SCV: Submitted on 05-03-2019 13:31:17 EDT for filing on 05-03-2019

IN THE

SUPREME COURT OF VIRGINIA

RECORD NO. 180885

DOROTHY ELIZABETH CILWA,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

BRIEF FOR THE COMMONWEALTH

MARK R. HERRING
Attorney General of Virginia

ELIZABETH KIERNAN FITZGERALD
Assistant Attorney General
Virginia State Bar No. 82288

OFFICE OF THE ATTORNEY GENERAL
202 North Ninth Street
Richmond, Virginia 23219
(804) 786-2071
(804) 371-0151 (fax)
oagcriminallitigation@oag.state.va.us

TABLE OF CONTENTS

PAGE

STATEMENT OF THE CASE 1

ASSIGNMENTS OF ERROR 3

STATEMENT OF FACTS AND MATERIAL PROCEEDINGS BELOW 4

ARGUMENT 14

The Court of Appeals correctly determined that the trial court had subject matter jurisdiction when it revoked Cilwa's suspended sentence on March 31, 2015. 14

A. Standard of Review 14

B. The September 16, 2009 order extending probation indefinitely cannot be collaterally attacked in this proceeding. 15

C. The Court of Appeals' decision in Wilson v. Commonwealth was wrongly decided, and this Court should take this opportunity to expressly overrule it. 20

D. Even if the September 2009 order was void, the Court of Appeals correctly held that Cilwa's probation was ongoing as ordered by the trial court on January 28, 2010. 22

E. Cilwa's reliance on contract principles does not entitle her to relief because her factual premise is not supported by the record. 27

CONCLUSION 30

CERTIFICATE OF TRANSMISSION AND SERVICE 32

TABLE OF AUTHORITIES

CASES

Andrews v. Richmond Redevelopment & Hous. Auth.,
292 Va. 79, 787 S.E.2d 96 (2016) 21, 22

Berry v. Commonwealth,
200 Va. 495, 106 S.E.2d 590 (1959) 29

Briggs v. Commonwealth,
21 Va. App. 338, 464 S.E.2d 512 (1995) 26

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

Cilwa v. Commonwealth,
No. 0687-15-4, 2018 Va. App. LEXIS 171
(Ct. App. June 26, 2018) ..... passim

Dunham v. Commonwealth,
59 Va. App. 634, 721 S.E.2d 824 (2012) 20, 21

Fredericksburg Constr. Co. v. J.W. Wyne Excavating, Inc.,
260 Va. 137, 530 S.E.2d 148 (2000) 30

Ghameshlouy v. Commonwealth,
279 Va. 379, 689 S.E.2d 698 (2010) 16

Grant v. Commonwealth,
223 Va. 680, 292 S.E.2d 348 (1982) 15, 26

Graves v. Commonwealth,
294 Va. 196, 805 S.E.2d 226 (2017) 24

Green v. Commonwealth,
263 Va. 191, 557 S.E.2d 230 (2002) 16

Hicks v. Mellis,
275 Va. 213, 657 S.E.2d 142 (2008) 19

In re Commonwealth,
278 Va. 1, 677 S.E.2d 236 (2009) 18

Jones v. Commonwealth,
293 Va. 29, 795 S.E.2d 705 (2017) 19

Kelley v. Stamos,
285 Va. 68, 737 S.E.2d 218 (2013) 14

Leitao v. Commonwealth,
39 Va. App. 435, 573 S.E.2d 317 (2002) 25

Marshall v. Commonwealth,
202 Va. 217, 116 S.E.2d 270 (1960) 25

Martin v. Commonwealth,
224 Va. 298, 295 S.E.2d 890 (1982) 15

Mohamed v. Commonwealth,
56 Va. App. 95, 691 S.E.2d 513 (2010) 17

Parrish v. Jessee,
250 Va. 514, 464 S.E.2d 141 (1995) 19

Peyton v. Commonwealth,
268 Va. 503, 604 S.E.2d 17 (2004) 26

Porter v. Commonwealth,
276 Va. 203, 661 S.E.2d 415 (2008) 15, 16

Richardson v. Commonwealth,
131 Va. 802, 109 S.E. 460 (1921) 17, 29

Virginian-Pilot Media Cos. v. Dow Jones & Co.,
280 Va. 464, 698 S.E.2d 900 (2010) 21, 22

Wallace v. Commonwealth,
65 Va. App. 80, 774 S.E.2d 482 (2015),
aff'd 292 Va. 1, 798 S.E.2d 595 (2016) 28

Wilson v. Commonwealth,
67 Va. App. 82, 793 S.E.2d 15 (2016) 20, 21, 22

Wright v. Commonwealth,
32 Va. App. 148, 526 S.E.2d 784 (2000) 26

STATUTES

Section 19.2-304, Code of Virginia 10, 12, 14, 15

Section 19.2-306, Code of Virginia 13, 14, 19, 23

OTHER AUTHORITIES

Rule 1:1 19

IN THE

SUPREME COURT OF VIRGINIA

RECORD NO. 180885

DOROTHY ELIZABETH CILWA,

***Appellant*,**

v.

