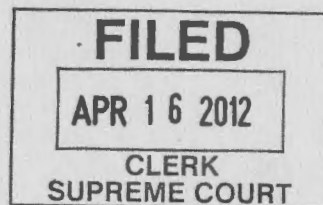


Commonwealth of Kentucky
Supreme Court
No. 2011-SC-30



ELMER DAVID MILLER

APPELLANT

v.

Appeal from Lincoln Circuit Court
Hon. Jeffrey T. Burdette, Judge
Indictment No. 03-CI-470

COMMONWEALTH OF KENTUCKY

APPELLEE

Brief for Commonwealth

Submitted by,

JACK CONWAY

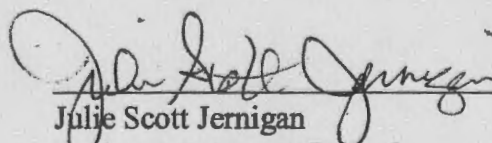
Attorney General of Kentucky

JULIE SCOTT JERNIGAN

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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 16th day of April, 2012 to Honorable Jeffrey T. Burdette, Judge, Lincoln Circuit Court, 100 N Main Street, P.O. Box 1324, Somerset KY 42502-1324, Hon. Richard Clay, Clay & Clay, 319 West Main Street, Danville KY 40422; and served via e-mail to Hon. Eddy F. Montgomery, Commonwealth's Attorney, 236 East Mt. Vernon, Somerset KY 42501.


Julie Scott Jernigan
Assistant Attorney General

INTRODUCTION

Appellant, Elmer Miller, pled guilty to one count of Criminal Attempt to Unlawful Transaction with a Minor in the First Degree. He was sentenced to 12 months in jail, probated for two years. Following a violation of his probation, the court extended his probation.

He appeals the Order extending his probation

STATEMENT CONCERNING ORAL ARGUMENT

The Commonwealth does not desire oral argument in this case, believing that this appeal may be resolved by reference to the record and the briefs of counsel. The Commonwealth does stand ready to present oral argument if so ordered.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

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COUNTERSTATEMENT OF THE CASE

The Court of Appeals made the following findings of fact:

On October 10, 2005, Miller was charged with unlawful transaction with a minor in the first degree, sodomy in the third degree, and for promoting prostitution in the first degree for allegedly attempting to convince a child younger than sixteen years of age to engage in sexual activities. Subsequently, Miller was indicted for criminal attempt to commit an unlawful transaction with a minor in the first degree, a misdemeanor offense.

On October 27, 2006, Miller entered a guilty plea to the charged offense and was sentenced to twelve months in jail, probated for two years. Miller was ordered to submit to an evaluation and attend counseling as requested by probation and parole. On October 14, 2008, Miller was summoned by the trial court for failing to complete the sex offender treatment program (SOTP). At the time, Miller was participating in the program but his probation was set to expire before it was completed. The Commonwealth requested that the trial court extend Miller's probation until he completed the sex offender treatment program.

On October 24, 2008, the trial court found that Miller's probation was set to expire on October 27, 2008, and issued an oral ruling continuing Miller's probation *status quo* until the probation extension issue could be resolved. Thereafter, the trial court issued an order extending Miller's probation "until such time as the community based SOTP is completed." This appeal followed.

Miller v. Commonwealth slip opinion, 2009-CA-00296

ARGUMENT

I.

THE COURT OF APPEALS DID NOT ERR.

The Court of Appeals reversed the trial court's extension of Appellant's probation beyond the statutory maximum. The Commonwealth believes that the Court of Appeals correctly determined that the trial court was not authorized to extend the

probation without Appellant's consent, as per Griffin v. Commonwealth, 942 S.W.2d 289 (Ky. 1997).

The Commonwealth argued in its brief, and the Court of Appeals agreed that, if the trial court were in error, the only option was to remand the case back to the trial court for revocation of Appellant's probation. Put simply, Appellant violated his probation. Admittedly, the violation was through no fault of his. That notwithstanding, when he entered his guilty plea to the charges, he did so knowing that he was required to enter and COMPLETE a Sex Offender Treatment Program. At the time of the hearing before the trial court, he had not yet completed the program. The trial court attempted to find an alternative to violating Appellant's probation, but acted outside its authority. That appellant objected to the extension of his probation is unfortunate, as his objection leaves the court no choice but to revoke his probation, ordering him to serve 12 months in jail.

The circumstances in this case are unfortunate - during the pendency of this appeal, Appellant has complete his treatment program and has committed no violations of his probation. The interests of justice would allow that this appeal be dismissed and that Appellant's probation be terminated. Believing this to be the case, Commonwealth offered just that, and Appellant rejected the offer.

Appellant argues that the trial court lost jurisdiction in this case because it issued the Order extending probation after the probationary period expired. He fails to acknowledge that, to retain jurisdiction, the court is only required to conduct a hearing within the probationary period. The case law does not require that the court issue Orders within the probationary period. Nonetheless, as the hearing in this case occurred 3 days

before probation was set to expire, and since the parties submitted briefs to the court arguing their various positions after expiration of the probationary period, Commonwealth argues that Appellant waived this claim¹. Had he objected to briefing and refused to file his brief on the grounds that the court had no jurisdiction, the claim would have been preserved. Appellant did not argue a jurisdictional issues until the matter was decided against him.

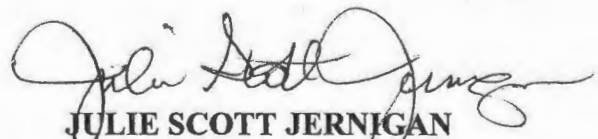
CONCLUSION

WHEREFORE, the Final Judgment of the Court of Appeals and the Lincoln Circuit Court must be AFFIRMED.

Respectfully submitted,

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Counsel for Appellee

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There is nothing in the record to suggest Appellant objected to briefing, but the video record, which may have shed significant light on the matter, was not certified on appeal.

