In The

Supreme Court of Virginia

RECORD NO. 180885

DOROTHY ELIZABETH CILWA,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

REPLY BRIEF OF APPELLANT

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SCV: Submitted on 05-16-2019 11:44:20 EDT for filing on 05-16-2019

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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. The Commonwealth is conflating general subject matter jurisdiction over indicted felonies with continued subject matter jurisdiction after a person has been placed on probation.

The Commonwealth argues that Virginia Code §17.1-513 conferred subject matter jurisdiction upon the trial court, and thus the ability to extend Ms. Cilwa's probation indefinitely after her probation had expired. Appellee's Br. at 15-19. Virginia Code §17.1-513 does not discuss subject matter jurisdiction over a person who has been convicted in a circuit court of a crime. A defendant accused of violating the terms of their probation are served either with a bench warrant, or a show cause, neither of which are discussed in Virginia Code §17.1-513.

Moreover, the Supreme Court of Virginia has held that when a general statute speaks to a subject in a general way and another one deals with a part of the same subject in a more specific manner, and if they cannot be harmonized, then the more specific should prevail. *See Brown v. Commonwealth*, 279 Va. 210, 223-224, 688 S.E.2d 185,

192-193 (2010)(holding that the more specific statute is to be followed over the more general statute).

On August 14, 2009 at 11:59 p.m. the Trial Court had two potential means of exercising jurisdiction over Ms. Cilwa: first over her probationary period as conferred upon the Trial Court through Va. Code §19.2-304, and second over a probation revocation through Va. Code §19.2-306. As of August 15, 2009 at 12:00 a.m. the trial court only had one potential means of exercising jurisdiction over Ms. Cilwa, and that was a probation revocation through Va. Code §19.2-306. It should be noted that even that potential jurisdiction was limited by subsection (B) of Va. Code §19.2-306 which only grants the Trial Court one year from the end of the probationary period to bring process against a probationer as to whether their probation should be revoked.

Virginia Code §17.1-513 cannot be the grounds on which Ms. Cilwa was still subject to the jurisdiction of the trial court. To hold otherwise would be to allow that code section to create jurisdiction in perpetuity.

B. Ms. Cilwa's revocation from December 17, 2009, does not cure the trial court's order of indefinite suspension of probation because that extension was still void *ab initio* even though the revocation was a valid conviction for violating probation.

The Commonwealth argues that because the trial court had jurisdiction under Virginia Code §19.2-306(B) to revoke Ms. Cilwa's suspended sentence after her probation ended on August 14, 2009, for alleged violations that occurred during her probationary period, the trial court's order of indefinite probation was not void *ab initio*. Appellee's Br. at 22-26. The December 17, 2009 revocation of Ms. Cilwa's probation, and the subsequent final order, merely reaffirmed what was already an order void *ab initio*. App. 30-31. Ms. Cilwa's revocation from December 17, 2009, was valid, and would remain a valid conviction for a probation revocation, despite the fact that the extension of her probation indefinitely was void *ab initio*, because notice and process was brought within the provisions of Virginia Code §19.2-306. The Appellee asserts that the Court of Appeals decided this issue correctly, that is to say, the Court of Appeals used the void *ab initio* order to interpret and inform the order of the trial court from the December 17, 2009, revocation hearing.

This logic is a bit 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 Cilwa*, __ Va. App. __, __ S.E.2d __, Record No. 0687-15-4, at 8. (stating "The 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.

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. The Appellee concedes this point stating, "[i]ndeed, a void order is "***without effect*** from the moment it came into existence." Appellee's Br. At 24 (bold and italics from Appellee's brief.) But curiously the Appellee then tries to argue that while the void order has no effect, it still physically exists, and therefore references to it are not invalid. *Id.* The Appellee can cite to no

cases that suggest a void order's terms and conditions that order a party to comply, can then become valid through the issuance of another order which does not specifically incorporate the prior void order into it. At most the Appellee points this Court to a case which found that when an order contains some void *ab initio* conditions only the void *ab initio* conditions are invalid, leaving the others to be effective.

The final order for the December 17, 2009 revocation does not contain, and the trial court did not expressly order, that Ms. Cilwa's probation be extended indefinitely because she was found in violation of her probation. The trial court order requiring Ms. Cilwa to remain under the same terms and conditions of supervised probation resulted in ordering Ms. Cilwa to comply with an order that was already void *ab initio*, or in the alternative it required Ms. Cilwa to comply with the last validly entered order by the trial court which was the August 14, 2008 order which placed her on probation until August 14, 2009.

Ultimately, Ms. Cilwa's December 17, 2009 probation revocation is a valid conviction for violating probation and should stand; however, the trial court's order reaffirming a previous order that was void *ab initio* does not allow for Ms. Cilwa's subsequent revocations to stand.

C. *Wilson v. Commonwealth* was correctly decided by the Court of Appeals, and this Court should decline to overrule it.

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 the period of Wilson's probation was extended. *Id.* This Court 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 jurisdiction 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 jurisdiction on September 16, 2009 to extend her probation.

