probation revocation hearing and decided to impose modified sanctions rather than revocation. The court ordered Jones to serve twenty days (already served) and comply with further instructions from his probation officer. Per the Probation and Order document filed on October 6, 2016, Jones was evaluated by Nancy Larimore, a Social Services Clinician who subsequently recommended inpatient treatment. Jones began inpatient treatment at

[1] Kentucky Revised Statutes ("KRS") 508.060, a Class D felony.

[2] KRS 512.020, a Class D felony.

Dismas Charities of Owensboro, Kentucky on May 5, 2016. Per the same document as well as a letter from a counselor at Dismas Charities, Jones was administratively discharged from the program due to "a complete disregard for the program since the day he arrived." The trial court signed a bench warrant on October 14, 2016, due to "alleged probation violations" resulting from Dismas Charities terminating Jones from their treatment program for unacceptable behavior.

Another revocation hearing was held on November 1, 2016. The court heard evidence and ordered that Jones' premature discharge from Dismas Charities Treatment constituted violation of his probation. Again, rather than revoking probation outright, the court imposed an alternate sentence in accordance with KRS 533.030(6) of 345 days in jail in addition to a substance abuse assessment with a review after 90 days.

Jones now argues that the trial court abused its discretion when it ordered Jones to serve a 345-day sentence without "a finding of significant risk to prior victims or the community at large" per KRS 439.3106(1). There is no allegation that the trial court did not comport with the minimum due process requirements necessary for a probation revocation hearing. *See Commonwealth v. Goff*, 472 S.W.3d 181, 190 (Ky. App. 2015).

STANDARD OF REVIEW

Our standard for reviewing a trial court's decision to revoke a defendant's probation is to determine whether the trial court abused its discretion.

Commonwealth v. Lopez, 292 S.W.3d 878, 881 (Ky. 2009). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair or unsupported by sound legal principles." *Woodard v. Commonwealth*, 147 S.W.3d 63, 67 (Ky. 2004) (quotation marks and citation omitted).

ANALYSIS

Under these facts we find that the court did not abuse its discretion. "Probation revocation [or graduated sanctions are] 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**." *Lopez* at 881 (emphasis added). Further, KRS 533.030, which establishes certain conditions of probation, among other things, states:

> When imposing a sentence of probation . . . the court . . . may require as a condition of the sentence that the defendant submit to a period of imprisonment in the county jail . . . at whatever time or intervals, consecutive or nonconsecutive, the court shall determine. The time actually spent in confinement . . . pursuant to this provision shall not exceed twelve (12) months . . . .

KRS 533.030(6)

Additionally, KRS 439.3106(2) outlines the formula to consider when imposing sanctions for supervised individuals, stating,

> Supervised individuals shall be subject to . . . [s]anctions 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.

When the court stated, "I find that [Jones] has violated the terms of his probation due to his discharge from Dismas Charities . . . An organization that I've sent many people to with good results," it was at that point within the court's purview to take action against Jones ranging from a straight revocation of probation to graduated sanctions while maintaining Jones' probation. However, as the proceeding analysis will show, revocation requires findings by the trial court unneeded in the imposition of graduated sanctions.

The court accepted that Jones was maintaining that he no longer had a problem with alcohol, but disagreed with his self-assessment in reaching its determination that a graduated sanction jail term was appropriate. After ordering the 345-day sanction and further assessment by a social services clinician, the court stated:

> I'm not gonna revoke his probation under these circumstances, [the court] is still gonna try to manage you in the community.
>
> . . . .
>
> After [Jones] has served 90 days, I will review an assessment. Mr. Jones, you can do one of three things. You can serve the 345 days and be done, you can go through an assessment and get serious about it and either convince the professionals who do the assessment that you don't have a problem or accept the assessment that you do and accept treatment. I'll review it in 90 days and we'll see what we do.

The trial court's sanction against Jones is not unreasonable, arbitrary, or unfair. Were the court to have decided the appropriate course of action was to revoke

Jones' probation, it would have needed to make the findings outlined in *Commonwealth v. Andrews*, 448 S.W.3d 773 (Ky. 2014). We agree with the Commonwealth that the rules established by the court in *Andrews* concerning necessary findings applies to revocation only, not graduated sanctions such as imposing the up to 12 months in jail granted to the court by the legislature via KRS 533.030(6). The Kentucky Supreme Court stated in *Andrews* at 779-80:

> 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.

The court determined that Jones could be managed in the community, thus graduated sanctions were more appropriate.

Jones' underlying conviction involved thrusting an engaged chainsaw through the driver window of the automobile driven by his niece while he was drunk. His first probation violation was for reporting to his parole officer drunk. With this history in the record, the court's decision to impose the sanction it did is, in fact, **fully** reasonable. The court's actions in this case have clearly been an ongoing attempt to help Jones confront and overcome his substance abuse issues and have been done in a manner consistent with the tools available to the court.

CONCLUSION

Based upon the foregoing, the Hardin Circuit Court is AFFIRMED.

ALL CONCUR.

BRIEF FOR APPELLANT:
Roy Alyette Durham II
Frankfort, Kentucky

BRIEF FOR APPELLEE:
Andy Beshear
Attorney General of Kentucky

J. Todd Henning
Assistant Attorney General
Frankfort, Kentucky