

Commonwealth of Kentucky
Court of Appeals

NO. 2006-CA-002249-MR

COMMONWEALTH OF KENTUCKY

APPELLANT

v. APPEAL FROM BOONE CIRCUIT COURT
HONORABLE PAUL W. ROSENBLUM, JUDGE
ACTION NO. 00-CR-00212

CHRISTOPHER COLE

APPELLEE

OPINION
REVERSING AND REMANDING

** ** *

BEFORE: MOORE, STUMBO, AND TAYLOR, JUDGES.

STUMBO, JUDGE: The Commonwealth of Kentucky appeals from an order of the Boone Circuit Court dismissing a charge of probation violation and releasing defendant, Christopher Cole, from the custody of the Boone County Jail. The order was based on the court's finding that a 2004 order of the Boone Circuit Court improperly extended Cole's probationary period. The Commonwealth argues that Cole expressly or impliedly consented to an extension of the original five-year probationary period, and that the

Boone Circuit Court erred in failing to so find. For the reasons stated below, we reverse the order on appeal and remand it for further proceedings.

On October 26, 2000, Cole entered a plea of guilty on the charge of Complicity to Commit Theft of a Controlled Substance, a Class D Felony, and was sentenced to five years in prison, to be probated for a period of five years. On October 24, 2004, a probation revocation hearing was conducted after Cole's probation officer filed an affidavit stating that Cole violated the terms of his probation by using a controlled substance (Oxycontin), failing to follow instructions, and failing to pay supervision fees. At the hearing, Cole's counsel sought to avoid Cole's return to prison to serve the original five-year sentence. Instead, counsel requested a sentence of twelve-to-eighteen months in prison, to be followed by a period of probation. On December 6, 2004, the court rendered an order sentencing Cole to twelve months in prison, and extending Cole's probation for five years. Cole was returned to prison, where he served the twelve-month sentence and was subsequently paroled in accordance with the December 6, 2004, order.

On June 19, 2006, Cole's probation officer filed an affidavit stating that Cole had again violated his probation by attempting to use a bottle of "clean" urine to avoid testing positive for drug use, and subsequently refusing to submit to a urinalysis. Cole, through counsel, filed a motion to dismiss the probation, arguing that the court lacked authority in 2004 to extend his probation beyond the original five-year term because he had never expressly consented to the extension.

On September 11, 2006, the court rendered an order dismissing the probation revocation proceeding and releasing Cole from custody. As a basis for the dismissal, the court cited *Commonwealth v. Griffin*, 942 S.W.2d 289 (Ky. 1997) for the proposition that the 2004 extension of Cole's probationary period was improper because Cole did not "expressly or otherwise consent to an extension of his probationary period." Further, it found that KRS 533.010(6) did not authorize an extension of the probationary period. The implicit conclusion was that Cole should not have been on probation in 2006 when the violation was alleged to have occurred. This appeal followed.

The Commonwealth now argues that the circuit court erred in its determination that the 2004 extension of Cole's probationary period was improper. It notes that *Griffin* is factually very similar to the matter at bar. The Kentucky Supreme Court held therein that the defendant - who sought extended probation rather than revocation and incarceration under the original sentence - was precluded by the doctrine of estoppel from later arguing that the extension was improper. Similarly in the matter at bar, the Commonwealth notes that Cole either expressly or implicitly sought to extend his probationary period rather than to be incarcerated, and just as in *Griffin*, he should be estopped from now arguing that the extension was improper. The Commonwealth seeks a reversal of the order on appeal, with remand for a revocation proceeding. Cole did not file a responsive brief.

We are persuaded by the Commonwealth's argument that irrespective of the five-year limit on felony probation set forth in KRS 533.020(4), a probationer may

voluntarily extend his term of probation in exchange for avoiding revocation of the initial probationary period and a return to prison. KRS 533.020(4) states that,

[T]he period of probation ... 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 upon conviction of a felony...** Upon completion of the probationary period ... the defendant shall be deemed finally discharged, provided no warrant issued by the court is pending against him, and probation ... has not been revoked. (Emphasis added).

In *Griffin, supra*, the Kentucky Supreme Court held that KRS 533.020(4) was not a jurisdictional bar to the extension of probation, and that a probationer could knowingly and voluntarily waive its limiting language as part of an agreement with the Commonwealth to avoid revocation and service of the underlying sentence. The Court noted that such a holding gave effect to the legislative purpose of KRS 533.020(4), that is, “to protect the convicted defendant.” *Griffin* at 291. To hold otherwise, it held, “would be *contrary* to the defendant’s interests rather than protective of them”. *Id.*¹

In the matter at bar, the circuit court determined that Cole did not expressly waive the five-year limit on probation, and that accordingly, the December 6, 2004, order purporting to extend probation was contrary to the law and without effect. This conclusion is refuted by the record. At the time of the 2004 revocation hearing, Cole had approximately ten months remaining on probation. In order to avoid Cole’s return to prison for service of the original five-year sentence, his counsel sought a term of

¹Judge Stumbo dissented in *Griffin*, noting that the five-year limit on felony probation set forth in KRS Chapter 533 is not subject to judicial amendment. Nevertheless, *Griffin* is controlling and dispositive of the matter at bar.

imprisonment of twelve-to-eighteen months followed by probation. Because this request was made with only ten months remaining on the original probationary period, Cole's request necessarily constitutes a waiver of the five-year limit set forth in KRS 533.020(4). It is further evident that the waiver was knowingly and voluntarily made, as Cole's request clearly benefited him by allowing him to avoid service of the original five-year sentence. *Griffin* is controlling, and recognizes that a probationer may waive the statutory limit on the duration of probation if done so knowingly and voluntarily. Cole's request for a twelve-to-eighteen month sentence followed by probation constitutes such a waiver, and the Boone Circuit Court erred in failing to so find. As such, Cole was on probation at the time he allegedly tried to use a bottle of "clean" urine to avoid taking a urinalysis, and the Commonwealth is entitled to address the alleged violation at a probation revocation proceeding.

For the foregoing reasons, we reverse the order on appeal and remand the matter for a probation revocation hearing.

ALL CONCUR.

BRIEF FOR APPELLANT:

NO BRIEF FILED FOR APPELLEE

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