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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. 2000-CR-16-002

COMMONWEALTH OF KENTUCKY — APPELLEE

BRIEF FOR APPELLANT, TARA LYNN WHITCOMB

Submitted by:

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The undersigned does certify that copies of this Brief were mailed, first class postage prepaid, to the Hon. Jack Conway, Attorney General, Office of Criminal Appeals, 1024 Capital Center Drive, Frankfort, Kentucky 40601; Hon. Todd Bradbury, Assistant Attorney General, Commonwealth Attorney's Office, 116 North Upper Street, Suite 300, Lexington, Kentucky 40507; Hon. Thomas L. Clark, Judge, 120 North Limestone, 511 Robert F. Stephens Courthouse, Lexington, Kentucky 40507; Hon. Heather Matics, Fayette Co Attorney's Office, 110 West Vine Street, Lexington, Kentucky 40507; and to served by messenger mail to on April 15, 2013. The record on appeal was not checked out for the purpose of this Brief.

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Introduction

The prosecution appealed the Fayette Circuit Court Order dismissing the probation violation against Tara Lynn Whitcomb for lack of jurisdiction because her probationary period had expired. After the Court of Appeals reversed that Order, this Court granted Discretionary Review.

Statement Regarding Oral Argument

Tara Lynn Whitcomb requests oral argument.

Statement of Points and Authorities

Introduction i

Statement Regarding Oral Argument i

Statement of Points and Authorities ii

Statement of the Case 1

Conrad v. Evridge, 315 S.W.3d 313 (Ky. 2010) ..... passim

Arguments 4

I. The Court of Appeals misinterpreted *Conrad v. Evridge* when reversing the Circuit Court's ruling that it lacked jurisdiction to revoke Tara's probation in February, 2011 when her term of probation began on February 11, 2000 and terminated on February 11, 2005 4

Preservation 4

Argument 4

KRS 533.020(4) 4,5,7

KRS 533.020(1) 7

II. Alternatively, the Court of Appeals misapplied *Conrad v. Evridge* and the doctrine of estoppel to Tara's case because the record reveals that the prosecution, police, and probation officer made no efforts to locate her after March 20, 2000 8

Preservation 8

Argument 8

Huffines v. Commonwealth, 2006 WL 1652868 (Ky. App. 2006) 8

Lovelace v. Commonwealth, 285 Ky. 326, 147 S.W.2d 1029 (1941) 9

State v. Burns, 615 S.E.2d 347 (NC. App. 2005) 10,11,12

N.C. Gen. Stat. § 15A-1344(f)(2007) 11

18 USC § 3583(i) 11

Conclusion 15

KRS 533.020(4) 15

Statement of the Case

Tara Lynn Whitcomb was indicted on January 4, 2000 for Theft by Deception Over $300. TR, 1. She entered a guilty plea on January 21, 2000. Ms. Whitcomb gave her address as 4931 US 62, Maysville, Ky. She told the Circuit Court during the *Boykin* colloquy that she had worked as a store manager for Domino's and then in tobacco. VR No. 1: 1/21/00; 10:46:45. The prosecution recommended a one year sentence and restitution for $10,166.54 on all checks, for which she and her three codefendants were jointly and severally liable. VR No. 1: 1/21/00; 10:52:00. A Waiver of Further Proceedings form was signed and entered on January 21, 2000. TR, 14-16.

Final sentencing was held on February 11, 2000. She indicated that she was going to move from Mason County to Cynthiana because of better job opportunities. She was pregnant and due in August. VR No. 1: 2/11/00; 11:12:00-11:13:30. The Circuit Court agreed to release her on probation in Harrison County in exchange for increasing her sentence from one year to five years. VR No. 1: 2/11/00; 11:14:00.

An odd exchange occurred during the sentencing hearing. The Circuit Court asked her if she knew where babies came from and if she knew what the purpose of getting pregnant with someone was. She said she was on birth control, and her doctor told her this one of the one percent of cases in which the pill did not work. Her other children were planned. VR No. 1: 2/11/00;

11:15:15. After this, the Circuit Court proceeded to discuss restitution, employment, and other conditions of probation. A Final Judgment memorializing this proceeding was entered on February 16, 2000. TR, 24-26.

