Commonwealth of Kentucky
Supreme Court
2010 – SC –000520 – DG

Mark Bolton, Director — Appellant

v.

Appeal from Court of Appeals
2010-CA-000865

Rickie Irvin — Appellee

**Brief for Appellee , Rickie Irvin**

Submitted by

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**Certificate of Service**

I hereby certify that on September 12, 2011, copies of this Brief were mailed to Mr. Samuel Floyd, Special Assistant Attorney General, 514 W. Liberty Street, Louisville, Ky. 40202, and to Hon. McKay Chauvin, Jefferson Circuit Court, Division 8, Jefferson County Judicial Center, 700 W. Jefferson Street, Louisville, Kentucky 40202,. A copy was mailed to Hon. Jack Conway, Attorney General, Criminal Appeals, 1024 Capital Center Drive, Frankfort, Ky. 40601, on this same date. The record on appeal was not withdrawn by Appellee

J. David Niehaus

## Counterstatement Concerning Oral Argument

This appeal may fairly be characterized as peculiar. It raises issues relevant to the proper functioning of the District Courts and the Court of Appeals about which there apparently is much confusion. Appellee believes that the Court will benefit from an oral presentation by both sides and therefore asks the Court to schedule this matter for oral argument.

## Note Concerning Citations to the Record

References to the clerk's record will be made (TR ). Any references to the video record will be made as required by CR 98. References to the Appendix of this Brief will be made (App ).

## Table of Points and Authorities

## Counterstatement of the Case

The Appellee agrees that the Statement of the Case provides an adequate summary of the proceedings in the lower courts "necessary to an understanding of the issues presented by the appeal." [CR 76.12(4)(c)(iv)]. Any additional details will be noted in the arguments that follow.

## Argument

### (1). The Court should disregard the Commonwealth's argument as to the propriety of the Court of Appeals dismissal order.

The Court should disregard the Commonwealth's argument on this point. At best it appears to be an informal request for a certification of the law because a ruling by this Court can have no practical effect on any civil or criminal litigation involving Mr. Irvin. It is a request for an advisory opinion. Although this Court has authority to render advisory opinions if it wishes, the power to do so should be exercised cautiously. [Riley v. Gibson, 338 S. W. 3d 230, 233 (Ky., 2011)].

The issue presented by the Commonwealth does not involve an unsettled question of law. The mode of analysis for "capable of evading review" appeals is well-known and long-standing, as reference to the numerous cases cited by the Appellant's Brief shows. The Commonwealth's argument asks this Court to evaluate how well or poorly the Court of Appeals applied this analytic method to a particular situation. The Court should not spend time on this question simply to render another exposition of well-established law.

If the Court chooses to deal with the dismissal, the argument should be resolved against the Appellant. The claim on page 7 of the Appellant's Brief, that the Court of Appeals is required to show its work when dismissing an appeal, is supported by nothing other than the government's bald assertion. The Order is the ruling of a court, not math homework. Nothing in the Rules of Court or the case law required the Court of Appeals to state in the dismissal order that it had

gone through each element of the capable of evading review analysis and resolved it against the Commonwealth. If the government thought the Order lacking, CR 76.38(2) allowed ten days in which to ask for a fuller explanation and reconsideration. It failed to make the request. It cannot be heard to complain about this supposed failing now.

The remainder of the government's argument is that the Court of Appeals just did not understand that the scenario could happen again. No one disputes that point. It did happen again – in one other case. (Appellant's Brief, p. 9; 11). The Court of Appeals had to determine whether the two cases mentioned of record created a reasonable expectation that the problem presented by those two cases would recur often enough to justify use of the exception. Dismissal was a judgment call to which deference should be given. The Appellant's Brief fails to show abuse of discretion in this instance.

A further problem for the Commonwealth is that the Court of Appeals may not have jurisdiction to consider moot cases. Certainly nothing in KRS 22A.020 or KRS 419.130 grants jurisdiction to resolve moot appeals.[1] Nor does the Court of Appeals appear to have inherent power to do so.

Section 111(2) of the Constitution gives the Court of Appeals "appellate jurisdiction only," subject to certain exceptions. In Metro Government v. Metro Louisville Hospitality Coalition, Inc., 297 S. W. 3d 42, 44 (Ky. App., 2009), the Court of Appeals held that it lacks ordinary appellate jurisdiction to consider and

[1] KRS 22A.020 is a jurisdictional statute. [Ballard v. Commonwealth, 320 S. W. 3d 69, 73 (Ky., 2010)]. KRS 419.130 authorizes a special statutory appeal to the Court of Appeals.

dispose of moot cases. If this is so, the power of the Court of Appeals to employ "capable of evading review" must arise from its "all writs" jurisdiction. But the writ authority of the Court of Appeals, unlike the writ authority of this Court, exists only to support its appellate jurisdiction.

