

RENDERED: MARCH 19, 2010; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2009-CA-000231-MR

MICHAEL D. BECK

APPELLANT

v. APPEAL FROM MUHLENBERG CIRCUIT COURT  
HONORABLE DAVID H. JERNIGAN, JUDGE  
ACTION NO. 02-CR-00113

COMMONWEALTH OF KENTUCKY

APPELLEE

AND

NO. 2009-CA-000232-MR

MICHAEL D. BECK

APPELLANT

v. APPEAL FROM MUHLENBERG CIRCUIT COURT  
HONORABLE DAVID H. JERNIGAN, JUDGE  
ACTION NO. 07-CR-00042

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING IN PART,  
VACATING IN PART, AND REMANDING

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BEFORE: COMBS, CHIEF JUDGE; CAPERTON, JUDGE; WHITE,<sup>1</sup> SENIOR JUDGE.

CAPERTON, JUDGE: The Appellant, Michael Beck, directly appeals from a January 12, 2009, order of the Muhlenberg Circuit Court revoking his probation in two separate indictments and reinstating his sentences.<sup>2</sup> On appeal, Beck argues that the trial court did not have jurisdiction to revoke his probation and that doing so violated his state and federal due process rights because he did not knowingly and voluntarily waive the statutory maximum five-year probation term imposable in felony cases. After a thorough review of the record, the arguments of the parties, and the applicable law, we vacate the portion of the order pertaining to the 2002 case and remand for entry of a new order consistent with this opinion.

On March 8, 2002, the Muhlenberg Grand Jury, in indictment number 02-CR-00113, charged Beck with one count of operating a motor vehicle under the influence, fourth or subsequent offense, in violation of KRS 189A.010, one count of operating a motor vehicle on a suspended license, third or subsequent offense,

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<sup>1</sup> Senior Judge Edwin M. White sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

<sup>2</sup> These were identified as cases 02-CR-00113, and 07-CR-00042. Beck was sentenced to serve his three-year sentence in case number 02-CR-00113 consecutively to his nine-year sentence in case number 07-CR-00042, for a total of twelve-years imprisonment. Beck filed a notice of appeal for both case numbers appealing the identical revocation order entered in each case, and the appeals were consolidated upon Beck's motion.

and one count of third-degree possession of a controlled substance (Schedule IV or Schedule V). On June 25, 2002, Beck entered into a plea agreement under which he pled guilty to one count of operating a motor vehicle under the influence, fourth or subsequent offense, and violation of operating a motor vehicle with a license which has been revoked or suspended for driving under the influence, third or subsequent offense. Final judgment was entered on July 23, 2002, and Beck was sentenced to three years on both counts, to run concurrently.

As part of the plea agreement, the Commonwealth did not oppose the trial court's granting shock probation after Beck served 150 days in jail.

Accordingly, on December 6, 2002, Beck was granted shock probation, and his sentence was suspended for five years. Thereafter, on February 23, 2007, Beck was indicted, in case number 07-CR-00042, on two counts of first-degree trafficking in a controlled substance (cocaine and methamphetamine), one count of trafficking in a controlled substance in the second degree (Lortab), one count for being a persistent felony offender, one count of possession of marijuana (less than eight ounces), and one count of possession of drug paraphernalia on or about January 22, 2007.

On March 26, 2007, the Commonwealth moved the trial court to revoke Beck's probation in case number 02-CR-00113. Following a hearing on April 30, 2007, the trial court found that Beck had violated the terms of his probation by possessing methamphetamine, cocaine, and marijuana. Accordingly, Beck's probation was revoked by an order entered on May 4, 2007.

