RENDERED: MAY 25, 2012; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-000346-MR

COMMONWEALTH OF KENTUCKY — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES D. ISHMAEL, JR., JUDGE
ACTION NO. 00-CR-00016

TARA LYNN WHITCOMB — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: TAYLOR, CHIEF JUDGE, ACREE, AND CAPERTON, JUDGES.

CAPERTON, JUDGE: The Commonwealth appeals from the Fayette Circuit Court's order dismissing the charge of probation violation against Tara Lynn Whitcomb for lack of jurisdiction due to her probationary period expiring. After a thorough review of the parties' arguments, the record, and the applicable law, we

conclude that the trial court did have jurisdiction and, accordingly, reverse and remand this matter for further proceedings.

The facts that give rise to this appeal are not in dispute. On January 21, 2000, Whitcomb pled guilty to one count of theft by deception over $300. The Commonwealth recommended a sentence of one year. On February 11, 2000, the Fayette Circuit Court probated Whitcomb's sentence for a period of five years and imposed numerous conditions, including restitution. On March 20, 2000, an affidavit was filed by David Rupard of the Probation and Parole Office, requesting that the court issue a warrant for Whitcomb's arrest for a charge of probation violation. Officer Rupard requested that Whitcomb's probation be revoked for failing to make contact with the probation office in Harrison County, Kentucky, where Whitcomb had requested that her probation be transferred. The affidavit also noted that Whitcomb may have absconded because she currently has an outstanding warrant from Fayette District Court for nonpayment of a fine. A warrant was issued on March 20, 2000, but remained unserved on Whitcomb until she was arrested on January 14, 2011, following a traffic stop in which she was a passenger and the officer discovered an active warrant for her arrest.

A probation revocation hearing was held on February 10, 2011. Therein, the trial court dismissed Whitcomb's charge of probation violation based on the recent decision in *Conrad v. Evridge*, 315 S.W.3d 313, 315 (Ky. 2010), wherein the Kentucky Supreme Court interpreted Kentucky Revised Statutes (KRS) 533.020(4) and held: "There is no plausible interpretation other than that probation must be

revoked, if at all, before the probationary period expires. The circuit court has no jurisdiction to revoke Appellee's probation, or to hold a revocation hearing, after that time." *Conrad* at 315 citing *Curtsinger v. Commonwealth,* 549 S.W.2d 515, 516 (Ky. 1977). Thus, the trial court concluded that it was without jurisdiction to revoke Whitcomb's probation because the revocation had not occurred within the probationary period. It is from this order that the Commonwealth now appeals.

On appeal the Commonwealth argues that the trial court erred in dismissing Whitcomb's charge of probation violation based on KRS 533.020. In addition, the Commonwealth argues that *Conrad, supra* is inapplicable *sub judice* and even if *Conrad* is applicable, the facts of this appeal should lead to a different result. Conversely, Whitcomb argues that the trial court correctly ruled that it no longer had jurisdiction to revoke Whitcomb's probation. With these arguments in mind we turn to our applicable jurisprudence.

First we note that this matter involves the trial court's conclusions of law concerning KRS 533.020 and the application of *Conrad, supra.* As such, a trial court's conclusions of law are subject to independent *de novo* review by this Court. *Gosney v. Glenn*, 163 S.W.3d 894, 898 (Ky.App. 2005). Additionally, "[b]ecause statutory interpretation is a question of law, our review is de novo; and the conclusions reached by the lower courts are entitled to no deference." *Commonwealth v. Love*, 334 S.W.3d 92, 93 (Ky. 2011).

Of import, KRS 533.020(4) states:

> (4) 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 five (5) years, or the time necessary to complete restitution, whichever is longer, upon conviction of a felony nor 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.

Each party contends that KRS 533.020(4) supports their position, particularly, "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." (Emphasis added).

