

MODIFIED: SEPTEMBER 11, 2009

RENDERED: JUNE 25, 2009

TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

2008-SC-000429-MR

DATE 9/11/09 Kelly Klauer D.C.

DAYRON CASTELLANOS HIDALGO,  
A/K/A DAYRON CASTELLANOS,  
REAL PARTY IN INTEREST

APPELLANT

ON APPEAL FROM COURT OF APPEALS

V.

NO. 2008-CA-000640-OA

JEFFERSON CIRCUIT COURT NO. 07-CR-002194

COMMONWEALTH OF KENTUCKY, ET AL

APPELLEES

AND

2008-SC-000518-MR

HON. A.C. MCCAY CHAUVIN, JUDGE  
JEFFERSON CIRCUIT COURT

CROSS-APPELLANT

ON APPEAL FROM COURT OF APPEALS

V.

NO. 2008-CA-000640-OA

JEFFERSON CIRCUIT COURT NO. 07-CR-002194

COMMONWEALTH OF KENTUCKY, ET AL

CROSS-APPELLEES

**OPINION OF THE COURT BY JUSTICE CUNNINGHAM**

**AFFIRMING**

On June 22, 2007, Appellant, Dayron Castellanos Hidalgo, a/k/a Dayron Castellanos, and a co-defendant robbed a Cash Express business using a BB gun. Appellant was subsequently indicted on one count of robbery in the first

degree. During plea negotiations, the Commonwealth offered to amend the charge to robbery in the second degree if Appellant would refrain from seeking probation or shock probation. At sentencing on January 7, 2008, Appellant supplemented the pre-sentence investigative report with statements regarding his good character, even though he was not technically asking for probation. The Commonwealth objected and the Jefferson Circuit Court denied probation. However, the court stated that it would consider shock probation if it had authority to do so *sua sponte*. The court set a status/scheduling hearing in sixty days, at which time it would let the parties know if shock probation would be considered and, if so, the date of the shock probation hearing. The Commonwealth objected and moved to set aside the plea and take the case to trial.

At the March 10, 2008 status hearing, the circuit court, on its own motion, scheduled a shock probation hearing for April 23, 2008. The Commonwealth objected and sought a writ of prohibition from the Court of Appeals. The Court of Appeals granted the writ on the basis that the trial court was acting outside its jurisdiction. Appellant then appealed that decision to this Court, and the Hon. A.C. McCay Chauvin filed a cross-appeal.

The sole issue on appeal is the authority of the circuit court to *sua sponte* conduct a hearing on shock probation. For the following reasons, we affirm the decision of the Court of Appeals.

The Court of Appeals has broad discretion in the issuance of writs of

prohibition, and each case must be considered on its own merits. Chamblee v. Rose, 249 S.W.2d 775, 776 (Ky. 1952). Because writs interfere with the proceedings of a trial court and the efficient dispatch of our appellate duties, the courts of this Commonwealth have formulated a rule governing the discretionary choice between issuing a writ and relegating a petitioner to the right to appeal. Hoskins v. Maricle, 150 S.W.3d 1 (Ky. 2004). This Court has consistently held that a writ of prohibition is appropriate in two circumstances: 1) when the lower court is acting without or beyond its jurisdiction and there is no adequate remedy through an application to an intermediate court; or 2) when the lower court is acting erroneously within its jurisdiction, and there exists no adequate remedy by appeal or otherwise and great injustice and irreparable injury would result. Id. at 10. This case is an example of the lower court acting beyond its jurisdiction.

The proper standard of review of a decision with respect to a writ of prohibition depends on the class of writ case. Grange Mut. Ins. Co. v. Trude, 151 S.W.3d 803, 810 (Ky. 2004). De novo review is generally the proper standard where the lower court is alleged to be acting outside its jurisdiction, because jurisdiction is generally only a question of law. Id. Thus, we review the granting of the writ de novo, giving no deference to the judgment below. Id.

“Shock probation” is purely a creature of statute. KRS 439.265(1) provides in relevant part:

Subject to the provisions of KRS Chapter 439 and Chapters 500 to 534, any Circuit Court may, *upon*

*motion of the defendant* made not earlier than thirty (30) days nor later than one hundred eighty (180) days after the defendant has been incarcerated in a county jail following his conviction and sentencing pending delivery to the institution to which he has been sentenced, or delivered to the keeper of the institution to which he has been sentenced, suspend the further execution of the sentence and place the defendant on probation upon terms the court determines. Time spent on any form of release following conviction shall not count toward time required under this section. (Emphasis added.)

