

SUPREME COURT OF KENTUCKY
FILE NOS. 2009-SC-229/2010-SC-348
(COURT OF APPEALS FILE NO. 2007-CA-1320)

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COMMONWEALTH OF KENTUCKY

APPELLANT

v.

APPEAL FROM GRAVES CIRCUIT COURT
HON. TIMOTHY C. STARK, JUDGE
INDICTMENT NO.04-CR-187

RANDY MARSHALL

APPELLEE

and

RANDY MARSHALL

CROSS/APPELLANT

COMMONWEALTH OF KENTUCKY

CROSS/APPELLEE

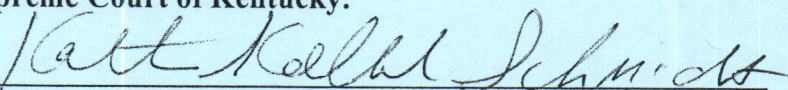
BRIEF FOR APPELLEE/CROSS-APPELLANT, RANDY MARSHALL

Respectfully Submitted,

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The undersigned does certify that copies of this Brief for Appellant were mailed, first class postage prepaid, to the Hon. Timothy C. Stark, Judge, Graves Circuit Court, Courthouse Box 5, 100 E. Broadway, Mayfield, Kentucky 42066; the Hon. David L. Hargrove, Commonwealth's Attorney, P.O. Box 315, Mayfield, Kentucky 42066-0315; and to Hon. Joshua D. Farley, Assistant Attorney General, Office of Criminal Appeals, 1024 Capital Center Drive, Frankfort, Kentucky 40601 on November 16, 2010. The record on appeal has been returned to the Clerk of the Supreme Court of Kentucky.


KATHLEEN KALLAHER SCHMIDT

Introduction

Randy Marshall, the Appellee/Cross-Appellant herein, appeals from the decision of the Graves Circuit Court to revoke the conditional discharge of his flagrant non-support conviction and sentence for failing to keep up with current and back child support payments. The Court of Appeals affirmed on one issue and reversed on another. Both aggrieved parties have asked this Court to review the Court of Appeals' opinion and this Court granted those requests.

Statement Concerning Oral Argument

Marshall welcomes oral argument on the unique issues in this case.

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Statement of the Case

This action stems from a 1995 order by a Mississippi Court mandating Randy Marshall, the Appellee/Cross-Appellant, pay seventy five dollars a month to support his daughter, Jade.¹ He was unable to make all those payments. Marshall pled guilty to Flagrant Non-Support in Graves Circuit Court on April 19, 2005.² The trial court sentenced him to three years, but conditionally discharged the sentence for five years.³ The condition placed on his release was that he remained current on his child support payments pursuant to the Mississippi order plus make payments of \$101.25 on the arrearage.⁴ Marshall paid \$957.42, with his last payment of \$175 being made on November 10, 2005.⁵ After that time, he was unable to make further payments on this judgment.

The Commonwealth moved to revoke Marshall's conditional discharge and a hearing was held. During the hearing, the prosecutor presented one witness, a child support worker. Marshall testified on his own behalf. The following evidence came out.

Marshall supported other children as well as the child who was the subject of this flagrant non-support conviction.⁶ He was supposed to pay \$350 to \$400 a month for his two boys in Mississippi.⁷ Similarly, he was also ordered to pay another \$195 a month for Brandy, his daughter in McCracken County.⁸

Other Kentucky courts threatened Marshall with jail time in order to secure payments for child support. Most notably, McCracken County used the threat of incarceration to get payment

¹ Transcript of Record (hereinafter TR) 8

² TR 39 - 42

³ TR 40 - 41

⁴ TR 40 - 41, 43

⁵ TR 48-49.

