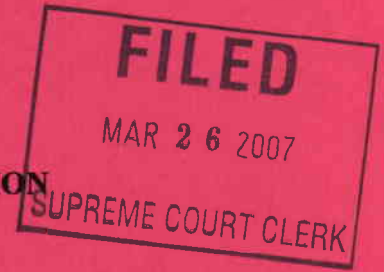


**SUPREME COURT OF KENTUCKY
FILE NUMBER 2006-SC-00575**

**REVIEW OF COURT OF APPEALS DECISION
NO. 2006-CA-001074-MR**

AND

**HARDIN CIRCUIT COURT DECISION
CASE NUMBER 06-CI-00189**



COMMONWEALTH OF KENTUCKY

APPELLANT

VS.

AMANDA R. GADDIE

APPELLEE

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was provided this 15 day of March, 2007, to Shane Young, Attorney for the Appellee, the Hon. Judge Kelly Easton, Hardin Circuit Judge, and to Chris Shaw, Commonwealth Attorney by placing a copy in their respective Courthouse mailboxes.

A handwritten signature in black ink, appearing to read "Jennifer B. Pitts", written over a horizontal line.

Jennifer B. Pitts
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APPELLANT'S BRIEF

Introduction

This is a case where the Appellee's probated sentence of 12 months was revoked after she failed to comply with and complete Hardin County Drug Court. Her Drug Court sentence was an amended term of her original probation for which she bargained at the time that the Commonwealth sought to initially revoke her probation. The issue before the Court is whether the Appellee, Amanda Gaddie, has been incarcerated without authority. She asserts that the District Court lacked authority or jurisdiction to amend the original plea agreement of September 12, 2003, which sentenced her to 180 days, probated for a period of 2 years on the condition that she complete drug screens with Kentucky Alternative Programs (KAPS).

Statement of Points and Authorities

1. KRS 24A.110
2. KRS 533.020
3. KRS 533.050(2)
4. Galusha vs. Commonwealth, 834 S.W.2d 696 (1992)
5. Stallworth vs. Commonwealth, 102 S.W.3d 918 (2003)
6. KRS 439.265
7. Kentucky Supreme Court, Administrative Procedures of the Court of Justice, Part XIII. Drug Court, 2006-01

Statement of the Case

After being probated on September 12, 2003, the Appellee received a positive drug screen on November 18, 2003 and on March 2, 2004 the Commonwealth filed a motion to revoke her probation. The final hearing on that motion was delayed until May

17, 2004, at which time the Appellee admitted her violation of probation and requested that the Court sentence her to drug court rather than service of original probated sentence of 180 days in jail. On that date "amended" terms and conditions of probation were put in writing and signed by the Petitioner, her counsel, the Commonwealth and the Court which indicated that the Appellee was "probated on the condition of her successful completion of misdemeanor or District Drug Court". A jail term of 12 months was probated at that time. The Appellee failed to report for Drug Court participation and thus a bench warrant was issued for her arrest on May 18, 2004. After the warrant was issued she was still given a substantial opportunity to turn herself in to initiate Drug Court but failed to do so and an order was entered August 25, 2004 which terminated her participation in Drug Court and revoked her 12 month probated sentence. She was finally arrested on that bench warrant nearly a year later on August 2, 2005 and the 12 month sentence was imposed by Hardin District Court. That sentence was affirmed by Hardin Circuit Court when it denied the Appellee's request for a writ of habeas corpus to release her from custody. The Court of Appeals then overruled the Circuit Court and ordered it to release her from custody.

Argument

Hardin District Court did not lack **jurisdiction** to sentence the Petitioner. The District Court has jurisdiction to sentence and monitor the probation of a defendant convicted of a misdemeanor. See KRS 24A.110. It is improper to assert that jurisdiction is lacking in this case. The real issue is whether the District Court had the authority to grant the Appellee's own request to amend her sentence in the form of amended terms and conditions of probation entered on May 17, 2004.

First it is important to look at KRS 533.020 which sets out the manner in which a court can sentence someone to probation. In subsection (1), it states that the “court may modify or enlarge the conditions” and that this may occur “at any time prior to the expiration or termination of the period of probation”. Further, KRS 533.050(2) contemplates that a court has the authority to modify probation. It sets out that a revocation or **modification** of probation cannot be made unless there is a hearing.

The Appellee has pointed this Court to the 1992 decision by the Court of Appeals in Galusha vs. Commonwealth, 834 S.W.2d 696 (1992) and to the Kentucky Supreme Court’s decision in Stallworth vs. Commonwealth, 102 S.W.3d 918 (2003) to support her contention that the District Court lacked the authority to modify the terms of her probation. But the Appellee’s situation is distinguishable from both Galusha and Stallworth.

