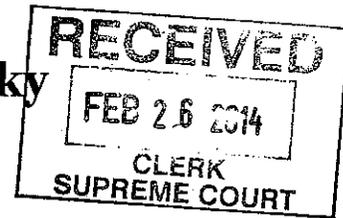




**Commonwealth of Kentucky**  
**Supreme Court**  
Nos. 13-SC-4



**COMMONWEALTH OF KENTUCKY**

**APPELLANT**

v.

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

**JOSEPH ANDREWS**

**APPELLEE**

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**Reply Brief for Commonwealth**

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**Submitted by,**

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**CERTIFICATE OF SERVICE**

I certify that a copy of the Reply Brief for Commonwealth has been mailed, this 26<sup>th</sup> day of February, 2014, 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

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## ARGUMENT

### **KRS 439.3106 IS NOT APPLICABLE TO THE TRIAL COURT.**

A. This issue is preserved.

At the revocation hearing, the trial court acknowledged that it was questionable whether KRS 439.3106 was applicable to the court. (VR: 6/23/11; 10:51). The trial court also observed that the system of graduated sanctions set forth in KRS 439.3107 was not in place at the time. (Id. at 10:56). In deciding to revoke Andrews's probation, the court again recognized that KRS 439.3106 might not be applicable to trial courts. (Id. at 11:00:23). However, to Andrews's benefit, the court did consider KRS 439.3106 in determining whether revocation was appropriate. The court found that Andrews posed at significant risk to the community by re-offending and committing drug related crimes based upon his extensive prior criminal history and could not be appropriately managed in the community. (Id. at 11:00:23 - 11:00:56).

On direct appeal, Andrews expressly argued that KRS 439.3106 was applicable to the trial court and the court did not satisfy the mandates of the statute when the court revoked Andrews's probation in lieu of graduated sanctions. Thus, Andrews argued that the court abused its discretion when it did not fashion an alternative to revocation other than incarceration. (Appellant's brief, pp. 3 - 5). In its opinion, the Kentucky Court of Appeals agreed. The court expressly determined that KRS 439.3106 was applicable to

the trial court and the court had to make additional findings prior to revoking a supervised individual's probation. (Slip opinion, p. 5). The court concluded that a positive drug test and Andrews's prior criminal history were insufficient to satisfy the mandate of KRS 439.3106(1). (Slip opinion, p. 6).

On discretionary review, the Commonwealth put forth the argument that KRS 439.3106 was not applicable to the trial court and the court did not abuse its discretion in revoking Andrews's probation based upon his prior criminal history. Discretionary review was granted by this court. In light of Andrews's argument in the Kentucky Court of Appeals, the opinion of the Kentucky Court of Appeals and this court's decision to grant discretionary review on the issue, the Commonwealth's argument about whether KRS 439.3106 is applicable to the trial court is properly before this court.

Additionally, the Kentucky Supreme Court has the authority to affirm a lower court's ruling even if the lower court used incorrect or different reasoning. It is well-settled that an appellate court may affirm a lower court for any reason supported by the record. See, e.g., Kentucky Farm Bureau Mutual Insurance Co. v. Gray, 814 S.W.2d 928, 930 (Ky.App.1991); McCloud v. Commonwealth, 286 S.W.3d 780, 786 (Ky. 2009). Therefore, this issue is properly preserved for review by this court.

B. Neither KRS 439.3106 or KRS 439.3108 allow the department to modify the conditions of probation in order to impose graduated sanctions.

The most troubling part of Andrews's argument is that he alleges that in the event the trial court's order is silent as to graduated sanctions, the department has the authority to modify the conditions of probation in order to impose graduated sanctions. This is not the case at all. Pursuant to KRS 439.553, it is clear that the court, and only the court, has the authority to determine the conditions of community supervision:

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 legislature's use of the word "shall" leaves no question that only the court has the authority to determine the conditions of supervision. If the case is appropriate, the court may, but does not have to, determine that DOC shall impose graduated sanctions for any violations of a condition of community supervision.

In reading KRS 439.3108 as a whole, the statute sets out what the department may do in the event of a probation violation. This includes modifying the conditions of supervision for the limited purpose of imposing graduated sanctions. However, in light of KRS 439.553, this occurs only if

the case is one in which the trial court has imposed graduated sanctions as a condition of supervision.

C. Read in context with the other statutes in the chapter, KRS 439.3106 sets forth the two sanctions a supervised individual faces in the event of a violation.

Andrews argues that the location of KRS 439.3106 does not mean that the statute is applicable to the Department of Corrections. This is incorrect.

It cannot go unnoticed that all of the surrounding statutes in the chapter make a direct reference to the Department of Corrections. KRS 439.3101 thru KRS 439.3105 address how the department goes about supervising individuals subject to community supervision. In the event of a violation of the conditions of community supervision, KRS 439.3106 sets forth the two appropriate sanctions for an individual. Finally, KRS 439.3107 and KRS 439.3108 address how graduated sanctions will be implemented if an individual violates the conditions of his/her supervision. To understand the legislative intent of KRS 439.3106, the statute should be read in context. The definition of context involves looking at the surrounding statutes to shed light on the meaning of KRS 439.3106, and courts attempt to understand a statute's legislative intent by considering the statutory context. Brown v. Commonwealth, 40 S.W.3d 873, 876 (Ky. App. 1999); See also Commonwealth v. Coffey, 247 S.W.3d 908 (Ky.2008). Like the statutes around it, KRS 439.3106 is applicable to the Department of Corrections. Therefore, as KRS 439.3106 is applicable to the DOC, it does not restrain the

court's discretion in deciding whether to revoke probation and it does not require the trial court to make any additional findings prior to exercising such discretion.

D. Andrews's prior criminal history in conjunction with a positive drug test was enough to warrant revocation.

Andrews argues that his prior criminal history was insufficient to mandate revocation. This argument is unreasonable and unduly depreciates Andrews's inability to benefit from the Commonwealth's and the trial court's past attempts in offering him opportunities for rehabilitation. In addition to a positive drug test which triggered the revocation proceedings in this case, Andrews lied 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). Andrews had four previous felony convictions, had been on probation before and had a previous probation violation. (VR: 6/23/11; 10:43). Andrews was charged with manufacturing methamphetamine, but pled guilty to unlawful possession of a methamphetamine precursor, second offense, and received a probated sentence. At sentencing, Andrews assured the court that he did not need drug treatment, he did not have a drug problem, 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). Andrews did not check into the rehabilitation facility when he took the methamphetamine, but

“voluntarily” entered the facility only after he tested positive for methamphetamine and knew revocation proceedings would ensue. (VR: 6/23/11; 11:01). These are clearly grounds for the trial court to revoke Andrews’s community supervision and the trial court did not abuse its discretion in doing so.

## CONCLUSION

Wherefore, based upon all of the foregoing, the decision of the Kentucky Court of Appeals should be reversed and the order of the Pulaski Circuit Court should be affirmed.

Respectfully submitted,

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