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

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

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**

Reply Brief for Commonwealth

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CERTIFICATE OF SERVICE

I certify that the record on appeal has been previously returned to the Clerk of this Court, and that a copy of the Reply Brief for the Commonwealth has been delivered October 4th 2011, Hon. Samuel Givens, Jr., Clerk, Court of Appeals, 360 Democrat Dr., Frankfort, KY 40602; Hon. A.C. McKay Chauvin, Judge, Jefferson Circuit Court, Division 8, 700 W. Jefferson St., Louisville, KY 40202; Hon Michelle Stengel, Jefferson District Court, Division 99, 600 W. Jefferson St., Louisville, KY 40202; and to Hon. J. David Niehaus, Louisville Metro Public Defender, 719 W. Jefferson St., Louisville, KY 40202, Counsel for Respondent/Appellee.

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STATEMENT OF THE CASE

Appellee sought review of a district court order increasing his bail from $10,000 to $100,000 by filing a writ of habeas corpus in circuit court.

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, and reinstated the $10,000 bail. The circuit judge 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) 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 appealed this ruling. Appellee, however, moved to dismiss the appeal as moot, since bail as set by the district court was superceded by a circuit court arraignment order entered May 28, 2010, setting bond at $10,000.

Responding to the motion to dismiss, Director Bolton pointed 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 dismissed the appeal as moot, and denied Director Bolton's motion for leave to file a brief. This Court granted the Director's motion for discretionary review. Director Bolton herein files his reply brief addressing inaccurate statements of law and fact in the brief for appellee.

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.

Appellee in his brief does not address the standard of review, thereby conceding that the standard of review as set forth in the brief for the Director is correct.

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

Appellee asks this Court not to address the correctness of the Court of Appeals ruling dismissing the appeal as moot (Brief for Appellee P. 2-4). Appellee asserts that this Court should not address the issue because this Court has previously analyzed the "capable of evading review" exception to the mootness doctrine in "numerous cases," and examining the appropriateness of the application of that exception to the facts of this case would be "simply to render another exposition of well-established law" (Brief for Appellee P. 2). Stated otherwise, appellee argues that this Court should not review, say, a search and seizure issue raised by a defendant on appeal because for this Court to do so would be for it "simply to render another exposition of well-

established law." Appellee contends that this Court should only address appeals which do *not* involve issues of "well-established law." Such an assertion by the public defender on behalf of one of its clients is as odd as it is meritless.

Appellee argues alternatively that this Court should give "deference" to the Court of Appeals' mootness determination even though the Court of Appeals order does not indicate how the panel reached that determination (Brief for Appellee Pp. 2-3). Appellee then claims that the Court of Appeals *did* decide that the circumstances involved with this appeal were not "enough to justify use of the [mootness] exception," even though nothing in the Court of Appeals ruling speaks to any such determination by the panel. Rather than addressing the substance of the mootness issue in this case, appellee merely asserts–without elaboration–that the Court of Appeals *must* be regarded as having made the correct ruling. Appellee's position seems to be that since the Court of Appeals did not expressly address the issue, he's not going to either. However, to the extent that the Commonwealth's arguments on the mootness issue remain unchallenged by appellee, they should be regarded by this Court as having been conceded by him.

Since appellee does not want this Court to review the Court of Appeals' mootness ruling, and since he has refused to do so himself, appellee's third alternative argument is–perhaps not surprisingly–that "the Court of Appeals may not have jurisdiction to consider moot cases" (Brief for Appellee P.3). The use of the word "may" by appellee indicates that this is merely a *suggestion* on his part. The suggestion is based on the opinion in Louisville/Jefferson County Metro Government v. Metro Louisville Hospitality Coalition, Inc., 297 S.W.3d 42, 43-44 (Ky.App. 2009), wherein the appellate

court examined a motion to dismiss the appeal based on the fact that the Metro Counsel had re-enacted the challenged Smoke Free Law to delete the complained-of exemption. Obviously, none of the rules of district and circuit court criminal procedure at issue here have been amended as was ordinance in the Metro Government case. Thus appellee's reliance on that opinion is–under the facts of the instant appeal–entirely misplaced.

Moreover, since the Court of Appeals has long addressed the issue of mootness over the years, e.g., Commonwealth v. Brown, 911 S.W.2d 279, 280 (Ky.App. 1995), appellee is with his suggestion inviting this Court to transgress his first alternative argument by spending time on a question "simply to render another exposition of well-established law" (Brief for Appellee P. 2). Nonetheless, as far as appellee's jurisdictional argument is concerned, it is unnecessary for this Court to consider adopting any such limitation on its appellate review authority. Appellee's *suggestion* that the Court of Appeals lacked jurisdiction is unsupported by the authority upon which it is based.

In sum, appellee's argument on the issue of mootness consists of a refusal to address the issue of mootness, and an invitation to this Court to do the same. He maintains without reference to supporting language in the Court of Appeals order, or authority related thereto, that the Court of Appeals ruling was correct, even as he suggests that the Court of Appeals lacked jurisdiction to render it. The only thing that is clear from all this is that appellee is unable to demonstrate that the Court of Appeals' consideration and application of the "capable of repetition but evading review" exception to the mootness doctrine–if indeed the appellate court below actually considered and applied that exception–was correct. Therefore, this Court should conclude that the

Director's arguments in his brief showing that the Court of Appeals mootness ruling was *incorrect* remain effectively unrefuted and unchallenged by appellee, and should be regarded as having been conceded by appellee for purposes of this appeal.