The Commonwealth argues that the trial court may revoke probation if an active warrant was issued prior to the termination of the probationary period, relying on the language "provided no warrant issued by the court is pending against him…." Whitcomb argues that KRS 533.020(4) clearly supports her position that a trial court may only revoke probation if two criteria are met: (1) that an active warrant is issued prior to the termination of the probationary period; and (2) that probation, probation with an alternative sentence, or conditional discharge has not been revoked. Whitcomb places great emphasis on the use of "and" in

KRS 533.020(4), whereas the Commonwealth does not. With these competing statutory interpretations we must look to our oft-used statutory construction maxims, as set forth in *Cosby v. Commonwealth*, 147 S.W.3d 56, 58-59 (Ky. 2004). Generally:

> "[A] court must not be guided by a single sentence of a statute but must look to the provisions of the whole statute and its object and policy." *County of Harlan v. Appalachian Reg'l Healthcare, I*nc., Ky., 85 S.W.3d 607, 611 (2002). "No single word or sentence is determinative, but the statute as a whole must be considered." *Id.* In addition, "[w]e have a duty to accord to words of a statute their literal meaning unless to do so would lead to an absurd or wholly unreasonable conclusion." *Bailey v. Reeves*, Ky., 662 S.W.2d 832, 834 (1984). Moreover, "[i]n construing statutory provisions, it is presumed that the legislature did not intend an absurd result." *Commonwealth, Central State Hosp. v. Gray*, Ky., 880 S.W.2d 557, 559 (1994). The legislature's intention "shall be effectuated, even at the expense of the letter of the law." *Commonwealth v. Rosenfield Bros. & Co*., 118 Ky. 374, 80 S.W. 1178, 1180 (1904).
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> We must further acknowledge that the General Assembly "intends an Act to be effective as an entirety. No rule of statutory construction has been more definitely stated or more often repeated than the cardinal rule that significance and effect shall, if possible, be accorded to every part of the Act." *George v. Scent*, Ky., 346 S.W.2d 784, 789 (1961).

Cosby at 58-59.

Additionally, "[i]n construing legislative enactments, courts should look to the letter and spirit of the statute, viewing it as a whole." *Lewis v. Jackson Energy Co-op. Corp.*, 189 S.W.3d 87, 93 (Ky. 2005), citing *Combs v. Hubb Coal Corp*., 934 S.W.2d 250 (Ky. 1996). Our duty as a court is to effectuate the intent

of the legislature in construing a statute. *Hall v. Hospitality Resources, Inc*., 276 S.W.3d 775, 784 (Ky. 2008), citing *Commonwealth v. Plowman*, 86 S.W.3d 47, 49 (Ky. 2002). "A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *Hall, supra* citing *United States v. Plavcak*, 411 F.3d 655, 660 (6th Cir. 2005). Thus, we ascertain the intention of the legislature from words used in enacting statutes rather than surmising what may have been intended but was not expressed. *See Hall* at 784.

The parties argue extensively over the use of the word "and." While *Hall* at 784 noted that "[i]t is a basic principle of statutory construction that terms joined by the disjunctive 'or' must have different meanings because otherwise the statute or provision would be redundant[,]" we believe our interpretation to be guided by *Hardwick v. Boyd County Fiscal Court*, 219 S.W.3d 198, 201 (Ky.App. 2007), wherein we stated:

> Our courts have said "[n]ot the literal language but the true intention or will of the Legislature is the law." *Asher v. Stacy*, 299 Ky. 476, 185 S.W.2d 958, 959 (Ky. 1945). Consequently, courts may, and frequently do, substitute "or" for "and," and vice versa, in the course of statutory interpretation. *See, e.g., Duncan v. Wiseman Baking Co*., 357 S.W.2d 694, 698 (Ky. 1961); *Commonwealth v. Bartholomew*, 265 Ky. 703, 97 S.W.2d 591, 595 (1936); *Moore v. Polsgrove*, 219 Ky. 410, 293 S.W. 965, 966–67 (1927).
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> But the courts will not and cannot take such liberties as changing statutory language unless it is "obvious that the intent of the legislature *would be thwarted* if the change were not made." *Boron Oil Co. v. Cathedral*

> *Foundation, Inc*., 434 S.W.2d 640, 641 (Ky. 1968) (emphasis added).

Hardwick at 201.

Thus, we are not shackled by the use of "and"; instead, we must look at KRS 533.020 in its *entirety* to effectuate the legislature's intent. KRS 533.020 states:

> (1) When a person who has been convicted of an offense or who has entered a plea of guilty to an offense is not sentenced to imprisonment, the court shall place him on probation if he is in need of the supervision, guidance, assistance, or direction that the probation service can provide. Conditions of probation shall be imposed as provided in KRS 533.030, but the court may modify or enlarge the conditions or, if the defendant commits an additional offense or violates a condition, revoke the sentence at any time prior to the expiration or termination of the period of probation. When setting conditions under this subsection, the court shall not order any defendant to pay incarceration costs or any other cost permitted to be ordered under KRS 533.010 or other statute, except restitution and any costs owed to the Department of Corrections, through the circuit clerk.
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> (2) When a person who has been convicted of an offense or who has entered a plea of guilty to an offense is not sentenced to imprisonment, the court may sentence him to probation with an alternative sentence if it is of the opinion that the defendant should conduct himself according to conditions determined by the court and that probationary supervision alone is insufficient. The court may modify or enlarge the conditions or, if the defendant commits an additional offense or violates a condition, revoke the sentence at any time prior to the expiration or termination of the alternative sentence.
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> (3) When a person who has been convicted of an offense or who has entered a plea of guilty to an offense is not sentenced to imprisonment, the court may sentence him

