Commonwealth of Kentucky
Supreme Court
No. 2010-SC-0520-D

MARK BOLTON, DIRECTOR, METRO CORRECTIONS — **MOVANT/APPELLANT**

V.

On Review from 2010-CA-0865
Appeal From Jefferson Circuit Court
Hon. A.C. McKay Chauvin, Judge
Action No. 10-CI-2295

RICKIE IRVIN — **RESPONDENT/APPELLEE**

Brief for Movant/Appellant

Submitted by:

JACK CONWAY
Attorney General of Kentucky

SAMUEL J. FLOYD, JR.
Special Assistant Attorney General
Office of Commonwealth's Attorney
514 West Liberty Street
Louisville, Kentucky 40202
(502) 595-2300

CERTIFICATE OF SERVICE

I certify that the record on appeal was not checked out from the Clerk of this Court, and that a copy of the Brief for Director Bolton has been mailed July 7th, 2011, to the Hon. Samuel Givens, Jr., Clerk, Court of Appeals of Kentucky, 360 Democrat Drive, Frankfort, Kentucky 40602; Hon. A.C. McKay Chauvin, Judge, Jefferson Circuit Court, Division Eight, Judicial Center, 700 West Jefferson Street, Louisville, KY 40202; Hon Michelle Stengel, Jefferson District Court, Division 99, 600 West Jefferson Street, Louisville, KY 40202; and to Hon. J. David Niehaus, Deputy Appellate Defender, Louisville Metro Public Defender, 719 West Jefferson Street, Louisville, Kentucky 40601, Counsel for Respondent/Appellee.

Samuel J. Floyd, Jr.
Assistant Attorney General

INTRODUCTION

The instant appeal involves the April 28, 2010, ruling of the Jefferson Circuit Court in a habeas corpus action initiated by Rickie Irvin again Metro Corrections Director Mark Bolton under RCr 4.43(2) complaining about a bond ruling by the Jefferson District Court made at the probable cause hearing. The circuit court concluded that the district court erred in increasing bond at the preliminary hearing, and on July 14, 2010, the Court of Appeals dismissed director Bolton's appeal of that ruling as moot. By order entered May 11, 2011, this Court granted the Director's motion for discretionary review. The Transcript of Record in this appeal consists of one (1) nineteen-page volume of record, a video record of circuit court proceedings, and the record of proceedings in the Court of Appeals.

STATEMENT CONCERNING ORAL ARGUMENT

Director Bolton does not believe that oral argument is necessary in this case since the matter at issue is sufficiently delineated and addressed in this brief. However, if the Court determines that oral argument would be helpful to the disposition of this appeal, the Commonwealth will gladly appear before the Court to present its case.

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

Appellee Irvin sought review of a Jefferson District Court action increasing his bail from $10,000 to $100,000 by filing–under RCr 4.43(2)–a writ of habeas corpus in Jefferson Circuit Court. In his habeas petition appellee claimed that his due process rights were infringed at the district court probable cause hearing because the district court judge supposedly acted in violation of RCr 4.42 in increasing his bail.

The circuit judge, while agreeing that the district court's probable cause finding constituted "a material change in the defendant's circumstances" under RCr 4.42(1), nevertheless granted the writ, vacating the $100,000 bond and reinstating the $10,000 amount (TR 10-12). The circuit judge granted the writ because he believed the district court erred with regard to the procedures set forth in RCr 4.42. The circuit judge acknowledged that RCr 4.42(1) expressly states that its dictates are applicable "following the release of the defendant," and that appellee had never been released even on the lower bond, but the judge stated that he was ruling in accordance with the "spirit" of the rule rather than it "literal interpretation" (VR; 4/9/10; 11:05:00).

Director Bolton, appellant herein, timely appealed this ruling, and the record on appeal was requested by the Court of Appeals, on May 5, 2010. Thereafter, Director Bolton asked the Court of Appeals for leave to file a brief in the appeal since this is normally not the practice where an appeal is taken from a habeas corpus ruling. Appellee, while asserting that briefing was required, nevertheless moved the court to dismiss the appeal as moot, since bail as set by the district court was superceded by a circuit court arraignment order entered May 28, 2010, setting bond at $10,000.