⁶ (VR No. 1: 6/04/07 ; 11:21:23)

⁷ (VR No. 1: 6/04/07 ; 11:21:23 - 11:21:47)

⁸ (VR No. 1: 6/04/07 ; 11:21:47 - 11:22:14)

close in time to the instant revocation.⁹ Marshall made those payments to avoid prison.¹⁰ Work would be slow and he would be forced to make a lump sum payment to avoid incarceration there.¹¹

After serving in the armed services, Marshall became severely depressed.¹² He sought help from the federal government, yet they turned him away because he did not have enough time in the service to qualify for treatment.¹³

While Marshall's necessary expenses, including child support, remained costly, his income went from meager to paltry. Marshall is self-employed.¹⁴ First, he had a job as a maintenance man for four to five years for some apartment buildings.¹⁵ However, in 2006, the apartments were put on the market, and maintenance on the apartments was put on hold pending sale.¹⁶ Originally, the new owners promised Marshall a promotion and a pay increase.¹⁷ He turned down other jobs in anticipation of his new duties and made plans for his new job, keeping in touch with the new owners daily.¹⁸ A letter was introduced to support this allegation.¹⁹ The owners kept dragging their feet and subsequently failed to employ Marshall in that capacity.²⁰ He was later evicted from his apartment.²¹ As Marshall testified, everything fell to pieces.²²

⁹ (VR No. 1: 6/04/07 ; 11:17:50 – 11:18:10)

¹⁰ (VR No. 1: 6/04/07 ; 11:20:17 – 11:25:27, 11:23:30 – 11:24:13)

¹¹ (VR No. 1: 6/04/07 ; 11:20:09)

¹² (VR1 6/04/07 ; 11:22:14 – 11:22:43)

¹³ (VR1 6/04/07 ; 11:22:30 – 11:22:43)

¹⁴ (VR No. 1: 6/04/07; 11:14:42)

¹⁵ (VR1 6/04/07 ; 11:15:31 – 11:15:57); TR 52

¹⁶ (VR1 6/04/07 ; 11:15:52); TR 52.

¹⁷ (VR1 6/04/07 ; 11:16:57 – 11:19:09)

¹⁸ (VR No. 1: 6/04/07; 11:18:10-11:19:58, 11:20:48); TR 51.

¹⁹ (VR No. 1: 6/4/07; 11:19:19).

²⁰ (VR1 6/04/07 ; 11:16:57 – 11:19:09)

²¹ (VR1 6/04/07 ; 11:20:44 – 11:21:23)

²² (VR No. 1: 6/04/07; 11:19:09)

After that employment fell through but prior to his incarceration, Marshall worked as a handyman on whatever odd jobs he could find.²³ This required he provide for necessary materials and pay his helpers out of his own pocket.²⁴ Sometimes he had to wait on a check from the people who employed him and sometimes that did not work out the way he planned. He hardly made any money.²⁵ Work had slowed down but he currently had two jobs he was working on, one for a member of the Missionary Baptist Church, and one for attorney Danny Murphy, getting his home ready to sell.²⁶ He had tried to obtain steady employment where a wage assignment could be put in place but could not find a job, even at McDonald's.²⁷ He was required to prove this to the other judge.

He was able to find another place to live, in the home of a woman and became responsible for half the rent and necessary expenses, which were minimal.²⁸ Jade, Brandy and his boys also lived with him for 2-3 months during the summer.²⁹ He did not have a car.³⁰

When asked directly if he was willfully refusing to pay, he explained he was not.³¹

The Commonwealth did not cross-examine Marshall or attempt to controvert his evidence in any way. The Commonwealth's sole witness was the child support case worker from the Commonwealth's Office who testified concerning what amount Marshall was ordered to pay and what payments he had made.³²

²³ (VR1 6/04/07 ; 11:14:40 – 11:15:40)

²⁴ (VR1 6/04/07 ; 11:20:09, 11:24:10)

²⁵ (VR No. 1: 6/04/07; 11:24:00).

²⁶ (VR No. 1: 6/04/07; 11:14:50).

²⁷ (VR No. 1: 6/04/07; 11:22:45, 11:23:23).

²⁸ (VR No. 1: 6/04/07; 11:20:30).

²⁹ (VR No. 1: 6/04/07; 11:22:50).

³⁰ (VR No. 1: 6/04/07; 11:23:00).

³¹ (VR No. 1: 6/4/07; 11:23:47).

