In The

Supreme Court of Virginia

RECORD NO. 180885

DOROTHY ELIZABETH CILWA,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

BRIEF OF APPELLANT

Shalev Ben-Avraham (VSB No. 81859)
OFFICE OF THE PUBLIC DEFENDER
2200 Wilson Boulevard, Suite 510
Arlington, Virginia 22201
(703) 875-1111 (Telephone)
(703) 875-0174 (Facsimile)
sben-avraham@vadefenders.org

Counsel for Appellant

THE LEX GROUP ♦ 1108 East Main Street ♦ Suite 1400 ♦ Richmond, VA 23219
(804) 644-4419 ♦ (800) 856-4419 ♦ Fax: (804) 644-3660 ♦ www.thelexgroup.com

SCV: Submitted on 04-05-2019 16:53:22 EDT for filing on 04-05-2019

Table of Contents

Page

Table of Authorities iv

Assignments of Error 1

Nature of the Case and Material Proceedings Below 2

Statement of Facts 5

April 25, 2008 Final Sentencing 5

July 9, 2008 Bench Warrant for Probation Violation 5

July 27, 2009 Letter Agreeing to Extend Probation Until Certain Conditions Were Completed 6

September 16, 2009 Order Extending Probation Indefinitely 6

October 8, 2009 Bench Warrant for Probation Violation 7

February 19, 2015 Bench Warrant for Probation Violation 7

August 12, 2016 Court of Appeals dismisses the case as moot 9

Argument 10

I. The Court of Appeals erred in finding that the trial court had personal and subject matter jurisdiction over Ms. Cilwa when it issued the February 19, 2015 bench warrant and when it revoked her suspended sentence in its March 31, 2015 order 10

A. *Standard of Review* 10

B. *Argument* 10

II. The Court of Appeals erred by finding that a void September 2009 order would have no effect on the January 2010 order or subsequent orders 15

A. *Standard of Review* 15

B. *Argument* 16

III. The Court of Appeals erred in affirming the trial court's error by not finding that Ms. Cilwa's probation terminated automatically when she completed substance abuse treatment in January 2013 because Ms. Cilwa had formed a contract conditions subsequent and those conditions had been met..... 20

A. *Standard of Review* 20

B. *Argument* 20

a. Ms. Cilwa's probation was extended through the formation of a contract, and the law of contracts will apply to that agreement..... 20

b. Ms. Cilwa entered into a valid contract with the trial court, and the Commonwealth, because there was an offer, acceptance of that offer, and valuable consideration 22

c. The language of the valid contract created by Ms. Cilwa, the trial court, and the Commonwealth created a condition subsequent, which once fulfilled, terminated Ms. Cilwa's obligation to continue probation 24

d. The contract formed between Ms. Cilwa, the trial court, and the Commonwealth was a contract condition subsequent, which terminated the contract upon the happening of all of conditions subsequent 27

e. Virginia courts have given effect to contracts with conditions subsequent in criminal cases 28

Conclusion 30

Certificate 31

Table of Authorities

Page(s)

Cases

Amin v. County of Henrico,
286 Va. 231, 749 S.E.2d 169 (2013)..... 10, 15

Anthony v. Kasey,
83 Va. 338, 5 S.E. 176 (1887) 18

Brewer v. First National Bank of Danville,
202 Va. 807, 120 S.E.2d 273 (1961)..... 23, 24

Calvillo v. Commonwealth,
19 Va. App. 433, 452 S.E.2d 363 (1994) 28, 29

Dailey v. Dailey,
59 Va. App. 734, 722 S.E.2d 321 (2012) 24, 25

Eagler v. Little,
217 Va. 869, 234 S.E.2d 242 (1977)..... 28

Esparza v. Commonwealth,
29 Va. App. 600, 513 S.E.2d 885 (1999) 22

Evans, *et al. v. Smyth-Wythe Airport Commission*,
255 Va. 69, 495 S.E.2d 825 (1998)..... 18

Heiderscheidt v. Commonwealth,
Record No. 1298-08-4, 2009 Va. App. LEXIS 256
(June 9, 2009) 8

Kirby v. Town of Claremony,
243 Va. 484, 416 S.E.2d 695 (1992)..... 28

Marshall v. Commonwealth,
202 Va. 217, 116 S.E.2d 270 (1960)..... 20

Mayer v. Corso-Mayer,
62 Va. App. 713, 753 S.E.2d. 263 (2014) 10, 15-16

Montagana v. Holiday Inns, *Inc.*,
221 Va. 336, 269 S.E.2d 838 (1980).....22-23

Morotock Ins. Co. v. Fostoria Novelty Co.,
94 Va. 361, 26 S.E. 850 (1897) 28

Singh, *M.D. v. Mooney*,
261 Va. 48, 541 S.E.2d 549 (2001)..... 10, 17, 18

Southerland v. Estate of Southerland,
249 Va. 584, 457 S.E.2d 735 (1995)..... 24, 25

Sluss v. Commonwealth,
14 Va. App. 601, 419 S.E.2d 263 (1992) 22

Wilson v. Commonwealth,
67 Va. App. 82, 793 S.E.2d 15 (2016) 12, 13, 14

Wright v. Commonwealth,
275 Va. 77, 655 S.E.2d 7 (2008).....22

Young v. Commonwealth,
273 Va. 528, 643 S.E.2d 491 (2007).....20

Statutes

Va. Code § 18.2-251.....28

Va. Code § 19.2-304..... 8, 21, 24

Va. Code § 19.2-306(B)..... 11, 14, 15

Other Authority

17A Jur. 2d *Contracts* § 464 27

Assignments of Error

I. The Court of Appeals erred in finding that the trial court had personal and subject matter jurisdiction over Ms. Cilwa when it issued the February 19, 2015 bench warrant and when it revoked her suspended sentence in its March 31, 2015 order.