Director Bolton responded to the motion to dismiss, pointing out that the

issue was not moot because–contrary to what appellee claimed–the matter before the appellate court involved a dispute "capable of repetition, yet evading review," Com., Dept. of Corrections v. Engle, 302 S.W.3d 60, 63 (Ky. 2010), as evidenced by the fact that the Louisville Metro Public Defender (which represents appellee) had raised an identical complaint in another habeas corpus action, i.e., Norman Grasch v. Mark Bolton, 10-CI-2355, filed in a different division of Jefferson Circuit Court (See Court of Appeals Docket, Event 6). In Grasch, however, the writ was *denied*, thereby creating a split of authority in the circuit court regarding the issue presented by the instant appeal.

Nonetheless, the Court of Appeals panel, in an order entered July 14, 2010, granted the appellee's motion to dismiss, dismissing the appeal as moot, and denying as moot Director Bolton's motion for leave to file a brief. On August 12, 2010, the Director filed a motion for discretionary review with this Court, and by order entered May 11, 2011, this Court granted review.

ARGUMENT

I. THE COURT OF APPEALS ERRED IN DISMISSING THE APPEAL AS MOOT BECAUSE THE ISSUE PRESENTED BY THE CIRCUIT COURT'S ERRONEOUS HABEAS CORPUS RULING IS CAPABLE OF REPETITION AND OF EVADING REVIEW WHEN THE ERROR RECURS.

A. Standard of Review.

This matter is before the Court on Director Bolton's motion for discretionary review of the July 14, 2010, order of the Court of Appeals dismissing the appeal as moot. In seeking review, the Director pointed out (1) that there was no district

court error in increasing bond; (2) that the circuit judge in granting the writ ignored the express language of RCr 4.42 and instead applied what he concluded was the "spirit" of that rule; and (3) that the issue presented on appeal is very much "capable of repetition, yet evading review," Engle, supra, as evidenced by the fact that the public defender twice in quick succession asserted the same meritless claim regarding district court bond proceedings, and thereby created a split of authority in Jefferson Circuit Court which can reasonably be expected to persist and create confusion and uncertainty in both circuit and district courts unless resolved by appellate court review.

Therefore, as a threshold matter, the standard of review focuses upon the Court of Appeals' application of the exception to the mootness doctrine which provides for review of an issue which–while moot in a given case–involves a dispute "capable of repetition, yet evading review." Jones v. Commonwealth, 319 S.W.3d 295, 296-297 (Ky. 2010); Lexington Herald–Leader Co., Inc. v. Meigs, 660 S.W.2d 658, 661 (Ky. 1983). This determination must necessarily involve a further examination of the circuit court's habeas corpus ruling which invalidated the district court ruling on bail.

"The decision whether to apply the exception to the mootness doctrine basically involves two questions: whether (1) the 'challenged action is too short in duration to be fully litigated prior to its cessation or expiration and [2] there is a reasonable expectation that the same complaining party would be subject to the same action again.'" Philpot v. Patton, 837 S.W.2d 491, 493 (Ky. 1992); quoting In re Commerce Oil Co., 847 F.2d 291, 293 (6th Cir. 1988). When this standard is applied to the facts of the case here, it is readily apparent that the Commonwealth can reasonably

expect–given the typically short duration of the pretrial procedures at issue–that it will be subject to future similar actions, particularly if a continuing lack of appellate review leaves the Jefferson Circuit and District Courts with disparate rulings on the matter.

B. The Court of Appeals Erred in Dismissing the Appeal as Moot.

"Kentucky courts have long held that unless there is an actual case involving a present, ongoing controversy, the issues surrounding it become moot." Engle, supra, 302 S.W.3d at 63. *However*, as mentioned above, it is equally well-established that an exception to this rule is applicable "when a dispute is capable of repetition, yet evading review." Id. The decision whether to apply this exception is–as previously stated–addressed to two questions: whether (1) the "challenged action is too short in duration to be fully litigated prior to its cessation or expiration and [2] there is a reasonable expectation that the same complaining party would be subject to the same action again." Philpot, supra.

