SCV: Submitted on 05-29-2019 11:31:24 EDT for filing on 05-29-2019

IN THE

SUPREME COURT OF VIRGINIA

RECORD NO. 181096

NOAH SALIM BURNHAM,

***Appellant*,**

v.

COMMONWEALTH OF VIRGINIA,

***Appellee*.**

BRIEF FOR THE COMMONWEALTH

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BRIEF FOR THE COMMONWEALTH

STATEMENT OF THE CASE

Appellant Noah Salim Burnham challenges the May 2017 order of the Circuit Court of Hanover County ("trial court") revoking his previously suspended sentence. Burnham argues that, because he was released from supervised probation in 2011, the trial no longer had jurisdiction to revoke the sentence. Because Burnham remained subject to the good behavior condition of his suspended sentence, the Court of Appeals correctly upheld the trial court's judgment. This Court should affirm.

ASSIGNMENT OF ERROR

Burnham assigns the following error:

> **The trial court erred in denying the defense motion to dismiss because the trial court lacked jurisdiction to find Defendant guilty of a probation violation where Defendant had completed his term of probation and was no longer subject to terms of suspension. The Court of Appeals erred by denying the appeal and affirming the ruling of the trial court.**

(Def. Br. at 2).

STATEMENT OF FACTS AND MATERIAL PROCEEDINGS BELOW

Burnham pled guilty to possession of cocaine and driving with a revoked license on November 13, 2008. (App. 1). By order entered December 4, 2008, the trial court sentenced Burnham to three years in prison for cocaine possession and 90 days in jail for driving on a revoked license, third offense. (App. 2-3). The trial court suspended all but ten days of the driving on a revoked license sentence. The suspensions were conditioned on Burnham's good behavior for a period of ten years for the felony and a period of one year on the misdemeanor, as well as completion of a one-year term of supervised probation. (App. 2).

On November 4, 2009, the trial court determined that Burnham had violated the terms of his supervised probation and revoked and resuspended all but sixty days of his previously suspended sentence. (App. 4-5). The court conditioned the suspension upon completion of an indefinite term of supervised probation "unless

[Burnham is] sooner released by the [c]ourt or the Probation Officer." (App. 5). The November 4, 2009 order was silent as to the imposition of a good behavior requirement. Burnham was released from probation by court order dated January 26, 2011. (App. 12, 28, 31-32).[1]

On January 21, 2016, the trial court ordered Burnham to show cause why his suspended sentence should not be suspended in light of a January 2015 Henrico County convictions for two counts of Possession of a Schedule I/II Controlled Substance.

Burnham orally moved to dismiss the show cause proceeding contending that when the trial court revoked the suspended sentence in 2009, it also removed the condition that Burnham remain on good behavior for ten years. (App. 13-14, 28-29). Burnham asserted that, because he was released from probation in 2011, and because the good behavior conditions in the original 2008 order were no longer applicable, he was no longer subject to the revocation of his suspended sentence. (App. 12, 28, 31-32).

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[1] The court order releasing Burnham from probation was not made part of the record on appeal. However, the Commonwealth below did not dispute that Burnham was released from probation on that date. Thus, the fact is established through the defense's unchallenged, unilateral avowal in the pleadings below. (App. 12). *See Maxwell v. Commonwealth*, 287 Va. 258, 274, n.1, 754 S.E.2d 516, 524, n.1 (2014) (citing *Whittaker v. Commonwealth*, 217 Va. 966, 969, 234 S.E.2d 79, 81 (1977) ("[A] unilateral avowal of counsel, if unchallenged . . . constitutes a proper proffer.")).