This issue was preserved in the Court of Appeals by the Opening Brief, p. 1, and by the Court of Appeals Opinion, Cilwa v. Commonwealth, __ Va. App. __, __ S.E.2d __, Record No. 0687-15-4 (2018).

II. The Court of Appeals erred by finding that a void September 2009 order would have no effect on the January 2010 order or subsequent orders.

This issue was preserved in the Court of Appeals by the Opening Brief, p. 1, and by the Court of Appeals Opinion, Cilwa v. Commonwealth, __ Va. App. __, __ S.E.2d __, Record No. 0687-15-4 (2018).

III. The Court of Appeals erred in affirming the trial court's error by not finding that Ms. Cilwa's probation terminated automatically when she completed substance abuse treatment in January 2013 because Ms. Cilwa had formed a contract conditions subsequent and those conditions had been met.

This issue was preserved in the trial court by the Motion to Dismiss, App. at 46-56; by defense counsel's objection and argument, App. at 70-89; and by the trial court denying the motion to dismiss, App. at 85.

This issue was preserved in the Court of Appeals by the Opening Brief, p. 1, and by the Court of Appeals Opinion, Cilwa v. Commonwealth, __ Va. App. __, __ S.E.2d __, Record No. 0687-15-4 (2018).

Nature of the Case and Material Proceedings Below

This case is before the Court upon an appeal by Dorothy Cilwa (hereinafter "Ms. Cilwa") from the opinion of the Court of Appeals on June 26, 2018 affirming her March 2015 probation violation conviction. Ms. Cilwa was sentenced on April 25, 2008, on one count of Grand Larceny to three years of incarceration with all three years suspended conditioned upon her successful completion of one year of active probation. On July 9, 2008, a bench warrant was issued for an allegation that Ms. Cilwa violated probation. On August 14, 2008, she was found in violation of probation. The trial court did not sentence Ms. Cilwa to any incarceration but did extend her active probation for one year.

On June 7, 2009, Ms. Cilwa was alleged to have committed a new felony, and on July 27, 2009, Ms. Cilwa signed an agreement with probation to extend her probation indefinitely. That letter stated she was agreeing to extend her probation so that she could take care of the new pending charges and enter and successfully complete both a residential and aftercare program. A bench warrant was issued for the alleged new violations of law on July 30, 2009. On August 11, 2009, the probation officer requested that the trial court recall that bench warrant. On September 16, 2009, the trial court extended Ms. Cilwa's probation

indefinitely. By January 2013, Ms. Cilwa had resolved what had been the new felony charge, and she had entered and successfully completed both a residential and aftercare program. On February 19, 2015, the trial court issued a bench warrant alleging that Ms. Cilwa had violated probation, specifically that she had picked up new charges on February 28, 2013, and on December 21, 2014. On March 20, 2015, Ms. Cilwa filed a motion to have the February 19, 2015 bench warrant dismissed on the grounds that the trial court violated the Virginia code when extending Ms. Cilwa's probation indefinitely, and that even if the trial court had not violated the statute, it formed a contract with conditions subsequent and that once those conditions had been satisfied Ms. Cilwa's probation should have terminated automatically. On March 27, 2015, the trial court heard argument on the motion and denied Ms. Cilwa's motion. The Honorable Judge Brett A. Kassabian presided over the hearing and found Ms. Cilwa in violation of her probation. The trial court sentenced Ms. Cilwa to ninety days incarceration and terminated her from probation.

The final order of conviction in this matter was entered on March 31, 2015. Ms. Cilwa timely filed a Notice of Appeal on April 28, 2015 with the Court of Appeals. On January 20, 2016, the petition was denied by a one judge *per curiam*. A demand for a three judge writ panel was timely filed on

February 3, 2016. On May 9, 2016, a full appeal was granted by the Court of Appeals. An opening brief was filed by Ms. Cilwa on June 20, 2016. The Commonwealth filed their brief on July 15, 2016. On July 29, 2016, Ms. Cilwa filed a reply brief.

On August 4, 2016 the Court of Appeals set Ms. Cilwa's merit argument for September 8, 2016. On August 12, 2016 the Court of Appeals dismissed the case as moot in an unpublished order. On August 31, 2016 Ms. Cilwa timely filed her Notice of Appeal to the Supreme Court of Virginia.

On April 21, 2017, the Supreme Court of Virginia granted an appeal in the case. On January 3, 2018, the Supreme Court of Virginia found error with the Court of Appeals and remanded the case. On June 26, 2018, the Court of Appeals held that the trial court did not err in finding Ms. Cilwa in violation of probation. On March 1, 2019, this Court granted Ms. Cilwa an appeal on all assignments of error.

Statement of Facts

A timeline of the events and orders relevant to this Petition for Appeal are as follows:

April 25, 2008 Final Sentencing.

On April 25, 2008, Ms. Cilwa was sentenced on one count of Grand Larceny by the Honorable Judge R. Terrence Ney, and sentenced to serve three (3) years with three (3) years suspended conditioned upon Ms. Cilwa's good behavior and that she be placed on active probation for one (1) year. App. at 5-7.

