

RENDERED: FEBRUARY 8, 2008; 10:00 A.M.  
NOT TO BE PUBLISHED

# Commonwealth of Kentucky

## Court of Appeals

NO. 2007-CA-000058-DG

JOSEPH E. JONES, JR.

APPELLANT

ON DISCRETIONARY REVIEW FROM FAYETTE CIRCUIT COURT  
v. HONORABLE GARY D. PAYNE, JUDGE  
ACTION NO. 06-XX-00019

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: ACREE, KELLER, AND MOORE, JUDGES.

KELLER, JUDGE: Joseph E. Jones, Jr. (Jones) appeals from the circuit court's order affirming the district court's order extending Jones's period of probation. The only issue on appeal is whether the district court retained jurisdiction to extend Jones's period of probation. For the reasons set forth below, we affirm.

## FACTS

The facts in this case are straightforward and not in dispute. In October of 2003, Jones entered a plea of guilty to misdemeanor theft by unlawful taking, received a sentence of 90 days probated for two years, and was ordered to pay restitution in the amount of \$1,700.<sup>1</sup> More than two years later, in December of 2005, Jones's probation officer filed a criminal complaint stating that Jones had failed to pay restitution. In response to that complaint, the district court extended Jones's period of probation. Jones timely appealed to the circuit court, which affirmed the district court. In doing so, the circuit court found that the district court retained jurisdiction to extend Jones's period of probation because Jones had failed to pay restitution. It is from this order that Jones appeals to this Court.

The sole issue raised by Jones is whether a probation officer can file a complaint for a probation violation after the period of probation has expired and thereby obtain a court order extending the probationary period.

## STANDARD OF REVIEW

The issue raised by Jones is one of law, which is subject to *de novo* review. *Carroll v. Meredith*, 59 S.W.3d 484, 489 (Ky.App. 2001); *see also A & A Mechanical, Inc. v. Thermal Equipment Sales, Inc.*, 998 S.W.2d 505, 509 (Ky.App. 1999); and *Aubrey v. Office of Attorney General*, 994 S.W.2d 516, 518-19 (Ky.App. 1998) (citing *American Beauty Homes Corp. v. Louisville and Jefferson County Planning and Zoning Commission*, 379 S.W.2d 450, 458 (Ky. 1964)).

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<sup>1</sup> We note that there is no written copy of Jones's plea agreement or a specific order reflecting the court's judgment. We are relying on the statements of the parties as set forth in their briefs to the circuit court and to this court regarding the terms of Jones's sentence, the audio recording of those proceedings, and a handwritten notation on the docket sheet.

## ANALYSIS

KRS Chapter 533 sets forth the statutory scheme regarding probation and conditional discharge. Pursuant to KRS 533.020:

(1) When a person who has been convicted of an offense or who has entered a plea of guilty to an offense 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. Conditions of probation shall be imposed as provided in KRS 533.030, but the court may modify or enlarge the conditions or, if the defendant commits an additional offense or violates a condition, revoke the sentence at any time prior to the expiration or termination of the period of probation. When setting conditions under this subsection, the court shall not order any defendant to pay incarceration costs or any other cost permitted to be ordered under KRS 533.010 or other statute, except restitution and any costs owed to the Department of Corrections, through the circuit clerk.

...

(4) The 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 . . . two (2) years, or the time necessary to complete restitution, whichever is longer, upon conviction of a misdemeanor. 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.

KRS 533.030(3) provides that a court shall order a defendant to make restitution to any victim who suffered monetary damage as a result of the defendant's criminal actions. Pursuant to KRS 532.033(8), a judge shall "not release the defendant from probation supervision until restitution has been paid in full and all other aspects of the probation order have been successfully completed."

Jones argues his probationary period automatically ended in October of 2005 when the two year period assessed by the district court expired. In support of this argument, Jones cites to KRS 533.020(4), which provides that a defendant "shall be deemed finally discharged" upon completion of the probationary period. However, Jones fails to take into consideration the first part of KRS 533.020(4) which provides that the probationary period for a misdemeanor is limited to two years "or the time necessary to complete restitution, whichever is longer." Although we would prefer to have a more clear cut record, it is implicit in the district court's judgment and in Jones's plea that his probation was conditioned on the payment of restitution. Therefore, his period of probation was set at two years and/or until he made restitution. Since Jones did not make restitution, his period of probation did not end in October of 2005, and the district court retained jurisdiction.

We have reviewed the cases cited by Jones in support of his position but find that they are not dispositive of the issue before us. In *Commonwealth v. Griffin*, 942 S.W.2d 289 (Ky. 1997), the issue was whether a defendant could agree to extend the probationary period beyond that mandated by statute. The Supreme Court of Kentucky held that he could. In *Gossett v. Commonwealth*, 384 S.W.2d 308 (Ky. 1964), there is no indication that making restitution was a condition of the defendant's probation. In *Curtsinger v. Commonwealth*, 549 S.W.2d 515 (Ky. 1977), the statute in question did not provide for extension of the probation period for payment of restitution and there is no indication that restitution was a condition of Curtsinger's probation. In *Wilson v. Commonwealth*, 577 S.W.2d 618 (Ky.App. 1979), the trial court imposed probation but did not set a specific period for that probation. When the Commonwealth sought to

revoke probation, the trial court attempted, through a *nunc pro tunc* order, to amend its judgment and impose a period of probation. This Court held that the circuit court could not use a *nunc pro tunc* order to affix a time period to the defendant's probation when no such period had originally been set. The preceding situations all clearly differ from the case at hand because Jones's period of probation was fixed - two years and/or pending restitution - and that period had not expired.

Finally, while it may have been preferable for the probation officer to have filed her complaint in early November rather than December 13<sup>th</sup>, the purpose of restitution is "to restore property or the value thereof to the victim." *Commonwealth v. Bailey*, 721 S.W.2d 706, 707 (Ky. 1986). Therefore, we agree with the circuit court that, to permit Jones "to escape this responsibility goes against the point of our criminal legal system, particularly when [Jones] has always been aware of the obligation to pay[.]"

#### CONCLUSION

Because Jones's probationary period had not expired, the district court retained jurisdiction. Therefore, we affirm.

ALL CONCUR.

BRIEF FOR APPELLANT:

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