Section 111(2) grants power to issue orders "in aid of" the Court of Appeals' "appellate jurisdiction." Obviously, if the Court lacks appellate jurisdiction over moot cases, the writ cannot be employed to create that jurisdiction. The other writ authority is for orders necessary to "the complete determination of any cause within its appellate jurisdiction." The same problem arises here. If the cause is not within the appellate jurisdiction of the Court of Appeals, no orders can issue.

The Metro Government case has created a real question as to whether the Court of Appeals may ever employ the capable of evading review exception. Mr. Irvin asks the Court to pass over the Commonwealth's first argument because it is unnecessary to disposition of the appeal in this Court and raises a number of perplexing questions that need not be resolved at this time. Alternatively, he asks the Court to render an opinion declaring that the Court of Appeals lacked jurisdiction to entertain moot appeals of any kind.

**(2). The circuit judge reached the right result when he determined that Appellee had been denied due process.**

Examination of Part (C) of the Commonwealth's Brief shows that it never directly addresses the judgment appealed from. The argument complains about adverse counsel and complains about what Judge Chauvin said at the hearing on

April 9th. But with the exception of one brief mention on page 10, it does not tell the Court what the Judge actually decided or why that decision is wrong.

The Circuit Court is a court of record. [KRS 23A.010(3)]. Necessarily, it speaks only through its records. [Allen v. Walter, 534 S. W. 2d 453, 455 (Ky., 1976)]. The record of the judge's decision is the final written judgment. [CR 54.01; 58(1)]. Judge Chauvin's decision is not what he said at the hearing. The decision is what he wrote, signed and had entered in the clerk's record. In any event, appeals are concerned with the propriety of the result, not the reasoning by which the result is obtained. [Emberton v. GMRI, Inc., 299 S. W. 3d 565 (Ky., 2009); Haddad v. Louisville Gas and Electric Co., 449 S. W. 2d 916 (Ky., 1969)]. Judge Chauvin reached the right result. His decision must be affirmed.

The final Order disposing of the habeas corpus action is set out at pages 1-3 of the Appendix to this Brief. In this Order the Judge appeared to state his conclusion first and then explain his reasoning in the remaining paragraphs. The first supporting paragraph is found on Appendix Page 3 (TR 12) where Judge Chauvin stated that

> In the instant case the Commonwealth does not dispute that the District Court increased the Defendant's bond without benefit of an adversary hearing. In so doing, the District Court failed to comply with RCr 4.40 and/or RCr 4.42 and, as such, denied the Petitioner due process of law.

Presumably Judge Chauvin was not intentionally misstating what had happened during the proceeding on April 9th. This statement represents the conclusion he drew from what had been said and argued at the hearing. If his conclusion as to

the absence of an adversary hearing was erroneous, the burden was on the Commonwealth to file a timely motion to correct under CR 52.02 or CR 59.05. None was filed. The failure even to make the attempt must count as evidence that the Commonwealth found no fault with the Order until the case was appealed. [CR 52.04].

The second important holding is found at the top of page 2 of the Order (TR 11; App 2):

> While a finding of probable cause may constitute a material change in a defendant's circumstances which a court may consider in ruling on a motion by the Commonwealth to increase a defendant's bond, that circumstance does not in and of itself divest a defendant of the right to due process of law.

Judge Chauvin continued that the process due was that "defined under RCr 4.40 and RCr 4.42." He concluded that a court must "act in accordance with those rules in the exercise of that authority."

Finally, on page 3 of the Order (TR 12), Judge Chauvin reinstated the original $10,000 cash bond, to remain fixed at that sum "absent proceedings in keeping with RCr 4.40 and or RCr 4.42 of (sic) until such time as the District Court loses jurisdiction over the matter."

The government's legal argument is not made until near the end of Section C, on pages 11 and 12 of the Appellant's Brief. It does not address the Order appealed from, except perhaps by a vague reference to "the circuit court's habeas ruling" in the final sentence of the argument. It is hard to determine what the Commonwealth is talking about. To this point of the Appellant's Brief, it

has never clearly referred to the Order. The reference to the "ruling" likely is to the statements made at the hearing on April 9th rather than to the written Order.

The failure to point out reversible error in the written Order justifies affirmance without any further consideration of the argument. [Kaminski v. Bremner, Inc., 281 S. W. 3d 298, 303, fn. 6 (Ky. App., 2009)]. But even if the Court chooses to consider the propriety of Judge Chauvin's Order, it must still affirm.

On page 11 of the Appellant's Brief, the Commonwealth states:

> 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.

On page 12, the argument correctly notes that even if Appellee had been on some form or 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 probable cause finding." It concludes with the statement that the habeas ruling "was an incorrect application of law to the facts of the case." The Commonwealth asks the Court (a) to vacate Judge Chauvin's "habeas corpus ruling premised upon an erroneous construction of RCr 4.42" and (b) to declare that the District Court bond ruling was "correctly entered under RCr 3.14." (p. 12).

