

Commonwealth of Kentucky
Court of Appeals

NO. 2011-CA-002196-MR

JUDY LUNSFORD GROSS

APPELLANT

v. APPEAL FROM CLAY CIRCUIT COURT
HONORABLE OSCAR G. HOUSE, JUDGE
ACTION NO. 04-CR-00030

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
VACATING AND
REMANDING

** ** * * * * *

BEFORE: DIXON, MOORE AND TAYLOR, JUDGES.

DIXON, JUDGE: Judy Lunsford Gross appeals from a judgment of the Clay Circuit Court revoking her probation and ordering her to serve the remainder of a five-year prison sentence. Because the circuit court was without jurisdiction to revoke Gross's probation, we vacate the order of revocation and remand this case for further proceedings.

Gross pled guilty to conspiracy to traffic in a controlled substance (first-degree), and on October 4, 2004, the court sentenced her to a term of five years' imprisonment, probated for five years.

On April 11, 2007, the court held a hearing at the request of Gross's probation officer, and the court revoked Gross's probation due to a positive drug screen. On July 2, 2007, the court granted Gross's *pro se* motion for shock probation. The court imposed a term of five years' probation and ordered Gross to complete drug court. Gross successfully completed drug court on April 30, 2009.

On September 14, 2011, Gross's probation officer alleged Gross had absconded from supervision, and he obtained a warrant for her arrest. When the warrant was served, Gross was found with drugs and drug paraphernalia in her possession. The circuit court held a revocation hearing on October 31, 2011, and concluded that Gross failed to comply with the terms of her probation. The court revoked probation and ordered her to serve the balance of her underlying five-year sentence. This appeal followed.

Gross contends that her probation had expired as a matter of law in January 2010; consequently, she contends the court lacked jurisdiction to revoke her probation pursuant to *Conrad v. Evridge*, 315 S.W.3d 313 (Ky. 2010), and Kentucky Revised Statutes (KRS) 533.020. Although Gross concedes that this issue was not raised below, an appellate court is vested with jurisdiction to correct the imposition of an unauthorized sentence, even if the issue is unpreserved. *Jones v. Commonwealth*, 382 S.W.3d 22, 27 (Ky. 2011).

This matter concerns the interpretation of KRS 533.020, which we review *de novo*. *Richardson v. Louisville/Jefferson County Metro Gov't*, 260 S.W.3d 777, 779 (Ky. 2008).

KRS 533.020 addresses probation and states in relevant part:

(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.

....

(4) 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 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.

In *Conrad, supra*, the Kentucky Supreme Court held that these statutory provisions plainly require “that probation must be revoked, if at all, before the probationary period expires. The circuit court has no jurisdiction to revoke . . . probation, or to hold a revocation hearing, after that time.” *Conrad*, 315 S.W.3d at 315. In an earlier case, *Curtsinger v. Commonwealth*, 549 S.W.2d 515, 516 (Ky. 1977), the Court similarly concluded that a trial court lost jurisdiction to revoke

probation on the statutory five-year expiration date if “no warrant issued by the court was pending against him and his probation had not been revoked.”

At the time Gross’s probation was revoked in April 2007, she had approximately two years and six months left on her probation period. Gross asserts that, after her release on shock probation in July 2007, her five-year probationary term would have expired in January 2010. Accordingly, Gross argues that the circuit court did not have jurisdiction to revoke her probation on October 31, 2011.

In contrast, the Commonwealth contends that the July 2, 2007, order granting shock probation specifically imposed a new five-year term of probation from the date of that order, rather than reinstating Gross’s prior probationary term. Pursuant to this theory, Gross would have been on probation until July 2, 2012. The Commonwealth alternatively asserts that Gross knowingly and voluntarily accepted a new five-year term of probation by requesting shock probation in exchange for her release from incarceration on July 2, 2007. The Commonwealth relies on *Commonwealth v. Griffin*, 942 S.W.2d 289, 291 (Ky. 1997), where the Court concluded that a defendant can knowingly and voluntarily waive the statutory five-year maximum probation sentence if the defendant requests an extension of the probation term to avoid incarceration.

After careful review, we believe *Griffin* is inapplicable because, in that case, the defendant unequivocally requested that the court extend probation an additional five years in lieu of revoking probation and imposing the underlying prison

sentence. *Id.* at 290. In the case at bar, we are not persuaded that Gross's *pro se* motion for shock probation constituted a knowing and voluntary waiver of the statutory term limit or a request for an extension beyond the five-year maximum probation term.

It is clear that “granting and revoking probation is not an inherent power in the courts, but is a power vested in the courts by statute.” *Conrad*, 315 S.W.3d at 316. With the plain language of KRS 533.020(4), “the legislature has wisely provided that the probation period may not exceed five years.” *Green v. Commonwealth*, 400 S.W.2d 206, 208 (Ky. 1966). This statutory limit ensures that “[t]here must be some time in which a convicted person may know he has satisfied his debt to society.” *Id.* In the case at bar, the court revoked Gross's probation on April 11, 2007; however, it again granted her probation less than three months later. We are not persuaded that the court can circumvent the five-year time limitation by revoking an initial probation term only to thereafter grant shock probation and impose a new five-year term of probation. Instead, the shock probation order effectively reinstated Gross's probation with modified conditions (i.e., to complete drug court). It is clear, pursuant to KRS 533.020(4), that the term of probation for a felony conviction shall not exceed five years. In October 2004, Gross was convicted of a felony and granted five years' probation. Gross had served probation for nearly two and a half years when her probation was revoked in April 2007. When shock probation was granted less than three months later, on July 2, 2007, the court attempted to impose an additional five years of probation

for the same underlying felony conviction. In light of the plain language of KRS 533.020(4), we conclude Gross's probation for her felony conviction expired in January 2010; consequently, the order of October 31, 2011, revoking probation was void. We vacate the Clay Circuit Court's order and remand this case for further proceedings consistent with this opinion.

ALL CONCUR.

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