COMMONWEALTH OF VIRGINIA,

***Appellee*.**

BRIEF FOR THE COMMONWEALTH

STATEMENT OF THE CASE

On May 18, 2008, the Circuit Court of Fairfax County convicted Dorothy Elizabeth Cilwa of grand larceny and sentenced her to three years of incarceration, with all three years suspended, conditioned on her good behavior and completion of a one-year term of supervised probation. (App. 1-7). Four months later, by order entered September 24, 2008, the trial court found Cilwa in violation of the terms of her probation and imposed another one-year term of supervised probation terminating on August 14, 2009. (App. 17-18, 38). In July of 2009, Cilwa agreed to extend her probation indefinitely to address her addiction issues and the trial

court entered an order extending probation indefinitely on September 16, 2009. (App. 20, 21). Four months later, the trial court again found Cilwa in violation of the terms of her probation, and ordered that she remain "under the same terms and conditions of supervised probation." (App. 31). Finally, on March 31, 2015, after finding Cilwa in violation of her probation, the court terminated her probation and revoked and imposed 90 days of her suspended sentence. (App. 85-88, 90-91).

Cilwa appealed this judgment to the Court of Appeals of Virginia, challenging the trial court's subject matter jurisdiction over her revocation proceeding and alleging in the alternative that her probation had terminated in 2013 based on contract principles. The Court of Appeals granted Cilwa an appeal, but subsequently issued a *sua sponte* order dismissing the appeal as moot. (App. 100, 102-05). This Court held the case was not moot and remanded to the Court of Appeals. (App. 115-19). On remand, the Court of Appeals affirmed the judgment of the circuit court, finding that the trial court had jurisdiction to enter the March 31, 2015 order. Cilwa v. Commonwealth, No. 0687-15-4, 2018 Va. App. LEXIS 171 (Ct. App. June 26, 2018). (App. 121-31).

Because the trial court did have jurisdiction over Cilwa's felony conviction and all attendant proceedings this Court should affirm. Cilwa's collateral attack on the trial court's September 2009 order is not supported by this Court's

jurisprudence on subject matter jurisdiction. Further, the trial court subsequently held a hearing and entered a new order in January 2010 requiring Cilwa to remain under the same terms and conditions as those stated in the order that Cilwa collaterally attacks. Therefore, regardless of the validity of the 2009 order, the trial court did not err in revoking Cilwa's suspended sentence.

ASSIGNMENTS OF ERROR

Cilwa assigns the following errors:

> **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.**
>
> **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.**
>
> **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 [with] conditions subsequent and those conditions had been met.**

(Def. Br. at 1).

STATEMENT OF FACTS AND MATERIAL PROCEEDINGS BELOW

Cilwa pleaded guilty to grand larceny on March 19, 2008. (App. 2-7). By order entered May 18, 2008, the circuit court sentenced Cilwa to three years' incarceration, with all three years suspended conditioned on one year of good behavior and a one-year period of supervised probation to commence on her release from incarceration. (App. 6).

On July 9, 2008, the trial court issued a bench warrant based on allegations that Cilwa had been convicted for misdemeanor concealment of merchandise, (App. 10, 11-12). Noting that Cilwa had "not been of good behavior and there [was] good reason to believe her suspended sentence should be revoked," the court required Cilwa to appear and show cause, if any, why her suspended sentence should not be revoked. (App. 11-12).

On August 14, 2008, the circuit court held a revocation hearing, and Cilwa admitted that she was in violation of her probation. (App. 17). By order entered September 24, 2008, the court found Cilwa in violation. The court did not impose any further incarceration, and instead "**ORDERED** that [Cilwa] be placed on

supervised probation for a period of One (1) year to commence from this date." (App. 17).[1]

In an "Alleged Violation of Probation" report dated June 16, 2009, Cilwa's probation officer informed the circuit court that Cilwa had been arrested on June 7, 2009, and charged with grand larceny and possession of burglary tools. (App. 19). Cilwa admitted to relapsing and taking five Xanax pills before committing the grand larceny. (App. 19). At the end of the report, the probation officer asked the court for "case handling instructions" because it was "doubtful that Ms. Cilwa's pending charges [would] be disposed of prior to her probation expiration date." (App. 19). The report stated that Cilwa's probation was scheduled to expire on August 14, 2009. (App. 19). A line labeled "Court Response" toward the bottom of the report contains the handwritten notation, "Let's extend probation one year. Bench warrant." (App. 19).

Accordingly, on July 30, 2009, the circuit court issued a bench warrant based on the grand larceny and possession of burglary tools charges listed in the

[1] In subsequent orders, the court clarified that Cilwa's probation was scheduled to end on August 14, 2009, one year from the date of the revocation hearing. (App. 34, 38).

"Alleged Violation of Probation" report. (App. 15-16).[2] Prior to the Sheriff effecting service of the bench warrant, however, the court received a letter signed by Cilwa and her probation officer voluntarily extending Cilwa's probation. The letter, which was dated July 27, 2009, was addressed to the trial judge overseeing Cilwa's case. (App. 20). Under the heading "Extension of Probation," Cilwa "agree[d] to voluntarily 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 [her] pending felony charge." (App. 20). Cilwa also acknowledged that she had "the right to have an attorney represent [her] and to appear before [t]he Court on this matter." (App. 20). By signing the form, Cilwa acknowledged that she "waive[d] these rights." (App. 20).

