SUPREME COURT KENTUCKY
CASE NUMBER 2009-SC-000589-DG
(2008-CA-1093-MR)

COMMONWEALTH OF KENTUCKY — APPELLANT

VS.

Appeal from Graves Circuit Court
Hon. Timothy C. Stark, Judge
Indictment No. 06 CR 00212

MARK JOHNSON — APPELLEE

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CERTIFICATE OF SERVICE

This is to certify that a copy of the enclosed brief has been served by mailing to the Hon. Timothy C. Stark, Judge, Graves Circuit Court, Courthouse Box 5, 100 E. Broadway, Mayfield, Ky., 42066; Hon. David Hargrove, Commonwealth Attorney, 205 N. 6th Street, Mayfield, Ky., 42066; Hon. Josh W. Nacy, Department of Public Advocacy, 503 N. 16th Street, Murray, Ky., 42071, trial counsel for Appellant; and by state messenger mail to the Hon. Jack Conway, Attorney General, Office of Criminal Appeals, 1024 Capital Center Drive, Frankfort, Kentucky, 40601, on this the 6th day of July, 2010. I further certify that the record has been returned to the Clerk of the Kentucky Supreme Court.

GENE LEWTER

INTRODUCTION

Appellee, Mark Johnson, pleaded guilty to Flagrant Non-Support, a Class D felony, and was sentenced to five years in prison but conditionally discharged for five years, conditioned upon his paying his current child support pursuant to a previous court order, in addition to arrearage.

His conditional discharge was later revoked when he could not, and did not, pay the amounts required, and the trial court refused to consider any alternative to incarceration. He was ultimately sentenced to serve the five years in prison. The Court of Appeals reversed, and this Court granted Discretionary Review to the Commonwealth.

STATEMENT AS TO ORAL ARGUMENT

The Appellee welcomes oral argument if this Court believes that it would assist it in rendering a fair and just opinion in this case.

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

Appellee, Mark Johnson, was indicted in the Graves Circuit Court on September 1, 2006, for Flagrant Non-Support and pleaded guilty to the charge on November 6, 2006. (TR 38).

On December 12, 2006, appellee's sentence was fixed at five years, but conditionally discharged for five years, conditioned upon his paying his current child support pursuant to a previous court order, in addition to $158.75 per month for 60 months which would pay off the entire arrearage of $9,524.66. (TR 44).

On January 18, 2008, the County Attorney for Graves County filed a motion to revoke appellee's conditional discharge for failure to comply with the terms of the conditional discharge, specifically stating that appellee had made his last payment of $25.00 on March 6, 2007, and had made no others since then.

An affidavit was attached to the motion stating that appellee had paid only $125.00 during the time of his conditional discharge (evidence at the hearing was that he had paid $225.00) and that he was required to have paid a total of $4,257.48 to have been in compliance with the arrearage and regular monthly payment. (TR 48-49).

A hearing was held on May 12, 2008, on the motion to revoke appellee's conditional discharge and is recorded on CD. References to the evidence and arguments will be referred to by date and time as indicated on the CD.

Betty Ingram, the case worker for child support matters at the County Attorney's office, testified that appellee had been ordered on December 12, 2006, to pay the current child support payment of $45.24 per week, in addition to an

arrearage payment of $158.75 per month. She said that his last payment had been for $25.00 and had been made on March 6, 2007 (VR No. 1; 5/12/08; 10:04:15). She said that he should have paid $6,068.72 during the period in question, but had actually only paid $225.00 (VR No. 1; 5/12/08; 10:03:32), leaving a total amount to be compliant with the court's order at $5843.72.

Appellee then testified that he had tried to find a job and had not been able to do so. (VR No.1; 5/12/08; 10:05:30). As a convicted felon, he said, he was always asked about his criminal record and he had to be honest about it. That made obtaining a job very difficult (VR No.1; 5/12/08;10:05:58).

Counsel for appellee argued to the court that child support payments are like restitution cases, and should be governed by the requirements of such cases. In normal restitution cases, counsel pointed out that the Commonwealth must prove a willful refusal to pay the restitution, and the Commonwealth had failed to do so herein.

Counsel argued that it is a denial of due process to send a person to prison for merely failing to pay the child support, without proof that it is a willful refusal to pay.

The court commented that since appellee had made only one $25.00 payment on March 6, 2007, and "not one penny since then," the failure to make any further payment was a willful refusal to pay (VR No.1; 5/12/08;10:09:08). The court added that the Commonwealth is incapable of proving that a person is able to work, so the burden of proof shifts to the defendant to prove that he is not capable of working (VR No.1; 5/12/08; 10:09:18).

