

Commonwealth of Kentucky
Supreme Court
No. 2009-SC-589

FILED

MAY 05 2010

SUPREME COURT CLERK

COMMONWEALTH OF KENTUCKY

APPELLANT

v.

On Discretionary Review
Court of Appeals No. 2008-CA-1093
Appeal from Graves Circuit Court
Hon. Timothy C. Stark, Judge
Indictment No. 06-CR-00212

MARK JOHNSON

APPELLEE

Brief for Commonwealth

Submitted by,

JACK CONWAY


Attorney General of Kentucky

WM. ROBERT LONG JR.

Assistant Attorney General
Office of Criminal Appeals
Office of the Attorney General
1024 Capital Center Drive
Frankfort, Kentucky 40601
(502) 696-5342

CERTIFICATE OF SERVICE

I certify that the record on appeal has been returned to the Clerk of this Court and that a copy of the Brief for Commonwealth has been mailed this 5th day of May, 2010 to Samuel Givens, Jr., Office of the Clerk of the Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601-9229; Hon. Timothy C. Stark, Judge, Graves Circuit Court, Courthouse Box 5, 100 East Broadway, Mayfield, Kentucky 42066; sent electronically to Hon. David Hargrove, Commonwealth's Attorney, 205 North 6th Street, Mayfield, Kentucky 42066; and sent via messenger mail to Hon. Gene Lewter, counsel for respondent, 100 Fair Oaks Lane, Suite 302, Frankfort, Kentucky 40601.



WM. ROBERT LONG JR.
Assistant Attorney General

INTRODUCTION

The Commonwealth appeals the Court of Appeals' decision rendered on August 21, 2009, in the case of Mark Johnson v. Commonwealth, File No. 2008-CA-001093-MR, so that this Court may resolve a conflict in authority/precedent created by the 2-1 split decision in this case and the Court of Appeals' contrary holding in Marshall v. Commonwealth, 2008 WL 3165791 (Ky. App. 2008). (A copy of that opinion is attached hereto).

STATEMENT CONCERNING ORAL ARGUMENT

Although the Commonwealth does not believe oral argument is necessary in this case, it nonetheless would welcome the opportunity to orally address the legal principles central to the determination of this appeal should this Court find that oral argument would be of material aid to its resolution of this case.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

INTRODUCTION i

STATEMENT CONCERNING ORAL ARGUMENT ii

COUNTERSTATEMENT OF POINTS AND AUTHORITIES iii

COUNTERSTATEMENT OF THE CASE 1

ARGUMENT 2

**I. THE TRIAL COURT PROPERLY REVOKED APPELLANT’S
PROBATION DUE TO HIS FAILURE TO ABIDE BY THE TERMS
OF HIS PLEA AGREEMENT.** 2

Bearden v. Georgia,
461 U.S. 660 (1983) 3

Clayborn v. Commonwealth,
701 S.W.2d 413 (Ky. App, 1985) 3

Polk v. Commonwealth,
622 S.W.2d 223 (Ky. App. 1981) 3

Mauk v. Commonwealth,
700 S.W.2d 803 (Ky. App. 1985) 3

Whitworth v. Commonwealth,
437 S.W.2d 731 (Ky. 1969) 3

McCarthy v. United States,
394 U.S. 459, 466, 89 S.Ct. 1166, 1171, 82 L.Ed.2d 418 (1969) 4

Whitworth v. Commonwealth,
437 S.W.2d 731, 731 (Ky. 1969) 4

Waddle v. Commonwealth,
391 S.W.2d 687, 689 (Ky. 1965) 4

Boykin v. Alabama,
395 U.S. 238, 242, 89 S.Ct. 1709, 1711-1712, 23 L.Ed.2d 274 (1969) ... 4

Clayborn v. Commonwealth,
701 S.W.2d 413 (Ky.App. 1985) 5

Beardon v. Georgia,
461 U.S. 660 (1983), 5

Marshall v. Commonwealth,
2008 WL 3165791 (Ky.App.,2008) 5

CR 76.28(4)(c), 5

CONCLUSION 6

COUNTERSTATEMENT OF THE CASE

On September 1, 2006, a Graves County Grand Jury indicted the respondent for flagrant non-support. (TR at 1). On November 6, 2006, the respondent accepted the Commonwealth's plea offer and entered his Motion to Enter Guilty Plea. (TR at 37). Pursuant to the terms of that plea offer the respondent would be sentence to five years that would be conditionally discharged for five years on the condition that the respondent paid the weekly child support as order by the Graves District Court and an additional amount of \$158.75 per month for sixty months on the substantial arrearage that had resulted from respondent's failure to pay child support. (TR at 38). The trial court accepted respondent's plea and entered it judgment in accordance with the terms of the plea agreement on December 13, 2006. (TR at 42).