The record indicates the July 30, 2009 bench warrant was subsequently "recalled" on either August 11, 2009 or August 14, 2009, at the probation officer's request. (App. 24, 30, 34, 44).

On September 15, 2009, Cilwa's probation officer, another probation officer, and a prosecutor signed a petition recommending that the circuit court enter an order extending Cilwa's probation indefinitely. (App. 21). In the petition, the

[2] As Cilwa acknowledges on brief, this bench warrant contains a scrivener's error. (Def. Br. at 6 n.1; App. 16). The warrant is dated July 30, 2008, but it should be dated July 30, 2009. (App. 16).

Commonwealth "respectfully recommend[ed] that an order be entered extending probation **INDEFINITELY**, until substance abuse treatment and aftercare are completed and pending charges are disposed of." (App. 21). In a section at the bottom of the page under the heading "ORDER OF EXTENSION OF PROBATION," the circuit court "ordered this 16th day of September, 2009 . . . that the probation in the above case is hereby extended for Indefinitely [sic], or until further order by the Court." (App. 21).

On September 29, 2009, Cilwa's probation officer wrote a letter informing the circuit court that Cilwa had been arrested while high on Xanax and charged with grand larceny and trespassing. (App. 22-23). On October 8, 2009, the circuit court issued a bench warrant for Cilwa's arrest, citing the probation officer's September 29, 2009 letter as well as the probation officer's June 16, 2009 letter alleging that Cilwa had been arrested on June 7, 2009, for grand larceny and possession of burglary tools. (App. 24-25.) The allegations in the June 16, 2009 letter had formed the basis of the earlier bench warrant that the circuit court had recalled on August 11, 2009. (App. 15-16, 24). The October 8, 2009 bench warrant was executed on October 16, 2009. (App. 25).

The circuit court held a revocation hearing on December 17, 2009. (App. 30-32). Cilwa admitted to violating her probation, and by order entered January

28, 2010, the court found her in violation. (App. 30-32). The court did not impose any active incarceration, instead ordering that Cilwa "be transferred with a bed to bed transfer to an intermediate residential substance abuse treatment facility," and further that she "remain under the same terms and conditions of supervised probation." (App. 31).

On February 14, 2012, the circuit court issued a bench warrant for Cilwa's arrest based on allegations that she had overdosed on Dilaudid on December 27, 2011, and been discharged from her substance abuse treatment program. (App. 33-35). The warrant was executed on February 16, 2012. (App. 35). A revocation hearing initially was scheduled for March 23, 2012, but the case was continued multiple times. (App. 39.) In the meantime, the circuit court entered an order on April 9, 2012, granting Cilwa's motion for a bed to bed transfer to the Demeter House Program in Arlington. (App. 35A).

On September 18, 2012, Cilwa's probation officer wrote a progress report informing the circuit court that Cilwa had successfully completed her treatment program at the Demeter House on July 27, 2012, and that she was residing at a transitional house called Steps to Recovery. (App. 36). On December 27, 2012, the program coordinator for Steps to Recovery wrote a letter verifying that Cilwa

had completed all the requirements of the Steps to Recovery program and would be acknowledged as a graduate at a ceremony on January 10, 2013. (App. 37).

When the revocation hearing finally was held on December 28, 2012, Cilwa admitted the alleged violations. (App. 39). After considering the evidence and the parties' argument, the circuit court dismissed the February 14, 2012 bench warrant. (App. 38-39).

On February 7, 2013, Cilwa signed a "Conditions of Probation Supervision" form that noted Cilwa had been placed on supervised probation for an indefinite period of time at the December 28, 2012 revocation hearing; that her probation supervision was subject to eleven specific conditions; and that her minimum release date from supervision "is Indefinite." (App. 66-67). By signing the form, Cilwa "agree[d] to the Conditions set forth." (App. 66-67).

On March 27, 2013, Cilwa's probation officer wrote a letter informing the circuit court that Cilwa had been arrested on February 28, 2013, for petit larceny, that she had admitted to taking Xanax, and that she was attempting to enter a long-term treatment program. (App. 40). On May 23, 2014, the probation officer wrote another letter informing the circuit court that Cilwa had left one treatment program against staff advice and entered another. (App. 41). On January 28, 2015, the probation officer wrote a letter informing the circuit court that Cilwa had been

arrested on December 21, 2014,[3] for felony possession of a controlled substance, misdemeanor possession of a controlled substance, identity theft, driving on a revoked or suspended license, and failure to obey a traffic marking. (App. 42-43). On February 19, 2015, the circuit court issued a bench warrant based on these allegations, which was executed on February 25, 2015. (App. 44-45.) By order entered March 2, 2015, the circuit court scheduled a revocation hearing for March 27, 2015, and appointed the Office of the Public Defender to represent Cilwa in the case. (App. 45A.)

On March 20, 2015, Cilwa filed a motion to dismiss the February 19, 2015 bench warrant. (App. 46-56). In her motion, Cilwa argued for the first time that the court's September 16, 2009 order extending her probation indefinitely was void because the court had failed to hold a hearing as required by Code § 19.2-304. (App. 48-50). In the alternative, Cilwa argued that her voluntary agreement to extend her probation in July 2009 had formed a contract with a condition subsequent—under which her probation would expire automatically by operation of law once she had completed two treatment programs and the trial court had adjudicated her pending charges. (App. 50-55). Cilwa further argued that she had satisfied those conditions by December 27, 2012 – the date that the Steps to

[3] Other places in the record indicate the offense date for these charges was December 12, 2014. (App. 58, 61-65.)

