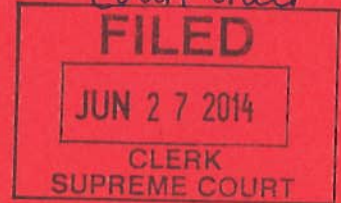


pursuant to
court order



**COMMONWEALTH OF KENTUCKY
KENTUCKY SUPREME COURT
FILE NO. 2013-SC-000608**

JAMES O. KIDD

APPELLANT

v.

**APPEAL FROM COURT OF APPEALS
FILE NO. 2012-CA-001130
APPEAL FROM LEE CIRCUIT COURT
HON. THOMAS P. JONES, JUDGE
INDICTMENT NO. 09-CR-00034**

COMMONWEALTH OF KENTUCKY

APPELLEE

BRIEF FOR APPELLANT, JAMES O. KIDD

Submitted by:

**BRANDON NEIL JEWELL
ASSISTANT PUBLIC ADVOCATE
DEPARTMENT OF PUBLIC ADVOCACY
SUITE 302, 100 FAIR OAKS LANE
FRANKFORT, KENTUCKY 40601
(502) 564-8006**

COUNSEL FOR APPELLANT

CERTIFICATE REQUIRED BY CR 76.12(6):

The undersigned does certify that copies of this Brief were mailed, first class postage prepaid, to the Hon. Thomas P. Jones, Judge, P.O. Box O, Beattyville, Kentucky 41311; the Hon. Heather Combs, Commonwealth's Attorney, 116 Main Street, Irvine, Kentucky 40336; the Hon. John S. Nelson, Defense Attorney, 452 Washington Street, P.O. Box 725, Stanton, Kentucky 40380-0725; and to be served by messenger mail to Hon. Jack Conway, Attorney General, Office of Criminal Appeals, 1024 Capital Center Drive, Frankfort, Kentucky 40601 on June 20, 2014.



BRANDON NEIL JEWELL

INTRODUCTION

The Appellant, Mr. James Kidd, appealed to the Kentucky Court of Appeals from an order revoking his probation and imposing the maximum sentence of ten (10) years imprisonment on the underlying conviction of trafficking in a controlled substance, first degree, first offense under KRS 218A.1412. The Court of Appeals affirmed the trial court and Mr. Kidd filed a motion for discretionary review in this Court which was granted.

STATEMENT CONCERNING ORAL ARGUMENT

Appellant believes oral argument could be helpful to the resolution of this case because it deals with the application of a relatively new statute, KRS 439.3106, that has redefined the factors to consider when a trial court is confronted with a motion to revoke an individual's probation and what punishments should be imposed.

CITATIONS TO THE RECORD

The record will be cited to in conformance with CR 98. The Court of Appeals Opinion (James Kidd v. Commonwealth, 2012-CA-001130-MR) will be cited to as "Kidd Opinion" with the page number immediately following. Mr. Kidd's Opening Brief that was filed in the Court of Appeals will be cited to as "Kidd COA Brief" and his motion for discretionary review will be cited to as "Kidd MDR."

STATEMENT OF POINTS AND AUTHORITIES

INTRODUCTION	i
KRS 218A.1412.....	i
STATEMENT CONCERNING ORAL ARGUMENT	i
KRS 439.3106.....	i
CITATIONS TO THE RECORD	i

CR 98	i
<u>James Kidd v. Commonwealth</u> , 2012-CA-001130-MR.....	i
STATEMENT OF POINTS AND AUTHORITIES	i
STATEMENT OF THE CASE	1
KRS 446.010.....	1
KRS 218A.1412	1
KRS 218A.141	1
Ky. Acts ch 2 (HB 463) § 9	1
Ky. Const. § 115	4
KRS 439.3106(1)	4, 5
KRS 439.3106.....	4, 6, 7
KRS 439.3106(2)	5
RCr 10.26	5
<u>Jarrell v. Commonwealth</u> , 384 S.W.3d 195 (Ky.App. 2012).....	6, 7
<u>Southwood v. Commonwealth</u> , 372 S.W.3d 882 (Ky.App. 2012)	6
<u>Kaletch v. Commonwealth</u> , 396 S.W.3d 324 (Ky. App. 2013)	6
<u>Carter v. Commonwealth</u> , 2013 WL 645829 (Ky. App. Feb. 22, 2013)	6
<u>Downs v. Commonwealth</u> , 2013 WL 1867982 (Ky. App. May 3, 2013).....	6
<u>Flink v. Commonwealth</u> , 2013 WL 1792511 (Ky. App. Apr. 26, 2013).....	6
<u>Williams v. Commonwealth</u> , 2013 WL 2948491 (Ky. App. June 14, 2013)	6
<u>Gibson v. Commonwealth</u> , 2013 WL 192887 (Ky. App. Jan. 18, 2013).....	6
<u>Cook v. Commonwealth</u> , 2013 WL 4710344 (Ky. App. Aug. 30, 2013).....	6
<u>Council v. Commonwealth</u> , 2012 WL 5306278 (Ky. App. Oct. 26, 2012).....	6
<u>Saulsberry v. Commonwealth</u> , 2013 WL 1932922 (Ky. App. May 10, 2013).....	6
<u>Lee v. Commonwealth</u> , 2013 WL 4400513 (Ky. App. Aug. 16, 2013).....	6

