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Supreme Court of Kentucky

2022-SC-0245-DG
2022-SC-0414-DG

COMMONWEALTH OF KENTUCKY — APPELLANT/CROSS-APPELLEE

ON REVIEW FROM COURT OF APPEALS
NO. 2021-CA-0621
V. CLINTON CIRCUIT COURT
NOS. 08-CR-00078 & 08-CR-00079

DANIEL MORELAND — APPELLEE/CROSS-APPELLANT

OPINION OF THE COURT BY JUSTICE CONLEY

AFFIRMING IN PART & REVERSING IN PART

This case comes before the Court for review from the Court of Appeals' opinion that held the sentence that Daniel Moreland, Appellee/Cross-Appellant, negotiated upon a plea of guilty and instituted by the trial court was illegal; and therefore, his probation revocation was also illegal. The Commonwealth sought discretionary review, which we granted. After review of the record and applicable law, we affirm the Court of Appeals insofar as the simultaneous imposition of ten years' incarceration and ten years' probation subsequent to incarceration is illegal. We reverse, however, as to the Court of Appeals' conclusion that the illegal probation mandates release of Moreland from custody. His underlying conviction and sentence of imprisonment being

otherwise lawful, the remedy for an illegal order of probation is to remand for resentencing.

I. Facts and Procedural Posture

In 2008, Moreland was charged in two separate indictments with multiple counts of sexual abuse in the first degree, unlawful transaction with a minor, and rape in the first degree. Moreland and the Commonwealth agreed to a plea deal. As to the first indictment, he would plead guilty to two counts of sexual abuse in the first degree and agreed to a ten-year prison term for each count to be served consecutively for a total of twenty years. In the second indictment, he agreed to plead guilty to one count of sexual abuse in the first degree and agreed to a ten-year prison term. The two sentences for each indictment would be served concurrently, for a total of twenty years, but the sentence of twenty years would be split—ten years in prison and ten years' probation after conclusion of the prison term. This was the language used in the Commonwealth's Offer on Plea of Guilty: "The two sentences are to run concurrently for a total of twenty (20) years, serve a total of ten (10) years, balance probated." The trial court's own handwritten notation in the Judgment and Sentence on a Plea of Guilty reads: "In 08-CR-0078 Defendant receive [sic] a sentence of 10 years on each charge to run consecutively for a total of 20 years. In 08-CR-0079 Defendant shall receive sentence of 10 years. The 20 year sentence and the 10 year sentence are to run concurrently for total sentence of 20 years." Further down the page, again in a handwritten notation, the trial court wrote "Defendant shall serve 10 years with the balance of the 20 years to

be probated with supervision for 10 years." Moreland received this sentence on April 19, 2010. An additional Order of Probation, substantively restating the above sentence, was entered on April 22, 2010.

Moreland was released from prison in 2018, after serving his ten-year term. He entered into supervised probation according to his plea deal. On March 15, 2021, the Commonwealth sought to revoke his probation. Moreland objected, arguing the sentence for probation after serving his prison term was illegal. The trial court held a hearing on April 8, 2021. The trial court ruled that Moreland had been sentenced to twenty years in prison and had failed to file a motion to alter, amend, or vacate the sentence. Thus, the trial court determined it could not alter the sentence and revoked his probation based on the testimony of Moreland's probation officer. Moreland appealed.

The Court of Appeals considered "whether the sentencing scheme created by [the] Kentucky General Assembly allows for a period of probation after service of time in prison. We conclude that it does not." Relying on various provisions of KRS Chapter 533, the Court of Appeals determined there was no provision in the statutes for the kind of split sentence that Moreland and the Commonwealth agreed upon. It further noted, citing *Phon v. Commonwealth*, 545 S.W.3d 284, 302 (Ky. 2018), that an illegal sentence is an abuse of discretion; can be set aside by an appellate court even when not presented to the trial court; and that the defendant's consent to an illegal sentence is irrelevant. In concluding, however, the Court of Appeals held

> [t]hough Appellant was sentenced to 20 years in prison, he was ordered to serve only 10 years of the sentence. We may not now

> reach back through the corridor of time and impose a sentence in excess of the term of imprisonment ordered on April 19, 2010 – a term which Appellant has already completed.