July 9, 2008 Bench Warrant for Probation Violation.

On July 9, 2008, a bench warrant was issued for alleged violations of probation. App. at 11-12. On August 14, 2008, as a result of a revocation hearing, the trial court found Ms. Cilwa in violation but ordered that none of the suspended sentence be revoked and ordered into execution. App. at 17-18. The trial court ordered that Ms. Cilwa be placed on supervised probation for a period of one (1) year which was to commence from the date of August 14, 2008. App. at 17-18. Ms. Cilwa's probation was set to expire on August 14, 2009.

July 27, 2009 Letter Agreeing to Extend Probation Until Certain Conditions Were Completed.

On June 7, 2009, Ms. Cilwa was charged with two counts of Grand Larceny, case numbers FE-2009-1920 and FE-2009-1921. On July 27, 2009, Ms. Cilwa signed an "EXTENSION OF PROBATION." That extension of probation stated that Ms. Cilwa voluntarily agreed to extend her probation "indefinitely beyond the scheduled termination date of August 14, 2009, in order to complete inpatient substance abuse treatment and to allow time for disposition of my pending felony charge." App. at 20.

On July 30, 2009, a bench warrant was issued for alleged violations of probation. App. at 15-16.[1] On August 11, 2009, as a result of the request from Probation and Parole Officer Bonnie Plaugher, the trial court ordered that the bench warrant be recalled. App. at 22-23. On August 14, 2009, Ms. Cilwa's probation ended, as no order had been entered prior to that date ordering her probation to be extended beyond August 14, 2009.

September 16, 2009 Order Extending Probation Indefinitely.

On September 16, 2009, the trial court ordered that Ms. Cilwa's period of supervised probation be extended indefinitely in order for her to

[1] This bench warrant is dated July 30, 2008, but alleges violations that occurred in 2009. The bench warrant was received by the clerk of court on August 4, 2009. Therefore, the July 30, 2008 date seems to have been a clerical error and should read July 30, 2009.

complete residential drug treatment and aftercare and time for disposition of her pending charges. App. at 21.

October 8, 2009 Bench Warrant for Probation Violation.

The trial court issued a bench warrant for alleged violations of probation on October 8, 2009. App. at 24-25. On December 17, 2009, as a result of a revocation hearing on the bench warrant issued on October 8, 2009, the trial court ordered that none of the suspended sentence be revoked and ordered into execution. App. at 30-32. The trial court ordered that Ms. Cilwa be transferred with a bed-to-bed transfer to an intermediate residential substance abuse treatment facility as determined by Alcohol and Drug Services (ADS). The trial court ordered that Ms. Cilwa remain under the same terms and conditions of supervised probation. The trial court further ordered that the Bench Warrant issued October 8, 2009, be discharged. App. at 30-32.

February 19, 2015 Bench Warrant for Probation Violation.

On February 19, 2015, the trial court issued a bench warrant for a violation of probation. App. at 44-45. On March 20, 2015, Ms. Cilwa filed a motion to have the February 19, 2015 bench warrant dismissed. App. at 46-56. The motion to dismiss was filed because the trial court on September 16, 2009, extended Ms. Cilwa's probation without first

conducting a hearing required by Virginia Code § 19.2-304. Ms. Cilwa also asserted that her probation terminated upon the moment that she completed all of the conditions required of her when her probation was extended indefinitely. App. at 46-56. Those conditions included her completion of a residential drug treatment program, her completion of an aftercare program, and the resolution of her felony charges that she picked up on June 7, 2009. App. at 46-56.

The motion was argued before the Honorable Brett A. Kassabian on March 27, 2015. App. at 70-89. Ms. Cilwa's motion arguing that the extension of probation was done without her being provided with minimal due process was denied by the trial court. App. at 83-85. The trial court cited to the Court of Appeals decision in *Heiderscheidt v. Commonwealth*, Record No. 1298-08-4, 2009 Va. App. LEXIS 256 (June 9, 2009), and found that the order extending Ms. Cilwa's probation was not void, but a voidable order which should have been appealed, and could not now be collaterally attacked. App. at 84-85.[2]

[2] Ms. Cilwa also argued that she had formed a contract, with conditions subsequent, and that upon those conditions having been satisfied, her probation should have terminated. The trial court denied that motion as well.

The trial court noted Ms. Cilwa's exception to the trial court's ruling. App. at 85. Ms. Cilwa admitted to the new charges through her counsel who was asked to, "…tell whether or not she admits or denies that she's in violation of probation in this case." App. at 85. Trial counsel responded with, "Your Honor, she admits the new charges." App. at 85. The trial court found Ms. Cilwa in violation and ordered ninety (90) days were to be revoked and probation was to be terminated. App. at 88.

August 12, 2016 Court of Appeals dismisses the case as moot.

The Court of Appeals dismissed Ms. Cilwa's appeal on August 12, 2016. *See* Court of Appeals order, Record No. 0687-15-4, dated August 12, 2016. The Court of Appeals found Ms. Cilwa's appeal was moot because Ms. Cilwa was no longer on probation and her sentence had been served. Ms. Cilwa timely appealed to the Virginia Supreme Court, which granted Ms. Cilwa's appeal and ultimately held that the appeal was not moot. On January 3, 2018, the Supreme Court of Virginia remanded the case to the Court of Appeals.