On January 18, 2008, the Commonwealth moved to revoke respondent's conditional discharge due to his continued failure to meet his weekly child support obligations or his monthly obligations as to the arrearage. (TR at 46). On February 11, 2008, the respondent failed to appear before the Graves Circuit Court to answer the motion to revoke. (TR at 51). Thus, the trial court entered a show cause order requiring the respondent to appear on February 18, 2008. (TR at 51). Again, the respondent failed to appear and a second show cause order was entered. (TR at 52). It appears from the record that after the respondent ignored the trial court's second show cause order by again failing to appear, the trial court finally issued a bench warrant for respondent's arrest. (TR at 54).

After respondent was apprehended, a revocation hearing due to his failure to pay his child support as he had agreed in the plea agreement was set for May 5, 2008. (TR at

67). Following the taking of proof to establish respondent's failure to pay, the trial court entered an Order Revoking Probation and ordered the respondent to serve the remainder of his sentence. (TR at 68). Respondent appealed the revocation of his probation and conditional discharge.

On August 21, 2009, the Court of Appeals rendered a split opinion (2-1) vacating the order revoking respondent's probation and remanding the matter for a new revocation hearing to consider only ". . . whether, post-plea, financial conditions beyond Johnson's control lessened or wholly negated his ability to comply with the probation condition requiring the payment of money." (Court of Appeals Opinion at 7). On September 21, 2009, the Commonwealth requested that this Court grant discretionary review of that decision in order to resolve a conflict between the holding in respondent's case and the Court of Appeals' contrary holding in Marshall v. Commonwealth, 2008 WL 3165791 (Ky. App. 2008). (A copy of that opinion is attached hereto). Additional facts will be developed below as needed to support the Commonwealth's argument.

ARGUMENT

I.

THE TRIAL COURT PROPERLY REVOKED APPELLANT'S PROBATION DUE TO HIS FAILURE TO ABIDE BY THE TERMS OF HIS PLEA AGREEMENT.

The central question before this Court is whether a person probated on a conviction of flagrant non-support can avoid revocation of his probation for failure to pay support as agreed in a plea agreement by demonstrating that post-plea financial conditions

beyond his control negated his ability to pay. Before the Court of Appeal the respondent argued that he was denied due process during his revocation hearing because the Commonwealth did not affirmatively prove that he had the ability to reasonably provide child support. Relying on conflicting precedents¹ dealing with a probationer's failure to pay fines or restitution, the Court of Appeals found for the respondent holding that, "[w]e believe, based on our caselaw, that Johnson should have been given the opportunity to present evidence arising post-plea of his inability to make payments." (Court of Appeal's Opinion at 6). However, as the Senior Judge Graves's dissent points out, the respondent, ". . . pled guilty to the offense and therefore admitted to every element of the crime." (Court of Appeals Opinion at 8; citing Whitworth v. Commonwealth, 437 S.W.2d 731 (Ky. 1969). Further, the dissent accurately pointed out that because all of the cases relied on by the respondent and the majority of the Court dealt with the failure to pay fines or restitution and not child support, "[t]here is no legal authority requiring the trial court to inquire into the reason for nonpayment or to consider alternative methods of punishment when revoking Johnson's conditional discharge for nonpayment of child support." Id. at 8.

By pleading guilty the respondent admitted his ability to reasonably provide

¹ Bearden v. Georgia, 461 U.S. 660 (1983) (Before revoking an indigent defendant's probation for failure to pay a fine and restitution, the sentencing court must inquire into the reasons for the failure to pay.); Clayborn v. Commonwealth, 701 S.W.2d 413 (Ky. App, 1985) (Criminal defendant is entitled to present evidence of his inability to pay restitution at a probation revocation hearing.); Polk v. Commonwealth, 622 S.W.2d 223 (Ky. App. 1981) (Probationer ordered to pay restitution as part of a plea agreement was not entitled to present evidence of indigency to explain his failure to pay.); Mauk v. Commonwealth, 700 S.W.2d 803 (Ky. App. 1985) (Defendant was entitled to present evidence of indigency for failure to pay fines and court costs.)

