

RENDERED: June 16, 2006; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2005-CA-001033-MR

CAROLYN HUFFINES

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE GEOFFREY P. MORRIS, JUDGE
ACTION NO. 00-CR-000050

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING

** ** * * *

BEFORE: GUIDUGLI, HENRY, AND TACKETT,¹ JUDGES.

GUIDUGLI, JUDGE: Carolyn Huffines appeals from an order of the Jefferson Circuit Court granting the Commonwealth's motion to revoke Huffines's probation. Huffines argues that the circuit court improperly acted after it had lost jurisdiction on the matter. She also maintains that the filing of a motion to revoke probation does not toll the running of the probationary period. For the reasons stated below, we reverse the order on appeal.

¹ Judge Julia K. Tackett concurred in this opinion prior to her retirement effective June 1, 2006.

The facts are not in controversy. On February 15, 2000, Huffines entered a plea of guilty in Jefferson Circuit Court to one count of forgery of a prescription. She received a sentence of one year in prison, which was probated for five years.

On December 6, 2004, the Commonwealth filed a motion to revoke Huffines's probation. A hearing on the motion was eventually conducted on May 9, 2005. Huffines argued at the hearing that the circuit court's jurisdiction to rule on the motion to revoke expired on February 15, 2005, the last day of her probationary period. The circuit court was not persuaded by this argument, and found that Huffines had violated her probation. It reinstated Huffines's one-year sentence on the underlying guilty plea. This appeal followed.

Huffines now argues that the circuit court committed reversible error in failing to find that its jurisdiction over the matter ended on February 15, 2005, the last day of Huffines's probationary period. She cites to KRS 533.020(1), which states in relevant part that ". . . if the defendant commits an additional offense or violates a condition, [the court may] revoke the sentence at any time prior to the expiration or termination of the period of probation." Since the termination of the probationary period was February 15, 2005, Huffines maintains that the circuit court acted outside

its jurisdiction by purportedly revoking her probation months later in May 2005. She seeks a reversal of the order on appeal.

We find Huffines's argument persuasive. KRS 533.020(1) states in clear and unambiguous terms that the court may revoke probation "at any time prior to the expiration or termination of the period of probation." This language is subject to but one interpretation, that being probation must be revoked, if at all, before the probationary period expires.

The Commonwealth relies on Commonwealth v. Griffin² for the proposition that the circuit court acted properly in revoking Huffines's probation after her probationary period ended. Griffin, however, is distinguishable from the instant facts. In Griffin, the probationer and the trial court agreed to extend the probationary period for an additional five years beyond the statutorily authorized five-year period. During the second (and unauthorized) five-year period, the probationer argued that probation could not be revoked because it was beyond the statutorily authorized five-year period. The Kentucky Supreme Court opined that the statute's five-year limitation on a probation period can be waived by a probationer's knowing and voluntary request for extension of the probationary period in exchange for avoiding imminent revocation of probation and imprisonment.

² 942 S.W.2d 289 (Ky. 1997).

In the matter at bar, Huffines neither sought nor received an extension of her probation beyond the five-year period authorized by statute. It was only after the end of her statutorily authorized five-year probationary period that she invoked the limiting language of KRS 533.020(1). Huffines's reliance on KRS 533.020(1) is wholly proper and dispositive of her claim of error. Again, the statute limits revocation to occurring during the probationary period. Griffin has no bearing on the resolution of Huffines's claim of error, because Griffin addressed the waiver of statutory protection arising from the probationer's willingness to extend the probationary period beyond the authorized five-year period. Probation revocation should have occurred in the matter at bar, if at all, before Huffines's probationary period ended, and the circuit court erred in failing to so rule.

Huffines's remaining argument on the tolling issue is moot. It is worth noting, however, that the primary case relied on by the Commonwealth on this issue, namely Sutherland v. Commonwealth,³ does not hold that probation is tolled by the probationer's actions. Rather, Sutherland holds that the Department of Corrections must comply with the statutory requirement that revocation proceedings be initiated within 90

³ 910 S.W.2d 235 (Ky.App. 1995).

days of the Department becoming aware of the basis for revocation.

For the foregoing reasons, we reverse the order of the Jefferson Circuit Court.

TACKETT, JUDGE, CONCURS.

HENRY, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

HENRY, JUDGE, DISSENTING: I dissent. To arrive at its holding the majority effectively overrules Curtsinger v. Commonwealth, 549 S.W.2d 515, (Ky. 1977), and seems to ignore the plain language of KRS 533.050(1)(a), where it states:

(1) At any time before the discharge of the defendant or the termination of the sentence of probation or conditional discharge:

(a) The court may summon the defendant to appear before it or may issue a warrant for his arrest upon a finding of probable cause to believe that he has failed to comply with a condition of the sentence (Emphasis added).

The majority's holding that revocation of probation must be *completed* prior to the expiration of the period in essence gives probationers an indefinite "free" period at the end of the sentence of probation or conditional discharge during which the conditions may be violated with impunity, because it is impossible to schedule and conduct the hearing, and issue the ruling, before the expiration of the period. This case is a perfect example of such abuse. 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".

All that is required by fairness and our statutes and cases is that proceedings be *commenced* prior to the expiration of the period. In this case revocation proceedings were commenced two months before the defendant's probation expired. I would affirm the ruling of the trial court.

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