<u>Hunt v. Commonwealth</u> , 2013 WL 3968667 (Ky. App. Aug. 2, 2013)	6
<u>Loewen v. Commonwealth</u> , 2013 WL 462082 (Ky. App. Feb. 8, 2013)	6
<u>Kidd v. Commonwealth</u> , 2013 WL 3968662 (Ky. App. Aug. 2, 2013)	6
<u>Hubbard v. Commonwealth</u> , 2013 WL 5305758 (Ky. App. Sept. 20, 2013)	6
<u>Lanham v. Commonwealth</u> , 2012 WL 6632779 (Ky. App. Dec. 21, 2012).....	6
<u>Burlingame v. Commonwealth</u> , 2013 WL 5886831 (Ky. App. Nov. 1, 2013)	6
<u>Mosby v. Commonwealth</u> , 2014 WL 505925 (Ky. App. Feb. 7, 2014).....	6
<u>Townsend v. Commonwealth</u> , 2014 WL 2040137 (Ky. App. May 16, 2014)	6
CR 76.28(4)(c).....	6
ARGUMENT	7
I. The trial court erred by revoking Mr. Kidd’s probation because the trial court failed to make the findings required for revocation under KRS 439.3106(1), because the evidence did not support the findings required for revocation under KRS 439.3106(1), and because under KRS 439.3106(2) the appropriate punishment for the alleged violation in this case was sanctions other than revocation and imprisonment. Accordingly, the Court of Appeals’ Opinion affirming the trial court must be reversed and the trial court’s order revoking probation must be vacated. ...	7
<u>Preservation:</u>	7
KRS 439.3106(1).....	8, 9, 10, 12, 13
RCr 10.26.....	8, 11
<u>Allen v. Commonwealth</u> , 286 S.W.3d 221 (Ky. 2009)	8, 11
<u>Ernst v. Commonwealth</u> , 160 S.W.3d 744 (Ky. 2005).....	8, 11
<u>Martin v. Commonwealth</u> , 207 S.W.3d 1 (Ky. 2006)	8
<u>Schoenbachler v. Commonwealth</u> , 95 S.W.3d 830 (Ky. 2003).....	8
<u>Law:</u>	8
House Bill 463	8

<u>Jarrell v. Commonwealth</u> , 384 S.W.3d 195 (Ky. App. 2012)	8
KRS 439.3106.....	8, 9, 10
KRS 439.250(10).....	9
<u>Analysis:</u>	9
A. The trial court erred in revoking Mr. Kidd’s probation because it did not make a finding regarding each of the elements that must be found in order to revoke.	9
<u>Southwood v. Commonwealth</u> , 372 S.W.3d 882 (Ky.App. 2012)	10
KRE 401	10
<u>Rasdon v. Commonwealth</u> , 701 S.W.2d 716 (Ky. App. 1986)	10
<u>Gagnon v. Scarpelli</u> , 411 U.S. 778 (1973).....	10, 11
<u>Morrissey v. Brewer</u> , 408 U.S. 471 (1972).....	11
<u>Murphy v. Commonwealth</u> , 551 S.W.2d 838 (Ky. App. 1977)	11
B. The trial court erred because the evidence did not support the findings required for revocation under KRS 439.3106(1)	11
KRS 218A.1412.....	12
KRS 218A.141.....	12
2011 Ky. Acts ch 2 (HB 463) § 9	12
C. The trial court erred in revoking because under KRS 439.3106(2) the appropriate punishment for the alleged violation in this case was sanctions other than revocation and imprisonment.	12
KRS 439.551(2)(c)	12
KRS 439.3106(2).....	12, 13
KRS 446.010.....	13
<u>Commonwealth v. Lopez</u> , 292 S.W.3d 878 (Ky. 2009)	13
<u>Commonwealth v. English</u> , 993 S.W.2d 941 (Ky. 1999)	13
U.S. Const. Amend. XIV	13, 14

Morrissey v. Brewer, 408 U.S. 471 (1972) 14

Payne v. Tennessee, 501 U.S. 808 (1991) 14

California v. Trombetta, 467 U.S. 479 (1984)..... 14

Chambers v. Mississippi, 410 U.S. 284 (1973) 14

Alexander v. Louisiana, 406 U.S. 625 (1972) 14

Hicks v. Oklahoma, 447 U.S. 343 (1980)..... 14

Miller v. Johnson Controls, Inc., 296 S.W.3d 392 (Ky. 2009)..... 14

Fetterly v. Paskett, 997 F.2d 1295 (9th Cir. 1993)..... 14

Relief: 14

II. Mr. Kidd was denied the right to confront and cross examine witnesses against him which is one of the minimum due process requirements required for revocation proceedings. 14

