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Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-000602-MR

DERICK DULIN

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE MITCHELL PERRY, JUDGE
ACTION NO. 02-CR-002369

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
VACATING AND REMANDING

** ** * * * * *

BEFORE: CLAYTON, STUMBO AND TAYLOR, JUDGES.

CLAYTON, JUDGE: Derick Dulin brings this appeal from a March 3, 2011, order of the Jefferson Circuit Court denying his motion to vacate sentence pursuant to Kentucky Rules of Civil Procedure (CR) 60.02. We vacate the sentence and remand for action consistent with this judgment.

On October 23, 2002, Appellant was indicted upon the offenses of first-degree trafficking in a controlled substance (Kentucky Revised Statutes [KRS] 218A.1412), complicity to traffic in a controlled substance (KRS 502.020), and with being a first-degree persistent felony offender (KRS 532.080). Through a plea agreement with the Commonwealth, Appellant entered a guilty plea to possession of a controlled substance and first-degree persistent felony offender. By judgment entered April 24, 2003, the circuit court sentenced Appellant to twenty (20) years of imprisonment probated for a period of five (5) years.¹

Thereafter, on October 20, 2004, Appellant was before the circuit court upon the recommendation of the probationary officer to revoke Appellant's probation. During the revocation hearing, Appellant stipulated to violating the terms of his probation and was ordered to serve 120 days in the Jefferson County Jail. When released from confinement, Appellant was required to report to probation and parole. Later, on April 18, 2005, Appellant was again before the circuit court upon the recommendation of the probationary officer to revoke Appellant's probation. At the revocation hearing, Appellant again stipulated to violating the terms of probation and was ordered to serve six (6) months in the Jefferson County Jail. After being released, he was required to report to probation and parole.

On March 25, 2008, the Commonwealth filed a motion to revoke Appellant's probation. The Commonwealth pointed out that Appellant had been

¹ Appellant's twenty (20)-year sentence was ordered to run consecutively with a ten (10)-year sentence in Action No. 03-CR-0676 for a total sentence of thirty (30) years of imprisonment.

criminally indicted upon sundry criminal offenses. The circuit court set a revocation hearing for May 12, 2008. Then, on May 8, 2008, an agreed order was rendered resetting the revocation hearing to June 30, 2008. After the hearing commenced on June 30, 2008, the circuit court continued the revocation hearing until August 11, 2008, and Appellant “agreed that his probation period be extended to August 11, 2008.” Nonetheless, the record indicates that the hearing was held on August 12, 2008, which falls after the Appellant’s agreement to extend his probation. By order entered September 8, 2008, the circuit court found Appellant violated the conditions of his probation and revoked Appellant’s probation. He was ordered to serve the twenty (20)-year sentence of imprisonment as imposed by the April 24, 2003, judgment.

On November 19, 2010, Appellant filed a CR 60.02 motion to vacate his sentence of imprisonment. Therein, Appellant argued that his five (5)-year probationary term expired on April 24, 2008, and that the circuit court revoked his probation on September 8, 2008, well after the probationary term ended. Thus, Appellant maintained that the circuit court untimely and improperly revoked his probation. By order entered March 3, 2011, the circuit court denied Appellant’s CR 60.02 motion. This appeal follows.

CR 60.02 provides relief from a final judgment only under extraordinary circumstances and under subsection (e), relief may be obtained if the judgment is void. *Nat’l Elec. Serv. Corp. v. Dist. 50, United Mine Workers of Am.*, 279 S.W.2d 808 (Ky. 1955). Appellant believes that the circuit court’s September

8, 2008, revocation order was void because his probation expired before entry thereof. For the foregoing reasons, we agree.

Appellant specifically asserts that the September 8, 2008, revocation order is void by application of KRS 533.020(1) because his probationary period expired before the circuit court revoked probation.

KRS 533.020(1) addresses probation and specifically provides:

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.** [Emphasis added].

Under KRS 533.020(1), a court may revoke a defendant's probation "at any time prior to the expiration or termination of the period of probation." It is generally understood that KRS 533.020 mandates that probation be revoked during the probationary term and that the court may not revoke after the probationary term expires. *Curtsinger v. Commonwealth*, 549 S.W.2d 515 (Ky. 1977); *Conrad v. Evridge*, 315 S.W.3d 313 (Ky. 2010).

In this case, the record is clear that Appellant's term of probation commenced on April 24, 2003, and was set for a period of five (5) years. Thus, Appellant's probationary term expired by its own terms on April 24, 2008. It is

equally clear that Appellant's probation was not revoked within the five (5)-year term (or before April 24, 2008). In fact, the circuit court revoked Appellant's probation approximately five (5) months later on September 8, 2008.

The Commonwealth, however, argues that the September 8, 2008, order that revoked Appellant's probation was timely because the five (5)-year probationary term had been tolled and was effectively extended under KRS 533.040(2).

KRS 533.040(2) reads:

If a court, as authorized by law, determines that a defendant violated the conditions of his probation or conditional discharge but reinstates probation or conditional discharge, the period between the date of the violation and the date of restoration of probation or conditional discharge shall not be computed as a part of the period of probation or conditional discharge.

