

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 2000-CA-000535-MR

WILLIAM FREDERICK HICKS

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE REBECCA M. OVERSTREET, JUDGE  
ACTION NO. 98-CR-00788

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING  
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BEFORE: GUDGEL, CHIEF JUDGE; EMBERTON, and McANULTY, Judges.

McANULTY, JUDGE: Appellant's probation was revoked by the Fayette Circuit Court. He now seeks dismissal of that revocation based on KRS 533.040(3). We affirm.

In August 1998, Appellant pleaded guilty to one felony and two misdemeanor counts of theft by failure to make a required disposition of property under KRS 514.070 and was sentenced to five years probation. Then, in March 1999, Appellant was arrested on charges of criminal possession of a forged instrument, which were pending prior to his earlier sentencing.

On May 19, 1999, Appellant's probation and parole officer filed an affidavit with the trial court requesting that

Appellant's probation be revoked. He cited Appellant's failure to pay probation fees, failure to pay restitution and failure to complete a required substance abuse program as Appellant's probation violations. That same day, the court issued a warrant for Appellant's arrest.

On January 20, 2000, the Department of Corrections (Corrections) filed an acknowledgment with the trial court. This acknowledgment showed that Appellant was already being housed at the Franklin County Detention Center and that Corrections would forward a "hold" on the Appellant to the Center.

A bench warrant was filed on February 1, 2000, and a date was set for Appellant's probation revocation hearing. At the revocation hearing on February 18, 2000, Appellant asked the court to dismiss the motion to revoke his probation pursuant to KRS 533.040(3) because it had been filed on May 19, 1999, more than ninety (90) days before his hearing date. The court denied Appellant's motion, and this appeal followed.

Appellant alleges that the revocation of his probation should be dismissed because the revocation hearing was not held in a timely manner as required by KRS 533.040(3), which reads:

A sentence of probation or conditional discharge shall run concurrently with any federal or state jail, prison, or parole term for another offense to which the defendant is or becomes subject during the period, unless the sentence of probation or conditional discharge is revoked. The revocation shall take place prior to parole under or expiration of the sentence of imprisonment or within ninety (90) days after the grounds for revocation come to the attention of the Department of Corrections, whichever occurs first.

KRS 533.040(3).

The question created by this statute, then, is at what point in these proceedings did the grounds for revocation of Appellant's probation come to the attention of Corrections?

This court thoroughly discussed this matter in Myers v. Commonwealth, Ky. App., 836 S.W.2d 431 (1992), overruled on other grounds in Sutherland v. Commonwealth, Ky., 910 S.W.2d 235 (1995). In that case, we asked what actions were sufficient enough to draw the attention of Corrections; would the ninety days begin to toll once the first allegation of wrongdoing was made or would it take the actual conviction of the alleged wrongdoer? In Myers, it was a conviction that began the time period. But we also said:

While a conviction for a new offense would be grounds for revocation, an arrest for the same offense may or may not be. An arrest and/or indictment are only allegations and the defendant remains innocent of the charge(s) until proven guilty. The Corrections Cabinet may treat the arrest as grounds for revocation, and if a detainer is placed on the defendant by Probation and Parole at anytime prior to the revocation hearing, it is our opinion that this would be notice to Corrections and this prosecutorial decision (notice that they are treating the allegations as having substance) would commence the ninety-day period for revocation.

Myers v. Commonwealth at 433.

In the case at bar, we believe the "hold" placed on Appellant while he served time in the Franklin County Detention Center is analogous to the detainer mentioned in Myers. This acknowledgment showed that Corrections had taken official notice of the grounds for revocation of his probation.

The hold on Appellant was filed January 20, 2000, and Appellant's revocation hearing took place less than a month later. Because the hearing occurred well within the statutory ninety day time period, we affirm the decision of the trial court to revoke Appellant's probation.

ALL CONCUR.

BRIEF FOR APPELLANT:

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