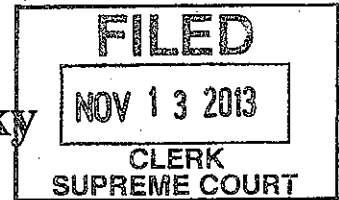


Commonwealth of Kentucky
Supreme Court
No. 2013-SC-4



COMMONWEALTH OF KENTUCKY

APPELLANT

v.

Appeal from Pulaski Circuit Court
Hon. David A. Tapp, Judge
Indictment No. 10-CR-347

JOSEPH ANDREWS

APPELLEE

Brief for Commonwealth

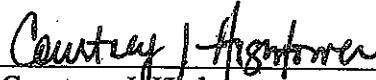
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CERTIFICATE OF SERVICE

I certify that the record on appeal has been returned to the Clerk of this Court and that a copy of the Brief for Commonwealth has been mailed this 13th day of November, 2013 to Honorable David A. Tapp, Judge, Pulaski Co. Circuit Court, 100 N Main St., Somerset, Ky. 42502-1324; via messenger mail to Hon. Shannon Dupree, Asst. Public Advocate, Dept. of Public Advocacy, 100 Fair Oaks Lane, Suite 302, Frankfort, Kentucky 40601, Attorney for Appellant; and via e-mail to Hon. Eddy Montgomery, Commonwealth's Attorney.



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INTRODUCTION

Joseph Andrews, hereinafter referred to as Andrews, was convicted on one count of unlawful possession of a methamphetamine precursor, second offense. Andrews received a probated sentence of ten (10) years in the penitentiary. Andrews's probation was revoked and he was sentenced to the aforementioned ten (10) years. The Kentucky Court of Appeals reversed the Pulaski Circuit Court's decision to revoke Andrews's probation and the Commonwealth file a motion for discretionary review. After this court granted the Commonwealth's motion, this is the Commonwealth's brief on discretionary review.

STATEMENT CONCERNING ORAL ARGUMENT

The Commonwealth does not believe that oral argument is necessary in this appeal, as the issues are plainly set forth in the briefs and the circuit record. However, should this court decide that oral argument would be helpful, the Commonwealth will gladly appear before the Court to present its case.

STATEMENT OF POINTS AND AUTHORITIES

INTRODUCTION i

STATEMENT CONCERNING ORAL ARGUMENT i

STATEMENT OF POINTS AND AUTHORITIES ii

STATEMENT OF THE CASE 1

KRS 439.3106(1) (passim)

KRS 439.3106 (passim)

ARGUMENT 5

KRS 439.3106 APPLIES ONLY TO THE DEPARTMENT OF CORRECTIONS. 5

A.. KRS 439.310 thru KRS 439.3108 are applicable to the Department of Corrections. 5

KRS 439.310 (passim)

KRS 439.250 (passim)

KRS 439.560 5

KRS 439.3101 (passim)

KRS 439.3108 (passim)

KRS 439.250(3) (passim)

KRS 439.3103 6

KRS 439.3104 6

KRS 439.3104(3)(c) 6

KRS 439.3105 6

KRS 439.3105(3) 6

	KRS 439.3107	(passim)
	KRS 439.3108(7)	(passim)
	HB 463	8
	<u>Gamble v. Com.</u> , 2011-CA-001658-MR, 2013 WL 375531 (Ky. Ct. App. Feb. 1, 2013)	8
	<u>Jarrell v. Commonwealth</u> , 384 S.W.3d 195 (Ky.App.2012)	8
B.	<u>KRS 533.010 and KRS 533.020 provide trial courts with authority and discretion in revoking probation.</u>	9
	KRS 533.010	10
	KRS 533.020(1)	10
	<u>Commonwealth v. Lopez</u> , 292 S.W.3d 878 (Ky.2009)	10
	<u>Commonwealth v. English</u> , 993 S.W.2d 941, 945 (Ky.1999) ..	10
	<u>Bybee v. Commonwealth</u> , 904 S.W.2d 244 (Ky.App.1995)	11
	<u>Wilson v. Commonwealth</u> , 839 S.W.17 (Ky.App.1992)	11
C.	<u>KRS 439.553 gives the court authority to impose graduated sanctions.</u>	11
	KRS 439.553	11
D.	<u>501 KAR 6:250 designates KRS 439.3106 as an administrative regulation for the department.</u>	12
	501 KAR 6:250	12
E.	<u>The system of graduated sanctions was not in place.</u>	12
	KRS 439.3106(1)	13
F.	<u>The Pulaski Circuit Court did not abuse its discretion.</u>	13
	<u>CONCLUSION</u>	15

