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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-000214-MR

BRAD A. BECKMAN

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE OLU A. STEVENS, JUDGE
ACTION NO. 06-CR-001215

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION VACATING AND REMANDING

** ** * * * * *

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

VANMETER, JUDGE: Brad Beckman appeals from the November 21, 2012, order of the Jefferson Circuit Court revoking his probation and imposing a seven-year prison sentence. Beckman argues his probationary period expired before the court revoked his probation and thus the court lacked jurisdiction to revoke.

Accordingly, he maintains he is currently incarcerated under a void judgment. We

agree, vacate the order of revocation, and remand this case for further proceedings.¹

Kentucky law is clear 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 v. Evridge*, 315 S.W.3d 313, 315 (Ky. 2010). KRS² 533.020(4) caps the period of probation at five years, providing as follows:

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court is pending against him, and probation, probation with an alternative sentence, or conditional discharge has not been revoked.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 issue before us is whether a circuit court’s order granting shock probation, following revocation of a defendant’s initial probation, imposes a new five-year term of probation from the date of that order, or simply reinstates the

¹ Beckman’s appellate brief does not comply with Kentucky Rules of Civil Procedure (CR) 76.12(4)(c)(vii), which requires the appellant to attach the order under review as the first document after the appendix list so that the order is readily available to this court. Since we were able to locate the order in the record with relative ease, we will not strike Beckman’s brief; however, we note that CR 76.12(8)(a) grants the appellate court authority to strike appellate briefs for failure to substantially comply with CR 76.12 and we emphasize the importance of compliance with this Rule.

² Kentucky Revised Statutes.

prior probationary period. KRS 533.020 does not specifically state whether the five-year term limit applies to shock probation; therefore, we review this issue of statutory construction *de novo*. *Richardson v. Louisville/Jefferson County Metro Gov't*, 260 S.W.3d 777, 779 (Ky. 2008).

The parties have not cited any statutory authority or binding case law that conclusively resolves this issue. However, after Beckman tendered his appellate brief, and before the Commonwealth submitted its response brief, a panel of this court addressed the issue at bar in an unpublished opinion, *Gross v. Commonwealth*, 2013 WL 3329080, No. 2011-CA-002196 (Ky. App. June 28, 2013).³ In *Gross*, this court held that a shock probation order effectively reinstates a defendant's probation with modified conditions (*i.e.*, completion of drug court), and a circuit court cannot circumvent the five-year term limit by revoking an initial probation term only to thereafter grant shock probation and impose a new five-year term of probation. *Id.* at *2. Indeed,

granting and revoking probation is not an inherent power in the courts, but is a power vested in the courts by statute. With the plain language of KRS 533.020(4), the legislature has wisely provided that the probation period may not exceed five years. This statutory limit ensures that there must be some time in which a convicted person may know he has satisfied his debt to society.

Id. (internal quotations and citations omitted). The court further held that Gross's *pro se* motion for shock probation did not constitute a knowing and voluntary

³ “Opinions that are not to be published shall not be cited or used as binding precedent in any other case in any court of this state; however, unpublished Kentucky appellate decisions, rendered after January 1, 2003, may be cited for consideration by the court if there is no published opinion that would adequately address the issue before the court.” CR 76.28(4)(c).

waiver of the statutory term limit or a request for an extension beyond the five-year maximum probation term. *Id.*

In this case, Beckman pled guilty to robbery in the second degree and fraudulent use of a credit card, and on October 19, 2006, the circuit court sentenced him to seven years' imprisonment, probated for five years. On March 6, 2008, the court revoked Beckman's probation due to probation violations and imposed the seven-year sentence. On July 17, 2008, the court granted Beckman's motion for shock probation and imposed a five-year period of shock probation, along with numerous conditions that Beckman was to follow.

In May 2012, the Commonwealth moved to revoke Beckman's shock probation based on alleged violations of the conditions. Beckman argued that his probationary period had expired and the court lacked jurisdiction to revoke. Beckman pointed out that he was probated for almost seventeen months, from October 19, 2006, until March 6, 2008, then revoked and served a prison sentence from March 6, 2008, until July 17, 2008 (134 days), then placed on shock probation. Beckman argued his initial probationary period was due to end on October 19, 2011, five years after his sentencing. Adding on the 134 days he spent in prison, Beckman claimed his probationary period expired on March 1, 2012, well before the Commonwealth filed its motion in May 2012 to revoke probation.

The circuit court held a hearing to address the jurisdictional issue and ultimately denied Beckman's motion to dismiss, finding that his initial five-year probationary period had been revoked and the subsequent shock probationary

period, on the same indictment, was a separate five-year period for which there could be no credit for any previous time served on probation. Thereafter, the court conducted a revocation hearing, revoked Beckman's shock probation and imposed the seven-year sentence. Beckman moved the court to alter, amend or vacate its revocation order, which the court denied.

On appeal, Beckman asserts his probation expired before the court revoked and thus the court lacked jurisdiction to revoke his probation. We believe *Gross* resolved this issue and similarly conclude that the circuit court was without jurisdiction to revoke. In addition, the record does not support a conclusion that Beckman knowingly and voluntarily waived the statutory maximum five-year probation term. If the Commonwealth and a defendant wish to extend the probation term beyond the five-year limit, the record must contain an express waiver by the defendant. The record in this case does not contain such a waiver. Accordingly, the revocation order of the Jefferson Circuit Court is vacated and this case is remanded for further proceedings.

ALL CONCUR.

BRIEF FOR APPELLANT:

Kenneth L. McCardwell
Louisville, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

John Paul Varo
Assistant Attorney General
Frankfort, Kentucky