Recovery program coordinator had written a letter indicating she had completed the program – and thus that her probation had expired on that date. (App. 50-55). Because the violations alleged in the bench warrant had not occurred until after that date, Cilwa argued that the bench warrant should be dismissed for this additional reason. (App. 55).

On March 27, 2015, the circuit court held the revocation hearing and heard argument on Cilwa's motion to dismiss. (App. 70-91.) In accordance with the Motion to Dismiss, defense counsel argued that the trial court's September 2009 order extending Cilwa's probation "should be voided" because it was entered without a hearing. (App. 72-75.) In the alternative, defense counsel argued that Cilwa had entered into a contract on July 27, 2009, "endorsed" by the Commonwealth and the circuit court, containing conditions subsequent that Cilwa had satisfied, and therefore that her probation had automatically terminated without the need for any additional involvement from the court. (App. 75-81). Defense counsel conceded, however, that the circuit court had not entered an order terminating Cilwa's probation. (App. 78).

The circuit court denied the motion to dismiss. (App. 83, 91). In explaining its ruling, the court held that Cilwa's constitutional due process rights had been satisfied by the amount of notice she had been given before her probation had been

extended in September of 2009. (App. 83). The court further held that, even assuming Cilwa's statutory right to a hearing under Code § 19.2-304 had been violated, the September 2009 order extending Cilwa's probation indefinitely had not been rendered void by the error because the court had subject matter jurisdiction to enter the order. Therefore, the order was "merely voidable as opposed to void, and there was no appeal of that decision in this case." (App. 84). Moreover, the circuit court held that the September 2009 order extending Cilwa's probation did not create a "condition subsequent," which would have terminated her probation by operation of law once she had completed her drug treatment in December 2012, because the order "simply extended [her probation] indefinitely." (App. 84-85).

After the circuit court denied Cilwa's motion to dismiss, she admitted the new charges forming the basis of the bench warrant. (App. 85). As a result, by order entered March 31, 2015, the court found Cilwa in violation of her probation, revoked and imposed 90 days of her suspended sentence, and terminated her supervised probation. (App. 88-91).

Cilwa appealed to the Court of Appeals of Virginia, which initially denied her petition, holding that the circuit court's September 2009 order extending Cilwa's probation indefinitely was not void, and further holding that the circuit

court had not conditioned the extension of Cilwa's probation on her completion of substance abuse treatment. (App. 100-103). Subsequently, a three-judge panel granted Cilwa an appeal on both issues; however prior to oral argument the Court of Appeals issued a *sua sponte* order dismissing the appeal as moot. (App. 104-109.) This Court subsequently found that Cilwa's case was not moot and remanded the matter to the Court of Appeals further proceedings. (App. 115-18).

On remand, the Court of Appeals affirmed the judgment of the trial court. The Court of Appeals held that even if the September 14, 2009 order was void, pursuant to Code § 19.2-306(B) the circuit court had both personal jurisdiction over the defendant and subject matter jurisdiction over her case when it later continued her supervised probation on January 28, 2010, and directed that she remain on the same terms and conditions of that probation. Cilwa, 2018 Va. App. LEXIS 171 at *12-13. The Court of Appeals also rejected the defendant's contractual argument her probation terminated automatically when she completed substance abuse treatment in 2013. Id. at *15.

ARGUMENT

The Court of Appeals correctly determined that the trial court had subject matter jurisdiction when it revoked Cilwa's suspended sentence on March 31, 2015.

The circuit court had subject matter jurisdiction over Cilwa's felony case when it entered the order extending her probation indefinitely in 2009. Accordingly, this order is not subject to collateral attack, and the trial court's judgment should be affirmed. Moreover, even if the 2009 order was void, the circuit court entered a subsequent order continuing Cilwa on indefinite probation in 2010. Cilwa does not contest the jurisdictional validity of this order, which required her to be on supervised probation at the time she committed the offenses that gave rise to the revocation proceeding at issue in this appeal. Finally, Cilwa's argument that her probation ended when she satisfied an alleged "condition subsequent" is not supported by a plain reading of the record. Accordingly, this Court should affirm Cilwa's 2015 probation violation.

A. Standard of Review

This Court conducts *de novo* review of issues involving the jurisdiction of the circuit court. See Kelley v. Stamos, 285 Va. 68, 73, 737 S.E.2d 218, 220 (2013). The construction of Code §§ 19.2-304 and 19.2-306 is also a question of law that this Court reviews *de novo*. Although penal statutes are to be strictly

construed against the Commonwealth, Martin v. Commonwealth, 224 Va. 298, 300, 295 S.E.2d 890, 892 (1982), "[t]he probation statutes are highly remedial and should be liberally construed to provide trial courts a valuable tool for rehabilitation of criminals." Grant v. Commonwealth, 223 Va. 680, 684, 292 S.E.2d 348, 350 (1982).