On March 20, 2000, Probation Officer David A. Rupard filed an Affidavit to revoke Tara's probation. It alleged that she did not report to her Harrison County Probation Officer and that she did not pay District Court fines. A warrant for her arrest was issued. TR, 32-34.

Nearly eleven years later, the warrant was served. TR, 35. A Uniform Citation indicated a Maysville Police Officer arrested Tara on January 14, 2011. Tara was a passenger in a traffic stop that occurred at 1:43 pm. The citation did not indicate why the car was pulled over. Neither did it state that Tara was engaged in any kind of criminal activity. TR, 37.

A status hearing was held on January 28, 2011. Tara informed the Circuit Court and the prosecution of the holding in *Conrad v. Evridge*, 315 S.W.3d 313 (Ky. 2010), and argued that it required the revocation proceeding be dismissed. The Court set a hearing on the matter. VR No. 2: 1/28/11; 11:56:00-11:58:15.

Some facts regarding Tara's life over the intervening decade can be gleaned from this hearing. She had family present with her in the courtroom.

She had been living in Mason County for ten years. Her living situation had been very stable. She had three children for which she was the primary-stay-at-home caregiver because her husband's job required him to travel frequently. The only outstanding issue other than this case was a holder officials in Clark County had placed on her because of a $500 debt that she owed. VR No. 2: 1/28/11; 11:58:15.

A revocation hearing was held on February 11, 2011. Tara argued that *Conrad* ruled that a Circuit Court loses jurisdiction to revoke probation once the five year term of probation expires. VR No. 2: 2/11/11; 8:53:35-8:55:00. The prosecution tried to distinguish the facts of *Conrad* from Tara's case by making an estoppel argument that a warrant issued within the probationary period should have tolled the probationary period. VR No. 2: 2/11/11; 8:55:00-8:57:15.

The Circuit Court ruled in favor of Tara because of *Conrad* and dismissed the probation violation. VR No. 2: 2/11/11; 8:58:30-8:59:50. The Circuit Court, despite this ruling, set a status hearing for September 30, 2011. VR No. 2: 2/11/11; 9:00:45. The Circuit Court entered an Order reflecting this on February 15, 2011. TR, 45. On February 22, 2011, the prosecution filed a Notice of Appeal of the Court's Order dismissing the probation violation. TR, 46. The Court of Appeals reversed and remanded in a To Be Published

Opinion on May 25, 2012. Tara Whitcomb filed for discretionary review on June 25, 2012, which this Court granted on February 13, 2013.

Arguments

I. The Court of Appeals misinterpreted *Conrad v. Evridge* when reversing the Circuit Court's ruling that it lacked jurisdiction to revoke Tara's probation in February, 2011 when her term of probation began on February 11, 2000 and terminated on February 11, 2005.

Preservation

Tara preserved this issue by citing *Conrad v. Evridge* to the Circuit Court and arguing that it required the revocation proceeding be dismissed (VR No. 2: 1/28/11; 11:56:00-11:58:15; VR No. 2: 2/11/11; 8:53:35-8:55:00) and by filing for discretionary review following the adverse opinion of the Court of Appeals.

Argument

The Circuit Court lacked jurisdiction to revoke Tara's probation because of how this Court interpreted the plain language of KRS 533.020(4) in *Conrad v. Evridge*, 315 S.W.3d 313 (Ky. 2010). The Circuit Court correctly applied this Court's interpretation of KRS 533.020(4) in *Conrad v. Evridge* to Tara's case when it ruled it no longer had jurisdiction to revoke her probation. The Court of Appeals misapplied *Conrad* when it reversed Tara's case. The Court of Appeals acknowledged, and ultimately embraced, the prosecution's argument the portion of KRS 533.020(4) that states "provided no warrant issued by the

court is pending against him" prevented the probationary period from expiring. Opinion, 4-8; Brief for Appellant, 2-3.

A simple exegesis and explication of KRS 533.020(4) refutes this conclusion. The statute states:

> 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.

The independent clause of the portion of KRS 533.020(4) states the imperative that "the defendant shall be deemed finally discharged." The main point of this sentence, then, is the final discharge of the defendant's probation. The preceding subordinate clause states the condition that must be met for this to occur, "[u]pon completion of the probationary period." Thus, the completion of the probationary period activates the final discharging of the defendant from probation.