The plain language of KRS 439.265(1) requires the defendant to make a motion for shock probation. Appellant's reliance on 439.265(2) is also misplaced. KRS 439.265(1) provides the framework for the circuit court to acquire jurisdiction to consider shock probation. Subsection (2) of that statute is concerned only with the defendant's right to a hearing in response to motions "filed in accordance with subsection (1) of this section." KRS 439.265(2). "This statute only *establishes a trial court's jurisdiction* after the passage of 30 days imprisonment *upon conviction and motion of the defendant.*" Commonwealth v. Gross, 936 S.W.2d 85, 87 (Ky. 1996) (emphasis added). Because Appellant did not file a motion pursuant to KRS 439.265, and indeed could not as part of his plea agreement, the circuit court lacked jurisdiction to order a hearing or consider shock probation. A writ of prohibition, therefore, "is appropriate . . . to prevent [the] lower court from exceeding the lawful power or authority with which it is invested or from assuming some power not authorized by law . . . ; as for example, when the court proceeds contrary to the

dictates of a relevant statute.” Corns v. Transportation Cabinet, Dept. of Highways, Commonwealth of Ky, 814 S.W.2d 574, 578 (Ky. 1991).

The trial court had the option of accepting the plea agreement or rejecting it. RCr 8.10. By accepting the agreement, the court cannot then circumvent its terms by its own actions. Also, we recognize in this decision that “shock probation” is procedurally much different than outright probation. The latter requires no overt act by the defendant, but must be considered by the court in all eligible cases, regardless of what the Commonwealth agrees to recommend. KRS 533.010(2). The court may grant outright probation against the recommendation of the Commonwealth’s Attorney in the plea agreement. In such a case, it neither violates the plea agreement nor is acting outside its jurisdiction.

Based upon all of the foregoing, the order of the Court of Appeals granting the writ of prohibition is hereby affirmed.

All sitting. All concur.

COUNSEL FOR DAYRON CASTELLANOS HIDALGO:

Paul S. Gold  
701 West Jefferson Street  
Louisville, KY 40202

COUNSEL FOR HON. A.C. MCCAY CHAUVIN:

Max Harding Comley  
Stewart Christopher Burch  
Logan & Gaines, PLLC  
114 W. Clinton Street  
Frankfort, KY 40601

COUNSEL FOR COMMONWEALTH OF KENTUCKY:

Jeanne Deborah Anderson  
Office of the Attorney General  
Office of Criminal Appeals  
1024 Capital Center Drive  
Frankfort, KY 40601-8204

Teresa Ann Young  
Assistant Commonwealth's Attorney  
514 West Liberty Street  
Louisville, KY 40202

# Supreme Court of Kentucky

2008-SC-000429-MR

DAYRON CASTELLANOS HIDALGO,  
A/K/A DAYRON CASTELLANOS,  
REAL PARTY IN INTEREST

APPELLANT

V.  
ON APPEAL FROM COURT OF APPEALS  
NO. 2008-CA-000640-OA  
JEFFERSON CIRCUIT COURT NO. 07-CR-002194

COMMONWEALTH OF KENTUCKY, ET AL

APPELLEES

AND

2008-SC-000518-MR

HON. A.C. MCCAY CHAUVIN, JUDGE  
JEFFERSON CIRCUIT COURT

CROSS-APPELLANT

V.  
ON APPEAL FROM COURT OF APPEALS  
NO. 2008-CA-000640-OA  
JEFFERSON CIRCUIT COURT NO. 07-CR-002194

COMMONWEALTH OF KENTUCKY, ET AL

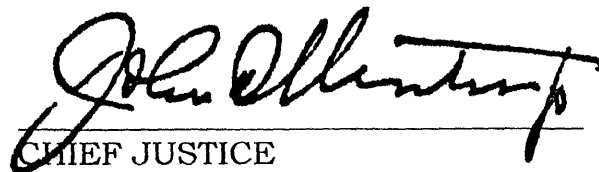
CROSS-APPELLEES

## **ORDER OF CORRECTION**

On the Court's own motion, the Opinion of the Court by Justice  
Cunningham, rendered June 25, 2009, is hereby modified by substituting  
pages 1 and 3 of the opinion as attached hereto, in lieu of pages 1 and 3 of the

opinion as originally rendered. Said modification does not affect the holding.

Entered: September 11, 2009.

  
CHIEF JUSTICE