STATEMENT OF THE CASE

On February 24, 2011, Joseph Andrews, appeared before the circuit court for sentencing. Andrews had previously entered a plea of guilty to unlawful possession of a methamphetamine precursor, second offense, and was sentenced to ten (10) years incarceration, probated for five years. At the sentencing hearing, the trial court inquired of Andrews whether he needed drug treatment. Andrews assured the court that he did not have a substance abuse problem, that he would not be back before the court on a drug use issue and if he developed a problem, he would notify his attorney right away. (VR: 2/24/11; 11:35 - 11:37).

On June 23, 2011, Andrews was back before the trial court for a probation revocation hearing. Prior to any testimony, Andrews stipulated to the probation violations alleged by the Commonwealth. The trial court made a factual finding that the Andrews had violated the terms of his probation. (VR: 6/23/11; 9:15).

Andrews called David Rogers, Andrews's probation officer, to testify in mitigation. Mr. Rogers testified that on May 3, 2011, Andrews was given a drug test and tested positive for methamphetamine. Andrews lied to Mr. Rogers and denied using any controlled substance. (VR: 6/23/11; 10:41). Two days later, Mr. Rogers received a phone call from Andrews's wife apologizing to the probation officer, admitting to him that Andrews had taken methamphetamine. Andrews's wife also stated that Andrews had checked

into Lake Cumberland Rescue Mission, a long term drug treatment facility. Andrews's reporting schedule was altered accordingly and he continued to report to Mr. Rogers. Mr. Rogers eventually arrested the appellant on a warrant as a result of Andrews's probation violation in testing positive for a controlled substance. (VR: 6/23/11; 10:41 - 10:42).

The Commonwealth then elicited testimony that Andrews had four previous felony convictions and had been on probation before. (Id. At 10:43). Mr. Rogers testified that on the Andrews's prior probation violation, Andrews had been violated before so he should have known what he was dealing with. Mr. Rogers also specified that Andrews initially lied to him about taking the methamphetamine and stated that he had taken a couple of his wife's diet pills in attempting to explain the positive test result. (Id. At 10:43 - 10:44).

Gary Warick, the director of the Lake Cumberland Rescue Mission, was also called to testify in mitigation. Mr. Warick testified that Andrews became a resident and was doing well in the program. (Id. At 10:44 - 10:49).

Andrews's trial counsel argued that based upon KRS 439.3106(1), Andrews's probation should not be revoked because the violation didn't pose a significant risk to a prior victim in the community at large and Andrews could be appropriately managed in the community. (Id. At 10:52). The court observed that KRS 439.3106 was actually addressing what probation and parole was supposed to be doing in considering graduated sanctions, not a standard the court had to find. Andrews argued that KRS 439.3106 was the

court section in Chapter 439. (Id. At 10:51 - 10:52). The trial court specifically questioned whether KRS 439.3106 eliminated the court's discretion in determining whether graduated sanctions or revocation was appropriate for a probation violation. (Id. At 10:54).

The trial court acknowledged that Andrews had three prior felony convictions, had violated his probation before, admitted that he violated his probation in this case and assured the court at sentencing that he didn't need any drug treatment. The court had warned Andrews not to come back to court later and ask for drug treatment after telling the court he didn't need such treatment. (Id. At 10:52 - 10:53). The court observed that Andrews had not been adequately managed in the community because he had specifically denied he needed drug treatment and sought such treatment only after he had gotten caught violating his probation yet again. (Id.).

The Commonwealth argued against allowing Andrews to continue on probation. The Commonwealth noted that Andrews had gotten worse on probation: 1) Andrews had indicated that he didn't use methamphetamine but then later tested positive for the drug; 2) Andrews stated he didn't need drug treatment; 3) Andrews was a repeat offender and had been on probation before; 4) Andrews had gotten a break because he was originally charged with manufacturing methamphetamine. (Id. At 10:57).

The trial court considered the facts set forth by Andrews in mitigation. The court considered Andrews's prior felony record and the fact that he was

on probation before and had violated his probation before. The trial court again noted that Andrews was offered supervised probation and drug treatment, but declined any treatment. The trial court revoked Andrews's probation finding that Andrews posed a significant risk for re-offending to the community at large based upon his extensive prior criminal history and drug use, and Andrews could not be appropriately managed in the community. (Id. At 10:57 - 11:01).

