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Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000296-MR

ELMER DAVID MILLER

APPELLANT

v. APPEAL FROM LINCOLN CIRCUIT COURT
HONORABLE JEFFREY T. BURDETTE, JUDGE
ACTION NO. 05-CR-00100

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING
AND REMANDING

** ** * ** * ** *

BEFORE: MOORE AND THOMPSON, JUDGES; WHITE,¹ SENIOR JUDGE.

THOMPSON, JUDGE: Elmer David Miller appeals an order of the Lincoln Circuit Court extending his probation beyond the maximum statutory two-year period for a misdemeanor conviction. For the reasons stated, we reverse and remand.

¹ Senior Judge Edwin M. White sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

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 summonsed 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 argues that the trial court erred by extending his misdemeanor probation beyond the maximum statutory period of two years. We agree.

Probation is a creation of the legislature which possesses the inherent power to change the parameters of a defendant's probation by statutory enactment. *Mullins v. Commonwealth*, 956 S.W.2d 222, 223 (Ky.App. 1997) (abrogated on other grounds by *Commonwealth v. Merriman*, 265 S.W.3d 196 (Ky. 2008)). In KRS 533.020(4), the legislature provided the following:

The period of probation, probation with an alternative sentence, or conditional discharge shall be fixed by the court and at any time may be extended or shortened by duly entered court order. Such period, with extensions thereof, shall not exceed . . . two (2) years, or the time necessary to complete restitution, whichever is longer, upon conviction of a misdemeanor. Upon completion of the probationary period, probation with an alternative sentence, or the period of conditional discharge, the defendant shall be deemed finally discharged, provided no warrant issued by the court is pending against him, and probation, probation with an alternative sentence, or conditional discharge has not been revoked.

Thus, misdemeanor convictions are subject to a maximum two-year probationary period, excluding when restitution is ordered as a probationary condition. *Id.*

The trial court found that it was authorized to extend probation because Miller failed to complete a condition of his agreed upon probation. The trial court then wrote the following:

This leaves the Court with [two] options under the law. The first is to revoke Defendant's probation for non-compliance with the conditions of probation, and the second is to extend the probation based on either a waiver implied from Defendant's plea agreement (entered into knowingly and voluntarily), or under the authority of *Griffin* and KRS 532.045(4). Both bases are sufficient for the Court to extend Defendant's probation.

While *Griffin* does permit the extension of probationary terms after the expiration of the normal probationary period, this authority is inapplicable under the facts of this case and, thus, was improperly applied to Miller.

In *Commonwealth v. Griffin*, 942 S.W.2d 289 (Ky. 1997), the court observed that the purpose of a strict probationary period is to protect a defendant from being subjected to a probationary status of indefinite duration. *Id.* at 291. However, when the period of probation is extended beyond the statutory period at the request of the defendant in order to avoid a more severe sanction for violating the original terms of probation, the court concluded that such an extension is “in harmony with the underlying purpose of the statute[.]” *Id.*

At his hearing, Miller specifically did not agree to the probation extension beyond the two-year statutory period. While the trial court ruled that *Griffin* supported extending probation, the court’s decision in *Griffin* only supports extending probation when the defendant requests the probation extension. Thus, the trial court, even with its good intentions, was not authorized under *Griffin* to extend Miller’s probation. He did not request it and specifically resisted the extension of his probationary period.

Regarding the trial court’s second basis for extending Miller’s probation, KRS 532.045(4) provides the following:

If the court grants probation or conditional discharge, the offender shall be required, as a condition of probation or conditional discharge, to successfully complete a community-based sexual offender treatment program

operated or approved by the Department of Corrections or the Sex Offender Risk Assessment Advisory Board.

Further, KRS 532.045, which generally deals with sex offenders, contains a provision, Subsection Nine, that its provisions take precedence over provisions to KRS 533.010, which contains our foundational probationary conditions.

While Miller points out that KRS 532.045 was not referenced by the trial court when he was sentenced and given probation, the trial court's sentencing order required Miller to complete any counseling recommended by probation and parole. Therefore, when probation and parole recommended that he complete a SOTP, he was obligated to comply as a condition of his probation.

When Miller failed to comply with his probation, KRS 532.045 did not authorize the trial court to unilaterally extend his probationary period. As stated in KRS 532.045(6), the failure to complete a required sexual offender treatment program constitutes grounds for the revocation of probation. Therefore, the trial court could only revoke Miller's probation or permit his probation to continue until expiration. Accordingly, the trial court erred by unilaterally extending Miller's probation.

We further note that the trial court's last-minute citation to KRS 532.045 to extend Miller's probation is problematic for another reason. KRS 532.045(8) provides the following:

Before imposing sentence, the court shall advise the defendant or his counsel of the contents and conclusions of any comprehensive sex offender presentence evaluation performed pursuant to this section and afford

a fair opportunity and a reasonable period of time, if the defendant so requests, to controvert them. The court shall provide the defendant's counsel and the Commonwealth's attorney a copy of the comprehensive sex offender presentence evaluation. It shall not be necessary to disclose the sources of confidential information.

Miller was not subjected to a comprehensive sex offender presentence evaluation and an opportunity to confront the contents of the evaluation as required by statute. Thus, we fail to see how KRS 532.045 would have any application on this case.²

Having reversed the trial court's order, we are left with deciding how the proceedings are to be conducted on remand. Miller contends that the trial court is without jurisdiction over his case because his probation expired on October 27, 2008. The Commonwealth contends that we should remand the matter back to the trial court for revocation of Miller's probation. Having reviewed the applicable law, we remand this 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*.

While we understand that Miller's case has proceeded for over four years, the Commonwealth initiated probation revocation proceedings against him prior to the expiration of his two-year probationary period. Miller was in court to answer for the alleged probation violation before October 27, 2008. Thus, Miller was on notice and litigating his probation revocation proceeding and, thus,

² We note that some statutes are mandatory in nature and would be applicable to a defendant's case even when the matter was not orally discussed or mentioned in a court's written judgment. See *Jones v. Commonwealth*, 200 S.W.3d 495 (Ky.App. 2006).

jurisdiction was not lost over his case pursuant to KRS 533.020(4). *Gossett v. Commonwealth*, 384 S.W.2d 308, 311 (Ky. 1964).

For the foregoing reasons, the Lincoln Circuit Court's order is reversed and remanded for further proceedings consistent with this opinion.

ALL CONCUR.

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