

RENDERED: SEPTEMBER 7, 2018; 10:00 A.M.  
NOT TO BE PUBLISHED

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

NO. 2017-CA-000704-MR

DAVID M. WATKINS

APPELLANT

v. APPEAL FROM CALDWELL CIRCUIT COURT  
HONORABLE C.A. WOODALL, III, JUDGE  
ACTION NOS. 15-CR-00118 AND 15-CR-00119

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
VACATING

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BEFORE: KRAMER, J. LAMBERT, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: David M. Watkins brings this *pro se* appeal from a March 28, 2017, order of the Caldwell Circuit Court denying him shock probation. We vacate.

In Criminal Action Nos. 15-CR-00118 and 15-CR-00119 in Caldwell Circuit Court, Watkins pleaded guilty to five counts of first-degree wanton

endangerment, third-degree criminal mischief, first-degree fleeing/evading police, and operating a motor vehicle on a suspended driver's license.

By final judgment entered August 5, 2016, the circuit court sentenced Watkins to a total of five-years' imprisonment in Action Nos. 15-CR-00118 and 15-CR-00119. Thereafter, on September 21, 2016, Watkins filed *pro se* motions for shock probation in both actions. He later filed motions for shock probation in both actions on March 16, 2017. By order entered March 28, 2017, the circuit court denied Watkin's motions for shock probation. This appeal follows.

Watkins contends that the circuit court lacked jurisdiction to deny his motions for shock probation. Watkins asserts that the circuit court was mandated by Kentucky Revised Statutes (KRS) 439.265 to rule upon his motions for shock probation within seventy days of being filed and failed to do so. As the circuit court did not timely rule upon the motions, Watkins claims that he was denied due process of law and equal protection as guaranteed by the United States Constitution and the Kentucky Constitution. As a result, Watkins maintains that he is entitled to shock probation.

KRS 439.265 provides, in relevant part:

- (1) Subject to the provisions of KRS Chapter 439 and Chapters 500 to 534, any Circuit Court may, upon motion of the defendant made not earlier than thirty (30) days nor later than one hundred eighty (180) days after the defendant has been incarcerated in a county jail following his conviction and sentencing pending delivery

to the institution to which he has been sentenced, or delivered to the keeper of the institution to which he has been sentenced, suspend the further execution of the sentence and place the defendant on probation upon terms the court determines. Time spent on any form of release following conviction shall not count toward time required under this section.

- (2) The court shall consider any motion filed in accordance with subsection (1) of this section within sixty (60) days of the filing date of that motion, and shall enter its ruling within ten (10) days after considering the motion. The defendant may, in the discretion of the trial court, have the right to a hearing on any motion he may file, or have filed for him, that would suspend further execution of sentence. Any court order granting or denying a motion to suspend further execution of sentence is not reviewable.

Under the mandates of KRS 439.265(2), the circuit court is directed to consider the motion for shock probation within sixty days of filing the motion and to rule upon the motion within ten days thereafter. This statute has been recently interpreted in *Commonwealth v. Settles*, 488 S.W.3d 626 (Ky. App. 2016).

In *Settles*, 488 S.W.3d 626, 629, this Court set forth the general rule that “a trial court loses jurisdiction over a criminal case ten days after entry of a final judgment.” However, the Court of Appeals recognized that KRS 439.265 provides an exception to this general rule and extends the trial court’s jurisdiction for the sole purpose of determining shock probation. *Id.* at 629. So, the Court regarded the time limitations set forth in KRS 439.265 as jurisdictional and subject to strict compliance. *Id.* at 630-31. The Court held that “an order granting or

denying a motion for shock probation may not be entered more than 70 days after the motion is filed.” *Id.* at 630.

In this case, the Commonwealth concedes that the circuit court failed to timely rule on Watkins’ motions for shock probation within seventy days as mandated by KRS 439.265. Under the uncontroverted procedural facts, we conclude the circuit court lost jurisdiction after the seventy-day period to rule upon Watkins’ motions for shock probation. KRS 439.265. Nonetheless, we do not believe that Watkins was denied the constitutional guarantees of due process or equal protection.

Watkins initially filed the motions for shock probation on September 21, 2016, and then filed additional motions for shock probation on March 16, 2017. Watkins could have filed a writ of mandamus with the Court of Appeals to compel the circuit court to timely rule upon the motions. Kentucky Rules of Civil Procedure 76.36. Watkins failed to do so. Moreover, it is clear that the circuit court did not believe Watkins was entitled to shock probation. Therefore, Watkins suffered no prejudice from the untimely denial of his motion for shock probation. In short, Watkins is not entitled to shock probation or any substantive relief from the judgment entered August 5, 2016. However, we vacate the circuit court’s order denying shock probation as it was without jurisdiction to render the March 28, 2017, order.

For the foregoing reasons, the order of the Caldwell Circuit Court is vacated as it lacked jurisdiction to render the March 28, 2017, order.

ALL CONCUR.

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