The clause beginning with "provided" following the independent clause states an exception to when probation will not be finally discharged. This exception applies when two factors exist: 1) "no warrant issued by the court is pending against him"; "and" 2) "probation . . . has not been revoked." The key word relating to the exception is "and". The word "and" here functions as a coordinating conjunction. It requires the presence of both factor one and

factor two for the exception to apply. If both factors are not present prior to the completion of the probationary period, then the exception does not apply.

Applying this grammatical analysis to Tara's case reveals the Court of Appeal's error and confirms the Circuit Court's ruling. Tara was sentenced to probation on February 11, 2000. TR, 24-26. The probationary period was to last five years, which meant it expired on February 11, 2005. Therefore, by statute, Tara's probation was finally discharged on February 11, 2005. The only way her probation would not be finally discharged was if the one statutory exception applied.

The exception did not apply to Tara's situation. Both factors were not met. The first factor did apply. The Circuit Court issued a warrant on March 20, 2000. TR, 34. However, the second factor was not met. Tara's probation was not revoked before the expiration of her probationary period. Thus, the exception did not apply to her. Her probation was finally discharged. The Circuit Court rightly ruled it had no jurisdiction to revoke her. The Court of Appeals wrongly reversed this ruling.

The holding of *Conrad v. Evridge* confirms this analysis. The defendant, Evridge, pled guilty and received a split sentence of two years with 180 days to serve and the balance probated for five years. 315 S.W.3d 313, 314 (Ky. 2011). Evridge's probationary period was to expire on June 17, 2009. *Id.*

Evridge subsequently stipulated to a violation in early 2009. On May 14, 2009, the Circuit Court ordered that the balance of his probation was revoked and that he would be incarcerated in the Oldham County Jail from May 26, 2009 (the day he was set to be released from the Carroll County Jail) to June 16, 2009. *Id.*

On May 29, 2009, Evridge tested positive for methamphetamine after he returned from work release. The prosecution filed a motion to "fully revoke" Evridge's probation on June 8, 2009. On June 18, 2009, the Circuit Court set a revocation hearing for July 23, 2009. Evridge filed a writ of probation with the Court of Appeals, and the Court of Appeals granted the writ. The prosecution appealed to this Court.

This Court also agreed with Evridge. This Court noted that KRS 533.020(1) limits the revocation of probation to the probationary time period: "'if the defendant commits an additional offense or violates a condition, [the court may] revoke the sentence at any time prior to the expiration or termination of the period of probation.'" *Conrad*, 315 S.W.3d at 315 (*quoting* KRS 533.020(1)). This Court then stated that if "probation is not revoked before it expires, 'the defendant shall be deemed finally discharged.'" *Id.* (*quoting* KRS 533.020(4)). This led to the inescapable conclusion that "there is no plausible interpretation other than that probation must be revoked, if at all, before the probationary period expires." *Id.*

In Tara's case, the Circuit Court did not read *Conrad* too broadly. Rather, the Circuit Court followed the only plausible interpretation this Court articulated and established in *Conrad.* Tara's probationary period had already expired. The Circuit Court no longer had jurisdiction to revoke her probation. The Circuit Court correctly interpreted and applied the controlling statutes and cases. The Court of Appeals misapplied *Conrad* when it reversed the Circuit Court's ruling. Therefore, this Court should vacate the Court of Appeal's opinion and reinstate the Circuit Court's order dismissing the violation.

II. Alternatively, the Court of Appeals misapplied *Conrad v. Evridge* and the doctrine of estoppel to Tara's case because the record reveals that the prosecution, police, and probation officer made no efforts to locate her after March 20, 2000.

Preservation

Tara made this argument in her Motion for Discretionary Review, which this Court granted.

Argument

The Court of Appeals rejected the analysis, *supra*, and adopted the prosecution's reliance on estoppel to reverse Tara's case. Opinion, 9-10. The prosecution relied on dicta in *Conrad* and an unpublished case cited by *Conrad*, *Huffines v. Commonwealth*, 2006 WL 1652868 (Ky. App. 2006), to argue that the doctrine of estoppel superseded the plain language of the

statute and enabled the revocation hearing to proceed. Brief for Appellant, 5-6. The Court of Appeals' conclusion was wrong.