On November 30, 2012, the Kentucky Court of Appeals determined that the trial court's decision to revoke Andrews's probation was arbitrary and reversed such decision. The Commonwealth filed a motion for discretionary review in this court, which was granted on September 18, 2013. This is the Commonwealth's brief in support of reversing the decision of the Kentucky Court of Appeals. Any additional facts shall be discussed as necessary in the Argument section of this brief.

ARGUMENT

KRS 439.3106 APPLIES ONLY TO THE DEPARTMENT OF CORRECTIONS.

The Kentucky Court of Appeals concluded that the trial court's decision to revoke Andrews's probation was arbitrary and must be reversed. The appellate court reasoned that Andrews's prior criminal history was an insufficient basis for revocation of probation, and pursuant to KRS 439.3106 the Andrews was subject to other sanctions rather than revocation.

A.. KRS 439.310 thru KRS 439.3108 are applicable to the Department of Corrections.

KRS 439.310 reads as follows:

The commission, with the approval of the secretary and the Governor, shall appoint a person charged with the administration of probation and parole laws, with the approval of the commissioner, shall appoint a number of probation and parole officers and other employees sufficient to administer the provisions of KRS 439.250 to 439.560; but no employee shall be appointed except in the manner hereinafter provided. The person charged with the administration of probation and parole laws shall have attained at least a bachelor's degree from an accredited college, and in addition, shall be a person with training and experience in probation, parole or other related form of welfare work.

KRS 439.310 makes clear that the provisions of KRS 439.250 to 439.560, including KRS 439.3106, were intended to create a framework in which the Department of Corrections supervises probationers and parolees.

KRS 439.310 specifically reads that probation and parole officers, with other

employees, are to administer the provisions of KRS 439.250 to 439.560. Further, KRS 439.3101 thru KRS 439.3108 refer to the "Department" with regard to the administration of probation and parole laws and "Department" means the Department of Corrections. KRS 439.250(3). In reading all of these statutes together, they set forth a system of managing an individual who is on probation or parole.

In KRS 439.3101 thru 439.3103, administrative regulations are set forth by which the Department of Corrections shall supervise and treat supervised individuals, train employees, and be accountable in its effort to implement the supervision regulations and reduce recidivism. KRS 439.3104 sets forth how the department shall conduct its initial assessment risk of an individual upon intake into community supervision. KRS 439.3104(3)(c) indicates that it is the department which shall apply the results of any risk and needs assessment to compliant and noncompliant behavior. KRS 439.3105 establishes an administrative caseload supervision program for the department in monitoring high and low risk supervised individuals. KRS 439.3105(3) specifically indicates that if a supervised individual engages in criminal activity or exhibits signs or symptoms of substance abuse, it is the department's duty to determine the consequence.

KRS 439.3106 is the initial statute to refer to alternate sanctions and reads 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 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 the availability of, interventions which may assist the offender to remain compliant and crime-free in the community.

If there is a probation violation, KRS 439.3106 sets out the two options (1) revocation proceedings and possible incarceration or (2) other appropriate sanctions. KRS 439.3107 sets forth how the Department of Corrections will adopt a system of graduated sanctions, including a menu of sanctions. KRS 439.3108 addresses how the department shall modify conditions of community supervision for the purpose of imposing graduated sanctions in accordance with KRS 439.3107. KRS 439.3108(7) even addresses what happens when a supervised individual successfully completes a graduated sanction.

The Commonwealth's argument that KRS 439.3106 is applicable only to the Department of Corrections is consistent with the spirit of HB 463:

In addition to the language of HB 463 itself, we find firm evidence of the General Assembly's intent in the statements of those who helped draft those amendments. The Kentucky Court of Justice has stated that HB 463 was "designed to curb the cost of incarceration without compromising public safety." Bedson v. Commonwealth, 2011-CA-001590-MR, 2012 WL 4839552 (citing <http://courts.ky.gov/pressreleases/NR06202011JB2.htm>). More recently, the Chief Justice of Kentucky's Supreme Court stated that HB 463's changes were "intended to reduce prison costs by lessening penalties for certain drug possession offenses and steering addicts away from prison and into rehabilitation or other forms of supervised release." Justin Story, *Chief Justice Praises State Reforms to Penal Code*, Bowling Green Daily News, Oct. 25, 2012. Such a clear statement by those who sought and secured HB 463's changes is difficult to refute and provides clear insight when attempting to resolve a question of legislative intent and statutory construction.

