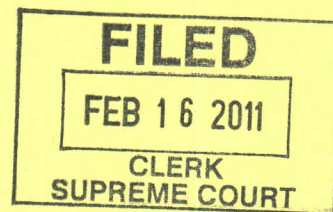


**Commonwealth of Kentucky
Supreme Court of Kentucky**

File Nos. 2009-SC-229/2010-SC-348



COMMONWEALTH OF KENTUCKY

APPELLANT/CROSS APPELLEE

v.

Appeal from Graves Circuit Court
Hon. Timothy C. Stark, Judge
Indictment No. 2004-CR-187

RANDY MARSHALL

APPELLEE/CROSS APPELLANT

Reply/Cross-Appellee Brief for Commonwealth

Submitted by:

JACK CONWAY

Attorney General of Kentucky

JOSHUA D. FARLEY

Assistant Attorney General
Office for Criminal Appeals
Office of the Attorney General
1024 Capital Center Drive
Frankfort, Ky. 40601
(502)696-5342
Counsel for Appellee

CERTIFICATE OF SERVICE

I certify that the foregoing Brief for the Commonwealth was mailed first class, U. S. Mail, postage pre-paid this 16th day February, 2011, to: Hon. Timothy C. Stark, Judge, Graves Circuit Court, Courthouse, Box 5, 100 E. Broadway, Mayfield, KY 42066; via e-mail to: Hon. David L. Hargrove, Commonwealth Attorney, P. O. Box 315, Mayfield, KY 42066; via Kentucky Messenger Mail to Hon. Kathleen Kallaher Schmidt, Assistant Public Advocate, Department of Public Advocacy, Suite 302, 100 Fair Oaks Lane, Frankfort, KY 40601. I further certify that the record on appeal was returned to the Clerk of this Court, this 11th day of February, 2011.

JOSHUA D. FARLEY
Assistant Attorney General

INTRODUCTION

Appellee's conditional discharge was revoked by the circuit court and the Kentucky Court of Appeals reversed holding that written findings of fact were not issued.

This Court has now granted discretionary review.

STATEMENT CONCERNING ORAL ARGUMENT

The Commonwealth does not believe oral argument would be helpful to the Court in this case because the issues are thoroughly addressed in the parties' briefs.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

INTRODUCTION i

STATEMENT CONCERNING ORAL ARGUMENT ii

COUNTERSTATEMENT OF POINTS AND AUTHORITIES iii

STATEMENT OF THE CASE 1

Marshall v. Commonwealth
2008 WL 3165791 Ky. App. 2008 2

Commonwealth v. Alleman
306 S.W.3d 484 (Ky. 2010) 2

Bearden v. Georgia
461 U.S. 660 (1983) 2

ARGUMENT 3

I. APPELLANT’S REPLY TO APPELLEE’S ARGUMENT THAT COMMONWEALTH V. ALLEMAN, 306 S.W.3d 484 (Ky. 2010) IS NOT ON POINT AND IS NOT CONTROLLING AUTHORITY ... 3

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

Gamble v. Commonwealth
293 S.W.3d 406 (Ky.App. 2009) 3

Wright v. Sales
78 S.W.2d 23, 24-25 (Ky. 1935) 4

Morrissey v. Brewer
408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972) 4

II. GAMBLE V. COMMONWEALTH, 293 S.W.3d 406 (Ky.App. 2009) IS NOT CONTROLLING IN THIS CASE. 5

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

<u>Bearden v. Georgia</u> 461 U.S. 660, 672-673 (1983)	5
<u>Gamble v. Commonwealth</u> 293 S.W.3d 406 (Ky.App. 2009)	5
<u>Hensley v. Commonwealth</u> 217 S.W.3d 885, 887 (Ky.App. 2007)	5
<u>State v. Caballero</u> 464 So.2d 939 (La.App. 1985)	6
<u>Dickey v. State</u> 257 Ga.App. 190, 570 S.E.2d 634 (2002)	6
<u>State v. Nordahl</u> 680 N.W.2d 247, 251-252 (N.D. 2004)	6
<u>State v. Jacobsen</u> 746 N.W.2d 405, 410-411 (N.D. 2008)	6
<u>Patton v. State</u> 458 N.E.2d 657 (Ind.Ct.App. 1984)	6
<u>Commonwealth v. Payne</u> 33 Mass.App.Ct. 553, 602 N.E.2d 594 (1992)	6
<u>Polk v. Commonwealth</u> 622 S.W.2d 223 (Ky.App. 1981)	6
CONCLUSION	8

STATEMENT OF THE CASE

On October 1, 2004, the Graves County Grand Jury handed down Indictment No. 04-CR-00187, charging appellee with flagrant non support (TR 19-20). Appellee pled not guilty at arraignment (TR 36), but on February 15, 2005, appellee accepted the Commonwealth's offer of three (3) years to serve, conditionally discharged for five (5) years, on a plea of guilty to the charged offense (TR 37-38). The plea offer was conditioned on appellee remaining current with his court-ordered monthly child support obligation, and paying an additional \$101.25 per month for sixty (60) months on his then outstanding arrearage of \$6,075 (Id.).