This Court in *Conrad* did consider whether estoppel might apply to those who purposefully delay a revocation until the probationary period expires. This discussion covered only a couple of paragraphs. *Conrad*, 315 S.W.3d at 316-317. While this Court speculated that the estoppel argument "might be persuasive" in another case, it concluded that Evridge's case "presents no such estoppel issue." *Id.* at 317.

The underlying reason why this Court chose to limit its discussion in *Conrad* applies equally well to Tara's case. This Court returned to the foundational idea of the restraint the plain language of the statute placed upon circuit courts:

> given that probation is a statutory creature, this Court is bound by the plain meaning of the probation statutes. The statutes are clear that probation must be revoked, if at all, before the probationary period expires. This Court rejects the Commonwealth's invitation to ignore this plain language.

Id. The inherent nature of probation explains why this Court emphasized the meticulous tracking of the statutory language: "[f]irst and foremost, granting and revoking probation is not an inherent power in the courts, but is a power vested in the courts by statute." *Id.* at 316(*citing, Lovelace v. Commonwealth*, 285 Ky. 326, 147 S.W.2d 1029, 1033–34 (1941)). For this reason, this Court in *Conrad* could not create a "common-law tolling exception." *Id.*

This reasoning applies equally to Tara's case. Kentucky courts, whether Circuit, Appeals, or Supreme, still remain bound by the plain language of the statute as explained above. The statute restricts revocation of probation to occurring within the probationary period. The statute does not allow revocation outside of the probationary period. Therefore, the Court of Appeals erred by reversing the Circuit Court's Order.

In order to obtain a different result, the statute must be changed. Other jurisdictions have a statutory system that allows for revocations past the expiration of the probationary period – if the prosecution proves certain statutory conditions exist. The case of *State v. Burns*, 615 S.E.2d 347 (NC. App. 2005), provides a useful example. In *Burns*, the defendant's probation was to run from January 2000 to July 2001. In March, 2001, the probation officer reported a violation to the trial court, and an arrest warrant was issued. Burns was arrested in March of 2004, and his probation was revoked. *Id.* at 348.

The *Burns* Court reversed the revocation of his probation. The Court concluded that the state failed to follow the statutory procedure. In order for a North Carolina trial court to revoke a defendant's probation after the expiration of the probationary period, the prosecution had to comply with two statutory requirements:

> (1) Before the expiration of the period of probation the State has filed a written motion with the clerk indicating its intent to conduct a revocation hearing; and
>
> (2) The court finds that the State has made reasonable efforts to notify the probationer and to conduct the hearing earlier.

N.C. Gen. Stat. § 15A-1344(f)(2007).[1] The Court held the state failed to make a reasonable effort to notify Burns and conduct a hearing. The Court reversed Burns' case because the trial court had no jurisdiction to revoke his probation. *Burns*, 615 S.E.2d at 350; *see* 18 USC § 3583(i).[2] Notably, the Court of Appeals failed to address the North Carolina and Federal rules in its

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[1]The legislature amended N.C. Gen. Stat. § 15A-1344(f) in 2008. That section now reads:

> (f) Extension, Modification, or Revocation after Period of Probation.—The court may extend, modify, or revoke probation after the expiration of the period of probation if all of the following apply:
>
> (1) Before the expiration of the period of probation the State has filed a written violation report with the clerk indicating its intent to conduct a hearing on one or more violations of one or more conditions of probation.
>
> (2) The court finds that the probationer did violate one or more conditions of probation prior to the expiration of the period of probation.
>
> (3) The court finds for good cause shown and stated that the probation should be extended, modified, or revoked.
>
> (4) If the court opts to extend the period of probation, the court may extend the period of probation up to the maximum allowed under G.S. 15A-1342(a).

[2]Additionally, the United States Code contains a similar section that specifically authorizes revocation of supervised release after the original supervision term:

> **(i) Delayed revocation.**—The power of the court to revoke a term of supervised release for violation of a condition of supervised release, and to order the defendant to serve a term of imprisonment and, subject to the limitations in subsection (h), a further term of supervised release, extends beyond the expiration of the term of supervised release for any period reasonably necessary for the adjudication of matters arising before its expiration if, before its expiration, a warrant or summons has been issued on the basis of an allegation of such a violation.