³² (VR No. 1: 6/04/07; 11:11:59-11:13:23).

Defense counsel argued that by analogy to Clayborn v. Commonwealth³³ and Bearden v. Georgia³⁴, the trial court had to find there was a willful refusal to pay before probation could be revoked, just as there would have to be proven before an indigent person could be incarcerated for failing to pay a fine.³⁵ Defense counsel argued that Marshall was doing all that he could but he was too poor to pay and it violated his due process rights under the Kentucky and United States Constitutions to revoke his probation.³⁶

The trial court commented that Marshall had not made a payment in a year and a half, and that because there were illegal aliens who came to this country and found a job that he believed Marshall could find a job if he wanted to.³⁷

The trial court revoked Marshall's conditional discharge and would not consider alternative sentencing or give him a date to report to jail.³⁸ A written order was entered on June 6, 2007.³⁹ Notice of Appeal was filed on June 25, 2007.⁴⁰

Marshall raised three issues before the Court of Appeals.⁴¹ He argued that the trial court violated his constitutional rights under the Due Process Clause of the Fourteenth Amendment to the federal constitution and under Sections One, Two and Eleven of the Kentucky Constitution when it refused to examine possible alternative punishments to imprisonment even though he did

³³Clayborn v. Commonwealth, 701 S.W.2d 413 (Ky. App. 1985)

³⁴Bearden v. Georgia, 461 U.S. 660, 672 – 673 (1983)

³⁵(VR No. 1: 6/04/07; 11:24:40).

³⁶(VR No. 1: 6/04/07; 11:25:40).

³⁷(VR No. 1: 6/04/07; 11:26:03).

³⁸(VR No. 1: 6/04/07; 11:26:41)

³⁹ TR 54-55.

⁴⁰TR 60.

⁴¹Marshall erroneously stated in his Cross-Motion for Discretionary Review that he raised two issues before the Court of Appeals. In reviewing the pleadings, he actually raised three. In addition to the Bearden v. Georgia issue and the issue discussing the violation of due process based on the insufficiency of the trial court's written order, he also argued the trial court abused its discretion in revoking his probation based on the evidence. The Court of Appeals appeared to deal with both issues together when it cited the abuse of discretion standard then held that Bearden v. Georgia did not apply. In any event, counsel did not purposefully misstate the number of separate issues raised in the Court of Appeals- counsel was simply mistaken in her memory of how many issues were raised as separate assignments of errors.

not willfully refuse to pay his child support. He specifically argued that the requirements of *Bearden v. Georgia*, 461 U.S. 660, 672 – 673 (1983) and *Clayborn v. Commonwealth*, 701 S.W.2d 413 (Ky. App. 1985) applied to this situation because the child support arrearage Marshall was ordered to pay as a condition of probation amounted to restitution. Marshall also argued that the trial court made inadequate written findings in the order revoking Marshall's probation.

The Court of Appeals rejected Marshall's first claim, holding that nonpayment of fines and restitution is different from non-payment of child support. *Marshall*, slip op. at 4. However, the Court of Appeals agreed that Marshall's constitutional rights were violated when the findings in the order revoking probation were inadequate. *Marshall*, slip op. at 5-6. The Court vacated the trial court's order and remanded.

The Appellant/Cross-appellee filed a motion for discretionary review on this sole issue. On October 21, 2009, this Court held the Commonwealth's motion in abeyance pending the decision in *Commonwealth v. Alleman*, 2007-SC-00570-DG. An opinion in *Alleman* was rendered on April 22, 2010. On May 12, 2010, this Court granted the Commonwealth's motion for discretionary review. Marshall filed his own cross-motion for discretionary review on the issue involving *Bearden v. Georgia* on which the Court of Appeals denied him relief. This Court granted that motion on August 18, 2010.

Response to Appellant's Brief Argument

The lack of oral and written findings of the trial court violated Marshall's due process rights; *Commonwealth v. Alleman* does not save this due process violation.

