

Commonwealth of Kentucky
Court of Appeals

NO. 2025-CA-0299-MR

JENNA ABNEE

APPELLANT

v. APPEAL FROM BOURBON CIRCUIT COURT
HONORABLE KATHRYN H. GABHART, JUDGE
ACTION NO. 20-CR-00092

COMMONWEALTH OF KENTUCKY

APPELLEE

AND

NO. 2025-CA-0300-MR

JENNA ABNEE

APPELLANT

v. APPEAL FROM BOURBON CIRCUIT COURT
HONORABLE KATHRYN H. GABHART, JUDGE
ACTION NO. 21-CR-00132

COMMONWEALTH OF KENTUCKY

APPELLEE

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NO. 2025-CA-0301-MR

JENNA ABNEE

APPELLANT

v. APPEAL FROM BOURBON CIRCUIT COURT
HONORABLE KATHRYN H. GABHART, JUDGE
ACTION NO. 21-CR-00133

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
VACATING AND REMANDING

** ** *

BEFORE: ACREE, L. JONES, AND MOYNAHAN, JUDGES.

JONES, L., JUDGE: Jenna Abnee (Abnee) appeals from probation revocation orders in three cases, entered simultaneously on January 22, 2025. Because the circuit court failed to make the requisite findings required by KRS¹ 439.3106(1), we have no option but to vacate the revocation orders and remand for further proceedings.

The facts underlying this case are not in dispute. Abnee simultaneously resolved the three underlying cases in Bourbon County in exchange

¹ Kentucky Revised Statutes.

for an aggregate total sentence of ten-years imprisonment. On December 5, 2023, Abnee was sentenced according to her plea agreements, though her sentences were probated for five years.² A condition of her probation was that she complete the Nicholas County Drug Court Program.³

A Violation of Supervision Report was filed in Bourbon Circuit Court on June 17, 2024, alleging Abnee violated her probation by “[f]ailure to comply with treatment program (sic) for substance abuse[,]” and noting that “[o]n June 3, 2024, Abnee appeared in Nicholas County Circuit Court for a Probation Revocation Hearing. During that hearing, Drug Court testified that on May 6, 2024, Abnee was terminated from the Nicholas County Drug Court Program.”⁴

The Violation of Supervision Report also noted that “Abnee’s Nicholas County

² Though not dispositive to this appeal, there appears to be some confusion as to the length of Abnee’s sentences. Abnee states in her brief that her total combined sentence was ten years. Appellant’s Brief at 1. The Commonwealth claims her total combined sentence is twelve years. Appellee’s Brief at 1. This confusion is exacerbated by Abnee’s counsel claiming her sentence was twelve years at the final hearing before this appeal. *See* Video Record (VR) 1/16/2026 at 11:00:44 a.m. – 11:00:46 a.m.

The judgments entered do not show that the sentences were to be run concurrent. *See* Trial Record (TR) 20-CR-00092 at 353-56; 21-CR-00132 at 311-314; and 21-CR-00133 at 309-12. The docket sheet for 20-CR-00092 does not indicate that sentence runs concurrently to the others. TR at 351. However, the docket sheet for 21-CR-00132 indicates that sentence was to run concurrently to 20-CR-00092. TR at 310. The docket sheet for 21-CR-00133 indicates that sentence was to run concurrently with “other cases.” TR at 308. Furthermore, the video record at sentencing shows that the circuit court elected to run Abnee’s sentences concurrently for a total combined sentence of ten years. VR 12/5/2023 at 2:59:34 p.m. – 3:00:08 p.m.

³ At the time the pleas were entered, it appears that Abnee had been probated for offenses out of Nicholas Circuit Court and Fayette Circuit Court.

⁴ TR 20-CR-00092 at 361; 21-CR-00132 at 320; and 21-CR-00133 at 315.

probation was revoked . . . imposing her original sentence of 7 years[,]” and that she was “lodged as a state inmate in Bourbon County Detention Center (sic).”⁵ Based on those allegations, the circuit court issued a warrant for Abnee’s arrest which was served at the Bourbon County Detention Center.

On August 23, 2024, Abnee made her first appearance before the Bourbon Circuit Court following service of the warrant. A probation revocation hearing was continued for several months because Abnee had filed a motion for shock probation in the 18th Judicial Circuit,⁶ seeking probation to Bourbon county’s drug court, and the parties and circuit court were awaiting the outcome of that motion before moving forward on the probation revocation. In the interim, the Bourbon Circuit Court also referred Abnee to drug court in Bourbon County,⁷ to which she was accepted.⁸

The matter came for a hearing on January 16, 2025, where Abnee’s counsel informed the circuit court her shock motion in the 18th Judicial Circuit had been denied.⁹ Before proceeding to any factual considerations and citing an

⁵ TR 20-CR-00092 at 361; 21-CR-00132 at 320; and 21-CR-00133 at 315.

⁶ The 18th Judicial Circuit is comprised of Harrison, Nicholas, Pendleton, and Roberson counties.