On April 19, 2005, the circuit court sentenced appellee in accordance with the terms of the plea agreement. On that same date, the circuit court entered its Judgement and Sentence, setting forth the terms and conditions of appellee's sentence and conditional discharge (TR 39-45). Just under two years later, however, on April 10, 2007, the Commonwealth filed a motion to revoke appellee's conditional discharge (TR 46-50). The motion included supporting affidavits showing that as of March 31, 2007, appellee had paid—under the terms of his conditional discharge—only \$957.42 on his child support obligation of \$4278.75, and that appellee had not made a child support payment as required by his conditional discharge since November 10, 2005 (Id.).

The circuit court held a hearing on the motion to vacate (VR No. 1; 6/4/07; 11:10:00-11:27:00). The Commonwealth called Betty Ingram, a child support caseworker with the county attorney's office, to testify regarding the record of appellee's child support payments (Id. at 11:11:00-11:14:00), and appellee testified in his own defense, claiming that his failure to comply with the conditional discharge agreement was

due to employment difficulties and his need to meet child support obligations for his other children (Id. at 11:14:00-11:24:00). After listening to the evidence and arguments of counsel, the circuit judge found from the record that appellee had violated the terms of his conditional discharge (Id. at 11:24:00-11:27:00). On June 6, 2007, the circuit court entered its order granting the Commonwealth's motion and revoking appellee's conditional discharge (TR 54-55). Appellee appealed and the Court of Appeals, while holding that his probation was properly revoked, vacated and remanded the case for the Circuit Court to enter written findings of fact. (Marshall v. Commonwealth, 2008 WL 3165791 Ky. App. 2008). The Commonwealth Petitioned for Rehearing or Modification and was denied on March 23, 2009.

The Commonwealth requested discretionary review by this Court and for this case to be held in abeyance pending this Court's decision in Commonwealth v. Alleman, 306 S.W.3d 484 (Ky. 2010). Discretionary review and abeyance were granted and the Commonwealth now asks this Court to reverse the Court of Appeals decision in this case in light of this Court's recent decision in Alleman. Subsequently appellee filed a cross-motion for discretionary review arguing that the Court of Appeals improperly applied Bearden v. Georgia, 461 U.S. 660 (1983), and that a more recent decision of the Kentucky Court of Appeals was correct and should be controlling. This Court granted discretionary review.

ARGUMENT

I.

APPELLANT'S REPLY TO APPELLEE'S ARGUMENT THAT COMMONWEALTH V. ALLEMAN, 306 S.W.3d 484 (Ky. 2010) IS NOT ON POINT AND IS NOT CONTROLLING AUTHORITY

Alleman is controlling precedential case law directly on point in these circumstances. In Alleman this Court held:

We conclude that oral findings and reasonings for revocation as stated by the trial court from the bench at the conclusion of a revocation hearing satisfy a probationer's due process rights, presuming the findings and reasons support the revocation, when they are preserved by a reliable means sufficiently complete to allow the parties and reviewing courts to determine the facts relied on and the reasons for revoking probation.

(Id. at 484).

Alleman directly controls in the case at hand. As set forth in the Commonwealth's Court of Appeals brief the trial court in this case gave an explanation, on the video record, as to the obvious reasons why appellee's probation was being revoked. The issue here is identical to the issue in Alleman. Appellee's claims to the contrary are without merit. All of appellee's claims that the findings in this case are inadequate, even under Alleman, are based upon the faulty premise that Bearden v. Georgia, 461 U.S. 660 (1983) and Gamble v. Commonwealth, 293 S.W.3d 406 (Ky.App. 2009) control in this case. As will be addressed in Argument II, *infra*, Gamble does not control under the circumstances particular to this case. As such, Alleman, is directly on point.

It has long been recognized that an appellate court “may affirm a circuit court on any grounds when it has reached the correct result.” Wright v. Sales, 78 S.W.2d 23, 24-25 (Ky. 1935). Unless this Court has now adopted a rule which requires that it totally ignore the record on appeal, it can *only* conclude—given the uncontested evidence, including appellee’s own admissions—that the circuit court correctly revoked appellee’s conditional discharge for the grounds set forth in its order and that Alleman is controlling upon this case.

Accordingly, appellee should not be allowed to defeat his revocation by simply arguing that written findings should have been entered into the record when this Court’s precedent in Alleman holds that oral findings of fact entered onto the video record are sufficient to satisfy due process under Morrissey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972). As such, this Court should reverse the Court of Appeals’ decision which requires written findings of fact when oral findings are clear on the record. In its place, this Court should issue a published decision delineating that Alleman is controlling case law in these circumstances.