B. The September 16, 2009 order extending probation indefinitely cannot be collaterally attacked in this proceeding.

The trial court had subject matter jurisdiction over Cilwa's felony conviction and any attendant probation or revocation proceedings pursuant to Code § 17.1-513. Any error by the trial court in extending Cilwa's probation was an error in the ***exercise*** of the trial court's jurisdiction. At worst, this error rendered the September 2009 order voidable. Cilwa's argument that noncompliance with Code § 19.2-304 stripped the court of subject matter jurisdiction conflates a circuit court's subject matter jurisdiction with the circuit court's power to exercise that jurisdiction.

As this Court has recognized, "[j]urisdiction is a term which can engender much confusion because it encompasses a variety of separate and distinct legal concepts." Porter v. Commonwealth, 276 Va. 203, 228, 661 S.E.2d 415, 426 (2008). "[S]ubject matter jurisdiction [is] perhaps best understood as the

'potential' jurisdiction of a court." Ghameshlouy v. Commonwealth, 279 Va. 379, 388, 689 S.E.2d 698, 702 (2010) (citation omitted). It is the "authority granted to it by constitution or statute over a specified class of cases or controversies, and becomes 'active' jurisdiction, the power to adjudicate a particular case upon the merits, only when various elements are present." Id. at 388-89, 689 S.E.2d at 702-03.

Here, the trial court had subject matter jurisdiction over Cilwa's probation revocation proceeding pursuant to Code § 17.1-513. This statute provides that, "[a]ll the circuit courts of the Commonwealth 'have original jurisdiction of all indictments for felonies and of presentments, informations and indictments for misdemeanors.'" Porter, 276 Va. at 229, 661 S.E.2d at 427 (quoting Code § 17.1-513). "[T]his statute means what it says," namely that all Virginia circuit courts have subject matter jurisdiction "over all felonies committed in the Commonwealth." Id.

Cilwa was convicted of a felony – grand larceny. All subsequent probation and revocation proceedings were part of the criminal process arising from her felony conviction. Accordingly, the circuit court had subject matter jurisdiction over Cilwa's probation proceeding. See Green v. Commonwealth, 263 Va. 191, 194, 557 S.E.2d 230, 232 (2002) ("A circuit court's jurisdiction to revoke a

convict's probation and suspension of sentence is part of [the] criminal process."). Cf. Richardson v. Commonwealth, 131 Va. 802, 807, 109 S.E. 460, 461 (1921) (noting that when a trial court suspends the execution of a defendant's sentence, "the case remains pending and the court does not thereby lose its control over the accused or his case"). See also Mohamed v. Commonwealth, 56 Va. App. 95, 100, 691 S.E.2d 513, 515 (2010) (citing Code § 17.1-513 and holding "that the trial court had subject matter jurisdiction over [the appellant's] revocation proceeding"). Accordingly, this Court should hold that the circuit court had subject matter jurisdiction over Cilwa's case when it extended her probation. Id.

Significantly, Cilwa acknowledges that at the time of the September 2009 order, the trial court had "subject matter jurisdiction over any revocation of [her] probation." (Def. Br. at 11). Further, she agrees that the trial court had active jurisdiction at the time it entered the January 28, 2010 revocation order. (Def. Br. 11, 19). Cilwa's position – that the trial court's subject matter jurisdiction to extend her probation lapsed, while at the same time the court's subject matter jurisdiction to revoke (and subsequently extend) her probation continued – takes too narrow a view of the "subject matter" at issue in this case.

Code § 17.1-513 granted the trial court potential jurisdiction over Cilwa's felony conviction and all attendant probation and revocation proceedings. Both

proceedings are part of the criminal process arising from her felony conviction. The trial court could not simultaneously have subject matter jurisdiction over one and not the other. Indeed, "subject matter jurisdiction is conferred by statute according to the subject of the case, . . . rather than according to a particular proceeding that may be one part of [the] case." In re Commonwealth, 278 Va. 1, 11, 677 S.E.2d 236, 240 (2009) (citations omitted). Accordingly, Cilwa's concession that the trial court retained both subject matter jurisdiction and active jurisdiction to revoke her probation compels the conclusion that it also had the subject matter jurisdiction, or potential jurisdiction, to extend probation.

Whether the trial court's ***potential*** jurisdiction had ripened into ***active*** jurisdiction prior to the entry of the September 15, 2009 order depends on the trial

court's compliance with Code § 19.2-304 and § 19.2-306.[4] "A challenge to an order based on a trial court's misapplication of statute generally raises a question of court error, not a question of the court's jurisdiction." Hicks v. Mellis, 275 Va. 213, 219, 657 S.E.2d 142, 145 (2008). See also Jones v. Commonwealth, 293 Va. 29, 53, 795 S.E.2d 705, 719 (2017) (noting that Rule 1:1 deprives trial court of "active" jurisdiction). Indeed, "[t]he court has jurisdiction to err, as well as to correctly adjudicate the questions before it for decision, and the remedy to correct the errors of the court is solely by appeal." Parrish v. Jessee, 250 Va. 514, 521, 464 S.E.2d 141, 145-46 (1995). Because, however, the order in question was entered in 2009, Cilwa cannot collaterally attack the court's exercise of active jurisdiction at this time.

---

[4] Code § 19.2-304 provides: "The court may subsequently increase or decrease the probation period and may revoke or modify any condition of probation, but only upon a hearing after reasonable notice to both the defendant and the attorney for the Commonwealth."