⁷ TR 20-CR-00092 at 369; 21-CR-00132 at 325; and 21-CR-00133 at 320.

⁸ TR 20-CR-00092 at 370; 21-CR-00132 at 326; and 21-CR-00122 at 321.

⁹ VR 1/16/2025 at 10:59:44 a.m. – 11:00:00 a.m.

unpublished case from this Court,¹⁰ Abnee addressed whether, after revocation, the sum total of her sentences across Fayette, Nicholas, and Bourbon counties, which consisted of Class C and Class D felonies that were required to run consecutively, would exceed the twenty-year cap for those offenses provided by KRS 532.110(1)(c). Furthermore, Abnee questioned whether the judgments across her three cases would need to be amended to effectuate that twenty-year cap.

We will not delve into the merits of whether Abnee’s sentences across all three counties should be capped at twenty years, as that argument is not the issue before us on appeal. We mention this argument, and the circuit court’s response and subsequent actions, because those arguments and actions are the primary reason the Commonwealth argues the circuit court should be affirmed. In making his argument, Abnee’s counsel stated, “If she’s revoked, which I think what—where we’re at—you know, there’s no other option—the total sentence would have to be twenty years. And I don’t know how to effectuate that through the judgment.”¹¹ The circuit court expressed reluctance to take any action regarding Abnee’s arguments about the twenty-year cap absent any further guidance in a published appellate opinion.

¹⁰ *Ormond v. Commonwealth*, No. 2023-CA-0332-MR, 2024 WL 3627793 (Ky. App. Aug. 2, 2024).

¹¹ VR 1/16/2025 at 11:01:41 a.m. – 11:01:56 a.m.

After the circuit court noted the matter needed to proceed to a hearing, Abnee's counsel believed there had been a prior stipulation,¹² but stated, "If there's not [a stipulation], Ms. Abnee's willing to stipulate."¹³ Abnee was placed under oath, and then agreed that she had violated the terms of her probation when she was discharged from the Nicholas County Drug Court. The Bourbon Circuit Court then orally ruled that "[b]ased on those allegations and the stipulation, the court will revoke you to serve the sentence that is included in the judgment that has already been entered, and with credit for time served."¹⁴ The circuit court made no further oral findings.

On January 22, 2025, the circuit court entered three identical orders revoking Abnee's probation. The orders read as follows:¹⁵

PROBATION REVOCATION ORDER

This matter came before the Court on January 16, 2025 upon the Motion of the Plaintiff to revoke the Defendant's probation because of the following violations:

Failure to comply with treatment for substance abuse[.]

¹² Abnee had not made any stipulations regarding revocation at any prior hearing.

¹³ VR 1/16/2025 11:08:17 a.m. – 11:08:19 a.m.

¹⁴ VR 1/16/2025 11:09:31 a.m. – 11:09:43 a.m.

¹⁵ TR 20-CR-00092 at 376; 21-CR-00132 at 330; and 21-CR-00133 at 326.

And it appearing to this Court that sufficient grounds exist to revoke the Defendant's probation for failure to comply with the conditions of supervision.

IT IS HEREBY ORDERED THAT the Court being sufficiently advised, hereby revokes the Defendant's probation with credit for time served up until January 16, 2025.

Abnee timely appealed the orders revoking her probation in all three cases. We have consolidated these cases for appeal.

On appeal, Abnee argues the circuit court erred in revoking her probation without making any factual findings that she posed a risk to prior victims or the community, or that she could not be appropriately managed in the community. Abnee concedes her argument was not preserved in the circuit court and asks for palpable error review. The Commonwealth argues that any errors regarding revocation were invited (and thus not reviewable), and, in any event, there was no palpable error.

Unpreserved claims of error are reviewed for palpable error. *Martin v. Commonwealth*, 207 S.W.3d 1, 3 (Ky. 2006). RCr¹⁶ 10.26 defines "palpable error" as "error which affects the substantial rights of a party . . . and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error." Palpable error "must be easily perceptible, plain, obvious and

¹⁶ Kentucky Rules of Criminal Procedure.

readily noticeable.” *Brewer v. Commonwealth*, 206 S.W.3d 343, 349 (Ky. 2006) (internal quotation marks and citations omitted).

Indeed, “[a] party claiming palpable error must show a probability of a different result or error so fundamental as to threaten a defendant’s entitlement to due process of law.” *Chavies v. Commonwealth*, 374 S.W.3d 313, 322-23 (Ky. 2012) (citing *Martin*, 207 S.W.3d at 3). The error “should be so egregious that it jumps off the page . . . and cries out for relief.” *Id* at 323 (internal quotation marks omitted).

With these principles in mind, we turn to the parties’ arguments.

KRS 439.3106 provides in relevant part:

(1) Supervised individuals shall be subject to:

- (a) 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
- (b) 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.

In interpreting KRS 439.3106(1), our Supreme Court has stated:

KRS 439.3106(1) *requires* trial courts to find that the probationer’s failure to abide by a condition of supervision constitutes a significant risk to prior victims or the community, *and* that the probationer cannot be managed in the community *before* probation may be revoked.