child support in an amount agreed to in the plea agreement and contained in the Order of Probation/Conditional discharge. Thus, there was nothing for the Commonwealth to prove other than the respondent's continued failure to make his child support payments when seeking revocation of respondent's conditional discharge. It is well settled that, ". . . a guilty plea is an admission of all of the elements of a formal criminal charge." McCarthy v. United States, 394 U.S. 459, 466, 89 S.Ct. 1166, 1171, 82 L.Ed.2d 418 (1969), *See also* Whitworth v. Commonwealth, 437 S.W.2d 731, 731 (Ky. 1969) ("Upon his plea of guilty, respondent confessed the allegations of the indictment"), Waddle v. Commonwealth, 391 S.W.2d 687, 689 (Ky. 1965) (By so pleading [Guilty] he confessed the charges made in the indictment). In Boykin v. Alabama, 395 U.S. 238, 242, 89 S.Ct. 1709, 1711-1712, 23 L.Ed.2d 274 (1969), the United States Supreme Court stated that, "[a] plea of guilty is more than a confession which admits that the accused did various acts; it is itself a conviction; nothing remains but to give judgment and determine punishment." By entering a plea of guilty to the indicted charge of flagrant non-support, the respondent admitted guilt to all of the elements of that charge, including that he possessed the ability to reasonably provide child support. Having already established respondent's guilt to flagrant non-support through respondent's own admission and entry of a valid guilty plea, the Commonwealth properly sought to have respondent's probation/conditional discharge revoked once it was clear that the respondent had blatantly violated the terms of the plea agreement and conditions of probation.

At the revocation hearing the Commonwealth established that since November of 2006 the respondent had paid only \$225.00 in child support and that his last payment of

\$25.00 had been made on March 6, 2007. The Commonwealth further established that as a result of the Judgment and Order of Probation/Conditional Discharge the respondent should have paid \$6,068.72. Despite respondent's self-serving testimony that he was having difficulty finding work because he was a felon and that he did not willfully fail to pay his child support, the trial court properly found that respondent's intent not to pay could be inferred from his failure to make any payment in over a year. Thus, the trial court properly revoked respondent's probation.

Both the respondent's and the Court of Appeals' reliance on Clayborn v. Commonwealth, 701 S.W.2d 413 (Ky.App. 1985), Beardon v. Georgia, 461 U.S. 660 (1983), and other related cases are misplaced since all of those case dealt with the nonpayment of fines or restitution rather than child support. The distinction between fines/restitution and child support was recognized by another panel of the Court of Appeals in its unpublished decision of Marshall v. Commonwealth, 2008 WL 3165791 (Ky.App.,2008).² In Marshall the appellant, like the respondent in this case, relied on Clayborn and Bearden and maintained that the circuit court was required to "inquire into the reasons why the defendant was unable to pay" before revoking his probation or conditional discharge. Id. The Court of Appeals rejected this argument holding that,

Clayborn and Bearden pertain to nonpayment of fines and restitution; by contrast, the case *sub judice* pertains to nonpayment of child support. *See id.* The distinction is

² Pursuant to CR 76.28(4)(c), "...unpublished Kentucky appellate decisions, rendered after January 1, 2003, may be cited for consideration by the court if there is no published opinion that would adequately address the issue before the court." Undersigned counsel has been unable to find any published authority directly addressing the arguments made by the respondent.

pivotal. There is simply no legal authority requiring the circuit court to consider alternative forms of punishment when revoking probation or conditional discharge for failure to pay child support. As such, we do not believe the circuit court erroneously failed to consider alternative forms of punishment when revoking Marshall's conditional discharge.

Id. at 2. The Court's current opinion in the case at bar offers no explanation as to why the distinction between fines/restitution and child support identified in Marshall is no longer pivotal.

Because respondent's guilt to flagrant non-support had already established through respondent's own admission and entry of a valid guilty plea, the Commonwealth respectfully asks this Court to find that evidence of post-plea financial conditions beyond respondent's control was not needed to establish a violation of the conditions agreed to by the respondent. For these reasons, the Court of Appeals Opinion reversing appellant's conviction must be reversed.

CONCLUSION

WHEREFORE, for the foregoing reasons, the Commonwealth respectfully requests that the Court of Appeals' decision rendered on April 28, 2006, in the case of

Mark Johnson v. Commonwealth, File No. 2008-CA-001093-MR, be reversed and that the Graves Circuit Court's order revoking respondent's probation be affirmed.

Respectfully submitted,

JACK CONWAY

Attorney General of Kentucky



WM. ROBERT LONG, JR.

Assistant Attorney General

Office of Criminal Appeals

Office of the Attorney General

1024 Capital Center Drive

Frankfort, Kentucky 40601-8204

(502)696-5342

Counsel for Appellee