On June 26, 2018, the Court of Appeals held that the trial court did not err in finding Ms. Cilwa in violation of probation. *See Cilwa v. Commonwealth*, __ Va. App. __, __ S.E.2d __, Record No. 0697-15-4 (2018). On March 1, 2019 Ms. Cilwa's appeal was granted by this Court.

Argument

I. The Court of Appeals erred in finding that the trial court had personal and subject matter jurisdiction over Ms. Cilwa when it issued the February 19, 2015 bench warrant and when it revoked her suspended sentence in its March 31, 2015 order.

A. *Standard of Review*

On appeal, a question of law is reviewed *de novo*. *Amin v. County of Henrico*, 286 Va. 231, 749 S.E.2d 169, 170 (2013). Whether a court has jurisdiction is a question of law. *See Mayer v. Corso-Mayer*, 62 Va. App. 713, 724-25, 753 S.E.2d. 263, 268 (2014) (stating "A challenge to a trial court's subject matter jurisdiction is a question of law that is reviewed *de novo* on appeal.")

B. *Argument*

In order for a court to act and issue an order, it must have subject matter and personal jurisdiction; the latter can be waived and is a voidable issue, while the former can never be waived and can be collaterally attacked at any time. *Singh*, *M.D. v. Mooney*, 261 Va. 48, 51-52, 541 S.E.2d. 549, 551 (2001). In this case the trial court retained personal jurisdiction over Ms. Cilwa, and that is not at issue. What is at issue, however, is the subject matter jurisdiction of the trial court, and when that jurisdiction lapsed.

As of August 14, 2009, the trial court had two different matters over which it retained jurisdiction in relation to Ms. Cilwa: her probationary period and any potential revocation of her probation. As of August 15, 2009, the trial court only had subject matter jurisdiction over any revocation of Ms. Cilwa's probation[3], as the subject matter of her probation period ceased to be retained by the court when it lapsed on August 15, 2009.

The revocation proceeding that occurred after August 2009, and was finalized by an order on January 28, 2010 was a valid order because the court had personal jurisdiction of Ms. Cilwa and it had subject matter jurisdiction over the revocation proceeding as specified in Va. Code § 19.2-306(B). However, the September 16, 2009 order was void because while the court retained personal jurisdiction over Ms. Cilwa it lacked subject matter jurisdiction over her probation period, which ended on August 14, 2009. Without a statute like Va. Code § 19.2-306(B), granting an extra year of subject matter jurisdiction to conduct a revocation hearing, the trial court was without subject matter jurisdiction to extend her probation period.

[3] Va. Code § 19.2-306(B) creates a statute of limitations of one (1) year beyond the ending of probation to conducted a revocation hearing for any alleged violations that occurred during the probationary period, effectively this creates the subject matter jurisdiction of the trial court over revocations.

Therefore, when the trial court issued the September 16, 2009 order it did so without subject matter jurisdiction over Ms. Cilwa's probation period. The subsequent revocation order was valid, however, its reference to previous conditions of probation can only be read to mean the last valid final order, issued August 14, 2008, which ended Ms. Cilwa's probation on August 14, 2009. Therefore, the January 28, 2010 order merely found Ms. Cilwa in violation of probation.[4] *See* App. 30-32.

The June 26, 2018 opinion by the Court of Appeals was in error because Ms. Cilwa's indefinite probation was the result of a void order, and therefore could not be cured by a future valid order. The void order, which is the only order that extended Ms. Cilwa's probation indefinitely, was entered on September 16, 2009, a full month after her probation had expired and after the trial court had lost subject matter jurisdiction over Ms. Cilwa's probation. *See* App. 21; *see also* App. 30-32.

The Commonwealth accurately conceded that the interpanel accord doctrine required the Court of Appeals to follow the precedent set forth by *Wilson v. Commonwealth*, 67 Va. App. 82, 793 S.E.2d 15 (2016). *See also* Appellee's Br. at 18-19 in the Court of Appeals (conceding that the Court of

[4] The conviction was not without consequence, as it added to Ms. Cilwa's criminal record, and caused her financial loss in the form of court costs and fees, but in practical terms it ended her probation.

Appeals was required to follow the decision of the *Wilson* panel). In *Wilson*, the defendant agreed to extend his probation by an agreement which stated that Wilson "agreed to waive a probation revocation hearing in the [] [c]ircuit [c]ourt and have [his] probation supervision extended until all court costs, fines, and restitution are paid in full." *Id*. at 94, 793 S.E.2d at 21. It then took over nine months from the date Wilson's probation ended for the circuit court to enter an order stating that Wilson's period of probation was extended. *Id.* The Court of Appeals found this to be error, concluding that "[b]y the time it entered its order doing so, the circuit court no longer had active jurisdiction to extend Wilson's probation and Wilson's signature on an agreement to extend jurisdiction was ineffective." *Id.* The *Wilson* Court correctly found that once the trial court had lost jurisdiction it could not extend a person's probation.

In Ms. Cilwa's case, the trial court lost subject matter jurisdiction over Ms. Cilwa's probation on August 15, 2009, and the trial court did not enter an order extending probation until September 16, 2009. Just as in *Wilson*, it is irrelevant that Ms. Cilwa signed the extension of probation letter because the trial court lacked subject matter jurisdiction, on September 16, 2009 to extend her probation. In rendering its opinion, the Court of Appeals failed to follow the precedent set forth in *Wilson* and incorrectly concluded,

contrary to the holding in *Wilson*, that the trial court maintained jurisdiction over Ms. Cilwa such that it could find her in violation.

