

NO. 97-CA-1340-MR

JACK EMERSON POWELL

APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE GEOFFREY MORRIS, JUDGE  
ACTION NO. 95-CR-0874

COMMONWEALTH OF KENTUCKY

APPELLEE

**OPINION**

**AFFIRMING**

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BEFORE: GUIDUGLI, MILLER, and SCHRODER, Judges.

MILLER, JUDGE. Jack Emerson Powell brings this appeal from a May 22, 1997 order of the Jefferson Circuit Court. We affirm.

The facts are these: In May 1995, appellant entered a plea of guilty to possession of cocaine and was sentenced to three years' imprisonment, which was probated for a period of five years. In March 1996, the Commonwealth filed a motion to revoke/review probation. A hearing was set, but appellant did not appear. A bench warrant was issued. Appellant was arrested on unrelated charges in August 1996. Thereafter, a hearing was conducted upon the Commonwealth's March 1996 motion to revoke/

review probation. Appellant and the Commonwealth reached an agreement imposing new conditions upon probation. Appellant would serve six months' incarceration in the county jail and participate in a mandatory drug treatment program. On September 18, 1996, the circuit court entered an order, which stated, in relevant part, as follows:

**IT IS ORDERED** that the motion of the Commonwealth to revoke is **sustained**.

The defendant is hereby ordered to serve six (6) months in the County Jail with referral to the Lifeline program.

In January 1997, the Commonwealth filed a motion to revoke appellant's probation. The basis of this motion stemmed from the charges of August 1996. On May 22, 1997, the circuit court entered an order, which stated, in relevant part, as follows:

**IT IS ORDERED** that the motion of the Commonwealth to revoke is **sustained**.

**The defendant is ordered remanded into the custody of the Sheriff of Jefferson County for delivery to the Department of Corrections for the service of the sentence of three (3) years in the penitentiary under judgment entered herein on May 22, 1995.**

This appeal followed.

Appellant contends that the May 1997 order revoking his probation and sentencing him to three years' imprisonment is void. Specifically, appellant asserts that the September 1996 order, by its terms, revoked his probation and sentenced him to six months in jail. Thus, the May 1997 order, which attempted to

revoke his probation for a second time, is void and ineffectual. We disagree.

We view the September 1996 order as ambiguous. Upon review of the record as a whole, we are of the opinion that the September 1996 order merely modified the terms of his probation and, in fact, did not revoke same. See Turner v. Ewald, 295 Ky. 764, 174 S.W.2d 431 (1943). We believe the circuit court's specific reference to sustaining the Commonwealth's motion to revoke was simply an inadvertence. We are buttressed in our conclusion by noting that the Commonwealth's actual motion was styled a "Motion to Revoke/Review." Furthermore, we believe such was the intent of the parties at the time of entering into the agreement which culminated in the September 1996 order. In sum, we do not believe the circuit court "revoked" appellant's probation twice. Rather, we view the September 1996 order as merely altering the conditions of appellant's probation and the May 1997 order as actually revoking probation. As such, we are of the opinion that the circuit court did not commit reversible error.

For the foregoing reasons, the order of the circuit court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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