Counsel for appellee then asked the court to consider an alternative to incarceration. The court commented that was what it had done when placing appellee on conditional discharge. When counsel repeated the request, the court merely looked skyward for less than one second, then commented, "Now I've considered it." (VR No. 1; 5/12/08; 10:09:45). The court then concluded that incarceration was the least restrictive means, no alternative to incarceration was applicable, revoked appellee's conditional discharge, and sentenced him to serve the five years in prison.

The Court of Appeals reversed and remanded the Order of the trial court, in a 2-1 opinion labeled "To be Published." The Commonwealth filed a Motion for Discretionary Review which was granted by this Court.

ARGUMENT

APPELLEE WAS DENIED DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAW UNDER THE 14TH AMENDMENT TO THE UNITED STATES CONSTITUTION BY HAVING HIS CONDITIONAL DISCHARGE REVOKED MERELY BECAUSE HE COULD NOT PAY THE CHILD SUPPORT ORDERED BY THE COURT AND BECAUSE THE COURT REFUSED TO CONSIDER ANY POSSIBLE ALTERNATIVE TO IMPRISONMENT

This issue was preserved for appeal by appellee's argument at the close of the evidence presented in the hearing to revoke his conditional discharge (VR No. 1; 5/12/08; 10:06:53).

Appellee contends that it is a denial of due process and equal protection of the law to revoke his conditional discharge without determining his ability to pay the required child support, and without considering an alternative to incarceration. Appellee further contends that the Court of Appeals was correct in its decision to reverse and remand the order of the trial court.

An obligation to pay child support as a term of probation or conditional discharge is basically the same as restitution as a term of probation.

Case law is clear that before probation may be revoked for a failure to pay a fine, or restitution, there must be a showing that the failure to pay is willful. The court must inquire concerning the reasons the accused has not paid, and consider alternatives to incarceration.

There can be no question that the trial court herein failed to comply with the requirements of **Bearden v Georgia**, 461 U.S. 660, 103 S.Ct. 2064, 76 L.Ed.2d 221

(1983), and **Clayborn v Commonwealth**, 701 S.W.2d 413 (Ky. App. 1985). The only issue is whether the requirements set forth therein for restitution and fines also apply to non-payment of child support.

In **Bearden**, *supra*, the United States Supreme Court held:

> In revocation proceedings for failure to pay a fine or restitution, a sentencing court must inquire into the reasons for the failure to pay. If the probationer willfully refused to pay or failed to make sufficient bona fide efforts legally to acquire the resources to pay, the court may revoke probation and sentence the defendant to imprisonment within the authorized range of its sentencing authority. If the probationer could not pay despite sufficient bona fide efforts to acquire the resources to do so, the court must consider alternate measures of punishment other than imprisonment. Only if alternate measures are not adequate to meet the State's interests in punishment and deterrence may the court imprison a probationer who has made sufficient bona fide efforts to pay. To do otherwise would deprive the probationer of his conditional freedom simply because, through no fault of his own, he cannot pay the fine. Such a deprivation would be contrary to the fundamental fairness required by the Fourteenth Amendment. **Bearden**, 461 U.S. at 672-673,103 S.Ct. at 2073.

When considering the **Bearden** requirements in this instance, it is clear that the trial court did no more than pay lip service, and eye service by looking upwards for half a second, to the requirements set forth by the United States Supreme Court.

In **Marshall v Commonwealth,** 2008 WL 3165791 (Ky. App., 2008) (Discretionary Review granted by this Court), quoted by the Commonwealth in its brief (page 5 and 6), the Court of Appeals, referring to **Clayborn,** *supra,* and **Bearden**, *supra*, stated:

> Clayborn and Bearden pertain to nonpayment of fines and restitution; by contrast, the case sub judice pertains to

> nonpayment of child support...The distinction is 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.

Within three months after the denial of the Petition for Rehearing in **Marshall**, there was indeed, legal authority to apply **Bearden** to probation violations in child support cases. **Gamble v. Commonwealth**, 293 S.W.2d 406 (Ky.App. 2009), specifically rejected the conclusion reached in **Marshall**, saying:

> "Restitution" is defined in KRS 532.350(1)(a) as "any form of compensation paid by a convicted person to a victim for counseling, medical expenses, lost wages due to injury, or property damage and other expenses suffered by a victim because of a criminal act." When a person commits the offense of flagrant nonsupport, he or she causes the party entitled to receive child support to incur expenses because of that criminal act. We believe that money owed for past due child support constitutes "restitution" within the meaning of the statute. As such, before probation or conditional discharge may be revoked based on a failure to pay child support, the requirements of the Bearden case must be met.

