

RENDERED: JANUARY 4, 2013; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-000513-MR

JOHN AUSTIN BERRY

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE PAMELA R. GOODWINE, JUDGE
ACTION NO. 06-CR-00961

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE, CHIEF JUDGE; DIXON AND VANMETER, JUDGES.

DIXON, JUDGE: John Austin Berry appeals from a judgment of the Fayette Circuit Court revoking his probation and ordering him to serve a two-year prison sentence. Finding no error, we affirm.

The underlying facts of this case are not in dispute. Berry pled guilty to flagrant non-support, and on September 22, 2006, the court sentenced him to a

term of two years' imprisonment, probated for five years. The court imposed several conditions upon Berry's probation, including that he cooperate with his probation officer, maintain full-time employment, and make court-ordered child support payments toward his arrearage of \$18,205.25.

On December 15, 2006, the court held a revocation hearing at the request of Berry's probation officer due to Berry's failure to pay child support and a positive drug screen. The court declined to revoke Berry's probation. On December 12, 2010, a second revocation hearing was held due to Berry's failure to pay child support. The court allowed Berry to remain on probation and ordered him to appear for a review hearing on February 25, 2011. On February 7, 2011, Casey McCoy of the Probation and Parole Office filed a special supervision report advising the court that Berry had failed to report to the probation office, failed to respond by telephone, and failed to pay child support. At the review hearing on February 25, 2011, Berry appeared and advised the court that he did not know that his probation officer had been looking for him. The court set a review hearing for April 29, 2011.

On March 3, 2011, Berry's probation officer tendered an affidavit to revoke probation. The affidavit alleged that Berry had not made a child support payment since May 2010, and that his total arrearage was over \$30,000.00. The affidavit further stated Berry had repeatedly failed to report to his probation officer. The trial court issued a warrant for Berry's arrest on March 8, 2011;

however, the warrant was not served on Berry until February 2, 2012, when he was at the Clark County Detention Center.

A probation revocation hearing was held on February 10, 2012. Berry argued that his probation had expired on September 22, 2011; consequently, he contended the court lacked jurisdiction to revoke his probation pursuant to *Conrad v. Evridge*, 315 S.W.3d 313 (Ky. 2010). The court disagreed, noting that the arrest warrant had been issued in March 2011, and that Berry's own conduct caused the delay in the proceedings by failing to report to his probation officer and to the court. The trial court rendered a judgment revoking Berry's probation and imposing the underlying sentence. This appeal followed.

This matter concerns the lower court's interpretation of Kentucky Revised Statutes (KRS) 533.020 and *Conrad*. We review these questions of law *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*, 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.

Berry asserts that the holding of *Conrad* requires this Court to reverse the trial court’s judgment revoking his probation because the court lost jurisdiction when Berry’s probation expired on September 22, 2011. The Commonwealth asserts the trial court retained jurisdiction because the pending arrest warrant precluded the automatic expiration of Berry’s probation pursuant to KRS 533.020(4). Under the circumstances presented here, we agree with the Commonwealth.

This case is distinguishable from *Conrad* since a probation violation warrant was pending against Berry at the time his probation would have otherwise expired. Further, Berry intentionally avoided the authority of the court and his probation officer for nearly twelve months. In *Conrad* there was no outstanding warrant or allegation of intentional delay by the defendant; rather, the trial court erroneously scheduled the revocation hearing after the defendant’s probation had expired. *Id.*

at 317. Despite the Court's conclusion that the statute's plain language indicated the trial court acted without jurisdiction, the Court acknowledged that, under a different set of facts, an estoppel argument "might be persuasive." *Id.*

The Commonwealth argues that the trial court retained jurisdiction because the pending arrest warrant precluded the automatic expiration of Berry's probation pursuant to KRS 533.020(4), which states in relevant part, "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 *Curtsinger v. Commonwealth*, 549 S.W.2d 515, 516 (Ky. 1977), the Kentucky Supreme Court held that a trial court lost jurisdiction to revoke a defendant's 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." Here, a valid arrest warrant was pending against Berry when his probation would have otherwise expired; thus, Berry was not discharged from probation on September 22, 2011, and the court did not lose jurisdiction of the case. *Id.* We find no error in the trial court's decision.

For the reasons stated herein, the judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Susan Jackson Balliet
Assistant Public Advocate
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

J. Hays Lawson
Assistant Attorney General
Frankfort, Kentucky