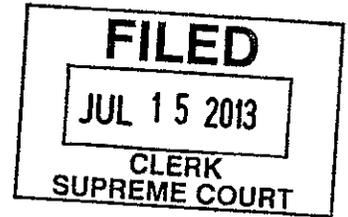


**Commonwealth of Kentucky
Kentucky Supreme Court
File No. 2012-SC-376**



TARA LYNN WHITCOMB

APPELLANT

v.

Appeal from Fayette Circuit Court
Hon. Thomas L. Clark, Judge
Indictment No. 00-CR-16-002

COMMONWEALTH OF KENTUCKY

APPELLEE

Brief for Appellee, Commonwealth of Kentucky

**Submitted by,
JACK CONWAY
Attorney General of Kentucky**

**ANDREA L. MATTINGLY WILLIAMS
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CERTIFICATE OF SERVICE:

The undersigned does certify that copies of this brief were mailed, first class postage prepaid, to the Hon. Samuel N. Potter, Department of Public Advocacy, 100 Fair Oaks Lane, Suite 302, Frankfort, Kentucky 40601, and to the Hon. Jack Conway, Attorney General, Office of Criminal Appeals, 1024 Capital Center Drive, Frankfort, Kentucky, and via hand-delivery to the Hon. Thomas L. Clark, Judge, Fayette Circuit Court, Chief Circuit Judge, Fayette County Courthouse, Room 511, 120 N. Limestone, Lexington, KY 40507 and to the Hon. Heather Matics, Fayette County Attorney's Office, 110 West Vine Street, Lexington, Kentucky, 40507, on July 15, 2013. The record on appeal was not checked out for the purpose of this brief.

A handwritten signature in black ink, appearing to read "Andrea L. Mattingly Williams". The signature is written over a horizontal line.

**Andrea L. Mattingly Williams
Assistant Commonwealth's Attorney**

Introduction

The Fayette Circuit Court dismissed the probation violation against Ms. Whitcomb because her probationary period expired before being served with a probation violation warrant. The Commonwealth of Kentucky appealed the decision of the Fayette Circuit Court's decision dismissing the probation violation. The Court of Appeals reversed the order of the Fayette Circuit Court in a "To Be Published" opinion. Ms. Whitcomb appealed the decision of the Kentucky Court of Appeals. This Court granted Discretionary Review.

Statement Regarding Oral Argument

The Commonwealth of Kentucky believes the arguments contained in the briefs submitted effectively resolve the issues in this case, and that no oral argument will be necessary.

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COUNTERSTATEMENT OF THE CASE

On February 11, 2000, Fayette Circuit Court Judge Laurance B. Vanmeter probated Appellant's sentence of one year on the charge of Theft by Deception over \$300 for a period of five years, and imposed numerous conditions, including restitution. TR, 24-26. On March 20, 2000, an affidavit was filed by David Rupard of the Probation and Parole Office, requesting that the court issue a warrant for the Appellant's arrest for a charge of Probation Violation. Officer Rupard requested that the Appellant's probation be revoked for failing to make contact with the probation office in Harrison County, Ky., where Appellant had requested that her probation be transferred. The affidavit also noted that "this Officer believes Whitcomb may have absconded as she currently has an outstanding warrant from Fayette District Court for non-payment of fine (99T027599) and is avoiding apprehension." TR, 32-34. A warrant was issued on March 20, 2000, (TR, 34) but remained unserved, yet active, on the Appellant until she was arrested on other charges in Mason County, Kentucky, and served with the warrant for Probation Violation on January 14, 2011. TR, 37.

A Probation Revocation Hearing was held on February 10, 2011. Chief Fayette Circuit Judge Thomas Clark, in the Probation Revocation Hearing, noted that the Appellee had been gone for eleven years, had changed her last name from Whitcomb to Cabrera, and had failed to meet the requirements of her probation. (# 22/8/11/CD/27; 23:05). Judge Clark further stated that he believed that all of these facts clearly showed that the Appellee had absconded from supervision, but that the decision in *Conrad v. Evridge*, 315 S.W.3d 313 (Ky. 2010) left the court without jurisdiction to hold a

revocation hearing. An order was entered dismissing the probation revocation violation on February 15, 2011. TR, 45.