Gamble v. Com., 2011-CA-001658-MR, 2013 WL 375531 (Ky. Ct. App. Feb. 1, 2013). It is also abundantly clear that the legislature intended to keep incarceration as a possible penalty when a supervised individual violates the terms of his probation. See Jarrell v. Commonwealth, 384 S.W.3d 195 (Ky.App.2012). However, in cases in which the court has made graduated sanctions a condition of probation, KRS 439.3106 thru KRS 439.3108 provide a framework for the Department of Corrections to manage supervised individuals. In the event of a violation of supervision, the system of

graduated sanctions allows the department to impose alternate sanctions on a supervised individual, in lieu of initiating revocation proceedings.

Consequently, in this case, the Kentucky Court of Appeals misinterpreted KRS 439.3106 when the court determined that the statute controlled a trial court's decision with regard to revocation of probation. Based upon the foregoing, KRS 439.3106 is part of the group of statutes which sets forth the Department of Correction's system of monitoring supervised individuals, including those individuals who have graduated sanctions as a condition of supervision.

B. KRS 533.010 and KRS 533.020 provide trial courts with authority and discretion in revoking probation.

The pertinent sections of KRS 533.010 read as follow:

- (6) Upon initial sentencing of a defendant or **upon modification or revocation of probation**, when the court deems it in the best interest of the public and the defendant, the court may order probation with the defendant to serve one of the following alternative sentences:
 - (a) To a halfway house for no more than twelve (12) months;
 - (b) To home incarceration with or without work release for no more than twelve (12) months;
 - (c) To jail for a period not to exceed twelve (12) months with or without work release, community service and other programs as required by the court;
 - (d) To a residential treatment program for the abuse of alcohol or controlled substances; or
 - (e) To an other specified counseling program, rehabilitation or treatment program or facility.

- (7) If during the term of the alternate sentence the defendant fails to adhere to and complete the conditions of the alternative sentence, the court may modify the terms of the alternative sentence or may modify or revoke probation and alternative sentence and commit the defendant to an institution.

KRS 533.020(1) reads as follows:

- (1) When a person who has been convicted of an offense or who has entered a plea of guilty to an offense is not sentenced to imprisonment, the court shall place him on probation if he is in need of the supervision, guidance, assistance, or direction that the probation service can provide. Conditions of probation shall be imposed as provided in KRS 533.030, but the court may modify or enlarge the conditions or, if the defendant commits an additional offense or violates a condition, revoke the sentence at any time prior to the expiration or termination of the period of probation.

The court's authority and discretion with regard to probation revocation is clearly set out in KRS 533.010 and KRS 533.020. There is no new standard for the court to consider in determining whether probation revocation is appropriate.

The Commonwealth's argument is consistent with the case law in Kentucky. On appeal, the appellate court may disturb a trial court's decision to revoke probation only if that decision is an abuse of discretion.

Commonwealth v. Lopez, 292 S.W.3d 878 (Ky.2009). A decision is an abuse of discretion if it is arbitrary, unreasonable, unfair, or unsupported by sound legal principles. Commonwealth v. English, 993 S.W.2d 941, 945 (Ky.1999).

A trial court's decision revoking probation is not an abuse of discretion if there is evidence to support at least one probation violation. Lopez, supra.

KRS 533.010 was not impliedly amended by KRS 439.3106. Our courts have strongly objected to such argument unless the two statutes are repugnant to each other and irreconcilable. Bybee v. Commonwealth, 904 S.W.2d 244 (Ky.App.1995). In light of KRS 439.310, this is not the case here. In fact, Kentucky has specifically held that Chapters 439 and 533 should be read together. Wilson v. Commonwealth, 839 S.W.17 (Ky.App.1992) and the language of both Chapters indicate the same.

C. KRS 439.553 gives the court authority to impose graduated sanctions.

KRS 439.553 reads as follows:

For supervised individuals on probation, the court having jurisdiction of the case shall determine the conditions of community supervision and may impose as a condition of community supervision that the department supervising the individual shall, in accordance with KRS 439.3108, impose graduated sanctions adopted by the department for violations of the conditions of community supervision.

