In The

# Supreme Court of Virginia

**RECORD NO. 181096**

## NOAH SALIM BURNHAM,

*Appellant*,

**v.**

## COMMONWEALTH OF VIRGINIA,

*Appellee.*

## BRIEF OF APPELLANT

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SCV: Submitted on 05-06-2019 13:09:36 EDT for filing on 05-06-2019

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## NATURE OF THE CASE AND MATERIAL PROCEEDINGS

In 2008, Noah Salim Burnham [hereinafter "Defendant"] was convicted and sentenced to one count of Possession of Cocaine and one count of Driving on a Revoked License, 3rd Offense, in Hanover Circuit Court. On the felony drug charge, Defendant received a 3-year sentence suspended conditioned upon, among other things, a 10-year period of good behavior. Defendant was subsequently found in violation of his probation, and the trial court revoked the previously suspended 3-year sentence, and re-suspended all but 60 days. He was placed on supervised probation for an indefinite period of time as a condition of the suspended sentence. The sentencing order on the first probation violation did not mention a specified period of suspension or good behavior, and simply conditioned it upon supervised probation.[1]

After Defendant was released from supervised probation, but before the expiration of 10 years from the date of his sentencing on the original conviction, Defendant was convicted of new drug charges in Henrico Circuit Court, resulting in a second show cause for a probation violation under his 2008 conviction in Hanover County. Trial counsel made an oral motion to dismiss, which was subsequently briefed by both parties and denied by the

[1] J.A. at 1-3

trial judge. Following the denial of the motion to dismiss, Defendant stipulated to being in violation of probation by incurring new criminal convictions.[2] Defendant was convicted of the 2017 probation violation, and the trial court revoked and re-suspended all 2 years and 385 days remaining of his previously suspended sentence and placed him on indefinite supervised probation and placed him on a 5-year period of good behavior.[3]

Defendant timely appealed to the Court of Appeals of Virginia. The Court of Appeals denied the appeal by per curium order dated July 25, 2018.[4] Defendant timely noted an appeal to this Court. His appeal was awarded by order dated March 27, 2019. He timely files this brief in support of his appeal.

## ASSIGNMENT OF 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. [5] The Court of Appeals erred by denying the appeal and affirming the ruling of the trial court. (J.A. 35)

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[2] J.A. at 36
[3] J.A. at 38
[4] J.A. at 58
[5] J.A. at 38

## STATEMENT OF FACTS

Defendant was placed on probation conditioned on a 10-year period of good behavior in 2008. He was subsequently convicted of his first probation violation in 2009. The 2009 order did not specify a new period of supervision or good behavior, but placed him on supervised probation.[6] In 2011, Defendant was released from supervised probation. In 2017, Defendant was convicted of a second probation violation based on 2015 convictions in another jurisdiction, which the trial court found to be a violation of the probation condition requiring good behavior.[7]

## AUTHORITY AND ARGUMENT

**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.[8]**

### a. Standard of Review

The issue of whether a trial court had jurisdiction over a matter poses a question of law which is reviewed de novo on appeal.[9]

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[6] J.A. at 4-5
[7] J.A. at 44-48
[8] J.A. at 38
[9] *Hernandez v. Commonwealth*, 281 Va. 222, 707 S.E.2d 273 (2011)

### b. Legal Analysis

In 2008, Defendant was placed on supervised probation conditioned on a 10-year period of good behavior.[10] In 2009, Defendant was found in violation of that probation, and his suspended sentenced was revoked and all but 60 days was re-suspended, and he was placed on indefinite supervised probation.[11] The 2009 show cause sentencing order did not mention a period of good behavior or a period of suspension.

