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Commonwealth of Kentucky
Court of Appeals

NO. 2017-CA-000802-MR

DANI FAZZARI

APPELLANT

v. APPEAL FROM GRAVES CIRCUIT COURT
HONORABLE TIMOTHY C. STARK, JUDGE
ACTION NO. 13-CR-00008

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
VACATING AND REMANDING

** ** * * * **

BEFORE: ACREE, COMBS, AND MAZE, JUDGES.

ACREE, JUDGE: Dani Fazzari appeals the Graves Circuit Court's March 8, 2017 order revoking her conditional discharge. Fazzari argues the trial court's decision cannot stand because it failed to consider, as required by KRS¹ 439.3106, whether

¹ Kentucky Revised Statutes.

her violations were a significant risk to her prior victim or the community at large, and whether she could be appropriately managed in the community. After our review, we vacate and remand.

On December 9, 2013, Fazzari pleaded guilty to felony flagrant non-support. Pursuant to her plea agreement, Fazzari agreed to pay current child support in the amount of \$35 per week, and to make regular installment payments in the amount of \$153 per month on her accumulated child support arrearage of \$9,180.00. The trial court sentenced Fazzari to five years' imprisonment, conditionally discharged for five years subject to numerous conditions, including that she remain current on her child support obligations and make specific monthly payments on the arrearage.

On May 20, 2015, the Commonwealth moved to revoke Fazzari's conditional discharge based on her failure to comply with her child support payment conditions. The Commonwealth stated in its motion that Fazzari had not made any payments since March 4, 2015, and that she was \$2,598.00 behind in payments since sentencing in December 2013. This began a series of court appearances spanning nearly two years. A clear pattern developed during that time: the trial court would order Fazzari to make a certain number of timely payments and set a future court date to determine if she complied. Fazzari would make few, if any, of the required payments and then, right before the scheduled

court date, Fazzari would make several payments or a lump sum payment sufficient to convince the trial court to continue the matter rather than revoke her conditional discharge.

At Fazzari's first appearance on June 8, 2015, she stated she had made a \$200 payment shortly before her court date. Fazzari also stated she had undergone two surgeries that had kept her from working, but she had recently obtained a part-time job and was starting a second part-time job at Pizza Hut. The trial court ordered her to set up a wage assignment and continued the motion.

At her next court appearance in September 2015, Fazzari indicated she was no longer working at Pizza Hut and had changed employment a few times. She recognized her payments had not been "the most consistent" and asked for another chance. The trial court ordered her to make four payments by her next court date.

On January 1, 2016, Fazzari again appeared before the trial court. She did not make four timely payments. Instead, the day before the hearing she tendered a money order to cover all four payments. The Commonwealth stated Fazzari's total payment was still less than it should have been paid, and that she was still approximately \$3,200 short of being in compliance with the terms of her conditional discharge. The trial court ordered Fazzari to make six payments by her next court date.

On February 22, 2016, Fazzari indicated she had made three payments since her last court date and was making a fourth that day. She claimed confusion about the payment schedule and asked the trial court for a schedule identifying exactly what and when she was supposed to pay. The trial court obliged, ordering Fazzari to pay \$70.30 (a combination of her current support and arrearage obligations) every Friday until the next court date.

By the next court date, April 4, 2016, Fazzari had failed to make the required payments on time and as ordered by the trial court. Instead, she tendered three payments on April 1, 2016, three days before her court appearance. Fazzari came again before the trial court on May 2, 2016. She stated she timely made all the payments due between the April and May court dates and in the proper amount. The trial court warned Fazzari she needed to continue making her weekly payments and removed the Commonwealth's motion from its docket.

Two months later, the Commonwealth filed another motion to revoke Fazzari's conditional discharge. It indicated that, as soon the trial court removed the matter from its docket, Fazzari quit making child support payments. In fact, she made no payments from May 3, 2016, to July 1, 2016, and was at that point \$3,882.60 short of being in compliance with the terms of her conditional discharge.

