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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2016-CA-001017-MR

COMMONWEALTH OF KENTUCKY

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE A.C. MCKAY CHAUVIN, JUDGE
ACTION NO. 15-CR-000469

TROY MARTIN

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: CALDWELL, DIXON, AND MAZE, JUDGES.

DIXON, JUDGE: The Commonwealth of Kentucky appeals from the order granting Troy Martin's motion for shock probation entered on June 20, 2016, by the Jefferson Circuit Court. On remand from the Supreme Court of Kentucky, and after careful review of the record, briefs, and law, we affirm.

Following Martin’s guilty plea to charges of distribution of matter portraying a sexual performance by a minor and 20 counts of possession of matter portraying a sexual performance by a minor, and sentence of six years’ imprisonment, Martin’s motion for shock probation was granted. The Commonwealth appealed.

A prior panel of our Court rendered an Opinion on February 23, 2018, reversing the trial court on grounds it acted outside its jurisdiction. *Commonwealth v. Martin*, No. 2016-CA-001017-MR, 2018 WL 1021423 (Ky. App. Feb. 23, 2018), *review granted and ordered not to be published* (Dec. 5, 2018), *rev’d and remanded*, 576 S.W.3d 120 (Ky. 2019).¹ The Supreme Court of Kentucky granted Martin’s motion for discretionary review and reversed and remanded this matter back to the Court of Appeals in *Martin v. Commonwealth*, 576 S.W.3d 120 (Ky. 2019). We adopt the facts, as follows:

The grand jury indicted Troy Martin on two counts of distribution of matter portraying a sexual performance by a minor and 20 counts of possession of matter portraying a sexual performance by a minor. Martin pleaded guilty to the charges, and on October 28, 2015, the trial court sentenced Martin to six years’ imprisonment. Martin was taken into custody and began serving his sentence in the county jail. On March 4,

¹ Judge Combs was assigned as presiding judge on the original panel and authored an Opinion which was consistent with the Supreme Court of Kentucky’s Opinion. However, her Opinion was outvoted by the other members of that panel, so she subsequently authored a dissenting Opinion instead. On remand, because two judges from the original panel are no longer members of our Court, this case was re-assigned to an entirely new panel. Our analysis of the issue on remand closely mirrors the language of Judge Combs’s proposed Opinion.

2016, Martin was transferred to the custody of the Department of Corrections.

On May 18, 2016, Martin filed a motion for shock probation. The trial court conducted a hearing on Martin's motion, in which Martin testified that the time he had already served in custody impressed upon him the seriousness of his crimes. He asked for shock probation, which the Commonwealth opposed. Importantly, the Commonwealth did not object to the trial court's exercise of jurisdiction over that motion.

The trial court eventually granted Martin's motion for shock probation but delayed his release by making probation effective on February 13, 2017. The Commonwealth appealed to the Court of Appeals the trial court's order granting shock probation. And it argued, for the first time, that the trial court was without jurisdiction to entertain Martin's motion. The Court of Appeals reversed, agreeing with the Commonwealth's position. Martin sought discretionary review from this Court, which we granted.

Id. at 121 (footnote omitted).

There are only two issues on appeal. The first issue is whether the trial court had jurisdiction to hear Martin's motion for shock probation. The second issue is whether the trial court exceeded its authority in granting probation with a delayed effective date. On its review, the Supreme Court of Kentucky stated:

The Court of Appeals should have declined to reach the Commonwealth's argument that the trial court did not have jurisdiction over Martin's motion. In failing to do so, the Court of Appeals failed to reach the Commonwealth's challenge to the trial court's

imaginative use of shock probation by delaying Martin’s release from custody from the Department of Corrections until eight months had elapsed after issuance of the shock-probation order. We are constrained to reverse the holding of the Court of Appeals, and we remand this case to that court to consider that issue.

Id. at 123. Per the Supreme Court of Kentucky’s instructions, we now consider the second issue concerning whether the trial court exceeded its authority in its order.

The Commonwealth argues that the shock probation order exceeds the trial court’s jurisdiction and that it also violates the separation of powers provisions of the Kentucky Constitution.² Specifically, it argues:

In granting shock probation effective ten months later, (well outside the 70-day period for hearing and ruling), the court inserted its judgment for that of the parole board, the body constitutionally and statutorily charged with determining whether execution of a sentence should be shortened at some point prior to serve out.

We disagree.

KRS³ 439.265(1) allows a trial court to “suspend the further execution of the sentence and place the defendant on probation *upon terms the court determines.*” *Jones v. Commonwealth*, 319 S.W.3d 295, 298 (Ky. 2010) (emphasis added) (citation omitted), *as modified on denial of reh’g* (Sept. 23, 2010). Terms and conditions the court may consider are set forth in KRS Chapter 533. *See*

² KY. CONST. §§27, 28, and 29.

³ Kentucky Revised Statutes.

Wilson v. Commonwealth, 839 S.W.2d 17, 19 (Ky. App. 1992) (“[S]hock probation is one form of probation given general coverage in Chapter 533 and specific coverage in Chapter 439.”). KRS 533.010 authorizes the court, when it “deems it in the best interest of the public and the defendant,” to order probation with an alternative sentence. KRS 533.010(6). One of the alternative sentences authorized is “jail for a period not to exceed twelve (12) months[.]” *Id.*

The trial court granted Martin shock probation, but it required that he spend eight months in custody as a condition of his release. This ruling is equivalent to a court deciding at sentencing that a defendant’s sentence should be probated on the condition that he spend up to a year in prison. Contrary to the Commonwealth’s assertion, the court’s imposition of time in custody as a condition of probation is not tantamount to the court’s substituting its judgment for that of the parole board in violation of the separation of powers provisions of the Kentucky Constitution. The trial court granted probation during the period in which it had re-acquired jurisdiction,⁴ and its determination was final when it

⁴ The Supreme Court of Kentucky observed:

When the Commonwealth challenged in the Court of Appeals the trial court’s grant of shock probation on the basis that the trial court lacked jurisdiction to do so, the Commonwealth was challenging the trial court’s jurisdiction over the case. But the Commonwealth failed to present that challenge to the trial court. “[P]articulate-case jurisdiction is subject to waiver.” Because the Commonwealth “did not raise th[is] jurisdictional issue until

entered its order. The condition that Martin serve eight months in custody does not otherwise change the fact that the trial court granted shock probation during the time it was authorized to do so, nor did it encroach upon the executive powers concerning parole. The trial court did not exceed its authority, and there was no violation of the principle of separation of powers.

Therefore, and for the foregoing reasons, the order entered by the Jefferson Circuit Court is AFFIRMED.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Andy Beshear
Attorney General of Kentucky

Andrew J. Gochenaur
Special Assistant Attorney General
Louisville, Kentucky

BRIEF FOR APPELLEE:

Adam Braunbeck
Louisville, Kentucky

appeal[, the Commonwealth] waived any issue relating to particular-case jurisdiction.”

Martin, 576 S.W.3d at 122 (footnotes omitted). So, although the trial court may have technically acted outside the window authorized by statute, the issue of its jurisdiction was waived by the Commonwealth’s failure to raise the issue until on appeal.