The Commonwealth cites to the *Grant* case as authority for the trial court to revoke a suspended sentence anytime within the maximum period of time allowed for sentencing on the original charge, where the sentencing order contains neither a set period of supervised probation nor a specified period of suspension.[12] The maximum sentence for the underlying charge was 10 years. Under the 2008 sentencing order, the trial court clearly retained jurisdiction to find Defendant in violation of his probation for 10 years, as the original sentencing order places him on good behavior for that period of time.[13] Like the defendant in *Grant*, Defendant was released from probation prior to the (second) show cause proceeding. However, what

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[10] J.A. at 1
[11] J.A. at 4
[12] *Grant v. Commonwealth*, 223 Va. 680, 686 (1982)
[13] J.A. at 1

distinguishes the instant case from *Grant* is the 2009 show cause sentencing order superseding terms of suspension in the the 2008 conviction order. The 2009 sentencing order revoked the originally suspended three-year sentence and re-suspended all by 60 days. The 2009 order placed Defendant on supervised probation for an *indefinite* period of time. The 2009 order did not specifically place Defendant under good behavior as a condition of his probation. The instant case is factually distinguishable from *Grant* because the 2009 order omits the good behavior requirement, and because an *indefinite* term of supervised probation was specified in the 2009 order. The rationale in *Grant* applies where *neither* a period of suspension *nor* a period of probation is *specified*. *Grant* does not require that the period be a *set term*. Defendant's 2009 order specifies that his probationary term is indefinite, and he was subsequently removed prior to his 2017 revocation proceeding.[14]

As Defendant argued below, the period of good behavior ordered in 2008 was a condition of the suspension of his sentence, not a part of his underlying sentence. Where a trial court originally suspends a sentence, and the defendant is found to be in violation of the terms of suspension, then the court *shall* revoke the suspension and the original sentence is in

[14] J.A. at 16

full force and effect; the court then has the option of either imposing the original sentence or re-suspending all or part of the original sentence.[15] In 2009, the trial court revoked the 2008 suspended sentence and re-suspended part of it without the conditions upon which it was suspended in 2008. In denying the Motion to Dismiss, the trial court found that notwithstanding the 2009 revocation, Defendant remained under the period of good behavior set forth in the 2008 suspension.[16] However, this ruling is incompatible with the clear language of 19.2-306(C), which requires the trial court to revoke the suspension whether the conditions have been violated. As Defendant noted below, the period of good behavior was a condition of the suspension, not a condition of the underlying sentence.[17]

It is a well-settled principle that a circuit court speaks through its written orders.[18] On its face, the 2009 order reads:

> Whereupon, on motion of the Attorney for the Commonwealth, the Court conducted a summary proceeding pursued to §§ 19.2-303 and 19.2-306 at which the defendant was required to show cause why probation should not be revoked, modified, or increased in length for violation of the terms of his probation. The defendant, after being given the opportunity to show cause against the alleged violation and as

[15] Virginia Code Section 19.2-306 C(ii)
[16] J.A. at 34
[17] J.A. at 2
[18] *Roe v. Commonwealth*, 628 S.E.2d 526, 528, 271 Va. 253 (Va. 2006)

> to why the suspension of sentence should not be revoked, modified, or increased in length was found to have violated the terms of his probation.[19]

The 2009 order then revoked and re-suspended, in part, the previously suspended sentence, and placed Defendant on probation as follows:

> **Supervised probation**: The defendant is placed on probation to commence on his release from incarceration, under the supervision of a Probation Officer of this Court for an indefinite period of time or unless sooner released by the Court or by the Probation Officer. The defendant shall comply with all the rules and requirements set by the Probation Officer. Probation shall include substance abuse and counseling and/or testing as prescribed by the Probation Officer.[20]

The 2009 order contains additional language similar to that found in the 2008 order, related to payment of court costs, remand to the jail, and credit for time served. The 2009 order specifically omits a separate period of good behavior period, whereas the 2008 order had set a 10 year period. There is no language in the 2009 order incorporating by reference the conditions of suspension from the 2008 order. The trial court's interpretation that any conditions from 2008 order not mentioned in the 2009 order are automatically assumed to be unchanged would not properly put the Defendant on notice as to what conditions were being imposed, are are incompatible with notions of fairness and due process.

