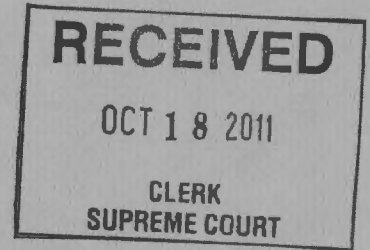


SUPREME COURT OF KENTUCKY
2011-SC-0030 D
(2009-CA-0296)



ELMER DAVID MILLER

APPELLANT

v.

APPEAL FROM LINCOLN CIRCUIT COURT
HONORABLE JEFFREY T. BURDETTE, JUDGE
ACTION NO. 03-CI-00470

COMMONWEALTH OF KENTUCKY

APPELLEE

BRIEF OF APPELLANT

CERTIFICATE

The undersigned certifies that copies of this brief were served by mail this 17th day of October, 2011, on Hon. Jeffrey T. Burdette, Judge, Lincoln Circuit Court, Hon. Jack Conway, and Hon. Eddy F. Montgomery and Hon. Virginia Carol Hill.

RICHARD CLAY
COUNSEL FOR APPELLANT

INTRODUCTION

This is a misdemeanor probation case where the court extended probation indefinitely.

STATEMENT CONCERNING ORAL ARGUMENT

Precedent is so clear and recent that oral argument would not likely be helpful.

STATEMENT OF POINTS AND AUTHORITIES

**DID THE COURT OF APPEALS ERR IN DECIDING MOVANT COULD
FACE PROBATION REVOCATION UNLESS HE ASKED IT BE
EXTENDED?**

Conrad v. Evridge, 315 S.W.3d 313 (Ky. 2010) 6

McClanahan v. Comm., 308 S.W.3d 694 (Ky. 2010) 5

Comm. v. Griffin, 942 S.W.2d 289 (Ky. 1997) 4

Curtsinger v. Comm., 549 S.W.2d. 515 (Ky. 1977) 6

Green v. Comm., 400 S.W.2d 206 (Ky. 1966) 6

Kentucky Constitution, § 27 7

Kentucky Constitution, § 28 7

KRS 17.500 4

KRS 532.045(4) 4

KRS 533.020(4) 3

1998 Ky. Acts ch. 606, §48 4

May it Please the Court,

STATEMENT OF THE CASE

The procedural history of this case is short. It began with a citation dated October 10, 2005, by KSP Trooper Collins charging Elmer David Miller with unlawful transaction with a minor, first degree, contrary to KRS 530.064, and related offenses. (TR 1). Arraignment was October 24, but the preliminary hearing was displaced by an indictment October 28 charging Miller with a single count of attempted unlawful transaction with a minor in the first degree occurring “on or about September 19, 2005 through October 10, 2005.” (TR 9, in Appendix). The indictment contained language the victim, “was a minor under sixteen years of age,” making a completed offense a Class B felony under KRS 530.064(2)(b). The attempt to commit such an offense, the actual inchoate charge in this case, was a Class C felony under KRS 506.010(4)(c).

Miller filed a Motion for Bill of Particulars November 2, 2005 (TR 27), which eventually produced a birth certificate showing the minor was born June 24, 1989, and was therefore over sixteen years of age when the criminal attempt was alleged to have occurred. The indictment, as clarified by the informal Bill of Particulars, and as the Commonwealth agreed, charged only a Class A misdemeanor under KRS 506.010(4)(d). Miller filed a motion to dismiss or remand August 10, 2006. (TR 39). The trial court never dealt with the motion attacking its jurisdiction. Miller ultimately plead guilty on October 27, 2006, to a misdemeanor attempted violation, as reflected in the “Judgment on Guilty Plea and Final Sentencing on Misdemeanor” of November 6, 2006. (TR 44). Miller was ordered to “Attend any counseling recommended by probation and parole.”

The record is silent until October 14, 2008, when a summons was ordered to be issued. (TR 49). The ground stated in the probation officer's affidavit was, "Failure to complete sex offender treatment program - subject has been attending sex offender treatment program since ordered to do so in 2006: however, the program generally lasts longer than two years, so subject has not officially completed." The trial court was asked to "Modify the defendant's sentence of probation as follows: until sex offender treatment program has been completed." Revocation was not sought, only extension, however confusing the fill in the blank "*Affidavit to *: Lincoln County - 28th Circuit Probation and Order*" makes it appear. A hearing was set for October 24, when the court ordered briefs on the issue. There next appears a document apparently considered by the trial court (although neither a pleading nor motion nor attachment to either), a letter from two state social workers on October 29, 2008 (TR 55), or two days after probation had expired by statute on October 27, 2008. After saying the program usually lasted about three years, the letter concluded, "Mr. Miller's probationary period is set to expire very soon but if his probationary period were to be extended, the SOTP would continue providing therapy services for Mr. Miller."