As the Commonwealth pointed out to the Court of Appeals in responding to appellee's motion to dismiss the appeal, this two-part test is met here. Not only did the Louisville Metro Public Defender concede in its motion to dismiss that the challenged action is too short in duration to be fully litigated prior to its cessation or expiration (Court of Appeals Docket Event 4), but by its recent Jefferson Circuit Court habeas corpus actions–not disclosed to the Court of Appeals in its motion to dismiss the appeal as moot–it demonstrated that indeed "there is a reasonable expectation that the same complaining party would be subject to the same action again." Engle, supra; Philpot v. Patton, supra; In re Commerce Oil Co., supra. "There is nothing to suggest that the

Commonwealth will face the same erroneous action in the future," is what appellee told the Court of Appeals in his motion to dismiss of June 1, 2010 (Court of Appeals Docket Event 4, P. 3). In actuality, the fact that the public defender had twice in succession filed the same kind of challenge to a district court bond ruling suggests just the opposite.

In responding to the Director's motion for discretionary review, appellee dismissed the exception to the mootness doctrine as merely being "a rule of judicial economy" subject only to a abuse of discretion standard of review (Response to Motion for Discretionary Review, P. 1). However, the "capable of repetition, yet evading review" exception is more often addressed to "important questions," such as public access to criminal trials, Meigs, supra, 660 S.W.2d at 661, or issues related to the right to counsel, May v. Coleman, 945 S.W.2d 426, 427 (Ky. 1997). Specifically, the Meigs case involved media access to voir dire proceedings, and in discussing the mootness exception at issue in Meigs this Court has observed:

> By its nature voir dire examination takes place over a brief span, usually a day or two, and if the public or press is excluded from all or any part of such examination and questions the constitutionality of such exclusion, the trial will progress past the point where relief is possible and before an appellate court can consider the merits of the controversy.

Philpot, supra, 837 S.W.2d at 493. In other words, rather than avoiding–in the interest of judicial economy or otherwise–a controversy as being moot, appellate courts applying the exception consider the broader implications of the issue presented.

For example, in May v. Coleman, under procedural circumstances similar

to those here, this Court held, as follows:

> The Court of Appeals deemed this action moot because Judge Coleman has already acted on Appellant's motion by denying it. . . . However, the general rule does not apply in a situation in which litigation is likely to be repeated, *Courier–Journal v. Meigs,* Ky., 646 S.W.2d 724 (1983), or where the issue is "capable of repetition, yet evading review." *West v. Commonwealth,* Ky., 887 S.W.2d 338, 343 (1994); *Philpot v. Patton,* Ky., 837 S.W.2d 491, 493 (1992). . . . Appellant has attached to his petition a copy of an order signed by another circuit judge granting the same motion which was denied in this case. Also, since the issue is a preliminary one involving a claim akin to right to counsel, it is likely to evade review if not addressed at this stage of the proceedings. Thus, we address the merits of the issue raised . . .

May v. Coleman, supra, 945 S.W.2d at 427. Consequently, while appellee in his response to the motion for discretionary review asserted that "[n]othing of record showed that the supposed problem described by the government is occurring regularly in Jefferson Circuit Court" (Response to Motion for Discretionary Review P. 2), it is clear that the test is *not* whether the legal action at issue is "occurring regularly." Rather, the controlling concern is whether the legal action at issue is "*capable* of repetition, yet evading review." Commonwealth v. Brown, 911 S.W.2d 279, 280 (Ky.App. 1995); emphasis added. A further consideration is whether there is a "reasonable expectation" of recurrence, Engle, supra, and the public defender by its actions in circuit court–which it can reasonably be expected to repeat–has demonstrated that recurrence is likely.

The record shows, however, that the Court of Appeals in the order under review, while mentioning the Commonwealth's argument concerning the exception to the

mootness doctrine (Order P. 2), completely failed to apply the test for the appropriateness of the exception in dismissing the appeal as moot. The test should have been addressed by the Court of Appeals, and the exception should have been found applicable. There is nothing in the panel's order which expressly states that the Court of Appeals actually considered the appropriateness of the exception in dismissing the appeal as moot. Therefore, the Court of Appeals ruling was incorrect in both law and fact, and that ruling should be reversed.

C. In its Habeas Corpus Ruling, the Circuit Court Incorrectly Construed RCr 4.42 in Finding Error in the District Court Bond Ruling.