18 USC § 3583(i). In the Federal system, a revocation may occur after expiration of the supervision period for conduct that occurred during the supervision period provided that a warrant for that conduct had been issued. However, the period of delay must be "reasonably necessary." *Id.*

opinion. As estoppel is an equitable doctrine, certainly the conduct of both parties, which includes the prosecution, police, and probation officer, ought to be examined. The Court of Appeals failed to do so in its opinion. This undermines the opinion's credibility and value.

The dismissal of Tara's probation violation should have been affirmed for reasons parallel to *Burns*. In both cases, a warrant was issued before the probationary period ended. North Carolina has a statutory procedure that enables a trial court to revoke a defendant's probation. Kentucky has no such provision. This lack of statutory authority is the first reason why the Order should have been affirmed.

In *Burns*, the Court of Appeals held that the state had not made the reasonable effort, as required by the North Carolina statute, to find Burns and hold the revocation hearing. The existence of a reasonable effort – a concept addressing equitable concerns – functions to extend the trial court's jurisdiction and enable it to revoke a defendant's probation past the expiration date of the probationary period. The *Burns* Court determined that a three year period was not reasonable. *Id.*

If three years was not reasonable, surely eleven years also is not reasonable. This is the second reason the Order should have been affirmed. The record reveals a lack of any effort by the prosecution, police, and/or

probation officer to find Tara over the following decade. Outside of the initial effort by Probation Officer Rupard, which consisted of mailing a letter and perhaps attempting a visit (TR, 32-34), the record is devoid of any effort the prosecution made to locate Tara. While it is true Tara did not contact her probation officer, she did not disappear off the grid in order to purposefully evade the conditions of her probation.

Rather, the record indicates that she lived a normal and productive life. She moved back home to Maysville, where she lived when she pled guilty. While her last name did change, that was likely the result of her marrying her husband. She stayed at home to care for her three children while her husband travelled for his job.

Further, nothing in the record suggests that Tara committed any criminal activity during this time. The arrest warrant in this case would have been served on her earlier had she been picked up for anything else during the intervening decade. When she was picked up, it happened during a traffic stop, which occurred in the middle of the afternoon, and in which she was only a passenger. Nothing in the uniform citation indicates that she, or anyone else with her, was engaged in any criminal activity. TR, 37.

To summarize, the Court of Appeals improperly relied on the doctrine of estoppel to reverse Tara's case. The prosecution made virtually no effort, and

definitely not a reasonable one, to find Tara. Tara lived a quiet, normal, and productive life over the preceding ten years. Kentucky has no statutory authorization to hold revocation hearings after the probationary period has expired, unlike North Carolina and the Federal system. The Court of Appeals should have affirmed the Order dismissing the probation violation. Left uncorrected, the Court of Appeals opinion in Tara's case will confuse and misguide future probation revocations. Therefore, this Court should vacate the Court of Appeal's opinion and reinstate the Circuit Court's order dismissing the violation.

Conclusion

The Fayette Circuit Court's Order dismissing the probation violation against Tara Lynn Whitcomb should be reinstated for three reasons. First, the Circuit Court properly applied the plain language of KRS 533.020(4) in ruling he no longer had jurisdiction because Tara's probationary period ended on February 11, 2005. Second, the Circuit Court properly interpreted *Conrad v. Evridge*. Third, the doctrine of estoppel does not apply to this case.

Therefore, Tara Lynn Whitcomb respectfully requests that this Court issue an Opinion that vacates the Court of Appeals' opinion, reinstates the Circuit Court's Order, states that Tara's probationary period has expired, and relieves her of any other hearings involving her probation in this case.

Respectfully submitted,

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APPENDIX

Tab Number	Item Description	Record Location
1	Commonwealth v. Whitcomb Opinion, 2011- CA-346	
2	Order	Pg. 45
3	Affidavit	Pgs. 32-34
4	Final Judgment	Pgs. 24-26
5	Citation	Pg. 37
6	Huffines, Commonwealth, unpublished 2006 WL 1652868 (Ky.)	