Miller objected to this proposal. The Commonwealth filed its memorandum in support on December 8, 2008. (TR 56). Miller replied December 11, arguing the court lost jurisdiction when probation expired October 27, 2008. (TR 72). The state filed more. (TR 76). On January 20, 2009, the court entered an *Order Extending Probation* (TR 84) "until such time as the community based SOTP is completed." Notice of appeal was filed February 17, 2009. (TR 89).

The Court of Appeals reversed and remanded the case by its opinion of December 10, 2010, case number 2009-CA-000296. It agreed with Miller in all regards but one. He argued he

was finally discharged from probation by operation of law on October 27, 2008, and the order extending that probation should be reversed. The Court of Appeals would not go so far, saying the Commonwealth had initiated revocation proceedings (actually only extension proceedings) before the statutory maximum two year probationary period expired, so the trial court did not lose jurisdiction of the case by passage of time. It remanded the “case to the trial court for further probation proceedings where the trial court can determine Miller’s probation in light of our reading of *Griffin*.” Miller was confronted with asking that his probation be extended or commencing service of his sentence.

Appellant sought discretionary review by motion filed January 11, 2011. Thereafter appellant’s probation officer told him that he had completed the SOTP and had no further obligation to her. This Court then granted discretionary review by order entered August 17, 2011.

ARGUMENT

DID THE COURT OF APPEALS ERR IN DECIDING MOVANT COULD FACE PROBATION REVOCATION UNLESS HE ASKED IT BE EXTENDED?

The Commonwealth succeeded in extending the period of misdemeanor probation beyond two years over Appellant’s objection, as stated in open court and repeated in his reply memorandum. (TR 72). The objection relies on the constraint of KRS 533.020(4): “Such period, with extensions thereof, shall not exceed . . . two (2) years, or the time to complete restitution, whichever is longer, upon the conviction of a misdemeanor. Upon the completion of the probationary period, . . . the defendant shall be deemed finally discharged” This Court

has recognized “the wisdom in restricting the time period in which the court can hold the ‘sword of Damocles’ over the head of a probationer”¹ Probation expired by statute October 27, 2008. The record reveals no dispute of fact. This raises only questions of law, subject to *de novo* review.

The government grounded its case initially (TR 56) in the sole exception announced by a split panel of this Court, that a defendant may waive the related felony probation limitation.² That decision was superseded by the Legislature when the statute itself was amended in 1998, codifying the authority of a court to extend probation for the time necessary to complete restitution.³ The Legislature said nothing of waiver, implicitly rejecting *Griffin*.

The Court of Appeals agreed *Griffin* did not authorize extending probation without appellant’s consent.⁴ The problem comes in its revival of *Griffin*, to movant’s peril, by putting him under the sword to withdraw his objection to continued probation and request an extension himself, or go to jail for not meeting the impossible condition of completing in two years a program known by the state usually to take at least three years.⁵

Sensing trouble on the waiver issue, by its “addendum” filing (TR 76) the state argued that Miller was subject to sex offender registration, according to KRS 17.500, *et seq.*, and therefore had to complete a treatment program, as required by KRS 532.045(4). The trial court

¹ *Comm. v. Griffin*, 942 S.W.2d 289, 291 (Ky. 1997).

² *Id.*

³ 1998 Ky. Acts ch. 606, §48 (in Appendix).

⁴ *Opinion*, p. 4.

⁵ “[T]he trial court can determine Miller’s probation in light of our reading of *Griffin*.” *Opinion*, p. 7.

accepted this argument (TR 86), tacitly admitting it neglected to require the comprehensive sex offender presentence evaluation before granting probation (subsection 3), or to disclose the report and allow challenges before imposing sentence (subsection 8). There is a reason the trial court was not so remiss. The statutory sex offender registration scheme does not apply to this case, nor was there ever a question it did.

