

Commonwealth of Kentucky
Supreme Court
No. 2006-SC-460

FILED

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SUPREME COURT CLERK

COMMONWEALTH OF KENTUCKY

APPELLANT

v.

Appeal from Jefferson Circuit Court
Hon. Geoffrey P. Morris, Judge
Indictment No. 00-CR-0050

CAROLYN HUFFINES

APPELLEE

Brief for Commonwealth

Submitted by,

GREGORY D. STUMBO

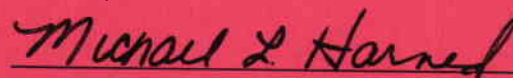
Attorney General of Kentucky

MICHAEL L. HARNED

Assistant Attorney General
Office of Criminal Appeals
Attorney General's Office
1024 Capital Center Drive
Frankfort, Kentucky 40601
(502) 696-5342

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 11TH day of December, 2006 to the Hon. Geoffrey P. Morris, Judge, Jefferson Circuit Court, Division Thirteen, Judicial Center, 700 West Jefferson Street, Louisville, Kentucky 40202; Hon. Barry M. Trifiletti, 721 West Market Street, Louisville, Kentucky 40202 and via electronic mail to the Hon. R. David Stengel, Commonwealth's Attorney, 514 West Liberty, Louisville, Kentucky 40202-2887.



Michael L. Harned
Assistant Attorney General

INTRODUCTION

This is a criminal case in which the Court of Appeals reversed the trial court's order revoking appellee's probation and this Court subsequently granted discretionary review from the Court of Appeals' action.

STATEMENT CONCERNING ORAL ARGUMENT

The Commonwealth does not believe that oral argument is necessary in this appeal because the issues are sufficiently addressed in the parties' briefs.

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COUNTERSTATEMENT OF THE CASE

On January 12, 2000, appellee was indicted by a Jefferson County Grand Jury for one count of forgery of a prescription. (Transcript of Record, hereinafter "TR," 1.) Appellee pled guilty to the charge. (TR 34-35.) On February 15, 2000, she was sentenced to one year imprisonment which was probated for five years. (35; 37.) Thus, the maximum expiration date for the probationary period was February 15, 2005.

On December 1, 2004, the Commonwealth filed a motion to revoke appellee's probation. (TR 47). The motion was on the trial court's motion docket for December 6, 2004. According to an order entered that day, appellee appeared without counsel and advised the Court she was due in another county on another court matter. The order also reflected that appellee's counsel had contacted the trial court and requested that the hearing be passed for one week. Accordingly, the case was continued to February 7, 2005 for a hearing on the revocation motion. (TR 58). On January 13, 2005, the Commonwealth filed a supplement to its motion and the hearing remained scheduled for February 7, 2005. (TR 60.)

On February 7, 2005, appellee appeared at the hearing without counsel despite the fact that she was being represented by the Honorable Barry M. Trifiletti on a similar motion to revoke in a different division of Jefferson Circuit Court. (Supplemental Tape 2/07/05, 12:02:08.) The trial court expressed its concern that appellee was without counsel. Appellee explained that she had hired Mr. Trifiletti for \$750 and thought this amount would cover both revocation proceedings. She stated that Mr. Trifiletti had subsequently informed her that she would have to pay him \$750 for each revocation

proceeding in which he was representing her. Appellee related that she had not had enough time to raise the additional \$750 she needed to hire Mr. Trifeletti for this case. (Supplemental Tape, 2/07/05, 12:02:12.) The hearing was rescheduled for February 14, 2005 - - the same day appellee and Mr. Trifeletti were to appear on the second revocation hearing in the other division. The trial court admonished appellee to tell Mr. Trifeletti and the prosecutor that he also needed to see them on that day. (Supplemental Tape 2/07/05, 12:04:50.)

On February 14, 2005, appellee again appeared without counsel. This occurred while she was being represented by Trifeletti at a similar hearing in the other case in the same courthouse that same day. (Supplemental Tape 2/14/04, 12:10:10). In that separate case appellee advanced the same argument that she does in the instant case - - that the trial court lacked jurisdiction to revoke her probation because the maximum expiration date had passed. (Supplemental Tape 2/14/05, 12:08:00.)

