

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 2000-CA-001045-MR

JEFFREY TROY MURRAH

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE STEPHEN P. RYAN, JUDGE  
ACTION NO. 96-CR-002576

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
REVERSING AND REMANDING  
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BEFORE: COMBS, BARBER, and TACKETT, Judges.

COMBS, JUDGE: Jeffrey Troy Murrah (Murrah) appeals from a March 30, 2000, order of Jefferson Circuit Court denying his Kentucky Rules of Civil Procedure (CR) 59.05 motion to alter, amend, or vacate a judgment of February 25, 2000, revoking his probation and sentencing him to serve five years. We reverse.

On September 10, 1996, the Jefferson County police arrested Murrah for Burglary, Second Degree (Kentucky Revised Statutes ((KRS)) 511.030), and for Receiving Stolen Property over \$300.00 (KRS 514.110). Murrah's case proceeded under Jefferson Circuit Court's "rocket docket," a docket designed to dispose rapidly of felony cases which are likely to end in a guilty plea. Prior to his indictment, on October 10, 1996, the Commonwealth made the following offer:

One (1) year to serve, four (4) if probated on RSPO/300; one (1) year on Escape II, consecutive, by law, for a total of two (2)

years to serve, five (5) years if probated. Probation in the court's discretion.

Murrah accepted the Commonwealth's offer and signed the plea agreement. On October 10, 1996, by information, the Commonwealth formally charged Murrah the two Class D felonies. He was sentenced according to the terms of his agreement: one year to serve for Receiving Stolen Property and one year to serve consecutively for Escape for a total of two years to serve in the state penitentiary.

After final sentencing, Murrah moved the court for shock probation pursuant to KRS 439.265. On April 15, 1997, the court granted Murrah's motion but amended his original sentence as a condition of probation -- enhancing it from two years to a total of five years to serve: four years for Receiving Stolen Property and one year for Escape to be served consecutively. Murrah entered into this new plea agreement and was placed on probation for five years.

On November 4, 1998, the Commonwealth moved the circuit court to revoke Murrah's probation. On December 23, 1998, the circuit court accordingly entered a judgment revoking his probation and sentencing Murrah to serve five years per the terms of the amended plea agreement. On January 28, 1999, Murrah moved the court for shock probation, and the circuit court probated him for a period of five years on February 17, 1999.

On October 5, 1999, the Commonwealth filed a motion to revoke Murrah's probation for the second time. On February 25, 2000, the circuit court granted the motion and revoked Murrah's probation, sentencing him to serve five years as it had done

after the first revocation. On March 2, 2000, pursuant to CR 59.05, Murrah moved the circuit court to alter, amend, or vacate its judgment of February 25, 2000. Citing Galusha v. Commonwealth, Ky. App., 834 S.W.2d 696 (1992), Murrah argued that the court illegally enhanced his original sentence of December 20, 1996, from two years to five years as an impermissibly imposed condition for granting probation. On March 30, 2000, the circuit court denied Murrah's 59.05 motion.

Murrah's argument on appeal is limited to one issue: that the court violated his due process rights and his right to be preserved from double jeopardy by enhancing his original sentence from two years to five years as a condition of probation. Murrah argues that Galusha, supra, is indistinguishable and dispositive of his case. We agree.

Galusha pleaded guilty to numerous minor felonies and was sentenced to a total of eight years. He moved the trial court for shock probation, and that motion was granted on the condition that his eight-year sentence be enhanced to twenty years. Galusha agreed. His probation was eventually revoked, and the court sentenced him to twenty years. This court held that a trial court cannot enhance a defendant's original sentence as a condition of probation, stating as follows:

[W]e find nothing in the shock probation statute to lead one to the rational belief that a prisoner is privileged to negotiate his release in the vein of Galusha--that is, agreeing to an enhanced sentence. In our view, entitlement to shock probation must rest upon an evaluation of a host of traditional criteria. A longer sentence may not supply the *quid pro quo* for probationary release. A rule which would allow a prisoner

to obtain probation in exchange for a longer sentence in the event of revocation would, in our opinion, not only result in chaos, but invite intrusion of arbitrary power, something foreign to our system of government. Ky. Const. § 2. In the end, we think such a practice would offend the due process clauses and the double jeopardy clauses of both the federal and state constitutions. Id at 698.

This court reversed and reinstated the defendant's original sentence.

The Commonwealth belabors the fact that Murrah agreed to the improper enhancement of his original sentence as a condition for probation. Galusha is quite clear that not only is such enhancement improper *per se* but also that the impropriety cannot be cured, excused, or justified by the fact that a defendant is willing to agree to the arrangement in exchange for probation. The constitutional violations of both due process and double jeopardy are too egregious to be susceptible of valid waiver under such circumstances.

Pursuant to the unequivocal directive of Galusha, we reverse the denial by the circuit court of Murrah's CR 59.05 motion to amend his enhanced sentence from five years to the two-year sentence originally imposed. We remand this case to the Jefferson Circuit Court with directions that it vacate the five-year sentence imposed on February 25, 2000, and that it reinstate the two-year sentence as provided in the original judgment of conviction.

ALL CONCUR.

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