It therefore determined "there is no lawful basis for remanding the matter for resentencing after Appellant's term of imprisonment was completed."

The Commonwealth filed a motion for rehearing and was denied. It filed a motion for discretionary review before this Court, which was granted. The Commonwealth now argues that split sentences like the kind at issue here have been tolerated by the courts of Kentucky for years, though it is obviously unable to cite a published case directly on-point approving the practice. The Commonwealth's chief authority for upholding the sentence here is *Commonwealth v. Griffin*, 942 S.W.2d 289 (Ky. 1997). In that case, we upheld a circuit court's particular case jurisdiction to extend probation already imposed beyond the five-year limitation contained in KRS 533.020(4) when requested by the defendant to allow him time to complete restitution. *Id.* at 291. We held, when

> the period of probation is extended beyond the statutory five year period at the request of the defendant in order to avoid a more severe sanction for violating the original terms of probation, a statutory interpretation which would disallow such an extension would be *contrary* to the defendant's interests rather than protective of them.

Id. Although the *Griffin* decision split the Court four to three, the General Assembly would later amend the statute and explicitly adopt *Griffin*'s holding. That statute now reads, "The period of probation . . . with extensions thereof, shall not exceed five (5) years, *or the time necessary to complete restitution,*

whichever is longer, upon conviction of a felony . . . .” KRS 533.020(4) (emphasis added).

Moreland’s arguments before this Court can be briefly summarized as the sentence is illegal because there is no statutory language providing for split sentences. Moreover, there is clear statutory language that effectively bars the sentence as it occurred in his case. This will be discussed more in-depth below.

II. Analysis

“[G]ranting and revoking probation is not an inherent power in the courts, but is a power vested in the courts by statute.” *Conrad v. Evridge*, 315 S.W.3d 313, 316 (Ky. 2010). “[G]iven that probation is a statutory creature, this Court is bound by the plain meaning of the probation statutes.” *Id.* at 317. In other words, as a statutory grant of authority, the judiciary is prohibited from exercising that authority in a manner not set forth within the enabling statute.

The General Assembly has declared when a person is convicted of or pleads guilty to an offense, and “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.” KRS 533.020(1). When the offense is a felony, the period of probation “shall not exceed five (5) years, or the time necessary to complete restitution, whichever is longer . . . .” KRS 533.020(4). “A period of probation . . . commences on the day it is imposed.” KRS 533.040(1). “A sentence of probation . . . shall run concurrently with any federal or state jail, prison, or parole term for another offense to which the defendant is or becomes subject during the period, unless

the sentence of probation or conditional discharge is revoked." KRS 533.040(3). As we have explained before, "[w]ith probation, the trial court (judicial branch) first decides on a sentence of imprisonment, but then imposes conditions for release and supervision—in lieu of implementation of incarceration—at sentencing. Probation is the suspension of the imposition of a sentence of incarceration." *Jones v. Commonwealth*, 319 S.W.3d 295, 297 (Ky. 2010).

On its face then, the probation Moreland received violated the statute in that it was for ten years, contrary to the five-year limitation declared in KRS 533.020(4).[1] The trial court also violated the statute by supposing to begin the probationary period ten years in the future, consecutive to a term of imprisonment in state prison for another offense that Moreland had already been sentenced to serve. But the Commonwealth essentially argues that Moreland's sentence was lawful because the trial court probated ten years of an otherwise lawful twenty-year term of imprisonment. That is not an entirely uncompelling argument. But the statutory language is unambiguous, that probation is only available "[w]hen a person . . . who has entered a plea of guilty to an offense *is not sentenced to imprisonment* . . . ." KRS 533.020(1) (emphasis added). Moreland was sentenced to imprisonment for twenty years and ordered to serve ten years of it. Therefore, probation was not available to him.