After Appellee's conditional discharge hearing was concluded, the trial court made the following statements: He said he regretted there had been no payments since November, 2005.⁴² Trial counsel argued that there was precedent on willful refusal to pay restitution and that a parallel could be drawn between restitution and child support, and cited *Clayborn, supra*, and *Bearden, supra*. Trial counsel argued there needed to be willful refusal to pay before a defendant was revoked on conditional discharge or probation. He said Marshall was clearly doing all he could but he was too poor to pay. Counsel said it violated Marshall's due process rights under the state and federal constitution to revoke him.

The trial court said, "He hasn't paid a nickel in one and a half years. We have illegal aliens who come here and get a job. I believe he can get a job if he wants it. The deal was he'd pay so much per month. He hasn't paid. I don't see a reason he hasn't paid."⁴³ The trial court revoked his conditional discharge. He would not agree to an alternative, commenting that a year and a half is a long time not to pay a nickel.

The written order of the trial court reads as follows, in pertinent part:

This matter is now before the Court on motion of the Commonwealth to revoke the Defendant's conditional discharge on grounds of violation of the terms of conditional discharge by his failure to keep current in his child support payments and his failure to pay additional payments on his arrearage which were conditions of his conditional discharge.

The Defendant appeared in Court with counsel, and the Court having heard testimony and being sufficiently advised from the record, now **GRANTS** the Commonwealth's motion and hereby **REVOKES** the Defendant's conditional discharge for violations as set forth above.

In *Morrissey v. Brewer*, 408 U.S. 471, 488-489 (1972), the United States Supreme Court established the minimal due process procedures required before a State may revoke parole. One year later, the Supreme Court held the same minimal due process requirements apply to

⁴²(VR No. 1: 6/04/07; 11:24:26).

⁴³(VR No. 1: 6/04/07; 11:26:03).

probation revocation. *Gagnon v. Scarpelli*, 411 U.S. 778 (1973). All parties are in accord that these minimum requirements include:

- a. written notice of the claimed violations of parole;
- b. disclosure to the parolee of the evidence against him;
- c. opportunity to be heard in person and present witnesses and documentary evidence;
- d. the right to confront and cross examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation);
- e. a 'neutral and detached' hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and
- f. a written statement by the fact-finders as to the evidence relied on and reasons for revoking parole

It is the final requirement that is at issue in this case. The Appellant argues that the trial court's findings are adequate. However, it is obvious that the Appellant misperceives what the United States Supreme Court meant by a "written statement by the fact-finders as to the evidence relied on and reasons for revoking parole." The Appellant argues that the trial court's written statement suffices to fulfill this due process mandate. It does not. As the Court of Appeals correctly found, the flaw is not that the trial court drew a conclusion that the evidence supported revocation, "it failed to make findings of fact specifying the evidence relied upon to support its decision to revoke Marshall's conditional discharge." *Commonwealth v. Marshall*, 2008 WL 3165791, p. 4 (Ky. App. 2008). It is this written statement specifying the evidence, or finding the facts, from the testimony and evidence it heard at the hearing, and then explaining why those facts have caused the court to revoke, that due process requires of the trial court. Yet in this case, the trial court did not mention any specific fact or piece of evidence, including the affidavits attached to the Commonwealth's motion, or the witnesses who testified at the hearing and other evidence presented therein. It did not say why it had revoked Marshall's conditional discharge based on that evidence but only stated it was revoking it.

The Appellant seems to argue that the reference to the fact that there was a hearing with testimony is sufficient to "amply advise" both Marshall and the reviewing appellate court as to

the evidence relied on and the reasons for the revocation. But the Appellant utterly fails to explain how that is true. Instead, the Appellant substitutes its own judgment about quantity and quality of the evidence presented and concludes the testimony was overwhelming that Marshall violated his conditional discharge. To the Appellant, it should then follow that we can all just assume that the trial court saw the evidence the same way the Appellant does.