Code § 19.2-306 contains the guidelines for a revocation proceeding. As pertinent to this appeal, subsection B provides: "The court may not conduct a hearing to revoke the suspension of sentence unless the court issues process to notify the accused or to compel his appearance before the court within one year after the expiration of the period of probation or the period of suspension…. If neither a probation period nor a period of suspension was fixed by the court, then the court shall issue process within one year after the expiration of the maximum period for which the defendant might originally have been sentenced to be incarcerated. Such notice and service of process may be waived by the defendant, in which case the court may proceed to determine whether the defendant has violated the conditions of suspension.

C. The Court of Appeals' decision in Wilson v. Commonwealth was wrong, and this Court should take this opportunity to expressly overrule it.

Cilwa primarily relies on the Court of Appeals' decision in Wilson v. Commonwealth, 67 Va. App. 82, 793 S.E.2d 15 (2016), to support her contention that the circuit court lost subject matter jurisdiction over the defendant's probation on August 14, 2009. (Def. Br. at 13-15). Wilson, however, is not binding on this Court. Further, because Wilson cannot be reconciled with this Court's jurisprudence on subject matter jurisdiction, this Court should take the opportunity to overrule it.

The Wilson opinion blurs the distinction between a trial court's active jurisdiction and subject matter jurisdiction, resulting in the erroneous holding that "[i]f the circuit court lacked 'active' jurisdiction over [the defendant] when it extended his probation in its February 8, 2011 order," the defendant could "collaterally seek to void the 2011 probation order that extended the period of suspension." 67 Va. App. at 93, 793 S.E.2d at 20.

Citing Dunham v. Commonwealth, 59 Va. App. 634, 721 S.E.2d 824 (2012), Wilson concluded that a litigant may collaterally attack an order entered by a trial court acting without "active" jurisdiction. Wilson, 67 Va. App. at 93, 793 S.E.2d at 20. But in Dunham, the Court of Appeals correctly held that "[b]ecause the trial

court had ***subject matter*** jurisdiction over [the] appellant's 1998 revocation hearing when it decided to extend the period of suspension, the 1998 sentencing order [was] not void," and the defendant could not "collaterally attack" it. 59 Va. App. at 640, 721 S.E.2d at 827 (emphasis added). Thus, Dunham supports the proposition that an order entered in the absence of ***subject matter*** jurisdiction may be collaterally attacked, but it does not support the proposition Wilson cites it for.

Wilson also relies on language from this Court's decisions in Andrews v. Richmond Redevelopment & Hous. Auth., 292 Va. 79, 787 S.E.2d 96 (2016), and Virginian-Pilot Media Cos. v. Dow Jones & Co., 280 Va. 464, 698 S.E.2d 900 (2010). In Andrews, this Court held that "[s]ubject matter jurisdiction is the authority granted to a court by constitution or by statute to adjudicate a class of cases or controversies," and that, "[u]nder settled principles, such jurisdiction cannot be conferred on the court by the litigants and a challenge to it cannot be waived." 292 Va. at 84, 787 S.E.2d at 99. Likewise, in Virginian-Pilot this Court held that the "lack of subject matter jurisdiction cannot be waived and such jurisdiction cannot be conferred on a court by the litigants." 280 Va. at 468, 698 S.E.2d at 902.

Wilson incorrectly applied this language to support its holding that "[b]y the time it entered its order doing so, the circuit court no longer had ***active*** jurisdiction

to extend [the defendant's] probation and [his] signature on an agreement to extend jurisdiction was ineffective." 67 Va. App. at 94, 793 S.E.2d at 21. Andrews and Virginian-Pilot are then cited for the proposition that "***such*** jurisdiction 'cannot be conferred on the court by the litigants' and a challenge to it 'cannot be waived.'" Id. (quoting Andrews, 292 Va. at 84, 787 S.E.2d at 99; Virginian-Pilot, 280 Va. at 468, 698 S.E.2d at 902) (emphasis added). But, this Court made clear in both of those cases that the phrase "such jurisdiction" applies only to the trial court's subject matter jurisdiction, not, as the Wilson court applies it, to the trial court's "active" jurisdiction. Andrews, 292 Va. at 84, 787 S.E.2d at 99; Virginian-Pilot, 280 Va. at 468, 698 S.E.2d at 902. Accordingly, Cilwa's reliance on Wilson is misplaced because Wilson is incompatible with this Court's jurisprudence. This Court should expressly overrule it.

D. Even if the September 2009 order was void, the Court of Appeals correctly held that Cilwa's probation was ongoing as ordered by the trial court on January 28, 2010.

The Court of Appeals held that, "Even assuming the September 16, 2009 order was void, we conclude that the circuit court had personal jurisdiction over the appellant and subject matter jurisdiction over her case as necessary to support the revocation of probation she challenges in this appeal." Cilwa, 2018 Va. App. LEXIS 171 at *9. The Court of Appeals reasoned that the trial court's January 28,

2010 revocation order, which Cilwa concedes is valid, continued Cilwa on indefinite probation. Id. Thus, the Court of Appeals concluded that even if the September 2009 order was void, Cilwa was on probation pursuant to the January 28, 2010 order at the time she committed the offenses that formed the basis of her March 2015 conviction. Id. at *12-13. This reading of the record is accurate.