II. 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 of 2013 because Ms. Cilwa had formed a contract conditions subsequent and those conditions had been met.

A. The four corners of the document, and the intention of the parties was to form a contract conditions subsequent.

Contracts condition subsequent do not need any sort of magic words to be formed. 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. *See generally* 17A Am. Jur. 2d *Contracts* §464. 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).

The order which was used to extend Ms. Cilwa's probation indefinitely is one full page. App. 21. It is clear that the four corners of the document, the very order that the trial court signed, shows that all parties were requesting the probation to be extended until certain conditions were

fulfilled. It is implicit that the parties were extending the probation indefinitely until the conditions were satisfied, and especially in light of the letter that Ms. Cilwa signed agreeing to extend her probation until those conditions were satisfied. App. 20. Moreover, the trial court's final order from January 28, 2010, states, "On September 16, 2009, the Court Ordered that the Defendant's period of supervises probation be extended indefinitely in order for the Defendant to complete residential drug treatment and aftercare and time for disposition of her pending charges." App. 30-31. It is clear from the trial court's own subsequent orders that the trial court believed that the purpose for the extension of probation was for Ms. Cilwa to satisfy certain conditions. This is a clear expression by Ms. Cilwa, the probation and parole office, and the trial court that Ms. Cilwa's probation be extended indefinitely until she satisfied the conditions required of her.

The Appellee appears to be approbating and reprobating with regard to the intentions of the parties and the interpretation of the trial court's orders. The Appellee states that, "[i]t is 'well established in this Commonwealth that a circuit court speaks only through its written orders." Appellee br. At 28. The Appellee then reasons the order extending Ms. Cilwa's probation on September 16, 2009, did not actually include the conditions subsequent, because the document while specifically

referencing the conditions and stated purpose did not include it in the actual order section. App. 21. Yet, when discussing whether the January 28, 2010 order extended Ms. Cilwa's probation the Appellee seeks to have this Court find the intent of the trial court, through the recitation of previous events in the case that are listed in the final order. This is approbating and reprobating and this Court has stated, "[a] party may not approbate and reprobate by taking successive positions in the course of litigation that are either inconsistent with each other or mutually contradictory." *Rowe v. Commonwealth*, 277 Va. 495, 502, 675 S.E.2d 161, 164 (2009). The Appellee cannot claim that this Court should look beyond the actual order section of an order in one instance, and then not look beyond the order section in another.

Moreover, the only way the trial court could have extended Ms. Cilwa's probation on September 16, 2009, would have been to have had a hearing in open court, unless of course Ms. Cilwa voluntarily waived that hearing.[1] This is important, because Ms. Cilwa was induced to consent to the extension of probation based upon the letter she signed voluntarily

[1] Ms. Cilwa still asserts that this order was void *ab initio*, but if the trial court had done this order on August 13, 2009, it would have been a voidable order if done without complying with the provisions of Va. Code §19.2-304, unless Ms. Cilwa had waived her right to that hearing.

waiving that hearing. App. 20. When the Commonwealth argues that this letter does not form the bargained for exchange between the parties, or that one or both parties had different interpretations of what was being exchanged there could not be a meeting of the minds. This would effectively mean that no contract was formed. Without a contract formed Ms. Cilwa did not voluntarily give up her right to a hearing, thereby rendering the order extending her probation without the necessary waiver of her right to a hearing and without her actual voluntary consent to extend the probationary period.

However, it was the intention of all the parties involved to create a contract conditions subsequent. The very document that indefinitely extended Ms. Cilwa's probation states that her probation should be extended, "**INDEFINITELY**, until substance abuse treatment and aftercare are completed and pending charges are disposed of." App 21. As of the end of January 2013 all of the conditions were met, and therefore the contract was dissolved. App. 36-37.

CONCLUSION

WHEREFORE, Ms. Cilwa respectfully requests that this Honorable Court vacate the order of conviction in this case and dismiss the charge against her, and any other appropriate relief.

Respectfully submitted,

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CERTIFICATE

I Shalev Ben-Avraham, certify as follows:

(1) That on May 16, 2019, this Reply Brief of the Appellant complies with Va. Sup. Ct. R 5:6, 5:26, 5:29, and specifically this Reply Brief of the Appellant, not including the cover page, table of contents, table of authorities, and certificate, contains 2,295 words, in compliance with the 2,625 word count limitation imposed by Rule 5:26(b).

(2) Three copies of the Reply Brief of Appellant have been hand-delivered to the Office of the Clerk of the Supreme Court of Virginia, Patricia L. Harrington, Clerk, Supreme Court of Virginia, 100 North 9th Street, 5th Floor, Richmond, VA 23219.

(3) An electronic copy of the Reply Brief of the Appellant was filed, via VACES.

(4) Appellant desires to state orally, by counsel, the reasons why her conviction should be vacated.

(5) And on this day May 16, 2019 an electronic copy of the Reply Brief of Appellant was served, via email, to:

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