Commonwealth v. Andrews, 448 S.W.3d 773, 781 (Ky. 2014) (emphasis added).

The issue is one of due process. As explained in *Lainhart v.*

Commonwealth, 534 S.W.3d 234, 238 (Ky. App. 2017):

For purposes of review, rather than speculate on whether the court considered KRS 439.3106(1), we require courts to make specific findings of fact, either written or oral, addressing the statutory criteria. *McClure v. Commonwealth*, 457 S.W.3d 728, 733-34 (Ky. App. 2015). A requirement that the court make these express findings on the record not only helps ensure reviewability of the court decision, but it also helps ensure that the court’s decision was reliable. “Findings 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, 93 S. Ct. 1756, 36 L. Ed. 2d 656 (1973)).

It is sufficient for the circuit court to make the requisite statutory findings either orally from the bench or in writing. *McClure v. Commonwealth*, 457 S.W.3d 728, 734 (Ky. App. 2015). We may even affirm a revocation order if the circuit court makes those findings in a cursory manner so long as the findings are supported by a preponderance of the evidence by the record. *Nantz v. Commonwealth*, 728 S.W.3d 804, 812 (Ky. App. 2026). However, the statutory

findings themselves must be made, and it is error when a circuit court fails to make those findings. *McClure*, 457 S.W.3d at 734. The failure to make those findings violates due process and is thus palpable error. *Lainhart*, 534 S.W.3d at 237.

Abnee’s argument that the Bourbon Circuit Court committed palpable error by revoking her probation without finding her dismissal from drug court constituted a significant risk to prior victims and the community *and* finding she could not be appropriately managed in the community is well taken. The Commonwealth argues “there is no grave error that jumps off the page, offends fairness, and demands a different outcome” because of Abnee’s admission she was discharged from drug court; because she was already revoked from probation in Nicholas Circuit Court, and because of her counsel’s argument that “revocation was the only option available[.]” Appellee’s Brief at 9. We understand the Commonwealth’s position, but *Lainhart* makes clear that the failure to make the requisite findings is, in and of itself, palpable error. The Commonwealth does not ask us to overrule *Lainhart*, and we find no reason to do so.

The Commonwealth also asserts the circuit court’s failure to make the requisite factual findings was “invited error,” and thus beyond appellate review. In making that argument, the Commonwealth highlights both the statement by Abnee’s counsel that “there’s no other option” than revocation and Abnee’s failure to offer any other alternative to revocation.

“Generally, a party is estopped from asserting an invited error on appeal.” *Quisenberry v. Commonwealth*, 336 S.W.3d 19, 37 (Ky. 2011). The difference “between forfeited errors, which are subject to plain error review, and waived errors, which are not,” is “that invited errors . . . amount to a waiver, *i.e.*, invitations that reflect the party’s knowing relinquishment of a right[.]” *Id.* at 38 (citing *United States v. Perez*, 116 F.3d 840 (9th Cir. 1997)). For example, a defendant cannot claim on appeal that evidence does not support a conviction for a lesser-included offense instruction when at trial, the defendant requested that very instruction and referred the circuit court to evidence which supported it.

Quisenberry, 336 S.W.3d at 37-38.

We understand the Commonwealth’s position, but find the present situation falls short of invited error. Our conclusion after reviewing the proceedings is that Abnee’s counsel was resigned to the fact her probation *likely* would be revoked, therefore counsel wanted to make and preserve any argument regarding the twenty-year cap. We do not believe counsel’s educated guess that revocation was the likely outcome to his client’s probation violation can be equated to a stipulation or concession to revocation. Moreover, a probation revocation order requires requisite findings supported by evidence in the record. *Kendrick v. Commonwealth*, 664 S.W.3d 731, 735 (Ky. App. 2023). Arguments made by Abnee’s counsel cannot substitute for evidence in the record as “the

arguments of counsel are not evidence.” *Miller v. Commonwealth*, 283 S.W.3d 690, 695 (Ky. 2009).

While Abnee stipulated that she violated her probation when she was discharged from the Nicholas County Drug Court, she did not stipulate, nor was she asked to stipulate, to a finding that she posed a risk to prior victims or the community or that she could not be appropriately managed within the community, or to any facts supporting such a finding. Abnee herself said nothing indicating she intended to waive the findings regarding risk or management in the community. Thus, we believe there was no invited error.

The law in Kentucky is clear: probation revocation requires not only a violation of the terms of probation, but factual findings supported by the record that the probationer constitutes a significant risk to prior victims or the community, and that the probationer cannot be managed in the community. Those findings are mandatory as a matter of due process. Thus, we have no choice but to vacate the Bourbon Circuit Court’s orders revoking Abnee’s probation and direct the circuit court to make the requisite factual findings, including holding a new hearing if necessary.

We view any remaining contentions of error as moot, unpersuasive, unpreserved, or without merit.

ALL CONCUR.

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