

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-000054-MR

GARRY LEE WALTON

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JUDITH E. MCDONALD-BURKMAN, JUDGE
ACTION NOS. 00-CR-000178 AND 04-CR-002622

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

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

TAYLOR, JUDGE: Garry Lee Walton¹ brings this *pro se* appeal from November 14, 2013, Orders of the Jefferson Circuit Court denying his motions for credit upon his sentences of imprisonment for time spent on probation. We affirm.

¹ Garry Lee Walton identified himself as “Gary Lee Walton” in his Notice of Appeal. However, the record indicates his name is actually “Garry,” and we assume that Garry made a typographical error in the Notice of Appeal.

On January 25, 2000, Walton was indicted by a Jefferson County Grand Jury upon one count each of receiving stolen property over \$300, theft by unlawful taking under \$300, giving a peace officer a false name, escape in the third degree, and persistent felony offender in the second degree (Action No. 00-CR-000178). Pursuant to a plea agreement with the Commonwealth, Walton pleaded guilty to the indicted offenses. By judgment entered April 2, 2003, Walton was sentenced to a total of ten-years' imprisonment probated for a period of five years.

Subsequently, Walton violated his probation by failing to report to his probation officer. The Commonwealth filed a motion to revoke probation, and the circuit court held a hearing thereupon. By order entered June 17, 2004, the circuit court denied the motion to revoke probation but imposed 365 days of home incarceration.²

In the June 17, 2004, order, Walton was directed to report to his home incarceration officer; however, Walton did not report as directed and efforts by the officer to locate Walton were unsuccessful. Consequently, the Commonwealth filed a second motion to revoke Walton's probation. By order entered November 9, 2004, the circuit court revoked Walton's probation and directed that Walton serve his ten-year sentence of imprisonment.

Walton was also indicted (Action No. 04-CR-002622) upon one count of escape in the second degree arising from Walton's absconding probation in

² In granting probation, the circuit court particularly considered that Walton suffered from congestive heart failure and dilated cardiomyopathy, a heart condition that caused weakness of his heart muscle.

Action No. 00-CR-000178. By judgment entered November 23, 2004, Walton was sentenced upon the escape offense to three-years' imprisonment to "run consecutive to any sentence in 00-CR-000178."

Walton then filed motions for shock probation in both Action Nos. 00-CR-000178 and 04-CR-002622. By orders entered March 16, 2005, the circuit court granted Walton's motions for shock probation and probated his sentences of imprisonment in both actions for a period of five years. The circuit court also placed Walton on home incarceration for 120 days.

On May 30, 2005, a home incarceration officer made a routine visit to Walton's residence and discovered Walton was outside his home in the yard. It is a violation of the terms of his probation for Walton to be physically outside his residence. So, the officer arrested Walton. The record is unclear, but Walton was apparently again released to home incarceration.

Then, from September 5, 2005, to November 4, 2005, Walton failed to report to his home incarceration officer, failed to complete substance abuse treatment, and absconded probation supervision. As a result, on November 16, 2005, the Commonwealth filed motions to revoke Walton's probation in Action Nos. 00-CR-000178 and 04-CR-002622. On November 10, 2005, the circuit court found probable cause to issue arrest warrants for probation violations in both Action Nos. 00-CR-000178 and 04-CR-002622. However, these warrants were not executed and served upon Walton until January 23, 2013, when Walton was arrested at a medical facility. The circuit court conducted a hearing on the

Commonwealth's motions to revoke probation. By orders entered November 14, 2013, the circuit court revoked Walton's probation in Action Nos. 00-CR-000178 and 04-CR-002622 and directed that Walton serve his underlying sentences of imprisonment.³

On November 21, 2013, in Action Nos. 00-CR-000178 and 04-CR-002622, Walton filed motions seeking credit for some 2,893 days spent on probation, and arguing that the circuit court lacked jurisdiction to revoke his probation. By orders entered November 14, 2013, the circuit court denied the motions. This appeal follows.

Walton contends that the circuit court lost jurisdiction to revoke his probation in Action Nos. 00-CR-000178 and 04-CR-002622. Particularly, Walton points out that in both actions his sentences of imprisonment were probated for five years by order entered March 16, 2005, and that his probation was not revoked until some eight years later by orders entered February 15, 2013. Walton argues that the circuit court only possesses jurisdiction to revoke probation within the probationary term, which was five years. According to Walton, his term of probation started on March 16, 2005, and ended on March 16, 2010, some three years before the circuit court revoked his probation.

It is true that a period of probation may generally not exceed five years and that the circuit court only possesses jurisdiction to revoke probation prior

³ In Action No. 00-CR-000178 Walton was sentenced to ten-years' imprisonment, and in Action No. 04-CR-002622, Walton was sentenced to three-years' imprisonment to be served consecutively with the ten-year sentence in Action No. 00-CR-000178, for a total of thirteen-years' imprisonment.

to expiration of the probationary period. Kentucky Revised Statutes (KRS) 533.020; *Conrad v. Evridge*, 315 S.W.3d 313 (Ky. 2010). However, the probationary period may be “tolled” if an active arrest warrant has been issued against the probationer or if his probation has been revoked. *Whitcomb v. Com.*, 424 S.W.3d 417 (Ky. 2014). Succinctly stated, “the presence of either an active warrant or the previous revocation of one’s probation will foreclose the probationer from being discharged and the period of probation will remain open.” *Whitcomb*, 424 S.W.3d at 419.

In this case, the record reveals that Walton’s sentences of imprisonment were probated on March 16, 2005, in both actions. Due to alleged probation violations, the circuit court issued warrants for Walton’s arrest on November 10, 2005. The issuance of these active warrants effectively tolled Walton’s probationary period. *See Whitcomb*, 424 S.W.3d 417. The warrants were executed and served on Walton on January 23, 2013, and Walton’s probation in both actions was revoked by order entered November 14, 2013, well within the five-year probationary term. Consequently, we believe that Walton’s probation was timely revoked within the probationary term and that the circuit court possessed jurisdiction to do so.

Walton next argues that he is entitled to 2,893 days credit upon his sentences of imprisonment for time spent on probation. In support of his argument, Walton cites this Court to *Commonwealth ex rel. Conway v. Thompson*, 300 S.W.3d 152 (Ky. 2010) and to “H.B. 372.” Walton’s Brief at 3.

House Bill 372 is codified as KRS 439.344. KRS 439.344 deals with parole and credit entitled to a parolee upon his sentence of imprisonment. It has no application to probation or credit due a probationer. Likewise, *Thompson*, 300 S.W.3d 152 deals with KRS 439.344 and time credit due a parolee. Walton has failed to cite this Court to any authority entitling him to 2,893 days of credit, and we are aware of none. Hence, we conclude that the circuit court did not err by denying Walton 2,893 days of credit upon his sentences of imprisonment.

For the foregoing reasons, the Orders of the Jefferson Circuit Court are affirmed.

ALL CONCUR.

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