The problem is the trial court's job did not end with the inquiry of whether Marshall had paid his child support as ordered when he was placed on conditional discharge. The trial court then had to undertake an inquiry about whether Marshall's reasons for not paying as directed should cause his conditional discharge to be revoked. The Appellee has argued in the second part of this brief that this inquiry includes assessing and making findings on whether Marshall's failure to pay was willful or was the result of poverty, and if it was based on an inability to pay, whether the trial court considered alternatives to incarceration. See Brief for Appellee/Cross-Appellant, *infra* at 18-19.

To say that the trial court's order satisfied the requirement of a statement by the fact-finders as to the evidence relied on and reasons for revoking parole would be like approving an order of the trial court in a suppression hearing stating only that a hearing was held and, based on the testimony and record, the evidence was suppressed. Such an order would provide no basis for the parties or an appellate court to understand what facts the court found to be true from the evidence presented and what legal reasoning then led it to suppress evidence. Marshall suspects the Commonwealth would appeal such an order and would argue that it was not supported by sufficient fact-finding or legal conclusions. Marshall finds himself in the same situation.

If the import of the evidence is as obvious as the Appellant suggests, then it is equally obvious that Marshall's conditional discharge should not have been revoked because he was

doing all he could with the limited resources and circumstances he was in to keep up with multiple child support obligations in different courts. Marshall suspects the Appellant would disagree that the evidence unequivocally shows that. This illustrates Marshall's point- it violates due process to assume what the trial court based its revocation on when it never affirmatively states what evidence or reasons it relied upon.

On page 5 of its Brief for Appellant, the Appellant states that "the circuit court order states that revocation is based on appellee's failure to comply with the terms of his conditional discharge, which required that he 'keep current in his child support payments and ... pay additional payments on his arrearage...'" [cite omitted]. That is not what the order explicitly states. The order says the trial court revoked "for violations as set forth above." It is in the previous paragraph that the trial court refers to the grounds of the Commonwealth's motion to revoke being the failure to pay current support and arrearages.

The Appellant cannot imagine what else the trial court could have stated in its order to delineate the evidence relied upon for revocation. If the evidence was as clear-cut as the Appellant suggests, then it is hard to imagine how the Appellant could not see what is missing from the written order. All the trial court had to do was state that the Commonwealth presented the testimony of a witness who testified about how much Marshall was obliged to pay, how much he actually paid and what the difference was. It could then have stated that Marshall presented evidence of what happened to the employment he had when placed on conditional discharge, his specific efforts to earn money during this time period, his explanation of why he had not met his full obligation and any documentary support presented on his behalf. Then the trial court could explain why it believed this evidence caused it to revoke conditional discharge

as opposed to taking some alternative action. That is all the Supreme Court in Morrissey and Gagnon required. It is just not that much to ask.

The Appellant is not helped by Commonwealth v. Alleman, 306 S.W.3d 484 (Ky.2010). In Alleman, this Court recently held that due process is satisfied if a reviewable record was made of a court's oral findings, so long as those oral findings comported with due process. In fact, this Court noted that it "might rule differently were we faced with 'general conclusory reasons by the [trial] court for revoking probation,'..., or with a record from which we were 'unable to determine the basis of the [trial] court's decision to revoke probation.'" [cites omitted].*Id.* at 487. This signaled that every oral statement made and recorded on video would not automatically comply with due process, regardless of its contents.

The Appellant appears to read Alleman too broadly. Alleman should not be interpreted to mean that as long as a record was made of a hearing, the parties can make their own assumptions and conclusions about what evidence and reasons for revocation the trial court had, in the absence of an affirmative statement about those issues. It is still necessary for the fact-finder- the trial court- to do just that, regardless of how long the hearing was or what evidence was presented, even if it does overwhelmingly support revocation. Again, if the record is so one-sided, it should have been easy for the trial court to state the evidence upon which it relied and the reasons for revocation.

In Alleman, the Commonwealth presented evidence that the defendant absconded from probation supervision, that he was told he was non-compliant with his conditions of parole in another county, and was found hiding at his sister's and arrested almost a year after he should have reported for probation supervision. This Court noted that Alleman presented no countervailing evidence but offered the defense that because he had a prior, consecutive sentence

to serve, he did not have to report in the second county until he completed parole supervision in the first county. (It is unclear whether any actual testimony was presented to support this argument.) The trial court stated orally that it was reasonable to go ahead and revoke Alleman given that he had absconded for a significant period of time. The written order was similar to the one in the instant case in that it stated Alleman had violated conditions of his parole but provided no other facts or reasons for revoking his probation.

