

RENDERED: SEPTEMBER 21, 2012; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2011-CA-002311-MR

DUANE R. YOUNGREN

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE MARY M. SHAW, JUDGE  
ACTION NO. 05-CR-001233

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
VACATING AND REMANDING

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BEFORE: CAPERTON, DIXON, AND STUMBO, JUDGES.

CAPERTON, JUDGE: Duane R. Youngren appeals from the December 7, 2011, order of the trial court revoking probation. On appeal, Youngren argues that the trial court was without jurisdiction to enter the order of revocation. After a thorough review of the parties' arguments, the record, and the applicable law, we agree with Youngren. Consequently, we vacate the December 7, 2011, order

revoking probation and remand for entry of a new order consistent with this opinion.

On July 5, 2005, Youngren was sentenced to a term of five years imprisonment, probated for a period of five years pursuant to a plea agreement. Youngren's original period of probation was set to expire July 5, 2010. On September 17, 2009, in response to a motion to revoke, the trial court entered an agreed-to order that extended the period of probation by 13 months and 18 days, the amount of time that had elapsed since Youngren first violated the conditions of his probation. Youngren's new period of probation was scheduled to terminate on August 23, 2011.

Thereafter, on August 1, 2011, the Commonwealth moved to *extend* Youngren's probation for another year to allow Youngren to complete the Drug Court Program. Youngren did not appear at the scheduled hearing date on the motion; the court continued the motion. On September 28, 2011, the trial court granted the Commonwealth's motion to extend probation but failed to enter the order into the record.<sup>1</sup> On November 11, 2011, the Commonwealth filed another motion to revoke Youngren's probation. On November 30, 2011, the court granted the motion, revoked Youngren's probation and ordered Youngren to serve 30 months of the sentence imposed; said order was entered on December 7, 2011. It is from this order that Youngren now appeals.

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<sup>1</sup> We note that a different judge in a different division heard this motion.

On appeal, Youngren presents one argument, namely, that the order of December 7, 2011, revoking probation is void because it was entered after the period of probation had expired. In support of this argument, Youngren directs this Court to KRS 533.020. The Commonwealth disagrees, and asserts that the trial court had jurisdiction pursuant to *Commonwealth v. Griffin*, 942 S.W.2d 289 (Ky. 1997), as the decision to extend probation was made in the best interest of the probationer. With these arguments in mind we now turn to our applicable jurisprudence.

At the outset 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 a question of law. *See Grange Mutual Insurance Co. v. Trude*, 151 S.W.3d 803, 810 (Ky.2004).

At issue, KRS 533.020 states in full:

(1) When a person who has been convicted of an offense or who has entered a plea of guilty to an offense is not sentenced to imprisonment, the court shall place him on probation if he is in need of the supervision, guidance, assistance, or direction that the probation service can provide. Conditions of probation shall be imposed as provided in KRS 533.030, but the court may modify or enlarge the conditions or, if the defendant commits an additional offense or violates a condition, revoke the sentence at any time prior to the expiration or termination of the period of probation. When setting conditions under this subsection, the court shall not order any defendant to pay incarceration costs or any other cost permitted to be ordered under KRS 533.010 or other statute, except restitution and any costs owed to the Department of Corrections, through the circuit clerk.

(2) When a person who has been convicted of an offense or who has entered a plea of guilty to an offense is not sentenced to imprisonment, the court may sentence him to probation with an alternative sentence if it is of the opinion that the defendant should conduct himself according to conditions determined by the court and that probationary supervision alone is insufficient. The court may modify or enlarge the conditions or, if the defendant commits an additional offense or violates a condition, revoke the sentence at any time prior to the expiration or termination of the alternative sentence.

(3) When a person who has been convicted of an offense or who has entered a plea of guilty to an offense is not sentenced to imprisonment, the court may sentence him to conditional discharge if it is of the opinion that the defendant should conduct himself according to conditions determined by the court but that probationary supervision is inappropriate. Conditions of conditional discharge shall be imposed as provided in KRS 533.030, but the court may modify or enlarge the conditions or, if the defendant commits an additional offense or violates a condition, revoke the sentence at any time prior to the expiration or termination of the period of conditional discharge.