> to conditional discharge if it is of the opinion that the defendant should conduct himself according to conditions determined by the court but that probationary supervision is inappropriate. Conditions of conditional discharge shall be imposed as provided in KRS 533.030, but the court may modify or enlarge the conditions or, if the defendant commits an additional offense or violates a condition, revoke the sentence at any time prior to the expiration or termination of the period of conditional discharge.
>
> (4) 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 five (5) years, or the time necessary to complete restitution, whichever is longer, upon conviction of a felony nor 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.
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> (5) Notwithstanding the fact that a sentence to probation, probation with an alternative sentence, or conditional discharge can subsequently be modified or revoked, a judgment which includes such a sentence shall constitute a final judgment for purposes of appeal.

KRS 533.020.

In reviewing KRS 533.020, we must bear in the mind the holding of our Supreme Court in *Conrad, supra*, and its reasoning. In reaching this conclusion,

the Court noted:

> First and foremost, granting and revoking probation is not an inherent power in the courts, but is a power vested in the courts by statute. *E.g., Lovelace v. Commonwealth*, 285 Ky. 326, 147 S.W.2d 1029, 1033–34 (1941). Thus, this 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 at 316.

However, the *Conrad* court left open the possibility that estoppel may foreclose the time limitation imposed by KRS 533.020 when probationers had absconded to intentionally avoid the authority of the court.[1] *Conrad* at 317. Finding such an issue to not be before it, the *Conrad* court ultimately rejected the Commonwealth's invitation to ignore the plain language of KRS 533.020(4) and determined that the clear provisions of KRS 533.020(4) required that the probation must be revoked, if at all, before the probationary period expires. *Conrad* at 317.

Sub judice, the trial court relied on the holding in *Conrad* in concluding that the court was without jurisdiction to proceed in Whitcomb's

[1] *See also Commonwealth v. Griffin,* 942 S.W.2d 289, 292 (Ky. 1997):

> Even if the trial court lacked jurisdiction of the particular case because of KRS 533.020(4), Griffin is estopped from challenging the court's exercise of that jurisdiction. Griffin voluntarily requested the five year extension of his probationary period, and he then accepted the benefits of the court's granting of the request (i.e., he avoided incarceration). As the former Court of Appeals noted, "[w]here the court has jurisdiction of the subject matter, statements made for the purpose of giving the court jurisdiction, after they have been acted on, cannot be withdrawn or contradicted by the party making them for the purpose of taking away such jurisdiction." *Duncan*, 451 S.W.2d at 631 (citation omitted).

Griffin at 292.

revocation hearing. In so deciding, the trial court believed that Whitcomb had absconded from supervision[2] and had failed to meet the requirements of her probation, but *Conrad* left the court without jurisdiction to hold the revocation hearing. We believe that such an interpretation of *Conrad* to be in error. *Conrad* clearly left open the possibility that estoppel may foreclose the time limitation imposed by KRS 533.020 when probationers intentionally abscond to avoid the authority of the court. *Conrad* at 317.

We believe such to be the case *sub judice*[3] and, accordingly, that the facts of the case before our Court fit within the exception to the general rule. Thus, the trial court erred when it concluded that it was without jurisdiction to proceed with the revocation hearing when a probationer had absconded to intentionally avoid the authority of the court. Accordingly, we reverse and remand this matter for further proceedings.

In light of the aforementioned, we reverse and remand this matter for further proceedings.

ALL CONCUR.

[2] *See* Video Record 2/11/2011 at 8:58 A.M.

[3] The case *sub judice* is unlike the situation presented in *Conrad* where the "Appellee never tried to delay the hearing, abscond, or otherwise manipulate the process." *Id.* at 317.

BRIEF FOR APPELLANT:

Jack Conway
Attorney General of Kentucky

Todd Bradbury
Assistant Attorney General
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Samuel N. Potter
Frankfort, Kentucky