On February 22, 2011, the Commonwealth filed a Notice of Appeal of the Fayette Circuit Court's order dismissing the probation violation against Appellant. TR, 46. On May 25, 2012, the Court of Appeals reversed the ruling of the Fayette Circuit Court in a To Be Published opinion. Appellant then filed a motion for discretionary review on June 25, 2012, and this Court granted such review on February 13, 2013. Appellant filed a brief in support of argument on April 15, 2013.

ARGUMENT

I. KRS 533.020 requires that two conditions be met before probation can be discharged

KRS 533.020 reads, in part: "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.*)

In *Williams v. Commonwealth*, 354 S.W.3d 158, 160 (Ky. Ct. App. 2011), the Court of Appeals stated:

When interpreting a statute, we must construe the statute according to its plain meaning. KRS 446.080(4). To that end, we construe all non-technical words in accordance with their common meanings and all words which have acquired a peculiar meaning in the law in accord with that meaning. *Id.* General principles of statutory construction require that we must not be guided by a single word or sentence in a statute, but we must look to the statute as a whole and consider its object and policy. *County of Harlan v. Appalachian Regional Healthcare, Inc.*, 85 S.W.3d 607, 611 (Ky.2002). Moreover, in interpreting a statute, we must ever keep in mind that the purpose of statutory construction "is to give effect to the intent of the legislature." *Id.*

Thus, when reading KRS 533.020, it is clear, by the language of the statute, that in order for a defendant's probation to be finally discharged, two conditions must be met. First, there shall be no warrant pending against the person on probation, and, second, the probation has not been revoked. Therefore, if the court has issued a warrant before termination of the probationary period, and that warrant remains outstanding at the projected expiration of a probationary period, then discharge does not automatically occur because one of the conditions of KRS 533.020 has not been met. In order for final discharge to occur, both conditions must be met.

In KRS 533.020, the word "and" must be given its ordinary, common, usage. When "and" is used, it requires both conditions must necessarily be met, otherwise the word "or" would have been used. Because the legislature used the word "and" and not "or", it is clear that a person's probationary period does not automatically expire unless both conditions of the statute are met.

In this case, a warrant was issued for Appellant just one month after she was placed on probation for absconding. The warrant was *pending against her* when her probationary period was set to expire. Because the warrant was pending against her, the two conditions in KRS 533.020 had not been met. Therefore, Appellant's probation was not automatically discharged and the circuit court retained jurisdiction to address the probation violation.

II. Appellant is estopped from arguing that the Circuit Court does not have jurisdiction to hear the probation violation

Appellant's probation did not automatically discharge because both factors in KRS 533.020 were not met, and the opinion of the Court of Appeals reversing the Fayette

Circuit Court should be affirmed. However, if this Court believes that the probation did automatically discharge, Appellant should be estopped from complaining that the Circuit Court did not retain jurisdiction to revoke her probation because she was the sole reason for the delay in the revocation hearing due to the fact that she absconded from supervision.

The Court of Appeals properly applied the holding in *Conrad v. Evridge*, 315 S.W.3d 313 (Ky. 2010), when ruling that the Fayette Circuit Court had jurisdiction to address the probation violation that was pending against Appellant before her probationary period expired.

When making its ruling, the Court of Appeals relied on the Kentucky Supreme Court's holding, that given different facts, estoppel may apply. *Conrad v. Evridge*, 315 S.W.3d 313, 317 (Ky. 2010).

In *Conrad*, the Kentucky Supreme Court held the trial court did not have jurisdiction to revoke Evridge's probation after his probation expired. Evridge appeared before the court on a probation violation for using marijuana and alcohol. The trial court found that defendant violated his probation and revoked his probation. The court issued an order stating the following:

The Defendant stipulated to violation of the terms of his probation and the Court revokes the balance of his probation following his release from incarceration in Carroll County, which probation expires June 17, 2009. The Court orders that he be confined to the Oldham County Jail from May 26, 2009, the expected date of his release from the Carroll County Jail, to June 16, 2009. The Court does allow work release while at Oldham County Jail....