On December 17, 2009, the trial court held a revocation hearing based in part on allegations that Cilwa had been arrested for committing new offenses on June 7, 2009 – two months before her probation had been set to expire. (App. 22-31). The December hearing was held well "within one year" of August 14, 2009. Code § 19.2-306(B). At the hearing, Cilwa "admitted to the violations, as alleged," and the court found her in violation. (App. 30- 31).

The court noted in the resulting January 28, 2010 order that on September 16, 2009, the court had previously "[o]rdered that [Cilwa's] period of supervised probation be extended indefinitely in order for [Cilwa] to complete residential drug treatment and aftercare and time for disposition of her pending charges." (App. 31). The court then ordered that Cilwa "***remain under the same terms and conditions of supervised probation.***" (App. 31) (emphasis added). Cilwa never objected to or appealed the January 28, 2010 revocation order. Moreover, she

concedes in this appeal that the 2010 order "was a valid order" and "should stand." (Def. Br. at 11, 19).

Notwithstanding her concession, Cilwa argues that the probation provision of the January 28, 2010 order was ineffective because it refers to a void order. (Def. Br. at 16-19). In other words, Cilwa does not contest that the circuit court intended to order she remain on indefinite probation, as previously ordered. (App. 31). Instead, she contends that the court failed to continue her on indefinite probation because the January 28, 2010 order references the September 16, 2009 order – which she submits was void *ab initio*.

For the reasons argued above, the September 16, 2009 order was not void. Even if it was, however, the determination that a sentence is void *ab initio* effects the legal efficacy of the order, not its physical existence. Indeed, a void order is "***without effect*** from the moment it came into existence." Kelley, 285 Va. at 75, 737 S.E.2d at 22 (emphasis added). The order, however, does not cease to exist. At a minimum, it remains part of the record in the case. Historical references to the order or its contents are, therefore, not invalid. Cf. Graves v. Commonwealth, 294 Va. 196, 208 n.6, 805 S.E.2d 226, 232 (2017) (explaining that where one of multiple sentences is void *ab initio*, the remainder of the sentencing order is not affected).

Even absent this common-sense conclusion, the trial court's intent in the January 28, 2010 order is clear. The court recites that on September 16, 2009, the court "[o]rdered that [Cilwa's] period of supervised probation be extended indefinitely in order for [her] to complete residential drug treatment and aftercare and time for disposition of her pending charges." (App. 31). The court then ordered that Cilwa "remain under the same terms and conditions of supervised probation." (App. 31). As the Court of Appeals correctly held, "the January 28, 2010 order was in no way dependent upon the September 2009 order for its own jurisdictional validity." Cilwa, 2018 Va. App. LEXIS 171 at *12. This Court should interpret the January 28, 2010 order to place the defendant on indefinite supervised probation in accordance with the clear intent of the order. Cf. Marshall v. Commonwealth, 202 Va. 217, 220, 116 S.E.2d 270, 273 (1960) (holding that, "in view of the purpose and history of the [probation] statute and the liberal construction to be given it," "good behavior is a condition of every suspension, with or without probation, ***whether expressly so stated or not***") (emphasis added). See also Leitao v. Commonwealth, 39 Va. App. 435, 438, 573 S.E.2d 317, 319 (2002) (holding that the "only logical interpretation" of the trial court's revocation order was that the "absence of an explicit recitation re-suspending the balance of the original sentence did not implicitly discharge the remaining sentence; it

implicitly re-suspended the balance that the defendant had not served"); Briggs v. Commonwealth, 21 Va. App. 338, 344, 464 S.E.2d 512, 514 (1995) (rejecting the defendant's "argument that because [on a later date] the trial court failed to set a specific time for the suspension, the statutory time began to run from the date imposition of sentence [originally] was withheld").

The remedial nature of Virginia's probation statutes counsel's against the cramped construction Cilwa proposes. "The probation statutes are highly remedial and should be liberally construed to provide trial courts a valuable tool for rehabilitation of criminals." Grant, 223 Va. at 684, 292 S.E.2d at 350. Accord Peyton v. Commonwealth, 268 Va. 503, 508, 604 S.E.2d 17, 19 (2004). As the Court of Appeals concluded, if this Court were to accept Cilwa's argument, Cilwa would "receive a benefit because of the trial court's indulgence and attempts to help [her] overcome [her] drug dependency. Clearly, this was not the legislature's intent and the plain language of the [probation] statute does not require such a result." Cilwa, Va. App. LEXIS 171, at *12 (quoting Wright v. Commonwealth, 32 Va. App. 148, 153, 526 S.E.2d 784, 785-87 (2000)) (alterations in Cilwa).

Accordingly, because the January 28, 2010 order broke the chain of causation between the September 16, 2009 order and the probation violation Cilwa challenges in this appeal, this Court should affirm the judgment below.

E. Cilwa's reliance on contract principles does not entitle her to relief because her factual premise is not supported by the record.

Cilwa argues in the alternative that her probation terminated in 2012 when she completed drug treatment because, when she agreed to the extension of her probation in 2009, she entered into a contract with the circuit court and the Commonwealth that "extended [her] probation indefinitely '*until*' she completed the residential substance abuse program, the aftercare program, and disposition of her then pending charges." (Def. Br. at 29). Cilwa asserted that this contract contained a condition subsequent that terminated the contract upon her completion of treatment programs and the resolution of the charges that were pending at the time she agreed to extend her probation. The record does not support this claim.