Thus, according to the Commonwealth, KRS 533.040(2) operates to "toll" a probationary term "from the time of the 'violation' until the court orders that probation be 'reinstat[e][d][.]'" *Conrad*, 315 S.W.3d at 317. The Commonwealth maintains that *Conrad* supports this interpretation. Under this reasoning, the time period between the probation violation and reinstatement of probation is excluded when computing the probationary period; thus, from the date of the probation violation until the court orders reinstatement of the probation necessitates that the probation time period be recalculated so as to exclude this time period. To trigger the tolling provision of KRS 533.040(2), the circuit court must have previously

concluded that the defendant violated his probation and must also have decided to reinstate probation as opposed to revoking probation.² *Conrad* at 317.

Thus, citing to KRS 533.040(2), the Commonwealth reasons that Appellant's probationary term was tolled by two (2) circuit court decisions finding that Appellant violated probation, ordering him to serve jail sentences, and then reinstating his probation after service of the jail terms.

Dulin argues that the circuit court did not revoke his probation but rather modified the terms of his probation by requiring him to serve jail sentences for both probation violations *during his probationary period*. KRS 533.010(6).

In the case at hand, the trial court lost jurisdiction to revoke Dulin's probation after April 23, 2008. Neither KRS 533.040(2) nor *Conrad*, supports the proposition that the trial court had jurisdiction to revoke Dulin's probation after his probationary period had expired. The record indicates that the trial court did not issue a written order after either the 2004 or 2005 revocation hearing. At the October 2004 hearing, Dulin's trial counsel requested a ninety (90)-day period of incarceration as a condition of continuing on probation. The trial court accepted that proposal but increased the period of incarceration to 120 days with work release and treatment release. At the April, 2005 hearing, the defense counsel recommended in-patient treatment in lieu of revocation. The court accepted the recommendation for in-patient treatment after the completion of a six (6)-month

² The circuit court concluded that Appellant waived his argument that the court did not retain jurisdiction past the expiration of the probationary period to sentence Appellant for his probation violation.

period of incarceration with treatment release. Significantly, the trial court at both hearings stated on the record that the defendant was continuing on probation.

Although written findings would have been helpful, the trial court does not necessarily have to make written findings and may make findings on the record.

Commonwealth v. Marshall, 345 S.W.3d 822 (Ky. 2011).

Clearly, in 2008 the trial court and the parties thought that there had been no tolling of probation but only additional conditions placed on Dulin's probation. In fact, the 2008 order, which extended the period of probation, reflects the belief that probation had expired. While a trial court may order that probation is extended when a violation of it occurs, in this case Dulin was told just the opposite by the court. Here, the trial court stated that Dulin was continuing on probation, and hence, the probation expiration date was still April 23, 2008. Even though in *Conrad* the trial court stated the exact date of the expiration of probation, this case is similar to *Conrad* because the incarceration was merely a modification of probation and not a reinstatement of probation.

In sum, we hold that the circuit court improperly denied Appellant's CR 60.02 motion to vacate sentence. For the foregoing reasons, the order of the Jefferson Circuit Court is vacated and remanded for a judgment consistent with this opinion.

STUMBO, JUDGE, CONCURS.

TAYLOR, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

TAYLOR, JUDGE, DISSENTING. Respectfully, I dissent. I agree with the Commonwealth that pursuant to KRS 533.040(2), Dulin's probationary term had been "tolled" as a result of his earlier probation violations, which extended his probationary term for at least 300 days.

The record in this case clearly reflects that Dulin violated the terms of his 2003 probation order on two separate occasions, and in both instances, probation was not revoked by the circuit court. Rather, Dulin was sentenced to confinement in a jail for a period of 120 days for the first violation and then for a period of approximately six months as punishment for the second violation. After serving the jail sentences, Dulin was returned to probation subject to the extended probationary period. Unlike the *Conrad* case relied upon by the majority, I do not believe that Dulin's probation was merely modified by his incarceration. In *Conrad*, the order entered after the probation violations expressly restated the original probation expiration date, which did not occur in this case. I do not believe KRS 533.040(2) requires a circuit court to expressly state a new probation expiration date after a violation occurs, incarceration in a jail is ordered, and probation is then reinstated as occurred in this case. Otherwise, KRS 533.040(2) is rendered totally meaningless.

Additionally, in *Conrad*, at the time of probation expiration, the defendant Evridge filed a petition for a writ with the Court of Appeals to prevent the circuit court from conducting a revocation hearing. In this case, Dulin agreed to extend the time for the revocation hearing past the original date of his probation

expiration. Dulin did not appeal the final order revoking his probation. More than two years after the final order was entered revoking his probation, Dulin then filed the present action pursuant to CR 60.02. I agree with the circuit court that Dulin should be estopped from bringing this tardy challenge to the revocation of his probation.

I further believe that the circuit court timely revoked Dulin's probation in 2008 prior to its termination in compliance with KRS 533.020(1). The majority appears to be bogged down by semantics as opposed to the substance of the circumstances surrounding the incarcerations resulting from earlier probation violations and their legal effect. The *Conrad* decision is based on facts clearly distinguishable from the facts of this case and thus should not be the basis for granting Dulin's motion.

For these reasons, I would affirm the order of the Jefferson Circuit Court denying Dulin's petition for relief from sentence.

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