The Commonwealth also conceded that the order was void by acknowledging that the *Wilson* opinion, which was published, required the Court of Appeals under the interpanel accord doctrine to find for Ms. Cilwa or to conduct an *en banc* hearing. *See* Appellee's Opening Brief at p. 19 ("*Wilson* has not yet been overturned. And it does not appear to be distinguishable on its facts. Thus, it appears that this panel must permit Cilwa to collaterally attack the circuit court's September 16, 2009 order extending her probation even though the court had jurisdiction over Cilwa and jurisdiction over the subject matter involved when the order was entered.").

The Court of Appeals reasons that the trial court retained jurisdiction over Ms. Cilwa under Virginia Code § 19.2-306(B). *See Cilwa*, __ Va. App. __, __ S.E.2d __, Record No. 0687-15-4, at 7. While ultimately the January 28, 2010 order and conviction should stand, that order referred to terms and conditions of probation that were part of a void *ab initio* order, as discussed *infra*. The January 28, 2010 order failed to set forth separate and distinct probation terms and conditions. By merely requiring her to remain under the same terms and conditions as a prior invalid order, Ms.

Cilwa's period of probation was not validly extended by the January 28, 2010 order. No other order subsequently extended her probation or amended the terms and conditions of her probation. Therefore, the Court of Appeals erred in concluding the trial court had jurisdiction under § 19.2-306(B) because, as discusse*d*, Ms. Cilwa was not on probation at the time the basis for the revocation violation arose.

In the alternative, if the January 28, 2010 order is read, with an understanding that the September 16, 2009 order effectively did not exist, then Ms. Cilwa's probation was already over and the final order was ineffectual because it required her to be on something that had already ended. For these reasons, the Court of Appeals erred in concluding the trial court had personal and subject matter jurisdiction over Ms. Cilwa when it issued the February 19, 2015 bench warrant and when it revoked her suspended sentence.

II. The Court of Appeals erred by finding that a void September 2009 order would have no effect on the January 2010 order or subsequent orders.

A. *Standard of Review*

On appeal, a question of law is reviewed *de novo*. *Amin v. County of Henrico*, 286 Va. 231, 749 S.E.2d 169, 170 (2013). Whether a court has jurisdiction is a question of law. *See Mayer v. Corso-Mayer*, 62 Va. App.

713, 724-25, 753 S.E.2d. 263, 268 (2014) (stating, "[a] challenge to a trial court's subject matter jurisdiction is a question of law that is reviewed *de novo* on appeal.")

B. *Argument*

As discussed *supra*, the Court of Appeals ignored *Wilson's* binding precedent, despite the interpanel accord doctrine, by invoking the "best and narrowest ground available" doctrine, and by not addressing whether the September 16, 2009 order was actually void. *See Cilwa*, __ Va. App. __, __ S.E.2d __, Record No. 0687-15-4, at 6. fn. 4. Instead, the Court of Appeals concluded it would assume the September 16, 2009 order was void but the January 28, 2010 order cured that deficiency. The Court of Appeals concluded that Ms. Cilwa remained on probation because of the January 28, 2010 order.

This logic is strained. Essentially, the Court of Appeals reasons that though the September 16, 2009 order may have been void, the January 28, 2010 order was *not* void, even though it required Ms. Cilwa to "remain under the same terms and conditions of supervised probation" of the September 16, 2009 *void* order. Therefore, the Court of Appeals interpreted the void order as merely setting out the terms of Ms. Cilwa's probation going forward. *See id.* at 8 (stating, "[t]he January 2010 order

referenced language in the September 2009 order merely to set out the terms and conditions of the appellant's probation from January 2010 forward."). The problem with this legal reasoning is clear: if the September 16, 2009 order is void, it is a nullity, yet it is the very document the Court of Appeals uses to interpret the January 28, 2010 order by stating what terms and conditions Ms. Cilwa is required to follow. This reasoning is erroneous for two reasons.

First, a void order cannot be used to interpret or "merely to set out the terms and conditions of the appellant's probation from January 2010 forward" because the void order needs to be treated as if it never existed. Orders that are void *ab initio* differ from orders that are merely voidable. The latter is the result of the court taking actions which are in error, whereas the former involves the authority of a court to take action in the first place. *Singh*, *M.D. v. Mooney*, 261 Va. 48, 51-52, 541 S.E.2d. 549, 551 (2001). An order void *ab initio* is an order which is a complete nullity, "and it may be 'impeached directly or collaterally by all persons, anywhere, at any time, or in any manner.'" *Id.* A court order is void *ab initio* when it is entered by a court without jurisdiction over the subject matter. *Id.* Furthermore, if the character of the order or procedure used by the court to

enter the order is one that the court could not lawfully adopt, the order is void *ab initio*. *Id.*

It is "essential to the validity of a judgment or decree, that the court rendering it shall have jurisdiction of both the subject matter and parties." *Anthony v. Kasey*, 83 Va. 338, 340, 5 S.E. 176, 177 (1887). Without having jurisdiction over both the subject matter and the parties involved, a court lacks jurisdiction to act, and thereby renders its orders in that instance void *ab initio*. *Evans*, *et al. v. Smyth-Wythe Airport Commission*, 255 Va. 69, 73, 495 S.E.2d 825, 828 (1998).

Orders that are void *ab initio* stand in contrast to voidable orders. Voidable orders may be set aside by motions filed in compliance with Rule 1:1 of the Supreme Court of Virginia, or other provisions dealing with the review of final orders. *Singh*, *M.D.*, 261 Va. at 51-52, 541 S.E.2d. at 551.