On May 21, 2007, Beck entered into a plea agreement in case number 07-CR-00042 under which he pled guilty to the amended charges of two counts of second-degree possession of a controlled substance, one count of persistent felony offender, one count of possession of marijuana, and one count of possession of drug paraphernalia. Final judgment was entered on June 6, 2007, and Beck was sentenced to five years on both counts of possession of a controlled substance, enhanced to nine years by the count of being a second-degree persistent felony offender, and was sentenced to twelve months on the counts of possession of marijuana and possession of drug paraphernalia. Specifically, the agreement provided that the sentences from the 2007 indictment were to be run concurrently but were to be, “consecutive with 02-CR-00113, to be probated following service of six (6) months in 02-CR-00113 from date of revocation of probation, being April 30, 2007.”

Thereafter, on October 26, 2007, Beck was granted shock probation in case numbers 02-CR-00113 and 07-CR-00042 for a period of five years. Nevertheless, on December 22, 2008, the trial court entered an order finding that Beck had violated the terms and conditions of drug court and had, therefore, been terminated from the drug court program. As a result, Beck’s case was scheduled for a probation revocation hearing. Shortly thereafter, on January 8, 2009, the Commonwealth moved the trial court to revoke Beck’s probation in case numbers 02-CR-00113 and 07-CR-00042.

A probation revocation hearing was held on January 12, 2009. During the course of that hearing, testimony was offered by Beck's probation and parole officer, who testified that Beck tested positive for drugs three times while on probation and in drug court, and that a search of his home on December 12, 2008, revealed drug paraphernalia, pills, and an empty bottle of liquid used for passing a drug screen. Accordingly, Beck was terminated from drug court on December 22, 2008, and was subsequently charged in case number 08-M-01482 for possession of a Schedule II controlled substance and possession of drug paraphernalia.

Following the hearing, the trial court found that Beck had violated the conditions of probation and granted the Commonwealth's motion to revoke Beck's probation in both the 2002 and the 2007 indictments. Beck was ordered to serve his three-year sentence in case number 02-CR-00113 consecutively to his nine-year sentence in case number 07-CR-00042, for a total of twelve years' imprisonment. It is from that order that Beck now appeals.

On appeal, Beck makes one argument, that the court was without jurisdiction to revoke his probation in case number 02-CR-00113. Beck concedes that this issue was not raised below. Nevertheless, as this issue is jurisdictional, the ability to raise it cannot be waived or forfeited by a failure to object. *See Wellman v. Commonwealth*, 694 S.W.2d 696, 698 (Ky. 1985), and *Singleton v. Commonwealth*, 208 S.W.2d 325, 327 (Ky. 1948). Further, we note that when the lower court is alleged to be acting outside of its jurisdiction, the proper standard of review is *de novo* because jurisdiction is generally only a question of law. *See*

*Grange Mutual Insurance Co. v. Trude*, 151 S.W.3d 803, 810 (Ky. 2004).

Specifically, Beck argues that his period of probation on case number 02-CR-00113 expired as a matter of law on September 9, 2008. To briefly review the timeline of pertinent events, we note that, (1) Beck was granted shock probation in 02-CR-00113 on December 6, 2002, for a period of five years (a period initially set to expire on December 6, 2007); (2) Beck violated his probation on January 22, 2007, and was indicted thereon in case number 07-CR-00042 on February 23, 2007;<sup>3</sup> (3) On October 26, 2007, Beck was again granted probation for a period of five years.<sup>4</sup>

Beck argues that as of January 22, 2007, the date that his parole violation occurred in 02-CR-00113, he had 318 days left to serve on his probation since the initial expiration date would have been December 6, 2007. Therefore, when probation was reinstated on October 26, 2007, he should have had 318 days remaining, making the new expiration date September 9, 2008. Accordingly, Beck argues that when the court revoked his probation in case number 02-CR-00113 on January 12, 2009, it was without jurisdiction to do so because the probation period had expired.

In support of his arguments in this regard, Beck directs this Court to KRS 533.020(4), which provides that:

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<sup>3</sup> Indictment 07-CR-00042 provided the grounds for revocation of his probation on April 30, 2007, in case number 02-CR-00113.

<sup>4</sup> A review of the court's October 26, 2007 order reveals that it is styled with both case numbers 02-CR-00113 and 07-CR-00042. Beyond the styling of the order, the order itself does not specifically reference one case number or the other in granting the five year period of probation.

