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Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-001363-MR

JIMMY DALE NEW

APPELLANT

v.

APPEAL FROM PERRY CIRCUIT COURT
HONORABLE ALISON C. WELLS, JUDGE
ACTION NO. 17-CR-00175

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: GOODWINE, NICKELL, AND SPALDING, JUDGES.

NICKELL, JUDGE: Jimmy Dale New appeals from an August 2018 order of the Perry Circuit Court revoking his probation. We affirm.

The relevant facts are uncontested. In October 2017, New plead guilty to one count of criminal possession of a forged instrument in the second degree and was sentenced to five years' imprisonment, probated for three years. As a condition of probation, New was ordered to "complete and graduate from the

Perry County Drug Court.” New repeatedly ran afoul of the drug court’s expectations. In December 2017, he was ordered to complete a short-term substance abuse program after having two positive drug tests. In March 2018, he was jailed for forty-eight hours and had to complete sixty hours of community service for providing false paperwork. In May 2018, he was jailed for seven days for again using drugs. And, finally, he was terminated from drug court on August 1, 2018, after he admitted to again using drugs.

The trial court conducted a probation revocation hearing on August 9, 2018, at which there was no live testimony. Instead, the court recited New’s drug court infractions, after which New stipulated to the facts and asked to receive long-term substance abuse treatment in lieu of revocation. The Commonwealth then argued revocation was proper as New’s history demonstrated he could not control his behavior. Without elaboration, the trial court orally found New could not be managed in society and presented a danger to himself and others, revoked his probation, and sentenced him to five years’ imprisonment. New did not ask for additional findings or ask to present any witnesses. After the trial court issued a written judgment of revocation, New filed this appeal.

A trial court has discretion in probation revocation matters but must exercise its discretion “consistent with statutory criteria.” *Commonwealth v. Andrews*, 448 S.W.3d 773, 780 (Ky. 2014). Specifically, before revoking

probation a trial court must make two findings under Kentucky Revised Statutes (KRS) 439.3106(1): (1) whether the alleged probation violation “constitutes a significant risk to prior victims of the supervised individual or the community at large” and (2) whether the defendant “cannot be appropriately managed in the community[.]”¹ A trial court is not required to provide explanations for those findings; instead, it must only make the findings, which must be “supported by the evidence of record.” *McClure v. Commonwealth*, 457 S.W.3d 728, 733 (Ky. App. 2015). We review a trial court’s revocation decision for abuse of discretion. *Andrews*, 448 S.W.3d at 780. “And for a trial court’s decision to be an abuse of discretion, we must find that the decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” *Clark v. Commonwealth*, 223 S.W.3d 90, 95 (Ky. 2007) (internal quotation marks and citation omitted).

Tellingly, New cites to no authority to support his argument the trial court erred by revoking his probation instead of sending him to long-term rehabilitation. We have specifically held “KRS 439.3106 permits, but does not require, a trial court to employ lesser sanctions” and so “incarceration remains a possibility.” *McClure*, 457 S.W.3d at 732. Thus, New’s argument the court erred by not imposing a lesser sanction is without merit, especially since New had already received lesser sanctions multiple times.

¹ The statute was amended in 2019, but subsection one was not substantively changed.

We also reject New’s fleeting argument the trial court spent insufficient time on the revocation proceedings. The facts were stipulated—the only issue was what sanction would be imposed—and New did not seek to present additional testimonial or documentary evidence.

Moreover, New errs to the extent he argues the court was required to provide explanations for its findings. *Id.* at 733. New’s seeming argument to the contrary notwithstanding, we did not require detailed findings in *Helms v. Commonwealth*, 475 S.W.3d 637 (Ky. App. 2015). In *Helms*, we stated “perfunctorily reciting the statutory language in KRS 439.3106 is not enough.” *Id.* at 645. But the overwhelming focus of our opinion was discussing the propriety of revocation based on a “zero-tolerance provision.” And so, in *Helms* we determined the trial court erred by revoking based upon the zero-tolerance provision, not because it perfunctorily recited the language of KRS 439.3106.²

Which leads us directly to the final issue: whether the KRS 439.3106 findings here are supported by the record. While on probation, New repeatedly used drugs and submitted falsified paperwork to the drug court. “These facts

² See, e.g., *Thompson v. Commonwealth*, 2019 WL 103866, at *4 (Ky. App. Jan. 4, 2019) (“The shortcoming of the trial court in *Helms* was not that it mechanically repeated the language of KRS 439.3106. Rather, it was that it revoked the defendant’s diversion agreement without sufficient evidence to satisfy the requirements of KRS 439.3106. We read *Helms* to mean that as long as there is proof in the record established by a preponderance that the defendant violated the terms of his release, and that the statutory criteria are met, a trial court does not abuse its discretion by revoking a defendant’s parole.”). We cite *Thompson* only as an illustration of the proper, limited scope of *Helms*, not as binding precedent.

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.” *McClure*, 457 S.W.3d at 733. In short, the record supports the trial court’s decision. Revocation was not an abuse of discretion.

For the foregoing reasons, the Perry Circuit Court is affirmed.

ALL CONCUR.

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