The Jefferson District Court correctly increased appellee's bond from $10,000 to $100, 000 following testimony at the probable cause hearing. As appellee acknowledged in his habeas corpus petition, he was charged at the time of his arrest with first degree robbery (3 counts), first degree burglary, resisting arrest, first degree fleeing and evading, and third degree criminal mischief (TR 1).[1] The Commonwealth stated at the probable cause hearing that it would be asking the court to increase appellee's bail, and defense counsel advised that he would be asking for a bond decrease (Id.). The judge stated that she would consider the matter of bond at the end of the probable cause hearing (Id.). After listening to the testimony, the district judge made a finding of probable cause, and waived the case to the grand jury, finding a material change in circumstance warranting an increase in bond to the amount recommended by the Commonwealth (Id.).

---

[1]This Court's online docket for Jefferson Circuit Court Indictment No. 10-CR-1465 reflects that on June 14, 2011, following entry of a plea of guilty, appellee was sentenced to thirteen (13) years in prison for the offenses charged in this case.

Appellee objected, asserting that there had been no material change in circumstance (Id.). The judge noted the objection, but did not change her bond ruling (Id.).

Five days later, on April 5, 2010, respondent filed a habeas corpus petition in Jefferson Circuit Court, claiming that the probable cause finding did not constitute a material change in circumstance under RCr 4.42(1), and that the district court had violated his due process rights as set forth in RCr 4.42(5) by not conducting an adversarial hearing on the issue of bond, and in not issuing written reasons for its ruling.

At the hearing on the habeas corpus petition, defense counsel, while acknowledging that RCr 4.42 was "not exactly on point because it contemplates a person being out of custody and a bond put on them" (VR; 4/9.10; 10:55:00), nonetheless argued that the due process standards under RCr 4.42 were applicable to his case and that the district court judge erred in increasing bond based on her probable cause finding (Id.). The Commonwealth pointed out that RCr 4.42 was not applicable to appellee's case because the rule expressly states that it pertains to changes in bond "following the release of the defendant," RCr 4.42(1), and appellee had not been released from jail when the probable cause hearing was held (VR; 4/9/10; 10:56:00-10:58:00). The Commonwealth pointed out that in Sydnor v. Commonwealth, 617 S.W.2d 58 (Ky.App. 1981), it was recognized that return of an indictment justified a review of bond by the circuit court, and the Commonwealth argued that the district court's probable cause finding was like that of the grand jury in handing down a circuit court indictment (Id.).

The Commonwealth also pointed out that another division of Jefferson Circuit Court had already ruled on the issue (VR; 4/9/10; 10:59:00). This was the case of

Norman Grasch v. Mark Bolton, 10-CI-2355, to which Director Bolton drew the attention of the Court of Appeals in his response to appellee's motion to dismiss the appeal as moot. In his response to the motion to dismiss, the Director pointed out that the Louisville Metro Public Defender, while asserting that the issue on appeal was not "capable of repetition, yet evading review," Engle, supra, failed to mention the Grasch habeas action which involved the same issue, and which was filed by the public defender just two days after the habeas action at issue here (Court of Appeals Docket Event No. 6). In Grasch, a different division of Jefferson Circuit Court *denied* the habeas petition.

The Jefferson Circuit Court judge in the Grasch habeas corpus action recognized that because the petitioner there–like appellee here–was not on release at the time of the district court bond ruling, *and because* the bond increase took place at the preliminary hearing in district court, RCr 3.14–not RCr 4.42–was controlling (Court of Appeals Docket Event No. 6). RCr 3.14 provides that upon its probable cause finding the district court has discretion to "*commit the defendant to jail, release the defendant on personal recognizance or admit the defendant to bail . . .*" RCr 3.14(1), emphasis added. The circuit court's analysis in the Grasch habeas action was certainly correct since it is well recognized that "[t]he sole purpose of a preliminary hearing under our rules is to determine whether there is probable cause to believe that the defendant committed a felony and, if so, whether and under what conditions he is to be released pending indictment." Commonwealth v. Wortman, 929 S.W.2d 199, 200 (Ky.App. 1996).