The period of probation . . . shall be fixed by the court and at any time may be extended or shortened by duly entered court order. Such period, with extensions thereof, shall not exceed five (5) years . . . upon conviction of a felony . . . . Upon completion of the probationary period . . . the defendant shall be deemed finally discharged, provided no warrant issued by the court is pending against him, and probation . . . has not been revoked.

*See also Curtsinger v. Commonwealth*, 549 S.W.2d 515, 516 (Ky. 1977). Thus, while Beck concedes that the court retained jurisdiction over case number 07-CR-00042, it had lost jurisdiction over case number 02-CR-00113, thereby voiding any order entered with regard thereto. Further, Beck argues that the order is void under the Fourteenth Amendment Due Process Clause of the United States Constitution.<sup>5</sup>

In response, the Commonwealth concedes that pursuant to KRS 533.020(4), the period of probation for a felony shall not exceed five years even with extensions. It nevertheless argues that the October 26, 2007, order of the court granting shock probation for the 2002 and 2007 indictments was not a reinstatement of Beck's 2002 probation, but instead, was a decision imposing a new five-year probation sentence on both indictments. The Commonwealth argues that this new sentence was given in exchange for Beck's guilty plea in the 2007 indictment and that by knowingly and voluntarily requesting shock probation on both indictments, Beck made a knowing and voluntary waiver of the statutory five-year maximum probation period.

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<sup>5</sup> *See Burnham v. Superior Court of California, County of Marin*, 495 U.S. 604, 609 (1990), citing *Pennoyer v. Neff*, 95 U.S. 718, 732 (1876), in holding that a judgment of a court lacking personal jurisdiction is void and violates the due process clause of the Fourteenth Amendment of the United States Constitution.

In support of its arguments in this regard, the Commonwealth directs this Court to *Commonwealth v. Griffin*, 942 S.W.2d 289 (Ky. 1997). In *Griffin*, our Kentucky Supreme Court departed from the statutory language concerning the five-year maximum probation period and held that in that case, the trial court retained jurisdiction over the defendant past the five-year period because the defendant knowingly and voluntarily requested that the period be extended in exchange for avoiding imminent revocation of probation and imprisonment.

The Commonwealth, relying on *Griffin*, asserts that Beck knowingly and voluntarily extended the probationary period on the 2002 sentence by pleading guilty to the 2007 indictment under the terms of the Commonwealth's offer because Beck received the benefit of a bargain by agreeing to an extension of the probationary benefit in exchange for being released from jail and placed on probation again. Having reviewed the record and the applicable law, we cannot agree.

Having reviewed *Griffin*, we find it to be distinguishable from the matter *sub judice*. In *Griffin*, the defendant expressly, knowingly, and voluntarily agreed that his probationary period would be extended for an additional five years. In this case, having reviewed the record, we cannot determine that Beck even understood that his probation would be extended for an additional five years on the 2002 charge or that he expressly agreed for the court to do so. Thus, we cannot find a knowing and voluntary waiver.

Beyond that, however, in *Griffin*, the defendant agreed for the probationary period to be extended *prior* to the time that the five-year period had expired on the initial charge. In the matter *sub judice*, however, Beck's period of probation on the 2002 case expired as a matter of law on September 8, 2008. Beck was not terminated from drug court until December 22, 2008, and it was not until January 12, 2009, that the trial court revoked his probation. Accordingly, the court had already lost jurisdiction over the 2002 case. Thus, any order entered by the court with regard to the probationary period in that case was void.

Having so found, we are compelled to vacate that portion of the Muhlenberg Circuit Court's January 12, 2009, order revoking Beck's probation on case number 02-CR-00113 and sentencing him to a corresponding three-year imprisonment. We hereby remand this matter to the Muhlenberg Circuit Court for entry of an order that shall reflect these changes to be sent to the Department of Corrections.

ALL CONCUR.

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