COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
FILE NO. 2010-SC-000116-DG
(COURT OF APPEALS FILE NO. 2008-CA-001312)

GERALD BARKER — APPELLANT

v.

APPEAL FROM GRAVES CIRCUIT COURT
HON. TIMOTHY C. STARK, JUDGE
INDICTMENT NO. 2003-CR-175

COMMONWEALTH OF KENTUCKY — APPELLEE

REPLY BRIEF FOR APPELLANT, GERALD BARKER

Submitted by:

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The undersigned does certify that copies of this Reply Brief were mailed, first class postage prepaid, to the Hon. Timothy L. Stark, Judge, Graves Circuit Court, Courthouse Box 5, 100 E. Broadway, Mayfield, Kentucky 42066; the Hon. David Hargrove, Commonwealth Attorney's Office, P.O. Box 135, Mayfield, Kentucky 42066-0315; the Hon. Josh W. Nacey, Department Of Public Advocacy, 503 N. 16th Street, Murray, Kentucky 42701; and to Hon. Joshua D. Farley, Assistant Attorney General, Office of Criminal Appeals, 1024 Capital Center Drive, Frankfort, Kentucky 40601 on March 31, 2011. The record on appeal was not checked out from the Clerk of this Court.

Frederick W. Rhynart by FWR
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Purpose of Reply Brief

The purpose of this reply brief is to respond to the arguments and cases cited by the Appellee to demonstrate why they are not on point to this case.

STATEMENT OF POINTS AND AUTHORITIES

I.

A. Tiryung v. Commonwealth, 717 S.W.2d 503 (Ky. App. 1986) may be twenty-five years old but the only cases that the appellee could find applying it, two in number, can be readily distinguished from the case at hand. The first case appellee used to assert the claim of progeny for Tiryung is Commonwealth v. Lopez, 292 S.W.3d 878 (Ky. 2009). In that case Lopez was a probationer who had admitted a violation of the Uniform Code of Military Justice (UCMJ) in order to avoid a court martial and thereby was discharged from the U.S. Army. The issue in Lopez was whether an already determined "violation of the UCMJ is an 'offense' for which a Kentucky court may revoke probation" *Id.* at 880. This is a very different issue than the one at hand wherein a probationer has yet been not found in violation but in fact denies it and raises a traditional defense to the charge.

The second case appellee finds applying Tiryung is Miller v. Commonwealth, 329 S.W.3d 358 (Ky. App. 2010). It can likewise easily be distinguished from the case at hand. During the probation hearing that led to that appeal, Miller, the probationer, stated to the court "that he was charged with trafficking in marijuana, had entered a plea of guilty to the new charge and stipulated to the violation." *Id.* at 359. These facts are very different than the case at bar in which the probationer raises a traditional defense to the new charge. It is also hard to see how these cases wherein a second tribunal had newly found the probationer in violation of the law can be viewed as progeny of

Tiryung's assertion, i.e. that a conviction is not necessary, but only arrest for a court to revoke probation, when in both cases a violation had been found by the respective tribunal.

To bolster his argument in behalf of Tiryung, a barren precedent with neither analysis nor true progeny, the appellee moves to sources from foreign jurisdictions to argue from the weak ground of authority rather analysis of the law of our Commonwealth. Appellee cites the position of federal circuits without noting the legal connection of these jurisdictions to Kentucky law; as if federalism were a dead letter and a nationalized common law could usurp that of the Commonwealth without discussion. Continuing on with foreign jurisdiction authority appellee lists eighteen states, a minority, as authority. The important point is that appellee is in search of external authority to provide legitimation for a common law justification that Tiryung did not provide.

