

RENDERED: December 3, 2004; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001638-MR

KENNETH DAVID

APPELLANT

v. APPEAL FROM BOONE CIRCUIT COURT
HONORABLE JOSEPH F. BAMBERGER, JUDGE
ACTION NO. 01-CR-00030

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * * *

BEFORE: BARBER, KNOPF, AND TACKETT, JUDGES.

TACKETT, JUDGE: Kenneth David appeals from the order of the Boone Circuit Court revoking his conditional discharge for several counts of theft relating to dishonored checks written to the Kentucky Revenue Cabinet for taxes owed. David agreed to plead guilty to eight misdemeanor counts, for which he received a sentence of twelve months conditionally discharged for two years. A month after the expiration of the two-year period, the Commonwealth sought revocation of his conditional discharge for failure to pay restitution. David argues on appeal that the

court lacked jurisdiction to revoke his conditional discharge because the two-year period expired before the Commonwealth sought revocation. We agree and reverse.

The final judgment and sentence contains the following language: "Upon completion of the above-described conditionally discharged period, the Defendant will be finally discharged provided he has complied with the above conditions, provided no warrant is pending against him, and provided his conditional discharge has not been revoked." The conditions referred to included payment of restitution at the rate of not less than \$1,500 per month for thirty-six months. Before the two-year period expired, David's business, a restaurant in the Northern Kentucky-Greater Cincinnati Airport, was forced to close as a result of reduced air traffic in the wake of the terrorist attacks of September 11, 2001. The period expired on April 11, 2003, and the motion to revoke was not filed until April 29, 2003. The court held that it had continuing jurisdiction over David because Kentucky Revised Statute 533.020(4) allows the court to extend a period of conditional discharge "at any time". This appeal followed.

This is a close case, involving two plausible interpretations of the law. The interpretation offered by David is that the conditional discharge period acts as a date before which the court must act if it intends to extend the period of

conditional discharge or revoke the conditional discharge altogether. Since the Commonwealth did not request revocation before that date, David argues, the court lost its jurisdiction to revoke his conditional discharge because the period expired with no action from the Commonwealth or court. The Commonwealth argues in response that because the agreed-upon restitution was for a period longer than the conditional discharge period, the intent of the parties to the plea bargain agreement was that the court would retain jurisdiction beyond the two-year period stated in the order. This situation is unusual and we are without guiding Kentucky precedent interpreting the statute the court relied on. That statute does say that the court may shorten or extend the period "at any time", but it does not specifically authorize a court to revoke probation or conditional discharge after the expiration of the period. In fact, the particular section the court relied on does not directly deal with revocation at all, only with extension or contraction of the period. We also note that the court would not have been able to extend the period under that statute, which limits the period of conditional discharge for a misdemeanor to two years, including any and all extensions. At the outset, the proposition that the parties had somehow agreed that the court would have jurisdiction beyond the two-year period rests on shaky ground, because it would appear that such

an agreement is contrary to the statute's plain language. Under prior law, Kentucky held to the view that probation could be revoked after the period expired if the proceedings were initiated before the date, but not after. See Gossett v. Commonwealth, Ky., 384 S.W.2d 308 (1964). Some other jurisdictions have held that a court retains jurisdiction for a reasonable time to revoke probation or conditional discharge for a violation occurring during the probation period. See generally, 13 ALR 4th 1240 §3.

For us, the deciding factor is that this situation was easily avoidable if the Commonwealth had acted in a timely fashion, or if the Commonwealth had set a review date before the expiration of the period. Due to the large amount of restitution to be paid, approximately \$35,000, it was contemplated by the parties that the restitution period would be three years, even though the order set the conditional discharge period at two years, the statutory maximum for a misdemeanor. The last payment made by David was February 8, 2002; he paid a total of \$13,500 in restitution before his business closed. We can discern no reason for the delay of over 14 months between the last payment of restitution and the Commonwealth seeking revocation of the conditional discharge. While we are reluctant to reward a wrongdoer, we also are reluctant to rescue the Commonwealth from a problem of its own making. Therefore, we

hold that the court lost jurisdiction to revoke the conditional discharge through inaction before the expiration date in the court's order. We must also note that nothing in this opinion prevents the Revenue Cabinet from seeking a civil remedy to collect the money it is owed.

For the foregoing reasons, the judgment of the Boone Circuit Court is reversed with directions to discharge David's sentence.

ALL CONCUR.

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