Oral findings of fact were issued on the record onto videotape. Thus, appellee was notified of the reasons for his revocation and the reviewing court was provided a record from which it could determine the basis of the trial court’s ruling. The revocation of appellee’s probation must be affirmed.

The published Kentucky Court of Appeals decision in this case stands in direct contradiction of Alleman and must be reversed.

II.

GAMBLE V. COMMONWEALTH, 293 S.W.3d 406 (Ky.App. 2009) IS NOT CONTROLLING IN THIS CASE.

Appellee/Cross-Appellant claims that the Court of Appeals erred when it held that child support was not a form of restitution and therefore Clayborn v. Commonwealth, 701 S.W.2d 413 (Ky.App. 1985), and Bearden v. Georgia, 461 U.S. 660, 672-673 (1983), were inapplicable to the appellee. (App. Br.14 at 27). Appellee relies upon the Court of Appeals holding in Gamble v. Commonwealth, 293 S.W.3d 406 (Ky.App. 2009), to set forth the basis for his argument. However, appellee ignores important modifiers to the Court of Appeals holding in Gamble.

The Court of Appeals in Gamble held “[W]e 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.” *Id.* at 410. However, the Court of Appeals modified this holding by stating:

In this case, Gamble knowingly and voluntarily entered his plea of guilty wherein he undertook to make child support payments in exchange for a conditional discharge. There was no provision in the agreement or order of judgment that this requirement would be lifted if he was unable to pay. ‘Courts have recognized that accepted plea bargains are binding contracts between the government and defendants.’ *Hensley v. Commonwealth*, 217 S.W.3d 885, 887 (Ky.App. 2007). ‘A defendant who materially fails to perform the agreement. However, is not entitled to enforce performance by the Commonwealth.’ *Id.* (citation omitted).

Id. at 412.

The Court of Appeals relied upon several cases from other jurisdictions that argue that Bearden is inapplicable in circumstances where the defendant has bargained for child-support payments, or restitution, as a condition of his guilty plea and release without imprisonment. See Gamble at 411-412; State v. Caballero, 464 So.2d 939 (La.App. 1985); Dickey v. State, 257 Ga.App. 190, 570 S.E.2d 634 (2002); State v. Nordahl, 680 N.W.2d 247, 251-252 (N.D. 2004); State v. Jacobsen, 746 N.W.2d 405, 410-411 (N.D. 2008); Patton v. State, 458 N.E.2d 657 (Ind.Ct.App. 1984); Commonwealth v. Payne, 33 Mass.App.Ct. 553, 602 N.E.2d 594 (1992). The Court of Appeals recognized that in Polk v. Commonwealth, 622 S.W.2d 223 (Ky.App. 1981), Kentucky courts followed the same logic. Gamble at 412. However, the Court of Appeals recognized that this issue had not been raised by the parties and as such the court declined to decide the case on that basis. Ibid.

The Court of Appeals logic in Gamble is in agreement with the logic employed by multiple other jurisdictions. Appellee should not be allowed to agree to pay child support or restitution, then breach his plea agreement and insist that he remain on probation or conditional discharge. Unlike in Bearden, appellee's "restitution" was not an involuntary sentence by the court to pay a fine as a condition of probation. Appellee negotiated payment of child support to avoid what likely would have been significant time in prison. Having breached the plea agreement he negotiated, appellee should not now be able to insist that he remain on probation and be excused from performance due to indigence. "[T]o hold otherwise, would permit defendants, either in good faith or bad faith, to bargain for payment of a fine in exchange for a suspended sentence, renege, and

then avoid incarceration or any other punishment for the offense committed.” Caballero at 943. Appellee knew better than anyone else whether he would be able to pay child support or not, and he thus ran the risk of not being able to pay child support and having his conditional discharge revoked when he bargained to pay in order to avoid imprisonment.

Even if this Court agrees with the Kentucky Court of Appeals, that child support is a type of restitution when ordered as part of a conditional discharge or probation, appellee should not be allowed to “game” the system in such a manner.

Bearden is inapplicable under these circumstances, since the appellee plainly bargained for child support payments and then reneged on his agreement with the Commonwealth.

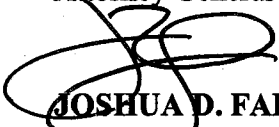
These payments were not involuntarily ordered of the appellee as the payments in Bearden were. Appellee received exactly what he bargained for and as such there was no error here.

CONCLUSION

For the above stated reasons, the judgment of the Kentucky Court of Appeals to vacate and remand for written findings of fact, in contradiction to Alleman, should be overturned; however, the judgment of the Kentucky Court of Appeals, to not apply Bearden to the present case should be affirmed.

Respectfully submitted,

JACK CONWAY
Attorney General of Kentucky



JOSHUA D. FARLEY
Assistant Attorney General
Office of Criminal Appeals
Attorney General's Office
1024 Capitol Center Drive
Frankfort, Kentucky 40601
(502) 696-5342

Counsel for Appellee