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

Regarding the circuit court habeas ruling, appellee argues that the circuit judge reached "the right result" (Brief for Appellee Pp. 4-11). According to appellee the circuit judge "ruled correctly" when he set aside the district court bond, even if he "erred as to [his] reasoning" (Brief for Appellee Pp. 7-8). In other words, having distanced himself from the Court of Appeals ruling, appellee next parts ways with the circuit judge insofar as endeavoring to defend the judge's legal rational for granting the petition.

In order to effect this separation, appellee first attempts to excise from consideration anything said by the circuit judge on the record at the hearing on April 9, 2010, insisting that the judge's decision consists, not in what he said at the hearing, but solely in"what he wrote" in his order granting the petition (Brief for Appellee Pp. 4-5). The Director does not dispute that the order under appeal is the written order of the circuit court entered April 28, 2010. However, the written order does not render the judge's statements from the bench irrelevant to this appeal.

Appellee wishes this Court not to consider the circuit judge's statements at the hearing on the habeas petition because it is at that hearing where the judge makes the pronouncements upon which his written order is premised. In granting the writ, the 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).

In other words, the circuit judge decided to ignore the plain language of RCr 4.42(1), and rule as he pleased. Consequently, it is not surprising that his order does not refer to the controlling language of the rule or his spirit-of-the-law rational for ignoring it. This does not mean, however, as appellee seems to suggest, that the Director is thereby foreclosed from pointing out the circuit court error. Such a deliberate violation of the rules of court by a circuit judge is unfortunate enough, but for appellee to assert that the Director may not challenge that violation in the appellate court simply because the circuit judge–as might be expected–did not expressly advertise his transgression in the written order, is ludicrous. In much the same way that appellee urged this Court not to address the mootness issue, appellee invites this Court not to consider the circuit court's misapplication of the Criminal Rules. As with the mootness issue, appellee's attempt to limit the Court's review merely highlights the fact that the error lies precisely where appellee does not want the Court to look.

For example, appellee points to that portion of the circuit court order wherein the judge–in ignoring the fact that RCr 4.42(1) expressly states that it is applicable "following the release of the defendant"–says that "the Commonwealth does

not dispute that the District Court increased the Defendant's bond without benefit of an adversary hearing" (Brief for Appellee P. 5). What the judge in his order and appellee in his brief fail to mention, however, is that there is no need to dispute what has not been placed in issue. While RCr 4.42 is neither legally nor factually applicable 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 bond hearing in district court.

In district court, as RCr 3.14(2) requires, defense counsel was given the opportunity to–and did–cross-examine the Commonwealth's witness at the probable cause hearing (CD; 3/31/10; 00:10:00-00:20:00). Moreover, 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.

Consequently, even if the misapplication of RCr 4.42(1) is ignored, in that appellee when he arrived in district court had not previously been released, it is clear from the record that there was no due process violation. Appellee was not deprived of due process in the district court bond ruling. Instead he *elected* to forego further hearing on the matter. Appellee asserts that "apparently" the circuit judge–rather than relying as he should have on RCr 3.14–decided to "analogize to RCr 4.42" (Brief for Appellee P.8).

The circuit judge may refer to it as following *the spirit* of the rule, and appellee may characterize it as *analogizing* to the rule, but all it is actually is not *following* the rule.

Evidently realizing that any attempt on his part to justify the circuit court ruling based on the language of the Rules of Criminal Procedure would be futile, appellee endeavors to disparage the importance of the Rules and direct the Court's attention to certain statutes, particularly KRS 431.520 (Brief for Appellee Pp. 8-10). Appellee focuses upon the language in that statute pertaining to release on "personal recognizance" and "unsecured bail bond" as though the statute contains no other provisions. In so doing, appellee claims that in district court he was not given a chance to be heard on "ROR or unsecured bond," but as pointed out above, this is simply not the case. Defense counsel–as he stated on the record–*elected* not to pursue those matters in district court. Moreover, nothing in KRS 431.520 invalidates RCr 4.42(1) or justifies the circuit court's decision to ignore the express language of that rule in granting the habeas petition.

Appellee in his brief does not so much attempt to justify the circuit court ruling as complain that the Director did not limit his arguments to the four corners of the circuit court order. Obviously, what was wrong with that order is primarily what it does not contain, i.e., the Rules of Criminal Procedure it misconstrues and the facts in the record it ignores. Appellee presents no authority in his brief which precludes the Director on appeal from addressing such matters.

Citing Kaminski v. Bremner, Inc., 281 S.W.3d 298, 303, fn. 6 (Ky.App. 2009), appellee asserts that "[t]he failure to point out reversible error in the written Order justifies affirmance without any further consideration of the argument" (Brief for

Appellee P. 7). Perhaps appellee was doing some *analogizing* when he made this assertion in his brief, or perhaps he was channeling some perceived *spirit* of footnote 6 of that opinion, but the rule of law quoted there from R.E. Gaddie, Inc. v. Price, 528 S.W.2d 708, 710 (Ky. 1975) is as follows: "Failure of appellant to discuss the alleged errors in its brief is the same as if no brief had been filed in support of its charges." Contrary to what appellee claims, there is nothing in the footnote about the arguments of the appellant in an appeal being limited to the "written order." The Director fully presented and addressed the circuit court errors in his brief, and based on those errors of rule and fact, the circuit court order granting the habeas petition should be reversed.

CONCLUSION

For these reasons, and all those set forth in the Commonwealth's initial brief, the Court of Appeals' July 14, 2010, order dismissing this appeal as moot should be reversed, the circuit court's April 28, 2010, habeas ruling premised upon an erroneous construction of RCr 4.42 should be vacated, and the Jefferson District Court bond ruling should be affirmed as correctly entered under RCr 3.14.

Respectfully submitted,

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