Gagnon v. Scarpelli, 411 U.S. 778 (1973)..... 15

Morrissey v. Brewer, 408 U.S. 471 (1972)..... 15

Murphy v. Commonwealth, 551 S.W.2d 838 (Ky. App. 1977)..... 15

CONCLUSION..... 16

STATEMENT OF THE CASE

James Kidd appealed an order of the Lee Circuit Court revoking James Kidd's probation for returning to Kentucky after he had been banished to Ohio. TR 80. During a bench conference between the Commonwealth, defense counsel, and the trial court prior to the revocation hearing, everyone seemed to agree that the reason Mr. Kidd returned to Kentucky was because his mother had become ill. VR Supp: 5/15/12; 10:22:38-10:26:50. The Commonwealth and defense counsel also agreed that any violation was merely technical in nature. Id. The Commonwealth was also receptive to defense counsel's suggestion that the trial court only impose graduated sanctions¹ if the court were inclined to revoke Mr. Kidd's probation. Id.

After all, Mr. Kidd had not picked up any new charges, in any state, during the two and a half years he was on probation. TR 82. He was a Gulf War veteran who had been injured in an explosion and primarily had traffic violations constituting his offense history.² VR Supp: 7/17/09; 11:42:18; TR 81-82. Moreover, the underlying indictment in this case was for the sale of a single pill and Mr. Kidd pled guilty to the offense and was sentenced to the maximum of 10 years imprisonment probated for five years.³ TR 1, 48-57.

¹ KRS 446.010 states:

"Graduated sanction" means any of a wide range of accountability measures and programs for supervised individuals, including but not limited to electronic monitoring; drug and alcohol testing or monitoring; day or evening reporting centers; restitution centers; disallowance of future earned compliance credits; rehabilitative interventions such as substance abuse or mental health treatment; reporting requirements to probation and parole officers; community service or work crews; secure or unsecure residential treatment facilities or halfway houses; and short-term or intermittent incarceration.

² According to the trial court, prior to the underlying offense in this case, Mr. Kidd had been convicted for Improper Start from Parked Position, Operating Motor Vehicle Under the Influence of Alcohol/Drugs 2nd Offense, Speeding 15 MPH Over Limit, Operating Motor Vehicle Under the Influence of Alcohol/Drugs, Misdemeanor Escape 3rd Degree, and Failure to Illuminate Head Lamps. TR 81-82.

³ The indictment was for trafficking in a controlled substance, first degree, first offense under KRS 218A.1412. At the time the offense was a Class C felony with a penalty range of 5 to 10 years

However, the trial court did not believe that Mr. Kidd was subject to graduated sanctions. VR Supp: 5/15/12; 10:27:30. Also, the trial did not believe that Mr. Kidd returning to Kentucky was only a technical violation. Id. at 10:25:24; TR 80. The trial court then held a hearing.

At the start of the hearing, the trial court took judicial notice of the condition of probation at issue. VR Supp: 5/15/12; 10:28:44. This condition was the trial court's handwritten notation that stated "defendant move out of the state for 5 years and leave by Nov. 15."⁴ The trial court also stated for the record that, in 2010, the trial court allowed Mr. Kidd to return to Kentucky twice because Mr. Kidd's sister, who eventually passed away, had terminal cancer.⁵ Id.

After making opening remarks, the trial court placed Jerry Parsons of probation and parole under oath and started questioning him. Id. at 10:31:40. Mr. Parsons had no material or substantive testimony to offer regarding any alleged violation. Id.

With Mr. Parson unable to offer a reason for revoking Mr. Kidd's probation, the trial court asked Victim's Advocate, Sharla Plowman, if she had any knowledge of Mr. Kidd returning to Kentucky and being in Owsley County. Id. at 10:33:22. She said "I've had several phone calls..." Id. at 10:33:30. Defense counsel interjected and objected on the grounds that a witness with more direct knowledge of an alleged violation was needed and that he would not be able to cross examination her regarding the allegations if she were going to repeat second or third hand information. Id. The trial court overruled the

imprisonment. Effective in 2011, this offense, selling one OxyContin pill, would be a Class D felony punishable by 1 to 5 years imprisonment. KRS 218A.141; 2011 Ky. Acts ch 2 (HB 463) § 9. eff. 6-8-11.

⁴ Final judgment was entered on October 20, 2009. TR 47. This notation is found at TR 53.

