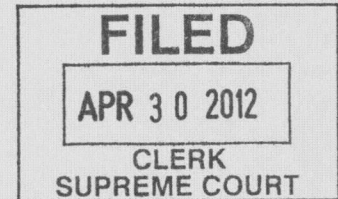


SUPREME COURT OF KENTUCKY  
2011-SC-0030 D  
(2009-CA-0296)



ELMER DAVID MILLER

APPELLANT

v.

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

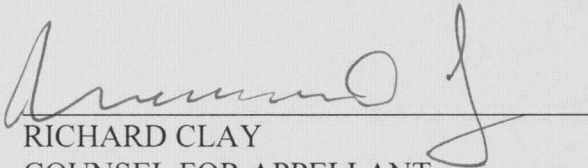
COMMONWEALTH OF KENTUCKY

APPELLEE

**APPELLANT'S REPLY BRIEF**

**CERTIFICATE**

The undersigned certifies that copies of this brief were served by mail this 27<sup>th</sup> day of April, 2012, 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

*May it Please the Court.*

The Commonwealth takes an interesting position in its brief. At the bottom of page two we find, "He fails to acknowledge that, to retain jurisdiction the court is only required to conduct a hearing within the probationary period." This same argument has been made and rejected by this Court. "[T]his Court cannot create some common-law tolling exception to the probation statutes, as the Commonwealth urges. The statute is plain on its face, and it allows revocation only 'prior to the expiration...of probation.'" *Conrad v. Evridge*, 315 S.W.3d 313 (Ky. 2010). The government may as well have confessed error. Contrary to its argument, case law does require the order of revocation (not extension) to issue within the probationary period.

The Commonwealth also argues, on page three of its brief, that Miller's claim of error could only have been preserved by refusing to file a brief in the trial court, putting into action, or inaction, his argument the court had lost jurisdiction. In the next sentence the state says Miller did not argue a jurisdictional issue "until the matter was decided against him." Quite an interesting counterpoint, to argue on the one hand that error could only be preserved by failing to preserve it, but on the other hand it was not preserved because not argued in the brief that it says should not have been filed. There is a simple answer. The following paragraph is taken from page two of *Defendant's Reply Memorandum on Probation Extension* filed in the trial court December 11, 2008 (TR 72). This fact was noted on page two of the original brief for appellant, which the Commonwealth should have addressed.

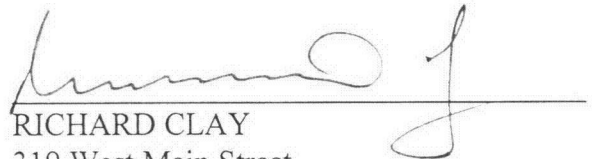
Case law is clear. This court lost jurisdiction on that date. Its subsequent orders are void. *Curtsinger vs. Comm.*, 549 S.W.2d. 515 (Ky. 1977). To hold otherwise is to maintain a "sword a Damocles." The statute is a guard against extensions of probation. "There must be some time in which a convicted person may know that he has satisfied his debt to society." *Green vs. Comm.*, 400 S.W.2d 206 (Ky. 1966).

CONCLUSION

The Commonwealth, in its blind stubbornness to incarcerate Elmer David Miller, refuses to acknowledge the controlling authority of this Court less than two years old, as well as the facts established in the record before the trial court. The Court should return the favor and ignore the brief of appellee. The order extending 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. The signature is fluid and extends to the right of the line.

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