After briefing and argument, the trial court disagreed with Burnham and denied the motion to dismiss. (App. 36). The trial court found that the 2008 order both required Burnham's good behavior for a period of ten years and placed Burnham on active supervised probation "for the period." (App. 32). The trial court further found that it was unnecessary for the trial court to "reestablish another good behavior period" at the 2009 revocation proceeding. (App. 32-33). The trial court reasoned that Burnham "remains under the original [s]entencing [o]rder, unless it's expressly terminated. And it wasn't." (App. 33). The trial court explained:

> [M]y position . . . is that he remained under the original ten years, which was the maximum period under which the original statute he was sentenced upon. . . . I didn't revoke the entire [s]entencing [o]rder. I don't think that's what the [o]rder says. . . . What I did was I revoked the suspended time and resuspended it on certain conditions, but I didn't expressly say that the period of good behavior on the original sentencing charge had changed. . . . I think that he remains under the original period of good behavior, irregardless of his probation status, and I don't think that a revocation of the . . . previous suspended sentence in a revocation proceeding changes that good behavior period. I can extend it, but it doesn't shorten it.

(App. 33-34).

After the motion to dismiss was denied, Burnham "acknowledged that he violated probation by obtaining a new charge and conviction." (App. 36). The trial court found that Burnham violated good behavior and revoked and

resuspended the entire remaining sentence, conditioned on an indefinite term of supervised probation and a five-year term of good behavior. (App. 38-39, 44-48).

A judge of the Court of Appeals denied Burnham's petition for appeal in a July 25, 2018 per curiam opinion. (App. 58). The Court of Appeals held that the requirement of good behavior is implicit in a suspended sentence and that, under Code § 19.2-306(A), the trial court could revoke Burnham's sentence "for any cause the trial court deemed sufficient that occurred within the maximum period for which the defendant might originally have been imprisoned" – in this case, ten years. (App. 60) (citing Code §§ 18.2-10 and 18.2-250) (additional quotation marks and citations omitted).

ARGUMENT

The Court of Appeals correctly determined that the trial court had jurisdiction to revoke Burnham's suspended sentence.

On appeal, Burnham argues that the trial court lacked jurisdiction to revoke his suspended sentence in 2017 for two reasons: (1) the 2009 order revoked all of the conditions originally imposed in the 2008 order suspending his sentence, including the good behavior requirement; and (2) the 2009 order specified a period of probation, which ended on January 26, 2011 when he was released from probation. (Def. Br. at 5). Burnham contends that he had fulfilled all of the conditions of his suspended sentence in 2011, and therefore the trial court was without jurisdiction in 2017 to revoke his suspended sentence. (Def. Br. at 8).

Burnham's arguments are without merit and ignore the distinction between probation and suspension of sentence. As explained below, Burnham satisfied the probation condition of his suspended sentence in 2011. But the good behavior provision associated with his suspended sentence remained in effect until at least December 4, 2018.[2]

A. Standard of Review

Absent an abuse of discretion, an appellate court will not reverse a trial court's revocation of a suspended sentence under Code § 19.2-306. *Hamilton v. Commonwealth*, 217 Va. 325, 326, 228 S.E.2d 555, 556 (1976). This Court reviews de novo 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 involves 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). "[T]he power of the courts to revoke suspensions and probation for breach of conditions

[2] *See Briggs v. Commonwealth*, 21 Va. App. 338, 343, 464 S.E.2d 512, 514 (1995) (concluding maximum sentence under the statute ran from date of initial revocation order).

must not be restricted beyond the statutory limitations." *Id.* at 684, 292 S.E.2d at 350.

B. A good behavior condition is implicit in all suspended sentences.

The trial court correctly determined that it was not required to expressly state in the 2009 order that Burnham's suspended sentence was conditioned upon his good behavior. (App. 32-33). This Court has held that "good behavior is a condition of every suspension, with or without probation, whether expressly so stated or not." *Marshall v. Commonwealth*, 202 Va. 217, 220, 116 S.E.2d 270, 273 (1960). Accordingly, regardless of the express wording of the 2009 revocation order, Burnham's suspended sentence was conditioned on his good behavior as a matter of law. *See id.* at 219, 116 S.E.2d at 273 ("While the language of the suspension[] does not in [its] terms include a condition of good behavior, that condition is implicit in every such suspension and constitutes the origin and purpose of the suspension and probation statutes."). The trial court properly found that Burnham violated the good behavior condition of his suspended sentence based on his new convictions.