⁵ The trial court entered an order on April 22, 2010 permitting Mr. Kidd to "enter the State of Kentucky, specifically Lee County, on April 23, 2010 at 9:00am and he may remain in Lee County for the next two months to be with his sister, Anna Smyth..." TR 60-61. The trial court entered another order on June 25, 2010 permitting Mr. Kidd to "remain in Lee County for the next 2 months to be with his sister, Anna Smyth..." TR 62-63.

objections on the grounds that hearsay is permissible and hearings are informal. Id. at 10:33:50-10:34:29. Defense counsel called the hearing a farce. Id.

The trial court then placed Ms. Plowman under oath and she told the trial court that she had prepared the motion to revoke Mr. Kidd's probation because she had received several phone calls from an individual who told her that Mr. Kidd was staying at a residence in Owsley County.⁶ Id. at 10:34:35-10:35:30. However, she could not remember the name of the individual who called her and the individual's name was not in the motion she had prepared for the Commonwealth's Attorney. Id. and at TR 64. She also testified that after she prepared the motion, Deputy Mike Havicus went and arrested Mr. Kidd in Owsley County. Id. at 10:35:33. No one testified regarding the fact that the trial court had entered an order issuing a bench warrant for Mr. Kidd's arrest for returning to Kentucky prior to Ms. Plowman's motion to revoke being filed. TR 64. As grounds, the order stated that the trial court itself had been informed by "Dispatch" that Mr. Kidd was in Owsley County. Id.

After hearing Ms. Plowman's testimony, the trial court told Mr. Kidd it was sorry he was having trouble with family members dying but that it had to enforce its orders. VR Supp: 5/15/12; 10:41:27. The trial court said it was assuming Deputy Havicus' arrest document was correct and found that Mr. Kidd had violated the condition of probation that he leave Kentucky for five years. Id. at 10:43:25.

The Commonwealth informed the trial court that it was still receptive to the court imposing graduated sanctions. Id. at 10:46:17. Defense counsel asked the trial court not to revoke Mr. Kidd's probation and argued that graduated sanctions were the most severe punishment that should be imposed due to the court finding a violation. Id. at 10:46:42-

⁶ Commonwealth's Attorney Heather Combs signed the motion. Id. and at TR 64.

10:50:50. Defense counsel also informed the court that there were no other allegations against Mr. Kidd, that Mr. Kidd was in substantial compliance with the terms of his probation and that he had already spent sixty days in jail due to this allegation. Id.

The trial court stated the docket entry would reflect that Mr. Kidd's probation was revoked and that Mr. Kidd be ordered to serve ten years in prison, but that he would also look at Mr. Kidd's activity subsequent to the original judgment prior to entering a final order. Id. at 10:50:52, 10:52:22. The Commonwealth again informed the trial court that it had no objections to the court imposing graduated sanctions. Id. at 10:52:10.

Subsequently, the trial court confirmed that Mr. Kidd had not picked up any new charges in any state during his time on probation but still entered a written order revoking Mr. Kidd's probation. TR 80-83. The order found that Mr. Kidd entered Kentucky when a family member was ill when he was aware such violated a condition of probation and concluded:

[t]here is a substantial risk that the Defendant will therefore commit another violation during any extended period of probation. The Defendant is in need of correctional treatment that can be provided most effectively by his commitment to a correctional institution, and further probation based upon the above violation would unduly depreciate the seriousness of the Defendant's crime.

Id. at 80, 82-83.

Mr. Kidd appealed the trial court's order as a matter of right to the Kentucky Court of Appeals. Ky. Const. § 115. Mr. Kidd argued to the Court of Appeals that the trial court erred by revoking Mr. Kidd's probation because the trial court failed to make the findings required for revocation under KRS 439.3106(1)⁷, because the evidence did

⁷ KRS 439.3106 provides:

Supervised individuals shall be subject to:

not support the findings required for revocation under KRS 439.3106(1), and because under KRS 439.3106(2) the appropriate punishment for the alleged violation in this case was sanctions other than revocation and imprisonment. Kidd COA Brief.

A panel of the Court of Appeals affirmed the trial court's order in an Opinion designated not to be published. Despite the fact that defense counsel and the Commonwealth agreed that graduated sanctions were the appropriate punishment, a panel of the Court of Appeals found the issue regarding the trial court's failure to make findings required for revocation under KRS 439.3106(1) was unpreserved because defense counsel did not "allude specifically to the terms of [KRS 439.3106(1)] or request the court to make findings under that section." Kidd Opinion pg. 4. The panel stated it could only review the issue under RCr 10.26.⁸ Kidd Opinion pg. 4.

Regarding Mr. Kidd's contention that the evidence did not support the findings required for revocation under KRS 439.3106(1) and that under KRS 439.3106(2) the appropriate punishment for the alleged violation in this case was sanctions other than revocation and imprisonment, the panel further found:

In response to defense counsel's request, the trial court considered and rejected the possibility of graduated sanctions, concluding that there was a substantial risk that Kidd would commit another violation during any extended period of probation; that he was in need of correctional treatment; and that further probation would unduly depreciate the

(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.