However, the instant case is different. In this case, the trial court heard evidence from a child support worker about Marshall's obligation to pay current support and arrearages as conditions of his conditional discharge. His payment history and current arrearage was set out. But unlike Alleman, Marshall testified and provided evidence about the reversal of his fortunes of his employment and income, his efforts to find work which would provide him sufficient income to pay his support, his multiple support obligations on other children, his actual support of those children while they stayed with him for periods of time, his meager living expenses and his work he was currently performing. The trial court only commented, "He hasn't paid a nickel in one and a half years. We have illegal aliens who come here and get a job. I believe he can get a job if he wants it. The deal was he'd pay so much per month. He hasn't paid. I don't see a reason he hasn't paid."⁴⁴ While it is not controverted that Marshall had not paid his child support as directed, that was not the only issue before the trial court. The other issue was why he had not paid.

The evidence Marshall presented was fairly extensive. But of all the evidence that was presented by both sides, no evidence about illegal aliens finding jobs was presented. So the trial court's comment was certainly not a finding of fact. The trial court's comment that Marshall could get a job if he wanted it is merely a conclusion not supported by substantial evidence. It

⁴⁴ (VR No. 1: 6/04/07; 11:26:03).

also seems to indicate the trial court erroneously thought Marshall was not working. Marshall provided proof he was working several jobs. If the trial court had followed the dictates of Morrissey and Gagnon, it is possible in making specific findings of fact, the trial court would have concluded that Marshall was doing all he could to pay his support and an alternative to prison was appropriate. As this Court pointed out in Alleman, *supra* at 486, citing Black v. Romano, 471 U.S. 606, 613-14 (1985), written statements encourage accuracy in fact findings. While allowing oral statements to supplement written statements, this Court should insist on the same accuracy it would in written findings of fact. And the statement of the trial court about Marshall's ability to get a job was not accurate. If the trial court had been required to specify the evidence it was relying on in concluding Marshall could find a job if he wanted, it might have realized this was not really the case.

The same is true of his comment that he did not see a reason why Marshall had not paid. Again, this is not sufficiently specific to know to what the trial court was referring. Did he mean he did not see why Marshall had not paid the whole amount owed? If so, this flies in the face of the extensive evidence, uncontroverted by the Commonwealth, that Marshall could not pay all he owed. If the trial court meant he did not see why Marshall had not paid anything, again that should have been explained.

Furthermore, Marshall asserts the trial court was obliged to inquire of and determine that Marshall's failure to pay was willful, and not based on a bona fide effort to pay that fell short due to poverty. This required that the trial court, either orally or in writing, assess Marshall's evidence presented on that issue- his efforts and reasons for not paying his full amount of support- and render a decision in a form that an appeals court could understand why the trial

court rejected Marshall's argument that he was entitled to have an alternative to incarceration considered.

If this Court allows this kind of written order and oral statement to suffice, it will give trial courts permission to mete out stingy, inadequate orders, whether written or oral, which does not reasonably inform either the defendant or the appellate court. This undermines the straightforward requirement of the due process clause set out in *Morrissey*. Reversal is required. 14th. Am., U.S. Const.; Sections 2, 11, Ky. Const.

Brief for Cross-Appellant Argument

Child support ordered as a condition of conditional discharge is the equivalent of restitution so Bearden v. Georgia and Clayborn v. Commonwealth apply to these revocation proceedings; the Court of Appeals has since reversed the position it took in the instant case in Gamble v. Commonwealth, 293 S.W.3d 406 (Ky.App. 2009); this Court should adopt that holding of Gamble and vacate Marshall's revocation.