C. Because Burnham was still subject to the good behavior condition, the trial court had the authority to revoke Burnham's suspended sentence within the maximum period for which the he might originally have been sentenced to be imprisoned.

A defendant "has no right to suspension of any part of the sentence imposed by the trial court." *Murry v. Commonwealth*, 288 Va. 117, 133, 762 S.E.2d 573, 583 (2014) (Mims, J., concurring). A suspended sentence coupled with probation represents "an act of grace" extended to a defendant who has been convicted and sentenced to confinement. *Price v. Commonwealth*, 51 Va. App. 443, 448, 658 S.E.2d 700, 703 (2008).

The imposition and revocation of a suspended sentence are governed by statute. Code § 19.2-303 grants a trial court the authority to suspend a sentence in whole or in part and "place the defendant on probation under such conditions as the court shall determine." Code § 19.2-306 governs a trial court's revocation of a suspended sentence. It provides that a trial court may revoke a previously suspended sentence "for any cause the court deems sufficient that occurred at any time within the probation period, or within the period of suspension fixed by the court." Code § 19.2-306(A). Alternatively, if the trial court did not originally fix a period of suspension or of probation, § 19.2-306(A) further provides that a trial court "may revoke the suspension for any cause the court deems sufficient that occurred within the maximum period for which the defendant might originally

have been sentenced to be imprisoned." Code § 19.2-306(C) provides that upon revocation of the suspension, a trial court "may again suspend all or any part of [the new sentence imposed] and may place the defendant upon terms and conditions or probation."

Code § 19.2-306 "recognizes the distinction between probation and the suspension of sentence. The concepts are distinct but overlapping, in the sense that a sentence of confinement may be suspended without admitting the defendant to probation while a prerequisite to probation is that any sentence of confinement be first suspended." *Collins v. Commonwealth*, 269 Va. 141, 145, 607 S.E.2d 719, 721 (2005); *see also Carbaugh v. Commonwealth*, 19 Va. App. 119, 126, 449 S.E.2d 264, 268 (1994) (noting "that probation and suspension of sentence are separate and distinct concepts" and that trial courts may fix each "at different intervals to accomplish different goals"). The implied condition of good behavior applies to both. *Collins*, 269 Va. at 145, 607 S.E.2d at 721.

In *Grant*, the trial court suspended the imposition of the defendant's sentence on several conditions, including that he be of good behavior and that he be placed on supervised probation. 223 Va. at 682, 292 S.E.2d at 349. The trial court did not fix a period of probation or of suspension. *Id.* at 684, 292 S.E.2d at 350. About two years later, the trial court entered an order releasing the defendant from supervised probation. *Id.* at 682, 292 S.E.2d at 349. Almost three years after

he was released from probation, the defendant was convicted of several drug distribution charges, and the trial court issued an order requiring the defendant to show cause why his previously suspended sentence should not be revoked. *Id.* The trial court revoked the suspended sentence and imposed two years' active incarceration. *Id.*

On appeal, the defendant argued that the trial court did not have jurisdiction to revoke his previously suspended sentence because more than one year had elapsed from the date he was removed from supervised probation. *Id.* at 683, 292 S.E.2d at 349. This Court held that, while the defendant had fulfilled the supervised probation condition of his suspended sentence, he had not fulfilled the good behavior condition and thus the trial court had jurisdiction to revoke the suspended sentence. *Id.* at 686, 292 S.E.2d at 348.

Grant controls this case. Here, as in *Grant*, Burnham remained subject to the good behavior condition of his suspended sentence regardless of when he was released from probation.

Burnham's efforts to distinguish *Grant* are unavailing. Burnham argues that, unlike in *Grant*, the trial court here fixed a period of probation and that, upon completion of that probation period, the trial court lost jurisdiction to suspend the sentence. (Def. Br. at 5). Burnham's distinction is not material under Code § 19.2-306, particularly given the liberal construction of the statute.