Nevertheless, in granting the writ, the circuit judge in appellee's case relied on RCr 4.42, even though he agreed with the Commonwealth that the probable

cause finding constituted a material change in the defendant's circumstances (VR; 4/9/10; 11:02:00), and even though he also recognized (Id. at 11:05:00) that RCr 4.42 expressly states that it is applicable "following the release of the defendant . . ." RCr 4.42(1). In so doing, the circuit judge applied what he perceived to be "the spirit this rule," holding that RCr 4.42 was applicable and that appellee in district court had been denied the procedures set forth in that rule (Id. at 11:05:00).

While RCr 4.42 is inapplicable to the circumstances of the bond ruling in this case (since appellee had not been released and RCr 3.14 was clearly controlling), it is worth noting that appellee–contrary to what the circuit judge concluded (TR 15)–was not deprived of a hearing in district court on his bond issue. Appellee has never asserted, even in his habeas petition, that he was deprived of an opportunity to confront witnesses at the probable case hearing. In fact, defense counsel *acknowledged* at the hearing on the habeas petition that he intended to seek a bond reduction in district court at the probable cause hearing, and could have actually done so, but *elected not to* when the district court raised the bond (VR; 4/9/10; 10:59:00-11:00:00). Consequently, to whatever extent appellee was not afforded an opportunity to be heard on the issue of a bond reduction, it was due only to the fact that defense counsel elected not to pursue the matter.

Instead, the public defender filed a petition for writ of habeas corpus, claiming–even though he later acknowledged that he showed up at the preliminary hearing prepared to seek a bond reduction–that he was not adequately notified of the bond issue, and that he was "denied the opportunity to adequately prepare cross-examination and introduce evidence" (TR 3). Appellee in his habeas petition accused the district

judge of "disregard for the established rules of criminal procedure" (TR 4) when in actuality the district judge acted in full accord with RCr 3.14.

Thereafter, upon obtaining a favorable–though legally unfounded–habeas corpus ruling, appellee sought to preclude appellate review by arguing that the issue was moot based on the circuit court's bond ruling at arraignment. The public defender claimed–in its motion to dismiss the appeal as moot–that there was "nothing to suggest that the Commonwealth will face the same erroneous action in the future," even as it neglected to mention its habeas action in the Grasch case. Hence, the record in this case shows is that the district judge ruled properly under RCr 3.14(1) in increasing appellee's bond; that the circuit judge erroneously construed the circumstances of the district court hearing and the applicability of RCr 4.42 in granting the writ; and that the Court of Appeals compounded the error by dismissing the Director's appeal as moot when the record showed clearly that the matter was capable of being repeated and evading review.

Given the plain language of RCr 3.14 stating that at the probable cause hearing "the judge *shall*"–if probable cause is found–"commit the defendant to jail . . . or admit the defendant to bail," there can be little doubt that the circuit judge's habeas ruling based on RCr 4.42 was incorrect. In concluding that appellee's bond was increased improperly, the circuit judge ignored the express controlling language of RCr. 3.14 and the well-established case law which recognizes that "[t]he sole purpose of a preliminary hearing under our rules is to determine whether there is probable cause to believe that the defendant committed a felony and, if so, whether *and under what conditions* he is to be released pending indictment." Wortman, supra; emphasis added. Instead, the circuit

court adopted what it perceived to be the "spirit" of RCr 4.42 in finding that rule controlling, even though RCr 4.42 states in its opening sentence that it is applicable in situations "following the release of the defendant," RCr 4.42(1), and appellee in this case was not on any form of release when the district court made its ruling increasing bond. Furthermore, even if he had been on release, RCr 3.14 unquestionably authorized the district court judge to review the conditions of bail and to increase the bond if warranted under the changed circumstance of the probable cause finding. Hence, the circuit court's habeas ruling was an incorrect application of law to the facts of this case.

CONCLUSION

For all the foregoing reasons, the Court of Appeals' July 14, 2010, order dismissing the appeal as moot should be reversed, the Jefferson Circuit Court's April 28, 2010, habeas corpus ruling premised upon an erroneous construction of RCr 4.42 should be vacated, and the Jefferson District Court's bond ruling should be affirmed as correctly entered under RCr 3.14.

Respectfully submitted,

JACK CONWAY
Attorney General of Kentucky

SAMUEL J. FLOYD, JR.
Special Assistant Attorney General
Office of Commonwealth's Attorney
514 West Liberty Street
Louisville, Kentucky 40202
(502) 595-2300

Counsel for Movant/Appellant