



NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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March 7, 2017

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Re: *Commonwealth of Virginia v. Michael Lupai*, FE-2010-1703

Dear Counsel:

This case is before the Court on the Defendant Michael Lupai's ("Lupai") Motion to Dismiss a Bench Warrant, alleging a probation violation, as untimely. The Motion raised one question:

Does detention by Immigration and Customs Enforcement ("ICE") toll the commencement, or completion, of a defendant's entire probationary period?

After considering the pleadings, authorities, and oral arguments presented by Counsel, the Court finds that ICE detention did not toll the entire probationary period, and thus the Bench Warrant was untimely and the Court does not have jurisdiction to revoke Lupai's suspended sentence. The Motion to Dismiss is granted.

OPINION LETTER

I. BACKGROUND

After originally being charged with two felonies, Lupai pled guilty on May 16, 2011, to two misdemeanor counts under Va. Code § 18.2-371. As a result, this Court sentenced Lupai to 360 days in jail for each count, to run consecutively, with 210 days suspended on each count. The suspended time was conditioned upon Lupai's completion of two years of active probation, a sex offender evaluation, and any recommended treatment stemming from that evaluation.

At the time of sentencing, Lupai was free on bond and an ICE detainer did not exist. Subsequent to his sentencing, but prior to his release, ICE submitted a detainer for Mr. Lupai. Upon completion of his jail time in the Fairfax Adult Detention Center on September 12, 2011, Lupai was transported to ICE. During this detention, Lupai did not report to a probation officer, nor complete a sex offender evaluation or any treatment. Despite clear violations of his probation terms, the Department of Corrections did not take any action related to Lupai's failure to abide by those terms. Additionally, the Court was not informed of Lupai's ICE detainer.

After three years of detention, Lupai was released from ICE on December 3, 2014. Upon release, he was contacted by a probation officer; nevertheless, he did not cooperate in performing the terms of his probation. At the request of the probation officer, in October 2016, this Court issued a Rule to Show Cause why the suspended sentence should not be revoked. When Lupai did not appear for that hearing in November, this Court issued a Bench Warrant for his arrest. Subsequent to his arrest, Lupai filed a Motion to Dismiss the Bench Warrant.

II. STANDARD OF REVIEW

In determining whether or not the tolling provision of § 19.2-306 is triggered, the Court must determine whether or not the defendant "due to his own conduct, [was] no longer under...control and supervision" of the Commonwealth. *Pierce v. Commonwealth*, 48 Va. App. 660, 670 (2006).

III. ARGUMENTS

A. Defendant's Argument

Lupai's argument is simple: The Commonwealth failed to pursue the Bench Warrant in the time allotted by statute. He maintains that ICE detention is civil, not criminal, and does not place Lupai beyond the reach of a writ issued by the Commonwealth. *Escamilla v. Superintendent, Rappahannock Reg'l Jail*, 290 Va. 374 (2015); *U.S. v. Rodriguez-Amaya*, 521 F.3d 437 (4th Cir. 2008). In other words,

the Court, at the Commonwealth's request, could have issued a writ requesting Lupai's appearance for violation of his probation. In the alternative, the Commonwealth could have requested and the Court could have lodged a Bench Warrant to keep Lupai from his freedom upon the completion of his ICE detention. It did not do so. His probation began when released from the Fairfax Adult Detention Center on September 12, 2011. It thus ended on September 11, 2013, two years thereafter. The terms of his probation were not completed, and the Commonwealth had one year from that point to act under § 19.2-306. It could have done so at any point during that time frame, and did not. As a result, the revocation hearing is no longer timely.

B. Commonwealth's Argument

The Commonwealth's argument has two parts. First, it argues that the probationary period did not commence until "release from confinement." Lupai was immediately detained by ICE upon completion of his jail-time, and thus was never truly released from confinement until December 3, 2014. Secondly, and notwithstanding that argument, the probationary period as a whole should have been tolled as a result of Lupai being beyond Virginia's control and supervision while detained by ICE. It would be an illogical result, and inconsistent with the remedial and rehabilitative goals of probation, if Lupai was (1) held in violation of probation while detained and unable to complete probation, and (2) not given an opportunity to complete probation and the terms thereof upon release from ICE detention. Instead, the Commonwealth contends that the correct application of the law suspended the entire probationary period until December of 2014, and thus the November 2016 Bench Warrant was timely.

IV. ANALYSIS

The Virginia Code permits the Commonwealth to seek revocation of a suspended sentence, for violation of probation, during the period of probation or for one year thereafter. Va. Code § 19.2-306.

The Commonwealth did not do so. Lupai was released from confinement in the Adult Detention Center on September 12, 2011. The Probation Officer could have requested a Rule to Show Cause why his sentence should not be revoked for his failure to perform the terms of probation. At any point during his ICE detention, the probation office could have requested a Bench Warrant, and Lupai might have been brought before the Court while detained by ICE, or, at the very least, after his detention. In either situation, the Court could have found good cause for his failure to follow the terms of probation, and tolled the probationary period. This would have followed the statutory guidelines, even if the bench warrant or show cause was not heard until after the ICE detention.

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Arguably, the post-probation year in which the Commonwealth may seek to revoke a suspended sentence was tolled by Lupai's ICE detention. *See Rease v. Commonwealth*, 227 Va. 289, 295 (1984). According to *Rease* and its progeny, when a defendant, by his or her own doing, is no longer under the control and supervision of the Commonwealth, the statute may be tolled. *Id.* In *Rease*, the Court explained that "the one-year time constraint of § 19.2-306 is suspended" in the event a probationer "places himself beyond the jurisdiction and control of the sentencing court," though "the probation period *expires* during incarceration in the other jurisdiction." *Id.* (emphasis added). *Rease* then further conditioned this tolling upon the Court acting "as soon as practicable" to issue a "warrant charging violation of probation and a detainer." *Id.* Hence, the line of cases under *Rease* indicate that the probationary period may still run while the probationer is detained elsewhere, even if the one year post-probation is tolled, but only provided that the Commonwealth act quickly upon the defendant's availability. Here, the one year extension after Lupai's release from ICE expired on December 2, 2015, still nearly a year before any action was taken by the Commonwealth.


Additionally, *Pierce v. Commonwealth* indicated that the entire probationary period might be suspended when a probationer is incarcerated or detained by a different jurisdiction. In *Pierce*, the defendant had completed five years of active probation, and two of his five years of inactive probation, before he was incarcerated in California for felonies committed therein. He was in prison for three years in California, and when released, the Court held that there were still three years remaining on probation. *Pierce v. Commonwealth*, 48 Va. App. 660, 670 (2006).

Pierce is distinguishable. In *Pierce*, the show cause order and even a *capias* for his arrest were both issued prior to his California incarceration and prior to the conclusion of his probationary period. Thus, everything *but* the hearing had occurred *prior* to his incarceration in another jurisdiction. *Id.* In such circumstances, the Commonwealth had timely acted to toll the running of the statutory period.

V. CONCLUSION

For the foregoing reasons, the Court grants the Motion to Dismiss.

Sincerely,


Daniel E. Ortiz
Circuit Court Judge

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