Conrad v. Evridge, 315 S.W.3d 313, 314-15 (Ky. 2010).

When Evridge returned to jail from work release, he tested positive, once again for drugs. The Commonwealth, on June 8, 2009, filed a motion to revoke. On June 18,

2009, the trial court scheduled another probation revocation hearing that was set to be heard on July 23, 2009. *Id.* at 315. However, the Kentucky Supreme Court held the trial court lacked jurisdiction to hold the hearing once the defendant's probation expired.

In *Conrad*, the Commonwealth argued that a "literal interpretation could result in probationers abusing the judicial process, such as by delaying or avoiding the hearing until their probation expires." *Id.* 316. The Commonwealth also complained "that a strict interpretation of KRS 533.020(1) would allow probationers to avoid revocation by 'intentionally avoid[ing] the authority of the trial court... by absconding until after the probationary period expires.'" *Id.*

However, the Court declined to address the issue of whether or not a probationer's actions in delaying a probation hearing would estop him or her from arguing that the hearing was held after the probationary period ended because the facts in *Conrad* did not represent that scenario. But, when addressing this issue, the Court did state "such a complaint might be persuasive in a case where the probationer actually does anything remotely like that." *Id.* at 317. Thus, the Kentucky Supreme Court clearly left open the possibility that given the facts, the ruling in *Conrad* could be applied to revoke probation for a defendant whose actions delayed the probation hearing.

The issue of estoppel was not present in the *Conrad* case, but is present in the case at hand. In *Conrad*, the defendant was not responsible for delaying the revocation hearing until after the probation expiration date. In this case, Appellant was the sole person responsible for the delay in the probation revocation hearing. The record clearly shows that Appellant knew she was placed on probation and she had conditions that she was expected to follow while on probation. TR, 24-26. A warrant was issued for her

arrest when she failed to comply with the conditions of her probation. TR, 32-34. Further, at the probation hearing, the Circuit Court Judge noted that the Appellee had been gone for eleven years, had changed her last name from Whitcomb to Cabrera, and had failed to meet the requirements of her probation. (# 22/8/11/CD/27; 23:05). The only person responsible for any delay in this case is Appellant.

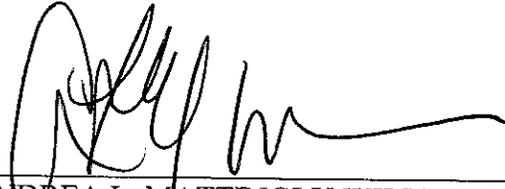
It is incumbent on Appellant, not the prosecution, police, or probation officer to ensure that Appellant complies with the conditions of her probation. She knew what was expected of her and she failed to comply. She purposely did not report to her probation officer, she changed her name, and her address. She should be estopped from claiming that her probation should not be revoked because the revocation hearing was not held before her probationary period ended. To allow such an argument would reward Appellant, who was the only person who was responsible for delaying her revocation hearing, and let her to abuse and manipulate the system. It would allow—and, in fact, encourage—probationers to abscond from supervision and avoid being served with a warrant until his or her probationary period expired. If this argument were successful, it would completely undermine the abilities of the Department of Probation and Parole, and be a manifest injustice to the citizens of the Commonwealth of Kentucky.

CONCLUSION

Wherefore, for all the foregoing reasons, the decision by the Kentucky Court of Appeals reversing the Fayette Circuit Court's ruling should be affirmed.

Respectfully submitted,

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Appendix

<u>Tab number</u>	<u>Item Description</u>	<u>Record Location</u>
1	Judgment	Pg. 24
2	Affidavit by Probation Officer	Pg. 32
3	Warrant	Pg. 34
4	Citation	Pg. 37
5	Order dismissing probation revocation	Pg. 45
6	Notice of Appeal	Pg. 46
7	<i>Commonwealth v. Whitcomb</i> , 2011-CA-346	