Defense counsel objected to Marshall's conditional discharge being revoked, on the grounds that under Clayborn v. Commonwealth, 701 S.W.2d 413 (Ky. App. 1985) and Bearden v. Georgia, 461 U.S. 660 (1983), he was being denied his state and federal constitutional due process rights because he was too poor to pay his support obligation. The trial court revoked the conditional discharge anyway and refused to consider an alternative sentence or a report date so that Marshall would not be taken into custody immediately.

Both the United States Supreme Court and Kentucky courts have laid out ground rules for a trial court to follow when deciding whether or not to impose a prison sentence because a defendant is unable to pay a fine or restitution imposed as a condition of probation. Bearden v. Georgia, *supra* at 672-3; Williams v. Illinois, 399 U.S. 235 (1970); Tate v. Short, 401 U.S. 395 (1971); Clayborn v. Commonwealth, *supra*. When a trial court decides whether or not to revoke probation based on a defendant's failure to make required restitution payments, the trial court **must** inquire into the reasons why the defendant was unable to pay. Clayborn v. Commonwealth, *supra*. The Court of Appeals held:

‘[I]n 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 could not pay despite sufficient bona fide efforts to acquire the resources to do so, the court **must consider alternative measures of punishment other than imprisonment**. Only if alternative measures are not adequate to meet the state's interest 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.'

Clayborn v. Commonwealth, *supra* at 415, citing *Bearden*, 461 U.S. at 672 – 673 [emphasis added].

Therefore, the trial court must first inquire into why the defendant could not pay the financial condition of his probation or conditional discharge. Second, the court must assess whether the defendant was unable to pay despite an honest attempt to get the money to fulfill his obligation or willfully refused to pay. Obviously, the trial court must make a specific finding as to whether the defendant made a sufficient bona fide effort to obtain the funds and provide the basis for its decision so its ruling can be reviewed on appeal. If the answer is yes, then the court must further consider whether there is another alternative other than incarceration that will satisfy the state's interest. Again, the court must make a record of its findings regarding available alternatives to incarceration.

In *Bearden v. Georgia*, *supra* at 662, the trial court convicted the defendant of burglary and theft by receiving stolen property but probated the defendant's sentence on the condition that he pay a fine of \$500 plus restitution to the victims totaling \$250. Bearden paid \$200 but failed to pay an amount sufficient to cover both the restitution and the fine. When the prosecutor tried to revoke the defendant's probation, a hearing was held. The defendant and his wife "testified about their lack of income and assets and of his repeated efforts to obtain work. While the sentencing court commented on the availability of odd jobs such as lawn-mowing, it made no finding that the petitioner had not made sufficient bona fide efforts to find work, and the record as it presently stands would not justify such a finding." *Id.* at 672-3. The trial court also rejected a

suggestion by Bearden's counsel that the time for making payments be extended. The United States Supreme Court made the holding which the Court of Appeals recognized and recited in the Clayborn case.

The United States Supreme Court stated, "By sentencing petitioner to imprisonment simply because he could not pay the fine, without considering the reasons for the inability to pay or the propriety of reducing the fine or extending the time for payments or making alternative orders, the court automatically turned a fine into a prison sentence." *Id.* at 674.

The Court explained its reasoning:

[I]f the State determines a fine or restitution to be the appropriate and adequate penalty for the crime, it may not thereafter imprison a person solely because he lacked the resources to pay it. Both *Williams* and *Tate* carefully distinguished this substantive limitation on the imprisonment of indigents from the situation where a defendant was at fault in failing to pay the fine.

...