In the case of *Jones v. Commonwealth*, the Court of Appeals reached the same conclusion that the language "is not sentenced to imprisonment"

[1] Moreland was not ordered to pay any restitution.

precluded a trial court from considering sentencing to "probation with an alternative sentence" under KRS 533.020(2) because the defendant had already been sentenced to one year confinement in prison. 839 S.W.2d 569, 570-71 (Ky. App. 1992). This does, however, create some discordance as to the exact nature of probation, but it is easily resolved.

Traditionally, "probation standing alone does not function as a sentence because it provides no authorized penalty . . . ." *Commonwealth v. Tiryung*, 709 S.W.2d 454, 455 (Ky. 1986). For example, Moreland pled guilty to three counts of sexual abuse in the first degree, with the victim being under twelve years of age. Therefore, he committed three Class C felonies, and the General Assembly has authorized the penalty of "not less than five (5) years nor more than ten (10) years[,]" for all Class C felonies. KRS 532.060(2)(c). Probation by itself is not an authorized penalty under the statute. Thus, a "sentence of imprisonment" is required before probation can be considered because probation is "in lieu of implementation of incarceration . . . ." *Jones*, 319 S.W.3d at 297. And incarceration upon conviction of a crime cannot occur without a sentence; that is elementary. Functionally then, "is not sentenced to imprisonment" means when implementation of incarceration is not ordered. And since implementation of incarceration was ordered in Moreland's case, the sentence purporting to probate ten years of that prison sentence is unlawful. KRS 533.020(1). The statutory scheme creates an "either/or" option, not a "both/and" option.

Our ruling in *Commonwealth v. Jennings*, 613 S.W.3d 14 (Ky. 2020), does not control here. There, we held a probationer's challenge to a condition of probation ought to have been brought at the time probation was imposed. *Id.* at 17. Acceptance of an improper condition of probation is tantamount to waiver. *Id.* Moreland is not challenging any conditions of probation. He is challenging the imposition of probation in and of itself. And since that probation was imposed in conjunction with a term of imprisonment—a split sentence—we believe the rule that an illegal sentence can be challenged at any time, with or without preservation is the operable rule. *McClanahan v. Commonwealth*, 308 S.W.3d 694, 700 (Ky. 2010). Additionally, requiring a probationer to challenge a condition of probation at the time it is imposed is consonant with the applicable statute, since the General Assembly specifically allows trial courts to impose "any other reasonable condition" in addition to those listed in the statute. KRS 533.030(2).

The Commonwealth's arguments that there is no language in the statutes prohibiting split sentences, and that such sentences can be beneficial to both the Commonwealth and defendants are unavailing. That is not how law works. "We are not at liberty to add or subtract from the legislative enactment or discover meanings not reasonably ascertainable from the language used." *Richardson v. Commonwealth*, 645 S.W.3d 425, 433 (Ky. 2022) (quoting *Commonwealth v. Harrelson*, 14 S.W.3d 541, 546 (Ky. 2000)). And we have rejected the theory of consensual statutory nullification already. "Whether recommended by an errant jury or by the parties through a plea agreement, a

sentence that is outside the limits established by the statutes is still an illegal sentence." *McClanhan,* 308 S.W.3d at 701. "Under our Constitution . . . [i]t is error for a trial jury to disregard the sentencing limits established by the legislature, and no less erroneous for a trial judge to do so by the acceptance of a plea agreement that disregards those statutes." *Id.* The force of *McClanhan*'s holding is not lessened by the fact that it was dealing with a hammer clause on a term of imprisonment that imposed a sentence of imprisonment beyond the statutory limits, whereas here we only have an illegal probation. It applies equally since probation is a statutory grant of authority to the judiciary and probation is merely "the suspension of the imposition of a sentence of incarceration." *Jones*, 319 S.W.3d at 297.