If the Court of Appeals was correct, then one would simply remove the September 16, 2009 order from the record. That is in fact the practical effect of it being a void order-- it is as if it never existed. Since the September 16, 2009 order does not exist, then it could not be used to "merely" set out the terms and conditions of the appellant's probation. An order that does not exist, which was the only order to set forth the

probationer's terms and conditions, results in that probationer not having any terms and conditions.

Second, even assuming analysis by the Court of Appeals was correct, then Ms. Cilwa was again not on probation following the January 28, 2010 order. If the September 16, 2009 order did not exist (because it was void), then the trial court's January order could only have referred to the last order that did exist and was valid. *See* App. 17-18. On August 14, 2008, the trial court found Ms. Cilwa in violation of her probation. The trial court ordered that none of the suspended sentence be revoked, but it ordered that Ms. Cilwa be placed on supervised probation for one year. App. 17-18. As this was the last valid order, then Ms. Cilwa's probation was already over when the trial court stated that probation was to be continued.

Ms. Cilwa asserts that the January 28, 2010 order which found her in violation of probation and assessed court costs against her, should stand. However, the portion of the order which stated she was to remain on the same terms and conditions of a prior order was not valid because it flowed from the void order of September 16, 2009. In the alternative, if the January 28, 2010 order is read, with the understanding that the September 16, 2009 order did not exist, then Ms. Cilwa's probation was already over and the final order was ineffective because it required her to be on

something that had already ended. Under either theory Ms. Cilwa was not on probation when the trial court found her in violation of probation in March of 2015 and the Court of Appeals erred in concluding otherwise.

III. The Court of Appeals erred in affirming the trial court's error by not finding that Ms. Cilwa's probation terminated automatically when she completed substance abuse treatment in January 2013 because Ms. Cilwa had formed a contract conditions subsequent and those conditions had been met.

A. *Standard of Review*

Because the trial court's refusal to grant the motion to dismiss involves a purely legal determination, it is reviewed *de novo* on appeal. *Young v. Commonwealth*, 273 Va. 528, 533, 643 S. E. 2d 491, 493 (2007).

B. *Argument*

a. Ms. Cilwa's probation was extended through the formation of a contract, and the law of contracts will apply to that agreement.

When a trial court places a person on probation it is not typically considered a "contract". *See generally Marshall v. Commonwealth*, 202 Va. 217, 219, 116 S.E.2d 270, 271 (1960) (opining that when a court suspends a sentence it 'does not make a contract with the accused, but only extends to him the opportunity which the State affords him to repent and reform'). In Ms. Cilwa's case, however, the trial court extended her probation on September 16, 2009 without the required hearing mandated

by Virginia Code § 19.2-304. Thus, the agreement entered into by Ms. Cilwa, the trial court, and the Commonwealth to extend Ms. Cilwa's probation was a contract outside the bounds of the probation statutes, and thus governed by general contract law.

The Court of Appeals erred in applying the "well-accepted principle that neither the suspension of sentence nor imposition of probation amounts to a contract with the accused." *Cilwa*, __ Va. App. __, __ S.E.2d __, Record No. 0687-15-4 at 10. The Court of Appeals' erroneous interpretation of the prior orders regarding the extension of probation contributed to this error.

When a defendant is given sentence after having been found guilty of a crime, the period of suspended sentence (if any ordered) and the probation (if any ordered) do not form a contract with the accused. The Court of Appeals asserts those principles in holding that no contract was formed with Ms. Cilwa. However, Ms. Cilwa is not arguing that a contract was formed with the trial court during her sentencing from 2008. Instead, Ms. Cilwa argues that a contract formed when the probation and parole office, with the consent of the Commonwealth Attorney, submitted an order to the trial court for Ms. Cilwa's extension of probation. Specifically, that

contract contained conditions subsequent, which when satisfied would cause the contract to dissolve by operation of well-settled contract law.

This would not be the first instance in which Virginia Courts have applied contract law to criminal proceedings. *See Wright v. Commonwealth*, 275 Va. 77, 80-82, 655 S.E.2d 7, 9-10 (2008) (stating that basic contract rules apply to plea agreements); *Esparza v. Commonwealth*, 29 Va. App. 600, 606, 513 S.E.2d 885, 888 (1999) (applying to criminal cases the contract principle that the law in effect when the parties formed the contract determines the rights of the parties at a later date.); *Sluss v. Commonwealth*, 14 Va. App. 601, 604, 419 S.E.2d 263, 265 (1992) (holding that when a defendant and the Commonwealth have an agreement the defendant is entitled to specific performance of that agreement so long as they follow through on their obligations contained within the agreement). Therefore, in some instances probation does become a contract between the trial court and the probationer, and that is what occurred with Ms. Cilwa.

b. Ms. Cilwa entered into a valid contract with the trial court, and the Commonwealth, because there was an offer, acceptance of that offer, and valuable consideration.

In Virginia, a valid contract is formed when there is an offer, acceptance of that offer, and valuable consideration. *Montagana v. Holiday*

Inns, *Inc*., 221 Va. 336, 346, 269 S.E.2d 838, 846 (1980). The determination of whether a contract was formed is ultimately resolved by looking to the intentions of the parties as objectively manifested in the writing. *Id*. It is not necessary for a contract to have a formal name on any specific document. *Id*.