⁸ Kentucky Rules of Criminal Procedure 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.

seriousness of his crime. Thus, the trial court complied with KRS 439.3106 in that it considered and rejected the possibility of other sanctions.

Kidd Opinion pg. 5.

Subsequently, Mr. Kidd filed a motion for discretionary review in this Court and asked this Court to review the panel's opinion to help provide guidance to the trial courts and the Court of Appeals as to how to apply the relatively new statute KRS 439.3106 during probation revocation proceedings. Kidd MDR. This Court granted the motion.

KRS 439.3106 is a relatively new statute that has not been reviewed in a published Opinion of this Court hitherto. Three Court of Appeals cases dealing with KRS 439.3106 have hitherto been published—Jarrell v. Commonwealth, 384 S.W.3d 195 (Ky.App. 2012), Southwood v. Commonwealth, 372 S.W.3d 882 (Ky.App. 2012), and Kaletch v. Commonwealth, 396 S.W.3d 324 (Ky. App. 2013). There have also been numerous unpublished cases.⁹

In dicta, the Southwood opinion stated “[t]he statutory language of KRS 439.3106 does not require the court to make specific findings of fact.” Southwood, 371 S.W.3d at 885. Kaletch and several unpublished opinions, such as the one at issue herein, have used

⁹ Carter v. Commonwealth, 2013 WL 645829 (Ky. App. Feb. 22, 2013); Downs v. Commonwealth, 2013 WL 1867982 (Ky. App. May 3, 2013); Flink v. Commonwealth, 2013 WL 1792511 (Ky. App. Apr. 26, 2013); Williams v. Commonwealth, 2013 WL 2948491 (Ky. App. June 14, 2013); Gibson v. Commonwealth, 2013 WL 192887 (Ky. App. Jan. 18, 2013); Cook v. Commonwealth, 2013 WL 4710344 (Ky. App. Aug. 30, 2013); Council v. Commonwealth, 2012 WL 5306278 (Ky. App. Oct. 26, 2012); Saulsberry v. Commonwealth, 2013 WL 1932922 (Ky. App. May 10, 2013); Lee v. Commonwealth, 2013 WL 4400513 (Ky. App. Aug. 16, 2013); Hunt v. Commonwealth, 2013 WL 3968667 (Ky. App. Aug. 2, 2013); Loewen v. Commonwealth, 2013 WL 462082 (Ky. App. Feb. 8, 2013); Kidd v. Commonwealth, 2013 WL 3968662 (Ky. App., Aug. 2, 2013); Hubbard v. Commonwealth, 2013 WL 5305758 (Ky. App. Sept. 20, 2013); Lanham v. Commonwealth, 2012 WL 6632779 (Ky. App. Dec. 21, 2012); Burlingame v. Commonwealth, 2013 WL 5886831 (Ky. App. Nov. 1, 2013); Mosby v. Commonwealth, 2014 WL 505925 (Ky. App. Feb. 7, 2014); Townsend v. Commonwealth, 2014 WL 2040137 (Ky. App. May 16, 2014). Because Mr. Kidd is not referencing these cases in support of an argument or as authoritative on an issue on which there are no published cases, he has not attached them in the appendix pursuant to CR 76.28(4)(c).

this line to conclude that a trial court did not err when it failed to apply the standards set forth in KRS 439.3106. However, the dissenting opinion in Jarrell states:

[T]he legislature expressly declared that even if a probation violation is found, the court must make two findings before revoking the offender's probation and imposing the sentence of incarceration. Specifically, the court must find that the violation constitutes a significant risk to prior victims or the community, and the probationer cannot be managed in the community. KRS 439.3106(1).”

Jarrell, 384 S.W.3d at 203 (Thompson, J. dissenting).

Another problem with the published cases is that they do not provide guidance as to what constitutes a significant risk to prior victims or the community and when an individual cannot be managed in the community under KRS 439.3106. In the case at bar, Mr. Kidd visiting his sick mother cannot constitute a significant risk to anyone and there was no evidence that he could not be managed in the community.

ARGUMENT

I.

The trial court erred by revoking Mr. Kidd’s probation because the trial court failed to make the findings required for revocation under KRS 439.3106(1), because the evidence did not support the findings required for revocation under KRS 439.3106(1), and because under KRS 439.3106(2) the appropriate punishment for the alleged violation in this case was sanctions other than revocation and imprisonment. Accordingly, the Court of Appeals’ Opinion affirming the trial court must be reversed and the trial court’s order revoking probation must be vacated.

Preservation:

This issue is preserved by defense counsel’s arguments against revocation and for imposition of graduated sanctions and by the Commonwealth informing the trial court

that it had no objections to defense counsel's requests. VR Supp: 5/15/12; 10:22:38-10:26:50, 10:46:42-10:50:50.