The Commonwealth announced that it was ready to proceed with the revocation proceeding. However, the trial court noted, "I'm not sending her [appellee] to the penitentiary without a counsel." The trial court stated that it would appoint the Public Defender's Office to represent appellee. (Supplemental Tape, 2/14/05, 12:11:53.)

Appellee related to the trial court that she had the means to pay Mr. Trifeletti, but just had not had the time to raise all of the money. The trial court noted that it was not going to take that chance and would still appoint the public defender to represent appellee. The trial court opined that if appellee worked it worked out with Mr. Trifeletti, he could enter a notice of appearance in the case. (Supplemental Tape, 2/14/05, 12:13:23.) The trial

court then continued the revocation hearing to March 28, 2005. (Supplemental Tape 2/14/05, 12:13:38.)

On March 28, 2005, appellee failed to appear because she was incarcerated in another county. The revocation hearing was continued to April 12, 2005. (TR 71.) On April 12, 2005, appellee failed to appear due to the fact that she was being housed in the Grayson County Jail under an assumed name. (TR 82.) The revocation hearing was then continued to May 9, 2005. (Id.)

On May 9, 2005, the revocation hearing was finally held. Appellee was represented by Mr. Trifiletti. Appellee contended that the trial court's jurisdiction to consider the Commonwealth's revocation motion expired on February 15, 2005 - - the date her probationary period expired. (Tape 5/09/05, 11:16:20.) The trial court rejected appellee's argument and revoked her probation. (Tape 5/09/05, 11:29:09.)

In a 2-1 opinion, the Court of Appeals reversed the trial court's order revoking appellee's probation. Relying on KRS 533.020(1), the majority determined that since the order was entered after the expiration of the period of probation, the trial court lacked jurisdiction to revoke appellee's probation.

This Court granted the Commonwealth's subsequent motion for discretionary review.

ARGUMENT

A DEFENDANT SHOULD NOT BE ALLOWED TO DEFEAT THE TRIAL COURT'S JURISDICTION TO REVOKE PROBATION BY ENGAGING IN TACTICS WHICH CAUSE THE HEARING TO BE CONDUCTED AFTER THE EXPIRATION OF THE PROBATION PERIOD.

As stated, the Court of Appeals majority opinion relied on KRS 533.020(1) to conclude that the trial court lacked jurisdiction to revoke appellee's probation. KRS 533.020 (1) states in pertinent part:

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 as any time prior to the expiration or termination of the period of probation.

No controversy exists that the Commonwealth's revocation motion in the instant case was filed on December 6, 2004 - - well before the period of probation was due to expire on February 15, 2005. The record also establishes that a revocation hearing was scheduled for February 7, 2005 - - again, before appellee's period of probation was due to expire on February 15, 2005.

However, in overruling the trial court's order revoking appellee's probation, the majority opinion latches upon the fact that the actual revocation did not occur until May 9, 2005 - -after the period of probation had expired. In doing so, the majority ignores the fact that the revocation would have occurred prior to the expiration of the probation period but for appellee's own actions. As indicated above, at the first

scheduled hearing on February 7, 2005, appellee appeared without counsel. Appellee was admonished to appear with counsel and the hearing was re-scheduled for February 14, 2005 - - again, before the expiration of the probation period.

On February 14, 2005, appellee again appeared without counsel. Over the Commonwealth's objection, the hearing was postponed until March 28, 2005 in order that counsel could appear with appellee.

Thus, it is uncontroverted that but for appellee's failure to appear with counsel, the revocation hearing would have been conducted before the expiration of the probation period. The majority opinion has permitted appellee to escape revocation by taking advantage of the trial court's effort to afford her representation. As noted by the dissenting opinion:

When the defendant repeatedly appeared without a lawyer even though she was represented by counsel in other simultaneous revocation proceedings, the trial court graciously permitted her to delay her hearing until she could appear with counsel. Now we say that by doing so, the trial court unwittingly permitted her to 'beat the system.'

(Slip opinion page 6.)

Appellee should not be allowed to benefit from her delaying tactics.

The Commonwealth filed the motion to revoke within the probationary period. But for appellee's own conduct, the hearing would have been held within this period. However, because of - - and only because of - - appellee's actions was the hearing held outside the period. Such a holding sends a message to other defendants on probation that they too can profit from self-induced delay.