The 2009 revocation order stated, as relevant here:

> The defendant is placed on probation to commence on his release from incarceration, under the supervision of a [p]robation [o]fficer of this [c]ourt for an indefinite period of time or unless sooner released by the [c]ourt or the [p]robation officer.

(App. 5).

The "indefinite period" of probation imposed in the 2009 order is not a fixed period of probation within the meaning of Code § 19.2-306(A).[3] "Words in a statute are to be construed according to their ordinary meaning, given the context

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[3] Code § 19.2-306 provides, in pertinent part:

> A. In any case in which the court has suspended the execution or imposition of sentence, the court may revoke the suspension of sentence for any cause the court deems sufficient that occurred at any time within the probation period, or within the period of suspension fixed by the court. If neither a probation period nor a period of suspension was fixed by the court, then the court may revoke the suspension for any cause the court deems sufficient that occurred within the maximum period for which the defendant might originally have been sentenced to be imprisoned.
>
> . . . .
>
> C. If the court, after hearing, finds good cause to believe that the defendant has violated the terms of suspension, then: (i) if the court originally suspended the imposition of sentence, the court shall revoke the suspension, and the court may pronounce whatever sentence might have been originally imposed or (ii) if the court originally suspended the execution of the sentence, the court shall revoke the suspension and the original sentence shall be in full force and effect. The court may again suspend all or any part of this sentence and may place the defendant upon terms and conditions or probation.

in which they are used." *Grant*, 223 Va. at 684, 292 S.E.2d at 350.[4] The word "fix" — as used in the context of § 19.2-306 — means "[t]o establish definitely: *fix a time*." American Heritage Dictionary 508 (2d College Ed. Houghton Mifflin 1991). Accordingly, the phrase "probation period . . . fixed by the court" in Code § 19.2-306 refers to the trial court setting a specific, definite period of time. By contrast, the word "indefinite" — as used in the 2009 revocation order — means the opposite of "fix." It is defined as: "[n]ot definite esp: a. Unclear; vague. b. Lacking precise limits. c. Uncertain, undecided." American Heritage Dictionary 654 (2d College Ed. Houghton Mifflin 1991). Thus, applying the plain meaning of the words in § 19.2-306(A) to the words of the trial court's 2009 order, the trial court did not "fix" a probation period. Nor did the entry of the order releasing Burnham from probation convert the indefinite period into a definite one. *See Grant*, 223 Va. at 686, 292 S.E.2d at 351 (rejecting similar argument and concluding "that an act of termination cannot, by inversion, be converted into an act of 'prescribing' a period of probation or suspension retroactively") (quoting then-Code § 19.2-306).

Because the trial court fixed neither a period of probation nor a period of suspension in the 2009 order, the trial court had the authority to revoke the

[4] *Grant* was decided on an earlier version of Code § 19.2-306, which used the word "prescribed" rather than "fixed." 223 Va. at 683, 292 S.E.2d at 349. The statutory amendment does not affect the analysis here.

previously suspended sentence "for any cause the court deem[ed] sufficient that occurred within the maximum period for which the defendant might originally have been sentenced to be imprisoned." Under Code §§ 18.2-10 and 18.2-250, Burnham's December 4, 2008 conviction for possession of cocaine carried a ten-year maximum sentence. Accordingly, the trial court had jurisdiction to revoke Burnham's sentence on November 22, 2017.

CONCLUSION

This Court should affirm the judgment of the Court of Appeals and of the Circuit Court for the County of Hanover denying Burnham's motion to dismiss.

Respectfully submitted,

COMMONWEALTH OF VIRGINIA

Appellee herein.

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CERTIFICATE OF TRANSMISSION AND SERVICE

On May 29, 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 Miriam Airington-Fisher, AIRINGTON, STONE & ROCKECHARLIE, PLLC, counsel for the appellant, at mairington@airingtonlaw.com. 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.

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