Finally, we believe *Griffin* is inapposite to the case at hand. As noted earlier, its facts and procedural posture are not similar to Moreland's case. Moreover, the General Assembly has adopted and codified *Griffin*'s holding. Codification of *Griffin*'s holding was an unmistakable act "that the law-making power concurred with this court, and approved the construction given by it to the statute in question. Such being the case, we do not feel at liberty to reopen the question for discussion." *Bradley's Ex'rs v. Lyles*, 7 Ky.Op. 462, 463 (Ky. 1874). In other words, the General Assembly having embraced the judicial construction of the statute by specifically codifying the holding of *Griffin*, we will not, more than twenty-five years later, declare *Griffin* to have held something beyond what its facts and language clearly portend, and was understood by the legislature.

Having determined the ten-year probation was illegal, the question becomes, what is the remedy. The Court of Appeals was under the impression that since Moreland was only ordered to serve ten years in prison, and that being accomplished, there was no remedy except to declare the probation revocation unlawful. The necessary effect being that Moreland would be released from custody. We do not agree.

> This Court has taken the position that, although probation of a sentence may be a benefit conferred upon a convicted criminal for an invalid reason, the order of probation is separable from the conviction itself and the judgment entered thereon. The fact that the probationary order is void does not render the conviction and the judgment void.

Weigand v. Commonwealth, 397 S.W.2d 780, 781 (Ky. 1965). In a word, "[t]he probation itself being a nullity there is nothing left for appellant to do but serve his sentences." *Id.*[2] In the case of *Bray v. Weaver*, the Appellant sought *habeas corpus* relief after he was imprisoned to serve thirty days in the county jail. 453 S.W.2d 7, 7 (Ky. 1970). His imprisonment was originally adjudicated in July of 1969 but was suspended, which the Court understood as probation. *Id.* at 8. When the Appellant was arrested again in March of 1970, he was ordered to serve out his suspended sentence. *Id.* at 7. The Court considered "whether the 'suspension' of the 1969 jail sentence was valid in the first place. Our conclusions is that it was not, and that Bray is now properly in custody for the

[2] This conclusion rejects Moreland's argument that the case should be remanded to the trial court for proper findings for probation revocation pursuant to KRS 439.3106. Having successfully argued he should never have been on probation in the first place, his re-incarceration, although done for the wrong reasons, is hardly a palpable error demanding remand.

purpose of serving that sentence." *Id.* The Court concluded that "so much of the 1969 judgment as purported to 'suspend' the jail sentence was unauthorized surplusage[;]" therefore, execution of the original sentence was appropriate. *Id.* at 8 (citing *Weigand, supra*). Indeed, the Supreme Court of the United States has also reached a similar conclusion that an illegal order of suspended sentence "is a mere nullity without force or effect, as though no order at all had been made . . . ." *Miller v. Aderhold*, 288 U.S. 206, 211 (1933). Therefore, the portion of the order of the trial court purporting to probate ten years of Moreland's sentence was void and of no effect.

In such cases, the law has long held that the custodial authorities of the executive branch should never have released the prisoner on the basis of a void order in the first place. Once the custodial authority "receives into his custody a prisoner under a final order of court, any order or direction of said court or any other court, or of any officer, other than the Governor, attempting to suspend the further execution of that judgment, being void and of no effect, should not be obeyed by him." *Brabandt v. Commonwealth*, 162 S.W. 786, 787 (Ky. 1914). "In short, [when] the court's order [of conditional discharge] was a mere nullity which had no legal efficacy . . . the public officials holding appellee in custody should not have honored it and released him." *Commonwealth v. Cornelius*, 606 S.W.2d 172, 173-74 (Ky. App. 1980). By the same reasoning, the attempt to probate ten years of Moreland's twenty-year prison sentence was unlawful and void. The Department of Corrections ought never to have released him except pursuant to applicable statues and regulations governing

sentencing credits, serve out, and parole eligibility for those convicted of Class C felony sexual offenses.