At court appearances on July 25, 2016, August 8, 2016, and August 29, 2016, Fazzari engaged in her typical practice of not making the ordered weekly

payments, and then making several individual or a lump sum payment immediately preceding the scheduled court date. She also indicated she had been unable to work due to medication she was taking, she was attempting to obtain her medical records to support her claim, and that as of the August 29, 2016 hearing, she was able to resume employment. The trial court ordered her to make five weekly payments by her next court date and continued the matter.

On October 3, 2016, Fazzari again appeared before the trial court, and again had failed to make the ordered weekly payments, instead opting to make several payments in the days immediately prior to the court date. Fazzari stated the delay was caused by the death of her mother-in-law. The trial court ordered Fazzari to make “seven (7) payments of seventy dollars and thirty cents (\$70.30), payable each Friday as ordered . . . , by November 21, 2016.”

Fazzari’s court appearance on November 21, 2016 revealed more of the same: she made a total of four payments, one on October 13, 2016, one on October 31, 2016, and two on November 14, 2016. The Commonwealth reiterated Fazzari did not pay each Friday as ordered, but instead paid at her leisure, as she had since the trial court granted her conditional discharge in 2013. The trial court reiterated it had imposed a weekly schedule at Fazzari’s request, and she refused to comply with that schedule. Fazzari stated she had lost her job but was currently

working for her grandfather. The trial court ordered her to make seven weekly payments by her next court date and continued the matter.

By that next court date on January 23, 2017, Fazzari had made four of the seven ordered payments, and all those were made on the same day. She stated she had lost her job and her electricity had been turned off. Fazzari also stated she was expecting a \$2,300 tax refund that could be applied to her child support obligation. The trial court again continued the matter.

On March 6, 2017, Fazzari appeared and admitted she had not made any payments since her last court date. The trial court conducted a revocation hearing that day. Theresa Irwin of the Graves County Child Support Office testified first.

Irwin said Fazzari's total arrearage was \$8,453.16. She stated Fazzari made no payments between January 23, 2017, and March 6, 2017. Irwin also testified that Fazzari had not made all the prior payments as ordered by the trial court and, instead, the child support office sporadically received payments immediately before Fazzari's various court dates.

Fazzari testified on her own behalf. She said she had been unemployed since January 2017 and her only source of income was her husband's disability. She admitted she had not made any payment since her last court date and planned to apply her tax return to her child support arrearage. Fazzari testified

she had made many payments since being placed on conditional discharge. She admitted her payments were behind and late, and that she had never paid exactly as ordered.

At the close of the hearing, the trial court noted on the record that, at Fazzari's request, it broke the total amount owed each month into manageable weekly payments and yet she still refused to pay as ordered. It also noted Fazzari failed to provide medical proof that she was unable to work, although she demonstrated she can obtain employment; she just refuses to maintain employment. The trial court was not convinced Fazzari displayed a *bona fide* good faith effort to attempt to pay child support. It stated Fazzari was clearly behind on her child support obligation and the court was at a loss as to what else it could do to convince Fazzari to pay on time, as scheduled, in the amount ordered.

It then entered an order on March 8, 2017, revoking Fazzari's conditional discharge and sentencing her to five years' imprisonment. The trial court stated:

The Court knows of no review date where the Defendant had made all the payments that came due between review dates. The Defendant has been able to obtain employment since sentencing, but she has not maintained it. This case is one of the most egregious that this Court has dealt with, as far as the failure to pay support and the chances the Court has given the Defendant in allowing her to comply. This Court finds that the terms of the Defendant's conditional discharge have been violated, that the Defendant has made no sufficient *bona fide* effort

to comply with her payment obligations, and there appear to be no alternative measures that might accomplish interest in punishment and deterrence, and it appears at the present time that imprisonment is necessary to accomplish these objectives.

(R. 89-90). That order makes no mention of KRS 439.3106. Fazzari appealed.

Fazzari argues the trial court erred by revoking her conditional discharge without first applying the strictures of KRS 439.3106. She admits the argument is not specifically preserved as she did not request KRS 439.3106 findings from the trial court. Fazzari asks for palpable error review under RCr² 10.26.³ The Commonwealth responds that no error occurred, palpable or otherwise, because KRS 439.3106 is not applicable to the revocation of conditional discharge. We have rejected the Commonwealth's reasoning on this point in the past. We reject it again.