The Court of Appeals rejected application of KRS 532.045.⁶ It might as well have endorsed the statute, because there would be nothing to remand unless a probated misdemeanor must complete an SOTP “recommended” by a probation officer, even if it lasts beyond the lawful probation period. In this case all Miller had to do under the probation order, however, was to “Attend any counseling recommended by probation and parole.” (TR 45). Had he been expressly required to complete a three year SOTP, such would have been error because it exceeded his maximum probationary period. The government knew in 2006 an SOTP extended at least a year longer than the maximum probation term. Appellant never asked to have his probation extended. He resisted it. Miller believes that, with a *Griffin* type waiver superseded by statute, there is no mechanism to extend probation as done here, so there is no point in remand. Even if a probationer may yet waive his right to finite probation, it is unworthy of the sovereign to manufacture a predicament to see whether the probationer will fight or submit. Given the *McClanahan*⁷ decision after briefs were filed in this case, Miller probably could not agree to extend his probation anyway.

⁶ *Opinion*, p. 6.

⁷ *McClanahan v. Comm.*, 308 S.W.3d 694 (Ky. 2010).

Case law is clear. The sentencing court lost jurisdiction on October 27, 2008. Its subsequent orders are void.⁸ To hold otherwise is to maintain over Miller the “sword of Damocles.” The statute is a guard against extensions of probation. “There must be some time in which a convicted person may know that he has satisfied his debt to society.”⁹ The Court of Appeals said the fight may resume because Miller was actually litigating his probationary status within the two year period, so the circuit court retained jurisdiction to decide the issue.¹⁰ While this has the attraction of syllogism, it begs the issue. The fact is that neither party had benefit during briefing of this Court’s controlling decision in *Conrad v. Evridge*.¹¹ “The circuit court has jurisdiction to hold a revocation hearing only before the probationary period expires.” To counsel’s shame, I did not become familiar with the case until preparing this brief. While there was a hearing in the trial court before probation expired, it was only for an extension. No action was taken by the court until the following January, after probation expired. Although *Conrad* was a writ case, the same rule should govern here. This case should be reversed.

The Commonwealth argued Miller violated his probation by not completing a counseling program recommended by his probation officer, however long it takes. Miller countered a sentencing court is not authorized by statute to impose more than a two year probationary term for a misdemeanor conviction.¹² The Commonwealth has assumed the position that if Miller wins that argument, then he loses. Because he did not complete in two years a program known

⁸ *Curtsinger v. Comm.*, 549 S.W.2d 515 (Ky. 1977).

⁹ *Green v. Comm.*, 400 S.W.2d 206 (Ky. 1966).

¹⁰ *Opinion*, p. 7.

¹¹ 315 S.W.3d 313 (Ky. 2010)

¹² KRS 533.020(4).

by the state to take longer, it wants to remand the case to circuit court, which still lacks jurisdiction of misdemeanor cases, to lock him up for probation violation. The alleged violation exists only if we disregard separation of powers. It is improper because imposed in a court without jurisdiction upon terms the state knew were impossible to perform. It was impossible because a probation officer, "recommending" counseling under the order of probation, required a three year program to be done in two years. The executive branch, even through probation officers, cannot so exercise discretion by delegation from the judicial branch where a statute directly prohibits the court itself.¹³ The position of the Commonwealth means Miller, or anyone else in his position, would be guilty of a violation when sentenced, because he could never meet the terms of probation imposed by the court on recommendation of a probation officer. Such a trap is also unworthy of the sovereign and easily avoided by reversal of the case for lack of jurisdiction.

The "Sword of Damocles" has been hanging over Miller for five years since his misdemeanor conviction of attempted unlawful transaction with a minor. Perhaps counsel failed in not seeking a writ against the trial court, a circuit court, which had no jurisdiction of this misdemeanor case. The case was ripe for such after the circuit judge ordered briefing after October 27. Perhaps appellant should have sought a writ for the relief sought in this appeal, divestiture of jurisdiction instead because probation expired by its terms before it was ever extended. What may have seemed overkill at the time looks the wiser course in hindsight. Perhaps the sun that shined on McClanahan would have warmed Miller.

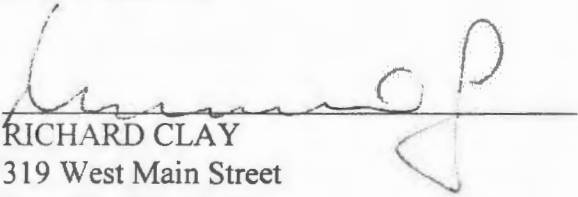
¹³ Kentucky Constitution, §§ 27 and 28.

CONCLUSION

Elmer David Miller was finally discharged from probation by operation of law on October 27, 2008. The order extending that probation should be reversed.

Respectfully submitted,

CLAY & CLAY

A handwritten signature in cursive script, appearing to read 'Richard Clay', is written over a horizontal line.

RICHARD CLAY
319 West Main Street
Danville, KY 40422
(859) 236-4867
(859) 236-4882 Fax