Appellee respectfully states that the Court may grant neither demand because Judge Chauvin ruled correctly when he set aside the new bond. If the

Judge erred as to reasoning, it was because he was unintentionally misled by the parties.

RCr 3.14 authorizes the judge to determine bail at the conclusion of an examining trial if the defendant is not discharged and he or she is eligible for bail. RCr 3.18 requires the judge to state the amount of bail on the commitment to jail. The purpose of these rules is to let a committed defendant post bail with the clerk of the court rather than wait for the court or the grand jury to be in session again. But neither speaks as to what the judge must consider when discharging this duty. That must be looked for elsewhere. Obviously, a judge reasonably could analogize to RCr 4.42. That is what Judge Chauvin apparently did in this case. Rather than leave RCr 3.14 open to a challenge for lack of standards, he chose to rely on another Rule. He should not be faulted for this. But his ruling can also be supported by two statutes that are the real basis for bail decisions.

RCr 3.14 is valid only to the extent that it establishes procedures for implementation of the policy stated in KRS 24A.110(3). A judge fixes bail at the close of a preliminary hearing because KRS 24A.110(3) says that he or she must do so, not because this Court has enacted rules of practice and procedure.

The Court will recall at this point that the District Court's authority to act arises solely from statute. The Rules that this Court has enacted pursuant to Section 116 of the Constitution exist only to establish the procedures by which substantive law is carried into effect. They cannot add to or detract from the

authority of the District Court Judge that is fixed by statute. [CR 1(2); CR 82; RCr 13.04]. Nor can they relieve a District Court Judge from an obligation that is fixed by statutes governing the exercise of jurisdiction.[2] Not surprisingly, the Legislative Branch, having imposed the duty under KRS 24A.110(3) to fix bail at the conclusion of an examining trial, has provided guidance as to how this obligation is to be discharged.

The public policy of the Commonwealth of Kentucky as to bail is set out in KRS 431.520. This statute reflects the legislature's understanding of what Sections 2, 16 and 17 of the Constitution require. The primary purpose of bail in Kentucky, according to the introductory paragraph of KRS 431.520, is to assure the appearance of a defendant at each step in the prosecution of a criminal offense.

The General Assembly has determined that the preferred method of release shall be own recognizance or unsecured bail bond. It is only after determining that neither of these forms of release is suitable that the judge may impose a financial condition of release. Non-financial conditions may be imposed in any case.

Because there are no words of limitation in KRS 431.520, it applies at every stage of proceedings in the District Court. This includes the fixing of bond at the conclusion of an examining trial conducted under KRS 24A.110(3). It also applies at hearings to change bond conducted under KRS 431.520(9). The

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[2] The District Court "shall exercise original jurisdiction as may be provided by the General Assembly." [Constitution, § 113(6)].

express language of KRS 431.520 leaves no doubt as to how a District Judge is to proceed. The judge is to consider own recognizance or unsecured release first. Release under one of these methods is required "unless the court determines in the exercise of its discretion that such a release will not reasonably assure the appearance of the person as required. When such a determination is made," the judge "shall" fix financial or other conditions.

Every time a District Court Judge determines bond he or she must go down the list of release alternatives. There must be a "determination" that ROR or unsecured release is insufficient in the circumstances presented. It is only after this determination is made that the question of a cash or property bond arises. Obviously, in a court of record[3] the judge must memorialize the determination and state reasons.

Because Section 2 of the Bill of Rights forbids arbitrary action by any agent of government, [Sanitation District No. 1 v. City of Louisville, 308 Ky. 368, 213 S. W. 2d 995, 1000 (1948)], the determination must provide the minimum due process protections of reasonable notice and opportunity to be heard. Nothing in the written or electronic record of the District Court proceeding shows compliance with KRS 431.520. Mr. Irvin was not given the chance to be heard on the matter at issue, why ROR or unsecured bond status was insufficient in his case. The purported bond increase was a nullity because the District Court Judge failed to comply with KRS 431.520. Judge Chauvin thus correctly granted relief

[3] KRS 24A.010(4)

from that new bond. The government has nothing to complain about on this score. The Order must be affirmed.

## Conclusion

For the reasons set out in Argument (1), Appellee urges the Court simply to disregard the question of mootness. If the Court does address this question, Appellee asks the Court to hold that the Court of Appeals lacks jurisdiction to employ the "capable of evading review" exception to the live controversy rule. Alternatively, the Court should declare that the Court of Appeals did not abuse its discretion when it declined to invoke the exception.

As to Argument (2), the Court should affirm because Judge Chauvin reached the right result. The Commonwealth seeks to have procedural rules control the substantive law. This is forbidden by Sections 113(6) and 28 of the Constitution. Judge Chauvin correctly perceived that Appellee was denied due process because he was not granted a chance fairly to contest the bond increase. The Court should affirm on this basis.

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