

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2013-CA-000445-MR

DAVID TAPP

APPELLANT

v. APPEAL FROM BATH CIRCUIT COURT  
HONORABLE BETH LEWIS MAZE, JUDGE  
ACTION NO. 11-CR-00086

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
VACATING

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

ACREE, CHIEF JUDGE: The appellant, David Tapp, appeals a Bath Circuit Court order that revoked his probation. Because the circuit court lost jurisdiction to revoke Tapp's probation when the probationary period ended, the order is vacated.

On February 2, 2012, Tapp received a one-year sentence for multiple drug related offenses<sup>1</sup> which was probated until February 2, 2013. On January 28, 2013, the Commonwealth's attorney filed a motion to review diversion.<sup>2</sup> The motion cited numerous violations for driving on a suspended license. Tapp was subsequently arrested pursuant to a bench warrant executed the evening of January 31, 2013. A uniform citation documenting the arrest was filed on February 1, 2013. On February 7, 2013, Tapp was brought before the circuit court and a parole revocation hearing was set for February 12, 2013. At the hearing, Tapp's counsel, citing Kentucky Revised Statute (KRS) 533.020(4) and *Conrad v. Evridge*, 315 S.W.3d 313 (Ky. 2010), made a motion to dismiss for lack of jurisdiction. The circuit court denied the motion, revoked Tapp's probation, and ordered him to serve his original sentence. This appeal followed.

The only issue before this court is whether the circuit court had jurisdiction to revoke Tapp's probation. Jurisdictional issues are questions of law that we review *de novo*. *Biggs v. Biggs*, 301 S.W.3d 32, 33 (Ky. App. 2009).

KRS 533.020(4) states that, “[u]pon 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 has not been revoked.” After

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<sup>1</sup> Tapp plead guilty to first-degree possession of a controlled substance, third-degree possession of a controlled substance first offense, possession of drug paraphernalia, and possession of a controlled substance not in its original container.

<sup>2</sup> Tapp was on probation, not diversion, a correction noted and corrected by the circuit court's revocation order.

discharge, the circuit court loses jurisdiction to revoke probation. *Conrad v. Evridge*, 315 S.W.3d 313, 316 (Ky. 2010).

However, in this case, the circuit court opined that KRS 533.050(2), which requires a hearing to be held prior to revocation, must be read in conjunction with KRS 533.020(4). As a result, the circuit court concluded that Tapp's probation had not been finally discharged because it was unable to hold a hearing before the probationary period ended. The circuit court also concluded that the probationary period was not finally discharged because a warrant was "pending" even though the warrant was executed and Tapp was in custody. The court expressed concern that if it did not have jurisdiction, probationers would be able to avoid revocation by committing violations near the end of the probationary period. On appeal, Tapp once again contends that *Conrad v. Evridge* is controlling, divesting the circuit court of jurisdiction after February 2, 2013. *See id.*

In *Conrad*, the probationary period was set to expire on June 17, 2009. *Id.* at 314. On June 18, 2009, the court set a probation revocation hearing. *Id.* at 315. Noting that the delay was by no fault of the probationer, the Court determined that the circuit court lost jurisdiction to revoke probation after June 17, 2009. *Id.* at 315-16. The Court explained that KRS 433.020 (4)

states in clear and unambiguous terms that revocation must occur 'prior to the expiration . . . of probation.' [As a result, t]here is no plausible interpretation other than 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.

*Id.* at 315; *see also Miller v. Commonwealth*, 391 S.W.3d 801, 807 (Ky. 2013) (“[T]his Court has stated [in *Conrad*] unequivocally that *revocation* must occur prior to the expiration . . . of probation.” (citations and internal quotations omitted)).

The Supreme Court also dispelled concerns that the rule would provide a windfall for probationers found to be in violation near the end of the probationary period. *Id.* at 316. Specifically, the court opined that

[a] probationer who commits crimes while on probation can of course still be charged with and convicted of those crimes. In fact, any felony committed while on probation could qualify the probationer as a persistent felony offender, *see* KRS 532.080(2)(c)(2), which, needless to say, is a strong disincentive. It is simply not the case that probationers will go on crime sprees in the waning hours of their probation; they are still subject to criminal prosecution, just like anyone else.

*Id.*

Tapp’s probation revocation hearing was held, and his probation revoked, after his probation was discharged pursuant to KRS 533.020(4). Although inconvenient, it was not impossible for a hearing to be held prior to February 2, 2013,<sup>3</sup> and there is no indication that Tapp caused the delay. Further, we find no support for the proposition that a warrant remains pending after execution.

Therefore, because there was no pending warrant, and his probation had not been

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<sup>3</sup> The warrant was executed on Thursday, January 31, 2013, and Tapp’s probation was discharged on Saturday, February 2, 2013.

previously revoked, his probation was discharged on February 2, 2013, and the circuit court lost jurisdiction.

For the foregoing reasons the circuit court's order revoking Tapp's probation is vacated.

TAYLOR, JUDGE, CONCURS.

VANMETER, JUDGE, DISSENTS.

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