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[19] J.A. at 4
[20] J.A. at 5

The trial court's ruling in this case improperly conflated the original *sentence* with the original *terms of suspension*, and assumes that the same terms of suspension be carried over to the new suspension without any mention in the order. In 2008, the court sentenced Defendant to three years and 90 days, and suspended three years and 90 days conditioned on a 10-year period of good behavior and supervised probation.[21] In 2009, the court revoked the suspended sentence and resuspended part of it conditioned on compliance with supervised probation.[22] The original *sentence* was unchanged by the 2009 order, but the original *terms of suspension* were different in the 2009 order, in that there was not a separate term of good behavior specified as a standalone requirement. The 2008 terms of suspension were superseded by the 2009 order. A plain reading of the 2009 order shows that the second suspension of his sentence was conditioned on supervised probation and any rules and requirements of the probation officer. When Defendant was removed from supervised probation in 2011, that condition was satisfied.

Because the original term of his sentence (3 years) had expired, and because Defendant had been removed from supervised probation, the trial

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[21] J.A. at 2
[22] J.A. at 5

court lacked jurisdiction to find him in violation of probation and revoke his previously suspended sentence. The Court of Appeals, in denying the appeal, noted that the trial court retained jurisdiction over the suspended sentence.[23] In conjunction with Section 19.2-306(A), a trial court retains jurisdiction to revoke a suspended sentence within the probation period, period of good behavior, or within the period of time for which the defendant might have originally been sentenced. In this case, the 2008 order set the period of good behavior at ten years. However, it was then *superseded* by the 2009 order which did not proscribe any time period of good behavior.

The Court of Appeals further noted that the requirement of good behavior is implicit in a suspended sentence and cited to its holding in *Singleton* for the proposition that a trial court retains discretion to revoke a sentence even where that condition is not explicit in the sentencing order.[24] In this case, the trial court *did* order Defendant to an indefinite period of probation, and at the time of the 2017 revocation, he had already been removed.

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[23] *Richardson v. Commonwealth*, 131 Va. 802, 807, 109 S.E. 460, 461 (1921)
[24] J.A. at 61

This Court has held that good behavior is an implicit condition during a defendant's probation period.[25] However, a key distinction in this case is that the 2017 revocation occurred *outside* of Defendant's probationary period. As the record reflects, he was placed on supervised probation in 2009 and removed from supervised probation in 2011. Defendant asserts that, in the absence of any other period proscribed in the 2009 order, the period of good behavior was the same as his period of probation, which had ended prior to the 2017 revocation. Consistent with the holdings of *Marshall* and *Coffey*, any implied period of good behavior during the period of probation ended satisfactorily when Defendant was removed from probation.

## CONCLUSION

Appellant contends that, for the foregoing reasons, the trial court lacked jurisdiction to find him in violation of his probation in 2017, as he had been removed from probation and his 2009 sentencing order did not specify a period of good behavior. Accordingly, Defendant submits that the trial court erred in denying his motion to dismiss. Appellant prays this

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[25] See *Marshall v. Commonwealth*, 116 S.E.2d 270, 202 Va. 217 (1960); *Coffey v. Commonwealth*, 167 S.E.2d 343, 209 Va. 760 (1969)

court REVERSE the trial court's order finding him in violation and placing him on indefinite supervised probation.

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## CERTIFICATE

I hereby certify that on this 6th day of May, 2019, pursuant to Rules 5:26 and 5:32(a)(3)(i), three paper copies of the Brief of Appellant and three paper copies of the Appendix have hand-filed with the Clerk of the Supreme Court of Virginia and electronic copies of the Brief and Appendix were filed, via VACES. On this same day, an electronic copy of the Brief of Appellant was served, via email, and electronic copies on CD of the Brief and Appendix were served, via UPS Ground Transportation, upon:

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