Appellee does this rather than addressing the statutory interpretation and statutory history of KRS 533 carried out in appellant's brief. See Brief for Appellant, pp. 6-8. That analysis demonstrated precedent incorporated into the relevant section of the reform that was the Kentucky Penal Code. The commentary in this section called for a probation revocation when based on a conviction of another crime. Kentucky Penal Code, Kentucky Crime Commission/LRC Commentary at 362-363, citing Hardin v. Commonwealth, 327 S.W.2d 93 (Ky. 1959). Rather show how Kentucky law has moved from this view through analysis of the statute or cases interpreting the

statute, the appellee seeks authority of foreign jurisdictions as if this were a novel case without a statutory base.

Appellee moves from foreign authority to a logic analysis arguing that the above statutory interpretation is "absurd" because a criminal conviction requires a higher level of proof, beyond a reasonable doubt, than that required in a probation hearing preponderance of the evidence. What appellee overlooks is that preponderance of the evidence is necessarily of all the evidence before the court and that a conviction is, as an arrest would be, one piece of the entire body of evidence considered by the court considering revocation. If a conviction were the only evidence the court considered, it would suffice as the commission of another "offense" as stated in the statute governing revocation. If, however, an arrest is considered as evidence, it, along with other evidence, might or might not suffice to revoke probation. This makes sense as the grounds for arrest are probable cause which "exists where facts and circumstances within officers' knowledge and of which they had reasonably trustworthy information are sufficient in themselves to warrant a person of reasonable caution in the belief that an offense has been or is being committed: it is not necessary that the officer possess knowledge of facts sufficient to establish guilt, but more than mere suspicion is required." *Black Law Dictionary* {hereinafter BLD}, p.1201.

This standard of evidence for arrest seems closer to that of substantial evidence than preponderance of the evidence, substantial evidence being "such

evidence that a reasonable mind might accept as adequate to support a conclusion," *BLD*, p.1428, whereas the preponderance of evidence is a court's balancing of "evidence, taken as a whole shows that the fact sought to be proved is more probable than not." BLD, p.1182. It is not the arrest, but complementary evidence which a revoking court in its deliberative process would review that would tip the balance of evidence one way or another. An arrest is a mere allegation and not an offense. Only a court can determine whether an offense occurred. Arrest standing alone in a revocation hearing would not constitute sufficient evidence, as the statute requires more. Just what evidence added to an arrest would constitute preponderance, only a neutral magistrate conducting a truly deliberative process can determine. Certainly waiting until the criminal would be tried would resolve this nearly imponderable question if it would be the only and/or the central allegation in the revocation hearing.

B. 1. Appellee makes much of Minnesota v Murphy 465 U.S. 420 (1984) in asserting that Gerald Lewis Barker waived his right against self-incrimination by not invoking it. The Court in Murphy did note "that the State could not constitutionally carry out a threat to revoke probation for the legitimate exercise of the Fifth Amendment privilege" *Id.* at 438. The appellee ignores the basis conundrum the Appellant, and others in his shoes, faced. If he explained what happened (which he initially tried to do and was silenced by the trial court), and specifically testified to refute the claims he was intoxicated when the incident with his family occurred or that he attacked anyone in his family at

all, his statements could and would be available in the Commonwealth's prosecution of him for assault. In fact, he did not testify before the trial court that revoked his probation, and was revoked based on the testimony of the probation officer referring to a uniform citation and hearsay and double hearsay from what others told the officer about the incident. The Appellant would have been in the best position to refute this evidence but could not do so without running the risk that it would be used against him in his criminal trial. It does not matter that he did not go through the charade of having his counsel call him to testify then refusing to answer on Fifth Amendment grounds. How would that change the basic analysis, i.e. that forcing a defendant to defend against a revocation when he also faces criminal charges arising from the same incident impermissibly forces him to either waive is Fifth Amendment right and testify or remain silent and forgo his opportunity to defend himself?

The state achieves a tactical advantage in excluding his testimony from the evidence, a preponderance of which a magistrate will decide upon. Again, the probationer is on the horns of the dilemma, if he testifies, the state gains a tactical advantage for its investigators and prosecutors in the future even if the testimony is not directly imported into court.