(4) The period of probation, probation with an alternative sentence, or conditional discharge 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, or the time necessary to complete restitution, whichever is longer, upon conviction of a felony nor two (2) years, or the time necessary to complete restitution, whichever is longer, upon conviction of a misdemeanor. Upon completion of the probationary period, probation with an alternative sentence, or the period of conditional discharge, the defendant shall be deemed finally discharged, provided no warrant issued by the court is pending against him, and probation, probation with an alternative sentence, or conditional discharge has not been revoked.

(5) Notwithstanding the fact that a sentence to probation, probation with an alternative sentence, or conditional discharge can subsequently be modified or revoked, a judgment which includes such a sentence shall constitute a final judgment for purposes of appeal.

KRS 533.020.

Recently, in *Conrad v. Evridge*, 315 S.W.3d 313, 315 (Ky. 2010), the Kentucky Supreme Court interpreted Kentucky Revised Statutes (KRS) 533.020 and held: “There is no plausible interpretation other than that probation must be revoked, if at all, before the probationary period expires. The circuit court has no jurisdiction to revoke Appellee's probation, or to hold a revocation hearing, after that time.” *Conrad* at 315 citing *Curtsinger v. Commonwealth*, 549 S.W.2d 515, 516 (Ky. 1977). Thus, the trial court was without power to revoke Youngren’s probation after the probationary period expired.

Originally, Youngren’s probationary period was set to expire on July 5, 2010. This period was properly extended until August 23, 2011. On August 1, 2011, the Commonwealth timely moved to *extend* Youngren’s probation for another year to allow Youngren to complete the Drug Court Program. However, this motion was not granted until September 28, 2011; fatal to the Commonwealth’s argument is the failure to enter this order.<sup>2</sup>

CR 58(1) plainly states:

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<sup>2</sup> We decline to address whether Youngren’s failure to attend the motion hearing originally set for August 8, 2011, should estop him from contesting the order of September 28, 2011, as the order was never entered into the record.

(1) Before a judgment or order may be entered in a trial court it shall be signed by the judge. The clerk, forthwith upon receipt of the signed judgment or order, shall note it in the civil docket as provided by CR 79.01. The notation shall constitute the entry of the judgment or order, which shall become effective at the time of such notation.

Thus, “[u]nder typical circumstances, when a trial judge signs an order or judgment it has no effect until it is entered into the record by the clerk. *Batts v. Illinois Cent. R. Co.*, 217 S.W.3d 881, 883 (Ky.App. 2007) citing *Hawes v. Cumberland Contracting Co.*, 422 S.W.2d 713 (Ky. 1967); *Murrell v. City of Hurstbourne Acres*, 401 S.W.2d 60 (Ky. 1966); and *Commonwealth v. West*, 147 S.W.3d 72 (Ky.App. 2004). As the September 28, 2011, order was never entered into the record, the duration of Youngren’s probation was never extended beyond August 23, 2011.<sup>3</sup> Consequently, the court’s order of December 7, 2011, revoking probation was entered after the expiration of the probationary period; the court was without jurisdiction to enter said order. As such, we must vacate the order and remand for entry of a new order consistent with this opinion.

In light of the aforementioned, we vacate the December 7, 2011, order and remand for entry of a new order consistent with this opinion.

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<sup>3</sup> We briefly address the Commonwealth’s contention that the trial court possessed jurisdiction per *Commonwealth v. Griffin*, 942 S.W.2d 289 (Ky.1997), as the decision to extend probation was made in the best interest of the probationer *sub judice*. We disagree with the Commonwealth’s interpretation of *Griffin* to the facts *sub judice*.

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. Simply stated, there is no indication in the record that Youngren knowingly and voluntarily requested that the period be extended in exchange for avoiding imminent revocation of probation and imprisonment beyond August 23, 2011.

ALL CONCUR.

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