The Court of Appeals found that the sub-issue that the trial court erred by failing to make the findings required for revocation under KRS 439.3106(1) was unpreserved. Kidd Opinion pg. 4. Mr. Kidd maintains that this issue is preserved as argued in Section A below. However, if this Court finds this issue, or any other, is inadequately preserved, Mr. Kidd asks this Court to conduct a review under RCr 10.26.¹⁰

Law:

In 2011, the Kentucky General Assembly enacted House Bill 463 in response to the rapidly rising rate of incarceration and its costs. Jarrell v. Commonwealth, 384 S.W.3d 195 (Ky. App. 2012) (Thompson, J. dissenting). This constituted a comprehensive revision of the penal system and made substantial changes to the probation revocation provisions. Id.

“Notably, the legislature expressly declared that even if a probation violation is found, the court must make two findings before revoking the offender’s probation and imposing the sentence of incarceration. Specifically, the court must find that the violation constitutes a significant risk to prior victims or the community, and the probationer cannot be managed in the community. KRS 439.3106(1).” Id.

KRS 439.3106 provides:

¹⁰ Regarding unpreserved errors, RCr 10.26 allows reversal based on an unpreserved, palpable error when a manifest injustice occurs. This has been characterized in a number of ways. For example, when an error threatened a defendant’s entitlement to due process of law, Allen v. Commonwealth, 286 S.W.3d 221, 226 (Ky. 2009), when the error seriously affected the fairness of the proceedings, Ernst v. Commonwealth, 160 S.W.3d 744, 758 (Ky. 2005), when the defect in the proceeding was shocking or jurisprudentially intolerable, Martin v. Commonwealth, 207 S.W.3d 1, 3 (Ky. 2006), when the error seriously affected the fairness, integrity, or public reputation of the proceeding, Id. at 4, and when a reviewing court determines there is a substantial possibility that the result in the case would have been different but for the error. Schoenbachler v. Commonwealth, 95 S.W.3d 830, 836 (Ky. 2003).

Supervised individuals^[11] 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^[12] 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.

Analysis:

In the case at bar, the trial court erred in revoking Mr. Kidd's probation because it did not make a finding regarding each of the elements that must be found in order to revoke, because the evidence did not support such a finding, and because sanctions other than incarceration were required.

A. The trial court erred in revoking Mr. Kidd's probation because it did not make a finding regarding each of the elements that must be found in order to revoke.

The trial court did not find that that Mr. Kidd returning to Kentucky after his mother became ill posed a significant risk to the community and that he could not be appropriately managed in the community. Again, under KRS 439.3106(1), incarceration is only possible if there is a finding that a probationer's violation poses a significant risk to prior victims¹³ or the community at large and cannot be appropriately managed in the community.

¹¹ Under KRS 439.250(10), "'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." Because Mr. Kidd was "an individual placed on probation by a court," KRS 439.3106 applied to him.

¹² There were no prior victims in this case.

¹³ Again, there were no prior victims in this case.

Further, the Court of Appeals erred by rejecting this argument and finding that defense counsel did not “allude specifically to the terms of [KRS 439.3106(1)] or request the court to make findings under that section.” Kidd Opinion pg. 4. The Court of Appeals also erred by following the dicta in Southwood, 371 S.W.3d at 885, that states “[t]he statutory language of KRS 439.3106 does not require the court to make specific findings of fact.” Id.

First, defense counsel did argue that graduated sanctions were appropriate, and the Commonwealth agreed. This is adequate for preservation. The Court of Appeals’ rationale that it was not adequate is analogous to an appellate court finding that when a trial attorney objects and says “irrelevant,” the objection would not be preserved because the attorney did not cite to KRE 401.

Second, the Court of Appeals erred by following the dicta in Southwood that findings are not required. If a trial court is not required to make findings that a probationer’s violation poses a significant risk to prior victims or the community at large and that the probationer cannot be appropriately managed in the community, then the statute is meaningless and the General Assembly’s intent is not being followed.

Third, despite what one panel of the Court of Appeals said, “[f]indings are a prerequisite to any unfavorable decision and are a minimal requirement of due process of law.” Rasdon v. Commonwealth, 701 S.W.2d 716, 719 (Ky. App. 1986) (citing Gagnon v. Scarpelli, 411 U.S. 778 (1973)).

Due process requires that an individual’s parole or probation cannot be revoked unless a probationer is afforded (a) written notice of the claimed violations; (b) disclosure to the probationer of evidence against him; (c) opportunity to be heard in person and to

present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless a hearing officer specifically finds good cause for not allowing confrontation); (e) a “neutral and detached” hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) **a written statement by the fact-finders as to the evidence upon which they relied and reasons for revoking parole.** Gagnon v. Scarpelli, 411 U.S. 778, 782-786) (1973) (holding that the aforementioned minimal due process requirements required to revoke an individual’s parole under Morrissey v. Brewer, 408 U.S. 471, 489 (1972) are also required to revoke an individual’s probation). Kentucky has also adopted the same six minimum Due Process requirements for revocation hearings. Murphy v. Commonwealth, 551 S.W.2d 838, 840 (Ky. App. 1977).

