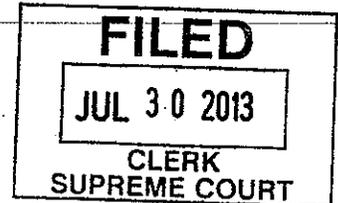


COMMONWEALTH OF KENTUCKY
KENTUCKY SUPREME COURT
FILE NO. 2012-SC-376



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

REPLY BRIEF FOR APPELLANT, TARA LYNN WHITCOMB

Submitted by:

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The undersigned does certify that copies of this Reply 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. Andrea L. Mattingly Williams, 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 July 30, 2013. The record on appeal was not checked out for the purpose of this Reply Brief.



SAMUEL N. POTTER

Purpose of the Reply Brief

The purpose of this Reply Brief is to address only those matters presented in the Brief for Appellee that deserve further comment, argument, and/or citation of additional authority.

Arguments

I. This Court's precedent and the facts of this case support reversing the Court of Appeals' opinion.

The Circuit Court rightly refused to revoke Tara Lynn Whitcomb's probation because more than five years had passed after the expiration of her probationary period. "[T]his Court has stated unequivocally 'that *revocation* must occur prior to the expiration . . . of probation.' *Conrad v. Etridge*, 315 S.W.3d 313, 315 (Ky. 2010)(quoting KRS 533.020(1))." *Miller v. Commonwealth*, 391 S.W.3d 801, 807 (Ky. 2013)(emphasis added in *Miller*). *Miller*, continuing to affirmingly cite *Conrad v. Etridge*, stated "that both the hearing *and* the revocation must occur 'before the probationary period expires' and that '[t]he circuit court has no jurisdiction to revoke . . . probation, or to hold a revocation hearing, after that time.'" 391 S.W.3d at 807. The Appellee's argument to the contrary proves to be unconvincing.

The Appellee emphasizes the last phrase of KRS 533.020(4), "and probation . . . has not been revoked" in support of revoking probation after the five year period expires. The Appellee misinterprets this language by arguing that the probationary period is indefinitely extended whenever a circuit court has issued a warrant but probation has not been revoked. Brief for Appellee, 2-3. Over and against the Appellee's position, Tara reasserts and reaffirms her explication of KRS 533.020(4). Brief for Appellant, 5-6.

Further, she will briefly restate it to show her interpretation is consistent with the statutory language and *Conrad v. Etridge*.

The last sentence of KRS 533.020(4) reads: "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."¹ This sentence explains the only way a probation period will not automatically expire once its time has run: a warrant was issued that led to revocation of a defendant's probation before the probationary period expired. Even if a warrant has been issued before the expiration of the probationary period, probation shall be finally discharged unless revocation also occurs before the expiration of the probationary period. This interpretation honors the plain language of the statute and conforms to *Conrad v. Etridge* and *Miller*.

Should this Court disagree and find the probationary period was tolled, Tara reasserts her argument raised in Issue II in the Brief for Appellant (8-14) and notes that the Appellee failed to adequately respond to her argument that the decade of inactivity by the probation officer, the police, and the prosecution was not reasonable so that tolling is inappropriate in this case.

¹While references to probation with an alternative sentence and conditional discharge have been omitted to increase clarity and improve readability, the same reasoning applies to these alternative forms of release.

Even if tolling the probationary period did apply in this case—which Tara steadfastly asserts is inapposite given the statutory limitations and this Court’s precedent—revocation would not be appropriate in Tara’s case. KRS 439.3106 requires a judge to make three findings before revoking probation: 1) that a violation occurred; 2) that the violation constituted a significant risk to the victims, the probationer, or the community; and 3) that the probationer cannot be appropriately managed in the community.²

The facts of Tara’s case do not support a finding for either point two or point three. During the ensuing decade after she failed to report, she got married, had children, stayed at home with them so her husband could work, and committed no new offenses. VR No. 2: 1/28/11; 11:58:15; Brief for Appellant, 2-3, 12-13. A decade of history proves she was not a significant risk to anyone.

Further, Tara’s situation is an instance where less supervision would be, and in fact was, more effective. KRS 533.020(3) provides for conditional discharge if the court “is of the opinion that the defendant should conduct himself according to conditions determined by the court but that

²Tara acknowledges that KRS 439.3106 had not taken effect at her revocation hearing on February 11, 2011. However, should Tara’s case be remanded for further proceedings, this new procedure would apply to her case: “procedural amendments—[t]hose amendments which apply to the in-court procedures and remedies which are used in handling pending litigation . . . —are to be retroactively applied (assuming no separation-of-powers concerns) so that the proceedings shall conform, so far as practicable, to the laws in force at the time of such proceedings.” *Rodgers v. Commonwealth*, 285 S.W.3d 740, 751 (Ky. 2009)(citations and quotations omitted).

probationary supervision is inappropriate." Conditional discharge is essentially unsupervised probation, which Tara completed in a *de facto* manner. Tara flourished over the 11 years that passed after she pled guilty. Had less supervision been ordered back in 2000, Tara would have completed her term without incident. This history proves she could have been effectively managed in the community. Thus, revocation would not be appropriate in Tara's case.

Conclusion

For these reasons, and those stated in the Brief for Appellant, Tara Lynn Whitcomb respectfully requests this Court to reverse the Court of Appeals' opinion and reinstate the Circuit Court's Order dismissing the proceedings against her. Tara also requests any and all other relief this Court determines is appropriate.

Respectfully submitted,



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