A better path would to wait until the new criminal charge is heard, as is done in civil cases using the preponderance of evidence standard, until the criminal case can heard. This approach would not possibly interfere with the defendant's right not incriminate himself in a pending criminal case nor add to

the investigative advantage that the state already has in almost all pending cases. It also seems that the appellee's analysis does not account for the behavior of the revoking judge in this case. Hostile to any possible defense in this truncated eight minute hearing, the judge bears little resemblance to a neutral magistrate as he told the probationer to "have a seat" when he raised the possibility of self defense. The appellee, in presuming a detached neutral magistrate, has missed the essential reality of what occurred during the eight minute revocation proceeding.

2. Appellee claims that probationer's counsel did not pursue a defense via cross-examination. Counsel did do so. He cross-examined the probation agent and pin-pointed certain objective facts within the knowledge of the agent to his client's advantage. But the key to the charges here, an arrest and drinking, was based on hearsay and double-hearsay testimony of the probation agent. Here cross-examination's utility is limited by the chief witness's lack of personal observation, recall, perception, and perhaps bias. Given the truncated nature of the proceeding, the majority of evidence was presented by the probation agent in hearsay and double-hearsay fashion. Given the propensity of the judge to have a quick hearing and to rely on the probation's hearsay, this was less than a fair hearing.

C. Appellee misunderstands the nature of probation as a statutory entitlement applied as it is by the original sentencing court, the fruit of the contract of a plea bargain. This plea bargaining is not the exception, but the

practice in over 90% of our felonies nation-wide such that our courts rather resemble administrative processing units rather than deliberative bodies conducting trials. The high courts of the United States have recognized this reality by extending the due process protections for ordinary citizens in the modern American administrative state from areas such as welfare and social security disability to probation and parole. The extension of the Court's anointed due process revolution within the administrative state to probation and parole is logical given the expansion of the state in the form of the number of prisons and the numbers of citizens incarcerated in the era of Law and Order and the War against Drugs. The whole point of Morrissey v Brewer, 408 US 471 (1972) and Gagnon v Scarpelli, 411 US 778 (1973) was to assure some protection to citizens ensnared in this new administrative system where trials are rare.

Appellee makes the outlandish claim that Appellant wants to overrule all case law developed in the Commonwealth under Morrissey and Gagnon. Appellant has asked only one precedent be overruled and that would be Tiryung. Appellant's simple point is this, that the application of *Matthews v. Eldridge*, 424 U.S. 319, 335 (1976), provides the most advantageous test for an appellate court reviewing probation revocation hearings within the Commonwealth as it will restore a certain balance that will assure proper deference is given to all three factors important in this due process protection. This three prong test is: (1) the nature and weight of the private interest that will be affected by the official action challenged; (2) the risk of an erroneous deprivation of such interest as a consequence of the summary procedures used;

and (3) the governmental function involved and the state interests served by such procedures, as well as the administrative and fiscal burden, if any, that would result from the additional or substituted procedures sought.

The primary advantage in this test goes not to the individual in this context but to the state. For in reviewing a probationer's potential revocation, for a court to postulate the only state interest is to exercise retribution and re-incarceration overlooks the state interest of the costs of confinement of re-incarceration. Our current era of scarcity is closing down the era of Law and Order and the War on Drugs as evidenced by the Kentucky General Assembly passage of HB 463. The use of *Matthews v. Eldridge* would allow a simple test to be applied to probation hearings that would restore among the three interests involved as well as a more deliberate probation hearing that would explore defenses and possibly hold off re-incarceration until the results of the new criminal charge are in. Such a reviewing standard would invoke a truly deliberative revocation process more in tune with prudent decision-making in an era of austerity.

CONCLUSION

For the above-stated reasons, Appellant requests that this Court reverse and vacate the probation revocation of Gerald Lewis Barker.

Respectfully Submitted,

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