Other jurisdictions have refused to reward defendants who have caused revocation hearings to be held outside the probationary period. For instance, in Parkerson v. State, 230 Ark. 118, 321 S.W.2d 207 (Ark. 1959) a motion to revoke a suspended sentence was filed before the expiration of the sentence. However, the hearing was postponed until after the end of the expiration date due to the defendant's request for a postponement of the hearing. The Arkansas Court held that the trial court had not lost jurisdiction since the defendant was the one who requested the delay:

It occurs to us that Appellant's right under the statute became fixed on the date of the filing of the application to revoke, and that it was for his benefit and at his request a postponement was granted. If he could have shown later that he had not violated the conditions of the suspension he would have escaped punishment for the original offense. It would be approaching the ridiculous to hold that appellant should be allowed to ask for and accept the favor of the court and then later use that favor to deprive the court of jurisdiction over him.

In Avance v. Mills, 495 P.2d 828, 1972 OK CR 89 (Okl. Crim. App. 1972), Avance was scheduled for a hearing to revoke his suspended sentence. However, the hearing was twice postponed, once due to Avance's motion for continuance and once due to both Avance and his attorney failing to appear. After being arrested and appearing in another court on an unrelated matter, the date of Avance's suspended sentence expired before he could be brought to court on the revocation hearing. Avance thereafter filed an original action seeking to prohibit the court from conducting a hearing to revoke his suspended sentence. Avance argued that the court had lost jurisdiction to hear the revocation since his sentence had expired before the time of the hearing.

The Oklahoma appellate court held that the trial court had not lost jurisdiction over the revocation proceeding simply because Avance's sentence had expired before the hearing could be conducted. The court based its holding on the fact that the hearing had originally been scheduled before the expiration date and that it was Avance's actions that had caused the delay:

To hold otherwise would encourage those under probationary, suspended or deferred sentences to go to some locality where he could not be found and remain there until after the expiration of his sentence; he would then be free of any restraint of his personal conduct, occasioned by the court's leniency in holding in abeyance the commencement of his term of imprisonment.

Similarly, in In Re Griffin, 67 Cal.2d 343, 62 Cal.Rptr. 1, 431 P.2d 625 (1967), the California Court held that the defendant would be estopped from attacking revocation of his probation on the ground that the period of probation had expired where the defendant had requested a continuance, which, when granted, continued the hearing past the probation expiration date. The Court opined:

A litigant who has stipulated to a procedure in excess of jurisdiction may be estopped to question it when 'To hold otherwise would permit the parties to trifle with the court.'

See also: People v. Bender, 24 A.D. 3d 819, 805 N.Y.S.2d 443 (N.Y.A.D. 3 Dept., 2005) (Where the court held the defendant had not been deprived of the statutory requirement of a prompt revocation hearing since the hearing was delayed as a result of the defendant's requests.); State v. Vashey, 823 A.2d 1151 (R.I. 2003) (Where the court rejected the defendant's contention that the probation revocation hearing was unjustly delayed because "responsibility for any delay lies with Vashey because it was he who repeatedly

continued the matter.”)

The same rationale applies to the instant case. Appellee should not be allowed to defeat the trial court’s jurisdiction to revoke her probation by engaging in tactics which caused the revocation hearing to be held after expiration of the probation period. As opined by the dissenting opinion, appellee should not be permitted to “beat the system.” This Court should reverse the Court of Appeals decision which allows for abuse of the revocation system. In its place, this Court should issue a published decision delineating that defendants cannot profit by delaying revocation proceedings. Such an opinion would send the correct message to would be recalcitrant probation violators and give the bench and bar of the Commonwealth guidance on how to proceed in such cases.

CONCLUSION

For the above-stated reasons, the Court of Appeals opinion should be reversed and the trial court’s order revoking appellee’s probation should be reinstated.

Respectfully submitted,

GREGORY D. STUMBO
Attorney General of Kentucky

Michael L. Harned

MICHAEL L. HARNED
Assistant Attorney General
Office of Criminal Appeals
Attorney General’s Office
1024 Capital Center Drive
Frankfort, Kentucky 40601-8204
(502) 696-5342

Counsel for Appellant