Accordingly, whether requested or not, the trial court’s failure to make findings violated the minimal due process requirements outlined above and such would constitute a manifest injustice under RCr 10.26 because this error denied Mr. Kidd’s entitlement to due process of law (see Allen supra) and because it seriously affected the fairness of the proceedings (see Ernst supra).

B. The trial court erred because the evidence did not support the findings required for revocation under KRS 439.3106(1).

The evidence did not support a finding that Mr. Kidd posed a significant risk to the community and that he could not be appropriately managed in the community.

Mr. Kidd had returned to Kentucky after his mother had become ill. Mr. Kidd had not picked up any new charges during the two and a half years he was on probation. TR 82. He was an injured Gulf War veteran and primarily had traffic violations

constituting his offense history.¹⁴ VR Supp: 7/17/09; 11:42:18; TR 81-82. Moreover, the underlying indictment in this case was for the sale of a single pill.¹⁵ TR 1, 48-57. He did not pose a significant risk to anyone, and there was no evidence that he could not be appropriately managed in the community.

C. The trial court erred in revoking because under KRS 439.3106(2) the appropriate punishment for the alleged violation in this case was sanctions other than revocation and imprisonment.

Mr. Kidd is the epitome of the person the Kentucky General Assembly does not want incarcerated. Sanctions other than incarceration were required. The trial court erred in its belief that Mr. Kidd was not subject to graduated sanctions. An express statutory purpose of graduated sanctions is to reduce revocation rates and the time and resources expended by the Department of Corrections. KRS 439.551(2)(c). Also, KRS 439.3106(1) does not mandate incarceration upon a finding that a probationer does pose a significant risk to prior victims or the community and cannot be appropriately managed. Rather, it states that incarceration is only a possibility upon such a finding.

Most importantly, without a finding that Mr. Kidd posed a significant risk to prior victims or the community and cannot be appropriately managed, KRS 439.3106(2) provides that the probationer **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,

¹⁴ According to the trial court, prior to the underlying offense in this case, Mr. Kidd had been convicted for Improper Start from Parked Position, Operating Motor Vehicle Under the Influence of Alcohol/Drugs 2nd Offense, Speeding 15 MPH Over Limit, Operating Motor Vehicle Under the Influence of Alcohol/Drugs, Misdemeanor Escape 3rd Degree, and Failure to Illuminate Head Lamps. TR 81-82.

¹⁵ The indictment was for trafficking in a controlled substance, first degree, first offense under KRS 218A.1412. At the time the offense was a Class C felony with a penalty range of 5 to 10 years imprisonment. Effective in 2011, this offense, selling one OxyContin pill, would be a Class D felony punishable by 1 to 5 years imprisonment. KRS 218A.141; 2011 Ky. Acts ch 2 (HB 463) § 9. eff. 6-8-11.

interventions which may assist the offender to remain compliant and crime-free in the community.”¹⁶

On appeal, the trial court’s decision is reviewed for an abuse of 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.” Commonwealth v. English, 993 S.W.2d 941, 945 (Ky. 1999).

The trial court’s ruling revoking Mr. Kidd’s probation was against sound legal principles because the trial court failed to make the findings required for revocation under KRS 439.3106(1), because the evidence did not support the findings required for revocation under KRS 439.3106(1), and because under KRS 439.3106(2) the appropriate punishment for the alleged violation in this case was sanctions other than revocation and imprisonment. Furthermore, the trial court’s order revoking probation is unfair and unreasonable.

Revoking Mr. Kidd’s probation also violated the Fourteenth Amendment to the United States Constitution because Mr. Kidd suffered a grievous loss, a deprivation of liberty by the government not following known procedures by depriving Mr. Kidd of a

¹⁶ KRS 446.010 states:

"Graduated sanction" means any of a wide range of accountability measures and programs for supervised individuals, including but not limited to electronic monitoring; drug and alcohol testing or monitoring; day or evening reporting centers; restitution centers; disallowance of future earned compliance credits; rehabilitative interventions such as substance abuse or mental health treatment; reporting requirements to probation and parole officers; community service or work crews; secure or unsecure residential treatment facilities or halfway houses; and short-term or intermittent incarceration.

state law entitlement, by applying state law arbitrarily, and by acting unreasonably, arbitrarily, and fundamentally unfairly.¹⁷

Relief:

Because the trial court erred by revoking Mr. Kidd's probation, the Court of Appeals, Opinion affirming the trial court must be reversed and the order to revoke must be ordered to be vacated. Also, because incarceration was not an appropriate remedy in this case, Mr. Kidd must be ordered released from prison and the time spent incarcerated should be credited towards his time spent on probation. Typically, if a trial court feels additional sanctions are needed, it is within the trial court's purview to impose sanctions other than incarceration. However, Mr. Kidd has been punished enough.