In effect, the Commonwealth argues that KRS 439.3106 applies only to "supervised individuals." In fact, that statute provides as follows:

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

² Kentucky Rules of Criminal Procedure.

³ RCr 10.26 provides: "A palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error."

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.

KRS 439.3106 (emphasis added). “‘Supervised individual’ means an individual placed on probation by a court or serving a period of parole or post-release supervision from prison or jail.” KRS 439.250(11).

KRS 439.3106 clearly applies to probation revocation proceedings, and trial courts must consider the statute in determining if probation revocation is appropriate. *Commonwealth v. Andrews*, 448 S.W.3d 773, 776-80 (Ky. 2014). Notwithstanding the argument that unsupervised individuals do not come within the ambit of KRS 439.3106, this Court held the statute is applicable when a trial court is determining whether to void pre-trial diversion. *Richardson v. Commonwealth*, 494 S.W.3d 495, 497-99 (Ky. App. 2015); KRS 533.256(2) (“In making a determination 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[.]”).

In *Williams v. Commonwealth*, 462 S.W.3d 407 (Ky. App. 2015), this Court specifically determined that trial courts must consider the criteria set forth in

KRS 439.3106 in determining the propriety of a conditional discharge revocation. *Id.* at 411. At issue in *Williams*, as in this case, was whether the trial court erred when it declined to determine if the appellant’s conduct constituted a significant risk to a victim or to the community at large and if he could be appropriately managed in the community prior to revoking his conditional discharge. This Court concluded the trial court’s failure to consider KRS 439.3016 constituted reversible error. *Williams* is a published opinion of this Court. It is on point and formative. We are bound to follow its dictates. *Jenkins v. Commonwealth*, 496 S.W.3d 435, 451 (Ky. 2016) (*Stare decisis* demands “that courts should respect their own decisions. For if they do not, then why should anyone else?”).

We thus reject the Commonwealth’s contention that the trial court was not required to make findings under KRS 439.3106 prior to revoking Fazzari’s conditional discharge. We hold, instead, that trial courts, in determining whether to revoke an individual’s conditional discharge, must consider and issue specific findings as to whether the individual’s failure to comply with terms of his or her conditional discharge constitute “a significant risk to [his or her] prior victims . . . or the community at large, and cannot be appropriately managed in the community[.]” KRS 439.3106(1).

It is undisputed in this case that the trial court’s written order makes no mention of KRS 439.3106 or its criteria. Its oral statements captured on the

record are similarly lacking any discussion of that statute. Instead, the trial court revoked Fazzari's conditional discharge based solely on her failure to abide by the terms of her conditional discharge and after making certain due process findings required by *Commonwealth v. Marshall*, related specifically to flagrant non-support matters. 345 S.W.3d 822, 833 (Ky. 2011) (requiring trial courts in flagrant non-support cases to make specific findings as to "whether each defendant made sufficient bona fide attempts to make payments but was unable to make the required payments through no fault of his own and, if so, whether alternative punishment might accomplish the Commonwealth's punishment and deterrence objectives").

We understand the trial court's frustration and decision in this case. It repeatedly afforded Fazzari leniency, yet she failed repeatedly to abide by the orders of the trial court and conditions of her discharge. However, the trial court failed to assess her conduct and the decision to revoke in light of KRS 439.3106. Following *Williams* and *Andrews*, we find that the trial court's failure constitutes palpable error.

For the foregoing reasons, we vacate the Graves Circuit Court's March 8, 2017 order revoking Fazzari's conditional discharge. We order the trial court to re-evaluate revocation under KRS 439.3106 and *Andrews*, specifically taking into consideration whether Fazzari's failure to abide by a condition of her

conditional discharge constitutes a significant risk to prior victims or the community, and whether Fazzari cannot be appropriately managed in the community. Nothing in this opinion should be construed as dictating the outcome of the trial court's re-evaluation on remand.

ALL CONCUR.

BRIEF FOR APPELLANT:

John Gerhart Landon
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Andy Beshear
Attorney General of Kentucky

John Paul Varo
Assistant Attorney General
Frankfort, Kentucky