Other jurisdictions support this view. In **U.S. v Davis**, an unpublished federal decision at 140 Fed. Appx 190, 2005 WL 1652183 (C.A. 11, Ga.), the court specifically applied the requirements of **Bearden** to revocation for non payment of child support. Furthermore, in **State v McCrimon**, 729 N.W.2d 682 (Neb. 2007), the Court said that before probation can be revoked and McCrimon sent to prison for non-payment of child support, his ability to pay and alternative punishments must be considered as required in **Bearden**. Also, in **State v Archuleta**, 812 P.2d 80 (Utah App.1991), the same considerations required in **Bearden** were applied to child support as to other restitution

matters.

There does not appear to be any valid reason to apply a different standard for child support than for other restitution requirements. In **Marshall**, supra, the Court of Appeals merely said the distinction between child support and fines, fees, and restitution was "pivotal" but never explained how or why there was a "pivotal" distinction. The Commonwealth committed the same sin by simply saying that the Court of Appeals herein "offers no explanation as to why the distinction between fines/restitution and child support identified in **Marshall** is no longer pivotal." (Commonwealth's brief, page 6). The Commonwealth simply ignored the fact that **Gamble** *supra*, was decided after **Marshall** and before the case sub judice, and explained it very well: child support arrearages are the same as restitution. Therefore, **Bearden** applies.

The most interesting part of the brief for the Commonwealth is, however, contained in the first sentence of its argument. The Commonwealth begins:

> 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.*** (Commonwealth brief, page 3) (Emphasis added).

The Commonwealth proceeded to argue that by pleading guilty appellee admitted that he had the ability to reasonably provide child support in an amount agreed to in the plea agreement. (Commonwealth brief, page 4).

That is true, to an extent. The point ignored by the Commonwealth and the dissenting opinion herein is that the plea relates to the past, not the future. In order to execute any plea agreement a defendant must confess (except for an Alford plea: would

the Commonwealth concede that in an Alford plea, the Commonwealth would have to prove at a revocation hearing that the defendant has the ability to pay, since he has not confessed?).

However, in any plea, the defendant confesses only to the elements of past crimes. To use that confession against him for a future "ability to pay" is not logical. There is no human being in the entire world, past or present, who can accurately say what will happen even ten seconds into the future. A statement at the guilty plea, saying, "Yes, your Honor, I had the ability to pay. I just did not do it. I will make every payment in the future," shows only an intent to pay but says nothing about a future ability to pay.

However, getting back to the Commonwealth's lead sentence, it states the issue as whether a person can avoid revocation if he ***demonstrates that his "post plea financial conditions beyond his control negated his ability to pay."***(emphasis added)

Meaning no disrespect to the Commonwealth, but does the Commonwealth really mean that? Let us assume that a defendant, Joe Unlucky, just finished Med School and his internship, and now pleads guilty to flagrant non support. He says that he could have made the payments before, but for personal reasons, he did not, using the little money he made for personal items. Now, his pay will be over a hundred thousand per year and he will never miss another payment. He is given conditional discharge and walks out of the courtroom a happy man.

So happy, in fact, that he walks in front of a truck and is run over. He goes to the hospital and remains in a coma for a year. Naturally, he has no income for that year, and he made no payments on his child support.

According to the Commonwealth's theory, and that of the dissent, Joe Unlucky's

conditional discharge can routinely be revoked, and his attorney can not even tell the court that he's been in a coma for the last year. Somehow, the Commonwealth contends that the guilty plea just before being hit by the truck is proof that he had the ability to pay the child support for the entire year while lying in a hospital bed in a coma.

Perhaps the Commonwealth will now argue that no one would revoke Joe Unlucky given those circumstances, and hopefully that is correct. But does the Commonwealth really contend that the law is, and should be, that a person in a coma can be revoked for not paying his child support, and there can be no defense? Maybe Joe Unlucky said something mean to the Commonwealth on his way out of the courthouse, and made an enemy. If the Commonwealth's present argument is successful, and this Court adopts it, a comatose man can be taken, by gurney, from the hospital to prison because he didn't make his child support payments while he was unconscious, and he would not be permitted to present a defense.

Does the Commonwealth understand how Draconian its understanding of the law truly is? Or how Draconian the law would be if this Court agrees that's the way the law should be?

Bearden, *supra*, spoke of the fundamental fairness guaranteed by the Fourteenth Amendment. Is it fundamentally fair to revoke a person's probation who has demonstrated that his financial condition has changed post sentencing through no fault of his own so that he cannot make the child support payments, as advocated by the Commonwealth?

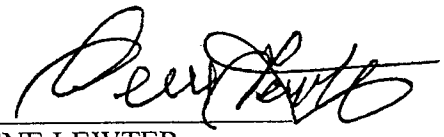
That is an untenable position. If the failure to pay is truly through no fault of the accused, there is no willful violation of the order to pay and a revocation is a violation of

due process.

CONCLUSION

Based on the foregoing, appellee requests this Court to affirm the ruling of the Court of Appeals and order that the revocation of his conditional guilty plea herein be set aside.

Respectfully submitted,



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