In this case, an offer was made to Ms. Cilwa that an outstanding bench warrant of July 30, 2008 would be recalled if she agreed to extend her probation indefinitely to complete a residential drug program, aftercare program, and to dispose of her pending charges. App. at 20. Ms. Cilwa's acceptance of this offer is clearly exhibited in her letter to the trial court on July 27, 2009. App. at 20.

The consideration in this bargained for exchange was Ms. Cilwa's willingness to continue with probation to complete her drug treatment and dispose of her charges, and in return a bench warrant for a probation violation would be recalled. "Consideration" for a valid contract need not be tangible or have any monetary value, but rather, can be a "legal detriment." *See Brewer v*. *First National Bank of Danville*, 202 Va. 807, 815, 120 S.E.2d 273, 279-80 (1961) (holding that it matters not to what extent a promisor is benefited or how little the promisee may give for the contract, the slightest advantage to one party or a "trifling inconvenience" to the

other will be enough to satisfy the element of consideration). Legal detriment as consideration is an act or forbearance by the promisee for the benefit of the promisor. *Id.* The promisor's benefit does not have to be economic; it can be peace of mind or merely the gratification of bending another's will. *Id.*

Ms. Cilwa's legal detriment was her agreement to continue on probation beyond its original expiration date. Ms. Cilwa's probation was extended without the requisite hearing mandated under Virginia Code § 19.2-304, and thus, general contract law governs the agreement made between Ms. Cilwa, the trial court, and the Commonwealth. Additionally, the agreement meets all of the necessary requirements for the creation of a valid contract, as there was an offer, acceptance of that offer, and valuable consideration.

c. The language of the valid contract created by Ms. Cilwa, the trial court, and the Commonwealth created a condition subsequent, which once fulfilled, terminated Ms. Cilwa's obligation to continue probation.

"Where the terms of an agreement are unambiguous, courts must adhere to the plain meaning of the agreement's stated terms." *Dailey v. Dailey*, 59 Va. App. 734, 739, 722 S.E.2d 321, 324 (2012) (quoting *Southerland v. Estate of Southerland*, 249 Va. 584, 588, 457 S.E.2d 375,

378 (1995)). The court may not "read into [the agreement] language which will add to or take away from the meaning of the words already contained in the agreement." *Id*.

The Court of Appeals erred by reading into, and ultimately interpreting, the contract beyond the language which was already contained in the agreement. There is no ambiguity as to the meaning of the agreement, and all orders of the trial court make it clear that the purpose was to have probation extended for Ms. Cilwa to complete an inpatient treatment program, aftercare program, and to have her other charges dealt with. The Court of Appeals recognized that the aim and purpose of the agreement was for Ms. Cilwa to complete substance abuse treatment and take care of her new charges when it wrote "[t]he stated *purpose* of the request for extension was to allow for the appellant's completion of inpatient substance abuse treatment and the disposition of her pending felony charges, but the order clearly characterizes the *duration* of the extension as indefinite." *See Cilwa*, __ Va. App. __, __ S.E.2d __, Record No. 0687-15-4 at 10. Because the purpose of the order was for Ms. Cilwa to complete inpatient substance abuse treatment and to allow for the disposition of her pending charges, then once those conditions were satisfied there was no need for the contract to be in effect anymore.

Moreover, if Ms. Cilwa believed that she was extending probation for the explicit purpose of completing those things, and her probation was to end once those conditions had been satisfied, but the trial court thought differently, then there was no meeting of the minds and the contract was not valid.

However, in this case, the terms of the agreement are clear. The letter from Ms. Cilwa to the trial court dated July 27, 2009, expressly stated that she agreed to extend her probation indefinitely "*in order to* complete inpatient substance abuse treatment and to allow time for disposition of [Ms. Cilwa's] pending felony charge." *See* App. at 20. (emphasis added). The trial court issued a bench warrant on July 30, 2009 and probation and parole submitted a request asking the trial court to withdraw the bench warrant, which the trial court did on August 11, 2009. *See* App. at 30-31 (referencing the trial court's decision on August 11, 2009 to recall the bench warrant due to a request from probation and parole the trial court ordered that the bench warrant be recalled). The petition and order for extension of probation submitted to the trial court by the Commonwealth on September 15, 2009 requested that the trial court extend probation indefinitely "*until* substance abuse treatment and aftercare are completed and pending charges are disposed of." *See* App. at 21. (emphasis added).

The petition submitted by the Commonwealth was signed by the trial court the next day, September 16, 2009. *Id.* It is clear from the plain meaning of both documents that the intention behind extending probation was for Ms. Cilwa to complete substance abuse treatment, aftercare, and for her pending charges to be disposed of. This is apparent by the use of the words "in order to" in the July letter from Ms. Cilwa, and "until" in the September petition. *Id*.

In other words, the plain meaning of the language in the contract is that Ms. Cilwa was obligated to abide by the rules and guidelines of probation until she completed the specified conditions, at which point her obligation would be terminated. In contract law, this is referred to as a "condition subsequent."

d. The contract formed between Ms. Cilwa, the trial court, and the Commonwealth was a contract condition subsequent, which terminated the contract upon the happening of all of conditions subsequent.

