

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001634-MR

ARVIN HUME

APPELLANT

v. APPEAL FROM MONROE CIRCUIT COURT
HONORABLE EDDIE C. LOVELACE, JUDGE
ACTION NO. 01-CR-00028

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * * *

BEFORE: TAYLOR AND VANMETER, JUDGES; POTTER, SENIOR JUDGE.¹

VANMETER, JUDGE: Arvin Hume appeals from an order entered by the Monroe Circuit Court revoking his probation and imposing a 90-day sentence. For the following reasons, we reverse and remand.

Hume was indicted on June 28, 2001, on charges of trafficking in alcoholic beverages in a dry territory² and

¹ Senior Judge Woods Potter sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

² KRS 242.230.

trafficking in a controlled substance in or near a school.³ Pursuant to Hume's guilty plea and the Commonwealth's recommendation, the circuit court dismissed the controlled substance charge and imposed a 90-day sentence probated for two years, as well as a \$200 fine for the alcoholic beverage charge. The court's order of probation required the defendant to forfeit any rights he had regarding search and seizure and "to remain of good behavior and . . . not violate any of the laws of the United States of America, the Commonwealth of Kentucky, or any other state or City therein."

On July 19, 2003, Hume was charged with possession of alcoholic beverages in a dry territory (second offense) and unlawful transaction with a minor (third degree). Ultimately, he was convicted of illegal possession of alcohol in a dry territory on May 14, 2004, for which the jury recommended a \$250 fine. On June 9 the Commonwealth moved to revoke Hume's October 2001 probation and impose the probated sentence. After a hearing on June 23, the circuit court sustained the Commonwealth's motion.⁴ On July 13, the circuit court entered an order revoking Hume's probation and imposing the 90-day sentence. This appeal followed.

³ KRS 218A.1411.

⁴ Hume attempted to appeal from the circuit court's calendar entry with regards to this hearing, but this court dismissed the appeal because it was not from a final and appealable order. *Hume v. Commonwealth*, No. 2004-CA-001293, slip op. at 2 (Ky.App. Oct. 7, 2004).

Hume contends on appeal that although he was charged with an offense during his probationary period, the circuit court erred in revoking his probation since the Commonwealth did not move for revocation until after his probationary period ended. We agree.

As an initial matter, Hume's appellate brief discusses KRS 533.040, which is titled "[c]alculation of periods of probation and conditional discharge[.]" More specifically, Hume discusses KRS 533.040(3), which the Kentucky Supreme Court has opined "addresses the calculation of sentences and whether they are to be served concurrently or consecutively, not the jurisdiction of the trial court to revoke."⁵ As Hume has not challenged the circuit court's order with regard to whether his 90-day sentence ran concurrently or consecutively with the other sentence, KRS 533.040 is not relevant to Hume's appeal.

Instead, the relevant statute in this matter is KRS 533.020(4), which provides as follows:

The period of probation, probation with an alternative sentence, or conditional discharge shall be fixed by the court and at any time may be extended or shortened by duly entered court order. Such period, with extensions thereof, shall not exceed five (5) years, or the time necessary to complete restitution, whichever is longer, upon conviction of a felony nor two (2) years, or

⁵ *Brewer v. Commonwealth*, 922 S.W.2d 380, 382 (Ky. 1996) (discussing *Sutherland v. Commonwealth*, 910 S.W.2d 235 (Ky. 1995) and *Kiser v. Commonwealth*, 829 S.W.2d 432 (Ky.App. 1992)).

the time necessary to complete restitution, whichever is longer, upon conviction of a misdemeanor. **Upon completion of the probationary period, probation with an alternative sentence, or the period of conditional discharge, the defendant shall be deemed finally discharged, provided no warrant issued by the court is pending against him, and probation, probation with an alternative sentence, or conditional discharge has not been revoked.**

(Emphasis added). The circuit court's Order of Probation emulates this statutory language, stating as follows:

Upon completion of the period of probation the Defendant shall be discharged from the same, provided the Defendant has not violated any conditions thereof, and there are no warrants issued by the Court pending against the Defendant, and the Defendant's probationary period has not been extended or revoked. If, upon a hearing, the Defendant's probation has been revoked, this Order of Probation shall be set aside and the Defendant shall be re-sentenced, or the terms of the Order of Probation may be modified and/or the period of probation extended.

In the matter now before us, the circuit court imposed upon Hume a two-year probationary period, beginning October 25, 2001. At the end of this two year period, no warrant was pending against Hume and his probation had not been revoked. Thus, pursuant to KRS 533.020(4), he was finally discharged. Accordingly, the circuit court erred in granting the Commonwealth's motion to revoke which was filed after Hume had

already been discharged. The court in *Gossett v. Commonwealth*⁶ reached a comparable result under the predecessor statute to KRS 533.020:

It is plain from the record that during the probationary period no warrant issued by the court was pending against appellant and his probation had not been revoked. Therefore, under KRS 439.270, appellant was deemed finally discharged and was, by the force of the statute, discharged. If the court wishes to act, he must do it during the limitations of the probation period.

Additionally, this conclusion is supported by the language of KRS 533.020(1) which states that a court may revoke a defendant's sentence at any time prior to the expiration or termination of the period of probation.

The order of the Monroe Circuit Court is reversed and remanded for further proceedings consistent with this opinion.

ALL CONCUR.

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⁶ 384 S.W.2d 308, 311 (Ky. 1964).