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TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2011-CA-000996-MR

COMMONWEALTH OF KENTUCKY

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE SUSAN SCHULTZ GIBSON, JUDGE
ACTION NO. 04-CR-003555

LEE ANDREW WRIGHT

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: COMBS AND STUMBO, JUDGES; LAMBERT,¹ SENIOR JUDGE.

STUMBO, JUDGE: The Commonwealth of Kentucky appeals from an Order of the Jefferson Circuit Court ruling that the court lacked jurisdiction to hear the Commonwealth's motion to revoke Lee Andrew Wright's probation. The

¹ Senior Judge Joseph E. Lambert 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.

Commonwealth argues that because Wright still owed restitution after the expiration of the court-ordered probationary period, KRS 533.020(4) and other statutes allow the probationary period to be extended beyond the statutory five-year term. Though we agree that KRS 533.020(4) allows felony probation to last the longer of either five years or the period required to make restitution, we cannot conclude that the circuit court erred in declining to consider whether Wright's probation should be revoked. Accordingly, we affirm the Order on appeal.

The facts are not at issue. On November 19, 2005, Wright was convicted on three counts of Theft by Unlawful Taking over \$300, and he was sentenced to three years in prison. In part because Wright had the ability to earn an income and make restitution, his sentence was probated for five years with the condition that he pay \$4,500 in restitution at the rate of \$160 per month. Wright's probation was to expire on or around November 19, 2010.

According to Wright's probation officer, Wright failed to pay restitution, and the Commonwealth moved to revoke his probation. The matter was set for a hearing on January 20, 2011. On that date, Wright, through counsel, argued that his probation had already expired; therefore, the court was without jurisdiction to revoke his probation. As a basis for this argument, Wright maintained that since the Commonwealth failed to seek an order extending his probation beyond five years, the probationary period ended on or around November 19, 2010, and after

such time the court could not revoke Wright's non-existent probation. Conversely, the Commonwealth pointed to various provisions of KRS Chapter 533 for the proposition that felony probation may last for five years or the time necessary to make restitution, whichever is longer.

After considering the matter, the circuit court determined that it was without jurisdiction to revoke Wright's probation because the probationary period had expired. The court relied on the language of KRS 533.020(4), which provides in relevant part that the court has the power to extend or shorten the probationary period, within the proscribed limits and "by duly entered court order." Since no order was entered extending Wright's probation past five years and because it found no statutory basis for automatically extending probation if the convicted person failed to pay restitution, the court declined to exercise jurisdiction on the Commonwealth's motion to revoke Wright's probation. The Commonwealth's subsequent motion to reconsider was denied and this appeal followed.

The Commonwealth now argues that the trial court erred in declining to exercise jurisdiction over the Commonwealth's motion to revoke Wright's probation. The focus of its claim of error centers on its assertion that KRS 533.020(4), in concert with other statutory law and case law, allows felony probation to continue for the longer of either five years or the time necessary to complete restitution. In its view, because Wright had not completed restitution after five years had elapsed, the court retained jurisdiction to consider the Commonwealth's motion to revoke his probation. At issue is the

Commonwealth's contention that the circuit court retained jurisdiction over Wright's probationary status even though the five-year statutory period - which was memorialized in the Judgment of Conviction - had elapsed.

In support of this argument, the Commonwealth notes that probation is a creation of statute, that courts are bound to the plain meaning of such statutes, and that the implementation of conditions of probation is discretionary. KRS 533.030; *Conrad v. Evridge*, 315 S.W.3d 313, 316 (Ky. 2010). It also points out that restitution is the only condition of probation upon which the Legislature has allowed the felony probationary period to be extended past five years. KRS 533.020. The focus of its argument, though, is that the trial court retains jurisdiction to adjudicate probation matters until restitution is completed and that the Jefferson Circuit Court erred in failing to so rule.

KRS 533.020(4) states:

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.

The parties properly note that this provision allows felony probation to be ordered for a term of five years, or the time it takes to make restitution, whichever is longer. Of particular importance for purposes of the issue before us is the phrase “shall be fixed . . . by duly entered court order[.]” In the matter at bar, it is uncontroverted that the Judgment of Conviction fixed Wright’s term of probation at five years. It is also uncontested that this five-year period ended on or about November 19, 2010. We conclude from these facts, just as the Jefferson Circuit Court concluded in its Order denying the Commonwealth’s motion to reconsider, that at the time this matter was considered, the five-year period had elapsed and Wright was no longer on probation.

The question is then properly characterized as whether the trial court is vested with jurisdiction to revoke Wright’s probation after his period of probation has ended. We must answer this question in the negative. KRS 533.020(1) provides in relevant part that, “[c]onditions 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.*” (Emphasis added). Wright’s term of probation expired before the Commonwealth’s motion was considered by the circuit court. We know this because the Judgment of Conviction states in clear and unambiguous terms that Wright’s sentence was probated for five years. Pursuant to the clear statutory language, the court is vested with authority to modify, enlarge or revoke probation

only during the pendency of that probation. Stated differently, the court may not revoke or otherwise modify probation after the probationary period has ended.

The Commonwealth appears to contend, albeit implicitly, that if the convicted person fails to complete the restitution within the five-year term of probation ordered by the trial court, the term of probation automatically continues until restitution is completed. We do not read KRS Chapter 533 as supporting such an interpretation, as it provides in unambiguous language that any amendment of probation must result from a court order. Additionally, because Wright was ordered to pay \$160 per month to satisfy \$4,500 in restitution, he must have violated the restitution order - if at all - within the first 28 months of his 60 month term of probation. As such, the five-year term of probation ordered by the court was more than sufficient to encompass the time it would have taken Wright to make restitution. It cannot be reasonably argued, therefore, that the circuit court somehow intended the term of probation to extend beyond the five-year term it expressly ordered.

By operation of statute, the Commonwealth was bound to seek revocation or amendment of probation, if at all, at a time after Wright allegedly stopped paying restitution, but also before the expiration of the five-year term. We find persuasive the circuit court's determination that, 1) the term of probation must be extended, if at all, by court order; 2) it may be extended, if at all, only during the pendency of probation and not sometime thereafter; and 3) when the term of probation expires,

the trial court loses jurisdiction to revoke that term of probation. We find no error in these conclusions.

For the foregoing reasons, we affirm the Order of the Jefferson Circuit Court ruling that it lacks jurisdiction to consider the Commonwealth's motion to revoke.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

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