A condition subsequent is a term in a contract where the happening or nonoccurrence of a future event discharges the parties from their otherwise binding agreement. 17A Am. Jur. 2d *Contracts* § 464. In other words, a condition subsequent arises as a term in a contract when the parties expressly or implicitly intend for a future event to discharge the parties of their obligations to the contract. Where it is the clearly expressed

intention of the parties to create a contract based on a condition subsequent, the courts must give effect to that intention. *Eagler v. Little*, 217 Va. 869, 872, 234 S.E.2d 242, 244 (1977). Conditions subsequent are to be strictly construed by the courts, and the burden of proof that the condition subsequent occurred falls on the party asserting that the conditions were met. *Kirby v. Town of Claremony*, 243 Va. 484, 490, 416 S.E.2d 695, 699-700 (1992); *Morotock Ins. Co. v. Fostoria Novelty Co.*, 94 Va. 361, 365, 26 S.E. 850, 851 (1897).

e. Virginia courts have given effect to contracts with conditions subsequent in criminal cases.

Virginia courts have not hesitated to apply contract laws pertaining to conditions subsequent to criminal procedure. In *Calvillo v. Commonwealth*, 19 Va. App. 433, 434, 452 S.E.2d 363, 363 (1994), pursuant to a plea agreement, Calvillo pled guilty to possession of cocaine, but disposition was deferred for one year pursuant to Va. Code § 18.2-251. After one year the charge would be dismissed, "conditioned that the defendant has no further violations of law." *Id*. At a hearing more than one year later, the trial court refused to dismiss the charge because Calvillo was not present in court, despite the fact that he had no violations within the "one year" period. *Id*. at 435, 452 S.E.2d at 364. The Court of Appeals reversed the decision, finding the condition that Calvillo have no further violations for one year

was a condition subsequent within the plea agreement; therefore, once the "one year" period lapsed Calvillo's obligation had terminated. *Id*. The Commonwealth was forced to dismiss the charge pursuant to the plea agreement. *Id*.

In this case, the contract extended Ms. Cilwa's probation indefinitely "*until"* she completed the residential substance abuse program, the aftercare program, and disposition of her then pending charges. All of these events occurred by the beginning of January 2013. Ms. Cilwa's "pending charges," identifiable as FE-2009-1920 and FE-2009-1921, were disposed of when she was sentenced on January 14, 2010. Ms. Cilwa eventually entered and successfully completed Demeter House, a full time residential drug program, and then entered and successfully completed Steps to Recovery, an aftercare program. *See* App. at 36; *See also* App. at 37. Immediately following Ms. Cilwa's completion of Steps to Recovery, the conditions subsequent had been satisfied in her case and the contract was terminated. Once the contract terminated in January of 2013, Ms. Cilwa was no longer on indefinite probation. Therefore Ms. Cilwa's alleged violation of probation which occurred on February 27, 2013, was after she was terminated from probation, and therefore Ms. Cilwa was not on probation at the time of the offense and the trial court lacked jurisdiction to

find Ms. Cilwa in violation of her probation. For these reasons, the Court of Appeals erred in concluding probation had not terminated based on a contract conditions subsequent.

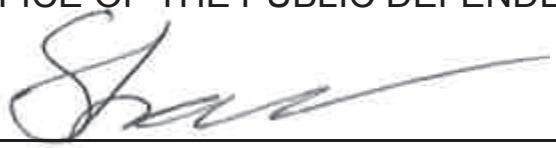
Conclusion

WHEREFORE, Ms. Cilwa respectfully requests that this Court reverse her conviction for violating probation.

Respectfully submitted,

DOROTHY ELIZABETH CILWA
By Counsel

OFFICE OF THE PUBLIC DEFENDER



Shalev Ben-Avraham, VSB #81859
Senior Trial Attorney
Office of the Public Defender
2200 Wilson Blvd, Suite 510
Arlington, Virginia 22201
P: (703) 875-1111 ext 133
F: (703) 875-0174
sben-avraham@vadefenders.org

Certificate

I, Shalev Ben-Avraham, certify as follows:

1. The name and temporary address of Appellant are:

   Dorothy Elizabeth Cilwa

2. The names, Virginia State Bar (VSB) numbers, mailing address, telephone number, facsimile number, and email address of counsel for appellant are:

   Shalev Ben-Avraham, VSB #81859
   OFFICE OF THE PUBLIC DEFENDER
   2200 Wilson Blvd, Suite 510
   Arlington, VA 222001
   Phone: (703) 875-1111, ext. 133
   Fax: (703) 875-0174
   Email: sben-avraham@vadefenders.org

3. The name, mailing address, telephone number, facsimile number, and email address of counsel for appellee are:

   Christopher P. Schandevel, Assistant Attorney General
   Office of the Attorney General
   202 North Ninth Street
   Richmond, Virginia 23219
   Phone: 804-786-9642
   Fax: 804-371-0151
   Email: cschandevel@oag.state.va.us

4. On April 5, 2019, electronic copies of the Opening Brief of Appellant and Appendix were filed, via VACES, and three paper copies of the Opening Brief of Appellant and three paper copies of the Appendix were hand-filed with the Clerk of this Court. On this same day, electronic copies of the Opening Brief of the Appellant and Appendix were served, via email upon, Christopher P. Schandevel, Assistant Attorney General, Office of the Attorney General, 202 North Ninth Street, Richmond Virginia, 23219.

5. This Opening Brief for the Appellant, not including the cover page, table of contents, table of authorities, and certificate, contains 6,652 words in accordance with Rule 5:26(b).

6. Counsel for appellant was appointed by the Court.

7. Appellant respectfully requests the opportunity to state orally to this Court, in person and by counsel, the reasons why relief should be granted.

Shalev Ben-Avraham
Counsel for Appellant