First, the Defendants in both Galusha and Stallworth were bargaining for shock probation. Shock probation is a unique statutory creation governed entirely by KRS 439.265. In Galusha, the issue was whether the Circuit Court could, as a condition of shock probation, enhance the sentence first imposed. The Court of Appeals found no authority for the Court to do so and rested its logic on the fact that nothing in the shock probation statute permitted such post-judgment enhancement in a shock probation setting. Galusha vs. Commonwealth, 834 S.W.2d 696, 698 (Ky.App. 1992).

Similarly, the Kentucky Supreme Court followed the same logic in another case of modification of a sentence in which shock probation was sought by the Defendant. In Stallworth vs. Commonwealth the Court found that in a case where the Defendant was probated on the condition that he complete a residential program, he absconded, and the

court revoked his probation, that the Defendant's shock probation could not be based upon a modification of his sentence such as to increase his original 10 year prison term to 20 years if he should again be revoked. See Stallworth vs. Commonwealth, 102 S.W.3d 918 (Ky. 2003). The reasoning in both cases applies only to shock probation settings and should not be extended to the unique circumstances in Appellee's case.

There are several differences in the case at hand. First, the Appellee did not seek to amend the court's final judgment as a means to be **released** from jail such as in a shock probation situation. The Appellee was before the court due to a new event, her positive drug screen, for which possible sanctions could occur. Secondly, the District Court by virtue of KRS 533.020 actually had the authority to modify the terms of the Appellee's probation. Further, the Appellee initiated a request for drug court prior to revocation of her sentence and thus was not bargaining her way out of incarceration. And lastly, the administrative procedures governing Kentucky Drug Courts, as approved by the Kentucky Supreme Court in 2006, expressly state that a referral to Drug Court may be made during probation, **including a referral in lieu of revocation** (S.Ct. 2006-01).

Hence, this Court has already spoken on the appropriateness of the very same process by which the Appellee was able to gain entry into Drug Court. The term "in lieu of" seems to acknowledge that a violation has occurred and that drug court becomes an alternative to incarceration for a probation violation. A rejection of this process would deny probationer's in Kentucky the ability to gain entry into Drug Court rather than to serve their full sentence when they are faced with having their probation revoked as a result of a violation. That would leave Drug Court open only to those who accept it as part of the sentence on their original plea. To understand true addiction is to

acknowledge that most addicts are not ready to do that. They must be faced with more certain jail service in the form of probation revocation.

For many people, probation is enough and the intensive and intrusive Drug Court resources are not appropriate or necessary. Those who need Drug Court most are frequently identified by the fact that they fail to meet the conditions imposed upon them by traditional probation. With limited Drug Court resources, it is important for the court system in Kentucky to be able to identify those for whom Drug Court is most appropriate. Allowing someone to first attempt traditional probation is the best way in which to do that. The Courts in Kentucky must have the ability to modify probation in the very limited case of Drug Court and only where the Defendant consents or requests the modification. The point of Drug Court is not to punish, but to rehabilitate. In this case, the Commonwealth asks this Court to approve, consistent with its own Administrative Procedures (See S.Ct. 2006-01) a Drug Court referral process which allows modification of the terms of a Defendant's probation, as was done in the Appellee's case.

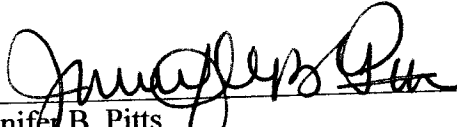
Shock probation is controlled by statute. KRS 439.265 does not set out a method by which to modify the terms of probation by virtue of the fact that a Defendant applying for shock probation is actually serving a sentence and is not "probated". A Defendant in that situation is bargaining to get out of jail. The entire philosophy behind shock probation is a modification of a final sentence. But for KRS 439.265, which expressly provides for a process by which to probate a Defendant who has been incarcerated by final judgment, it might be said that shock probation invites the same "chaos" as any other modification of a judgment.

Conclusion

In sum, the District Court maintained the authority to modify or enlarge the terms of the Appellee's probation during the two year term and that is what occurred based upon the Appellee's request on May 17, 2004. Modification of the conditions of probation is fundamentally different from the unique statutory creature of shock probation and thus the reasoning in both Galusha and Stallworth are inapplicable to the Appellee's situation.

Her probation was properly modified and she failed to complete the conditions she agreed to have imposed upon her. Her current incarceration is therefore founded on proper authority and is consistent with the Drug Court Administrative Regulations.

The Commonwealth requests that this case be remanded to Hardin Circuit Court where the Appellee can be required to serve the balance of her 12 month sentence.


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