The Kentucky Court of Appeals relied on this statute in support of its decision to reverse the trial court. However, this statute gives the trial court authority to impose graduated sanctions as a condition of supervision. This statute does not set out how such graduated sanctions shall be implemented. If the court imposes graduated sanctions as a condition of supervision, then KRS 439.3106 thru KRS 439.3108 do establish how the Department of Corrections will implement the graduated sanctions on a supervised

individual.

- D. 501 KAR 6:250 designates KRS 439.3106 as an administrative regulation for the department.

The Kentucky Court of Appeals also relied on 501 KAR 6:250 in reversing the trial court's decision. 501 KAR 6:250 specifically designates KRS 439.3106, 439.3107, 439.3108, 439.470, and 439.551 as authorizing the Justice and Public Safety Cabinet and Department of Corrections to promulgate administrative regulations necessary and suitable for the proper administration of the department or any of its divisions and to establish a system of graduated sanctions for probation violations. This administrative regulation establishes graduated sanctions for responding to violations of probation. In reading the KRS 439.310 thru KRS 439.3108 together with 501 KAR 6:250, KRS 439.3106 is applicable only to the Department of Corrections.

- E.. The system of graduated sanctions was not in place.

KRS 439.3107 provides:

(1) The department shall by January 1, 2012, adopt a system of graduated sanctions for violations of conditions of community supervision. Notwithstanding KRS Chapter 533, the system shall set forth a menu of presumptive sanctions for the most common types of supervision violations, including but not limited to: failure to report; failure to pay fines, fees and victim restitution; failure to participate in a required program or service; failure to complete community service; violation of a protective or no contact order; and failure to refrain from the use of alcohol or

controlled substances ...

In this case, the Kentucky Court of Appeals determined that Andrews's probation could not be revoked for a mere probation violation. The court concluded that the trial court had to make a determination pursuant to KRS 439.3106(1). Further, the court concluded that Andrews should have been subject to other sanctions. However, Andrews appeared before the circuit court on June 23, 2011, for revocation proceedings. June 23, 2011 was prior to the January 1, 2012 deadline by which the department was supposed to adopt a system of graduated sanctions. Therefore, although KRS 439.3106 was in effect, the system of graduated sanctions had not been finally adopted and could not be employed by the Pulaski Circuit Court.

F. The Pulaski Circuit Court did not abuse its discretion.

In this case, Andrews stipulated to a probation violation. The Commonwealth elicited testimony that Andrews had four previous felony convictions and had been on probation before. (Id. At 10:43). Andrews had been on probation before and also violated the terms of his probation. Andrews lied to his probation officer about taking the methamphetamine and stated that he had taken a couple of his wife's diet pills in attempting to explain the positive test result. (Id. At 10:43 - 10:44).

The Kentucky Court of Appeals concluded that Andrews's prior criminal history was insufficient basis for revocation of probation. However, the trial court did not consider just Andrews's criminal history of four felony

convictions and a prior probation violation. The trial court also considered Andrews's numerous misrepresentations to the court, in addition to Andrews's criminal history. The court specifically observed that Andrews had been offered treatment, specifically denied he needed drug treatment and sought such treatment only after he had gotten caught violating his probation yet again. (VR: 6/23/11; 10:52 - 10:53). The trial court then revoked Andrews's probation finding that the Andrews posed a significant risk for re-offending to the community at large based upon his extensive prior criminal history and drug use, and Andrews could not be appropriately managed in the community. (Id. At 10:57 - 11:01). The Pulaski Circuit Court did not abuse its discretion in revoking the Andrews's probation in this case.


CONCLUSION

Wherefore, based upon the Kentucky Court of Appeals' erroneous conclusion that the Pulaski Circuit Court abused its discretion in revoking Andrews's probation in this case, the Commonwealth respectfully requests this Honorable Court reverse that decision.

Respectfully submitted,

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APPENDIX

- 1) Pulaski Circuit Court, Final Judgment on Guilty Plea, Case No. 10-CR-347-002
Filed February 25, 2011 1-4
- 2) Pulaski Circuit Court, Order Revoking Probation and Imposition of Sentencing,
Case No. 10-CR-347-002
Filed June 24, 2011 5-6
- 3) Kentucky Court of Appeals Opinion Reversing and Remanding
Andrews v. Commonwealth, 2011-CA-001360-MR
Rendered November 30, 2012 7-13
- 4) Gamble v. Commonwealth, 2013 WL 375531 (Ky.) Unpublished Opinion 14-19
- 5) 501 KAR 6:250E, Graduated sanctions for technical violations 20-23