The form Cilwa signed agreeing to extend her probation stated that she had "agree[d] to voluntarily 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 [her] pending felony charge." (App. 20) (second emphasis added). Thus, the stated ***purpose*** of the extension was to allow Cilwa to complete treatment programs and to allow for her pending felony charge to be disposed of. (App. 20). But the stated ***duration*** of that extension was indefinite. (App. 20). The order specifically contemplated termination of the

probation by subsequent court order, not by the satisfaction of unspecified conditions. (App. 20).

Moreover, while Cilwa's probation officer subsequently recommended that the circuit court enter an order "extending probation INDEFINITELY, until substance abuse treatment and aftercare [were] completed and pending charges [were] disposed of," the resulting order made no reference to Cilwa's pending charges or completion of substance abuse treatment. (App. 21).

Instead, the circuit court entered an order stating that Cilwa's probation "is hereby extended for Indefinitely [sic], or until further order by the Court." (App. 21, 84-85). Thus the order, like the form signed by Cilwa, did not place any limitation on the ***duration*** of the extension, and it in fact provided that the termination of Cilwa's probation could only be effected by a subsequent court order. (App. 20-21).[5] It is "well established in this Commonwealth that a circuit court speaks only through its written orders." Wallace v. Commonwealth, 65 Va. App. 80, 91, 774 S.E.2d 482, 487 (2015), aff'd, 292 Va. 1, 798 S.E.2d 595. The

[5] Similarly, Cilwa's "Conditions of Probation Supervision" signed following her December 28, 2012 revocation hearing recites that her "minimum release date from supervision is Indefinite, but you will remain under supervision ***until you receive a final release***." (App. 66) (emphasis added). Cilwa's signature on this document on February 7, 2013 undermines her assertion that she believed her probation terminated upon completion of her treatment program in January 2013.

order entered here does not contain the "condition subsequent" that Cilwa claims controls the resolution of this case.

In any event, neither the suspension of sentence nor imposition of probation amounts to a contract with the accused. "When a trial judge suspends a sentence, …he does not make a contract with the accused, but only extends to him the opportunity which the State affords him to repent and reform. It is the free gift of the Commonwealth, and not a contract to relieve him from the punishment which fits his crime." Richardson v. Commonwealth, 131 Va. 802, 810, 109 S.E. 460, 462 (1921). See also Berry v. Commonwealth, 200 Va. 495, 498, 106 S.E.2d 590, 593 (1959). Likewise, Cilwa's reliance on Calvillo v. Commonwealth, 19 Va. App. 433, 452 S.E.2d 363 (1994) in this context is unpersuasive. (Def. Br. at 28). In Cavillo, the appellant's claim that the trial court had approved an agreement between him and the Commonwealth was supported by the record, namely a written plea agreement that the trial court had accepted. Id. at 434, 452 S.E.2d at 363. Therefore, when the defendant complied with the terms of the plea agreement, "the trial court was bound to enforce" it. Id. at 435, 452 S.E.2d at 364.

As the circuit court in this case explicitly found, the record does not support the conclusion that any agreement to limit the duration of Cilwa's probation occurred here. (App. 84-85). Nor did the circuit court ever accept any such

agreement. (App. 84-85). Instead, the circuit court ordered that Cilwa's probation be extended indefinitely, or until further order of the court. (App. 21, 84-85).

"[T]rial courts have the authority to interpret their own orders." Fredericksburg Constr. Co. v. J.W. Wyne Excavating, Inc., 260 Va. 137, 144, 530 S.E.2d 148, 152 (2000). Further, this Court is required to "give deference to the interpretation adopted by the lower court." Id. Under these circumstances, Cilwa's probation did not expire before she committed new violations in 2013 and 2014, and the trial court properly denied her motion to dismiss and revoked 90 days of her suspended sentence. (App. 40-45, 58-65, 83-85, 88, 91).

CONCLUSION

This Court should affirm the judgment of the Court of Appeals and of the Circuit Court for the County of Fairfax denying Cilwa's motion to dismiss, finding that she had violated her probation, and revoking 90 days of her suspended sentence.

Respectfully submitted,

COMMONWEALTH OF VIRGINIA

Appellee herein.

By: _____
Counsel

Mark R. Herring
Attorney General of Virginia

Elizabeth Kiernan Fitzgerald
Assistant Attorney General
Virginia State Bar No. 82288

Office of the Attorney General
202 North Ninth Street
Richmond, Virginia 23219
phone (804) 786-2071
fax (804) 371-0151
email oagcriminallitigation@oag.state.va.us

CERTIFICATE OF TRANSMISSION AND SERVICE

On May 3, 2019, this brief was filed electronically with this Court, and the required copies were subsequently hand-delivered to the clerk's office in compliance with Rule 5:26. A copy was emailed to Shalev Ben-Avraham, OFFICE OF THE PUBLIC DEFENDER, counsel for the appellant, at sben-avraham@fai.idc.virginia.gov. A courtesy copy has been sent to the trial judge and the Commonwealth's Attorney. This brief complies with Rule 5:26(b).

The Commonwealth desires to present oral argument in this case.

ELIZABETH KIERNAN FITZGERALD
Assistant Attorney General
Criminal Appeals Section