

Commonwealth of Kentucky
Court of Appeals

NO. 2006-CA-002196-MR

PHILLIP JAMES NORTHCUTT

APPELLANT

v. APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE JULIE REINHARDT WARD, JUDGE
ACTION NO. 03-CR-00459

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING AND REMANDING

** ** *

BEFORE: HOWARD, JUDGE; GUIDUGLI AND KNOPF, SENIOR JUDGES.¹

KNOPF, SENIOR JUDGE: Phillip Northcutt appeals from a September 22, 2006 order of the Campbell Circuit Court revoking his probation and sentencing him to two years in prison. Northcutt contends that the trial court abused its discretion by basing the revocation order on an offense Northcutt committed prior to his probationary sentence.

We agree and so must reverse and remand for an order reinstating Northcutt's probation.

¹ Senior Judges Daniel T. Guidugli and William L. Knopf sitting as Special Judges by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

The pertinent facts are not in dispute. In October 2003, Northcutt pled guilty in Campbell Circuit Court to second-degree possession of a forged instrument, in violation of KRS 516.060. Pursuant to KRS 533.250, the circuit court accepted Northcutt's plea, deferred judgment, and assigned Northcutt to the pretrial diversion program for a period not to exceed three years. Some eighteen months later, in early May 2005, Northcutt was arrested in Kenton County and charged with trafficking in marijuana, over five pounds. KRS 218A.1421(4). Apparently Northcutt failed to report this arrest to the probation authorities overseeing his diversion and failed as well to report a change of address. On the basis of those reporting failures, admitted violations of Northcutt's diversion agreement, the Campbell Circuit Court revoked Northcutt's diversion and by judgment entered December 1, 2005, sentenced him to two years in prison for the forged instrument offense, but probated that sentence for five years.

Some time after March 2006, Northcutt was convicted of the Kenton County marijuana charge and was sentenced in August of that year to five years in prison. Thereupon, the Commonwealth moved for the revocation of Northcutt's Campbell County probation and alleged as grounds only the Kenton County conviction. As noted at the outset, in September 2006 the Campbell Circuit Court granted the Commonwealth's motion, revoked Northcutt's probation, and ordered him to serve his two-year forged instrument sentence. Northcutt contends that the trial court abused its discretion by revoking his probation on the basis of conduct that preexisted the December 2005 probationary sentence. We agree.

As Northcutt correctly notes, although there is no right to probation, once probation has been granted the state may not revoke it except in compliance with the state and federal constitutional due process provisions. *Gagnon v. Scarpelli*, 411 U.S. 778, 93 S.Ct. 1756, 36 L. Ed. 2d 656 (1973); *Wilfong v. Commonwealth*, 175 S.W.3d 84 (Ky.App. 2004). One of the basic requirements of due process is “notice or fair warning of what conduct might result in revocation.” *United States v. Twitty*, 44 F.3d 410, 412 (6th Cir. 1995). Because one obviously cannot be given fair warning after the fact, several courts, including the Sixth Circuit Court of Appeals, have held that probation may not be revoked consistently with due process “for conduct which occurs prior to the date on which the defendant was sentenced to probation.” *Id.* at 413. *See also State v. Gary*, 144 P.3d 634 (Kan. 2006); *Smith v. State*, 742 So. 2d 1146 (Miss. 1999); *Taylor v. Missouri State Board of Accountancy*, 880 S.W.2d 360 (Mo. App. 1994); *Bell v. State*, 656 S.W.2d 502 (Tex. App. 1982); *State v. Hale*, 400 A.2d 996 (Ver. 1979); *State v. Demchack*, 351 So.2d 1053 (Fla. App. 1977). We agree with these courts and accordingly agree with Northcutt that the trial court abused its discretion when it based its revocation order on Northcutt’s pre-sentence conduct.

The Commonwealth, apparently understanding Northcutt to contend that his probation should not have been revoked for the same behavior that led to the revocation of his diversion agreement, argues that in fact the grounds for the two revocations were distinct—Northcutt’s failures to report to his supervisor in the diversion matter and his marijuana conviction in the probation matter. Although this observation is

correct, it misses the thrust of Northcutt's appeal, which is simply that it was an abuse of discretion to revoke his probation on the basis of a condition over which, at the time his probationary sentence was entered, he had no control. *Cf. Keith v. Commonwealth*, 689 S.W.2d 613 (Ky. App. 1985) (probationer did not violate a condition of his probation requiring him commit himself to a mental hospital when he duly sought commitment but his doctor would not commit him).

In fairness to the trial court, we should note that its December 2005 probationary sentence appears to have been an attempt to be lenient with Northcutt pending the outcome of his marijuana charges. Our ruling confronts a court in those circumstances with a dilemma: either the revocation proceeding must be postponed until the pending charges are resolved, or a binding decision in the revocation proceeding must be entered without knowing whether the pending charges will stand up. At least one court has held that this dilemma justifies the sort of post hoc revocation that happened in this case. *Commonwealth v. Infante*, 888 A.2d 783 (Penn. 2005). Although we are convinced that the due process considerations underscored in *United States v. Twitty*, *supra*, require a different result, one way around the dilemma might be for the trial court to offer the defendant probation expressly conditioned on the outcome of the pending charges and for the defendant to waive any objection to revocation should the pending matter result in a conviction. Our Supreme Court has recognized a defendant's right to waive certain sentencing limitations in exchange for probation, *Commonwealth v. Griffin*, 942 S.W.2d 289 (Ky. 1997), and waiver in circumstances like those presented in this case

also seems a reasonable possibility. Be that as it may, there is no suggestion of waiver in this case, and so Northcutt may assert his due process right.

In sum, there was no evidence that Northcutt violated his probation where the conduct giving rise to his post-probation marijuana conviction had occurred prior to entry of the probationary sentence. That conduct could not violate a condition of probation that did not yet exist. It was an abuse of discretion, therefore, to revoke Northcutt's probation, and accordingly, we reverse the September 22, 2006 Order of the Campbell Circuit Court and remand for reinstatement of Northcutt's probation.

ALL CONCUR.

BRIEF FOR APPELLANT:

J. Brandon Pigg
Assistant Public Advocate
Department of Public Advocacy
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

C. David Yates
Assistant Attorney General
Frankfort, Kentucky