But, shorn of the probation order, there is still the order of the trial court that Moreland should only serve ten years in prison. What to make of this? It is difficult to characterize such an order as, substantively, it amounts to an order of probation; or it may be an order of parole, or even a commutation of the sentence. The amorphous nature of the order is reason enough alone to not give it efficacy. But more compelling is the fact that no matter how it is characterized, it impermissibly encroached upon the executive power. KRS 533.020(1) and KRS 533.040(1) together do not allow probation to be ordered at a set date in the future, after a sentence of incarceration has been ordered and a portion of it served. An order purporting to suspend "the further execution of the sentence imposed was not merely erroneous; it was an act beyond and without the jurisdiction of the court, an attempted exercise of a power, not judicial, but wholly executive in its nature . . . ." *Brabandt*, 162 S.W. at 787. "The power to grant parole is a purely executive function." *Jones*, 319 S.W.3d at 298 (quoting *Prater v. Commonwealth*, 82 S.W.3d 898, 902 (Ky. 2002)). And the power to commute a sentence is vested in the governor. Ky. Const. § 77. For these reasons, the order which purported to release Moreland after ten years of a twenty-year sentence was also void.

Moreland might complain that such an outcome deprives him the benefit of his plea agreement. But we have obviously rejected the Commonwealth's own argument that it was being deprived of its bargained-for benefit. Moreland

cannot ask this Court to ensure that he have a lawful sentence imposed upon him, and then complain when the lawful sentence is imposed. There is no argument that twenty years' imprisonment for three counts of Class C felony sexual abuse in the first degree is unlawful.

Given that this is an issue of first impression, the law is not clear as to the proper remedy. The *McClanahan* court did reverse the illegal sentence, remand, and allow the defendant the opportunity to withdraw his guilty pleas. 308 S.W.3d at 702. But that was only because the defendant had specifically sought to withdraw his guilty pleas at the trial court once the illegal hammer clauses were to be enforced against him. *Id.* at 697 ("Appellant moved to withdraw his guilty pleas . . . ."). Moreland made no such motion in the trial court below and he has not argued on appeal that his guilty plea is invalid. In *Phon v. Commonwealth*, the defendant pled guilty and went to the jury only upon sentencing. 545 S.W.3d 284, 289 (Ky. 2018). Phon, a youthful offender, was sentenced to life without parole contrary to statute. *Id.* at 301. Although we remanded to the trial court in that case, we specifically ordered the trial court to impose the only available sentence that was not illegal: life without parole for twenty-five years. *Id.* at 309. There was no suggestion in *Phon* that the illegal sentence per se tainted his guilty plea. Phon only sought "a new sentencing hearing . . . ." *Id.* at 290. We also generally hold that when trial courts fail to comply with statutory procedures regarding sentencing, the proper remedy is remand for resentencing. *Arnold v. Commonwealth*, 573 S.W.2d 344, 346 (Ky. 1978).

Given that we have held this issue is one of illegal sentencing and is a failure to follow the statutory parameters for when probation is available, we hold the remedy in this case is remand for resentencing. This case is more analogous to *Phon* than it is to *McClanahan*. This solution also obviates any claim by either Moreland or the Commonwealth that they have been deprived the benefit of their original bargain because both parties, along with the trial court, may now seek a new bargain on how Moreland shall serve his sentence; including, if agreed to by the parties, a new period of probation in conformity with the statute.

III. Conclusion

Split sentences are not authorized by the applicable statutes governing probation. Probation is the suspension of a sentence of imprisonment, and once a convicted criminal has been ordered to serve any portion of that sentence of imprisonment, a trial court may not simultaneously probate the remainder of that sentence. Probation is only available when the defendant "is not sentenced to imprisonment . . . ." KRS 533.020(1). This ruling does not apply in cases of shock probation, KRS 439.265, or pursuant to the trial court's retention of jurisdiction over a criminal case for ten days after entry of final judgment, allowing amendment of that judgment. CR 59.05. An illegal order of probation is void and of no effect. The order that Moreland should be released after serving ten years of his twenty-year sentence assumed a power purely executive in nature, whether considered as an order of probation,

parole, or commutation of sentence. It is equally void. Moreland shall remain in custody, and we remand to the Clinton Circuit Court for resentencing.

All sitting. All concur.

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