II.

Mr. Kidd was denied the right to confront and cross examine witnesses against him which is one of the minimum due process requirements required for revocation proceedings.

This issue is preserved. VR Supp: 5/15/12; 10:33:30-10:34:29.

Due Process requires that an individual's parole or probation cannot be revoked unless a probationer is afforded (a) written notice of the claimed violations; (b) disclosure to the probationer of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) **the right to confront and cross-examine adverse witnesses (unless a hearing officer specifically finds good cause for**

¹⁷ Revoking a probationer's release status inflicts a "grievous loss" and invokes due process. Morrisey v. Brewer, 408 U.S. 471, 481 (1972). The Fourteenth Amendment due process clause requires fundamental fairness. Payne v. Tennessee, 501 U.S. 808, 825 (1991); California v. Trombetta, 467 U.S. 479, 485 (1984) and Chambers v. Mississippi, 410 U.S. 284, 294 (1973); Alexander v. Louisiana, 406 U.S. 625 (1972). A state violates a criminal defendant's due process right to fundamental fairness if it arbitrarily deprives the defendant of a state law entitlement. Hicks v. Oklahoma, 447 U.S. 343, 346 (1980). See also, Miller v. Johnson Controls, Inc., 296 S.W.3d 392, 397 (Ky. 2009); Fetterly v. Paskett, 997 F.2d 1295, 1300 (9th Cir.1993).

not allowing confrontation); (e) a “neutral and detached” hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the fact-finders as to the evidence upon which they relied and reasons for revoking parole. Gagnon v. Scarpelli, 411 U.S. 778, 782-786 (1973) (holding that the aforementioned minimal Due Process requirements required to revoke an individual’s parole under Morrissey v. Brewer, 408 U.S. 471, 489 (1972) are also required to revoke an individual’s probation). Kentucky has also adopted the same six minimum Due Process requirements for revocation hearings. Murphy v. Commonwealth, 551 S.W.2d 838, 840 (Ky. App. 1977).

Mr. Kidd was denied the right to confront and cross-examine adverse witnesses against him. At the hearing, the trial court asked Victim’s Advocate, Sharla Plowman, if she had any knowledge of Mr. Kidd returning to Kentucky and being in Owsley County. She said “I’ve had several phone calls...” Defense counsel interjected and objected on the grounds that a witness with more direct knowledge of an alleged violation was needed and that he would not be able to cross examination her regarding the allegations if she was going to repeat second or third hand information. The trial court overruled the objections on the grounds that hearsay is permissible and hearings are informal. VR Supp: 5/15/12; 10:33:20-10:34:29.

Ms. Plowman then testified that she had prepared the motion to revoke Mr. Kidd’s probation because she had received several phone calls from an individual who told her that Mr. Kidd was staying at a residence in Owsley County.¹⁸ Id. at 10:34:35-10:35:35. However, she could not remember the name of the individual who called her

¹⁸ Commonwealth’s Attorney Heather Combs signed the motion. TR 64.

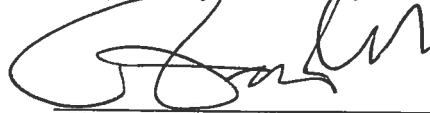
and the individual's name was not in the motion she had prepared for the Commonwealth's Attorney. Id.

As defense counsel stated, he was unable to confront any witness regarding this allegation. While Deputy Havicus' post arrest complaint stated that Mr. Kidd was arrested in Kentucky, the trial court simply assumed that the document was correct without sworn testimony from any one with actual knowledge that Mr. Kidd was in Kentucky. Consequently, Appellant has suffered a violation of his constitutional right to due process which resulted in grievous loss of his liberty and if the order revoking probation is not vacated for the relief requested in Argument Section I, Mr. Kidd requests that the order be reversed and the case remanded for a new hearing.

CONCLUSION

For the reasons stated herein, this Court must order the Court of Appeals' Opinion be reversed and that the Order revoking Mr. Kidd's probation be vacated.

Respectfully Submitted,



Brandon Neil Jewell
Assistant Public Advocate
Department of Public Advocacy
100 Fair Oaks Lane, Ste 302
Frankfort, KY 40601
(502) 564-8006

APPENDIX

<u>Tab Number</u>	<u>Item Description</u>	<u>Record Location</u>
1	<u>Kidd v. Commonwealth</u> , Kentucky Court of Appeals 2012-CA-001130-MR Opinion Affirming	
2	Order Revoking Probation	TR 80-84
3	Judgment And Sentence On Plea of Guilty	TR 48-57
4	Order Granting Discretionary Review	