This distinction, based on the reasons for non-payment, is of critical importance here. If the probationer has willfully refused to pay the fine or restitution when he has the means to pay, the State is perfectly justified in using imprisonment as a sanction to enforce collection. See ALI, Model Penal Code § 302.2(1) (Proposed Official Draft 1962). Similarly, a probationer's failure to make sufficient bona fide efforts to seek employment or borrow money in order to pay the fine or restitution may reflect an insufficient concern for paying the debt he owes to society for his crime. In such a situation, the State is likewise justified in revoking probation and using imprisonment as an appropriate penalty for the offense. But if the probationer has made all reasonable efforts to pay the fine or restitution, and yet cannot do so through no fault of his own,^{FN9} it is fundamentally unfair to revoke probation automatically without considering whether adequate alternative methods of punishing the defendant are available. This lack of fault provides a "substantial reaso[n] which justifie [s] or mitigate[s] the violation and make[s] revocation inappropriate." *Gagnon v. Scarpelli*, *supra*, 411 U.S., at 790, 93 S.Ct., at 1764.^{FN10} Cf. *Zablocki v. Redhail*, 434 U.S. 374, 400, 98 S.Ct. 673, 688, 54 L.Ed.2d 618 (1978) (POWELL, J., concurring) (distinguishing, under both due process and equal protection analyses, persons who shirk their moral and legal obligation to pay child support from those wholly unable to pay).
Id. at 667-9 [footnotes omitted].

In *Clayborn*, *supra* at 415, the trial court placed the defendant on conditional probation on the condition he pay weekly restitution of \$80 until the balance was paid. After a hearing was

held to revoke the probation for failure to pay the required amount, the trial court summarized the defendant's income for a time period wholly outside the disputed time period and erroneously found that there was no valid reason why he could not pay his restitution and support himself out of the remainder. *Id.* at 414-5.

The Court of Appeals held that the trial court did not consider alternatives to incarceration such as those set out in KRS 533.030. The Court held:

In this case, the revoking court did not consider any alternative forms of punishment. Despite evidence in the record that appellant's income from June of 1983 through May of 1984 averaged \$113.00 per week, the revoking court did not determine whether appellant made bona fide efforts to pay the fine, or whether appellant was capable of paying the fine, or whether alternative forms of punishment would be adequate to meet the state's interest in punishment and deterrence as required by *Bearden*. The court simply based its revocation order on the bare fact that appellant failed to make restitution payments. This, too, constitutes reversible error.

Id. at 415.

The mandates of *Bearden* and *Clayborn* are binding in the present situation as they concern the trial court's decision to revoke a conditional discharge in a flagrant non-support case for failure to pay both back and current child support ordered as a condition of his conditional discharge. No difference exists between ordering restitution to a burglary or theft victim as a condition of probation and ordering the payment of current and back child support as a condition of probation or conditional discharge in a non-support case on the same child. Logically, child support is a form of restitution paid to the parent raising the child to compensate that parent for expenditures for the child.

KRS 533.030 (3) states that when "a victim of a crime has suffered monetary damage as a result of the crime due to his property having been converted, ... , or where the victim suffered ... direct out-of-pocket losses, or a loss of earning as a direct result of the crime ... , the court shall order the defendant to make restitution." Child support payments arise as an obligation

created by a court order which entitles one parent to receive a sum certain from the other parent for the benefit of that child. Failure to pay the financial obligation is conversion of that money by the person ordered to pay. More directly, it is a direct out-of-pocket loss or a loss of earning. The value of the obligation that accrues for each period the non-custodial parent was supposed to pay support is substantially decreased when the parent pays nothing or less than the full amount.

Other courts have applied Bearden v. Georgia to situations where child support is ordered as a condition of probation or conditional discharge. Importantly, the United States Court of Appeals for the Sixth Circuit has utilized Bearden in examining child support cases. U.S. v. Marriner, 79 Fed.Appx. 102, 204 (6th Cir. 2003), attached at Appendix Tab 3. Additionally, in Marriner, the Sixth Circuit apparently treated restitution and child support as synonymous. The United States Court of Appeals for the Eleventh Circuit cited Bearden when it decided a recent flagrant non-support case, looking to see if the defendant had willfully failed to pay his obligation. U.S. v. Davis, 140 Fed.Appx. 190 (11th Cir. 2005), attached at Appendix Tab 4.

Other jurisdictions have found that, before revocation of probation can be effected, Bearden requires an inquiry and finding into whether there was a willful refusal to make court-ordered payments regarding child support, and if good reasons existed for failure to pay, including poverty, a finding concerning whether the trial court considered alternatives to revocation before taking the defendant's liberty. State v. McCrimin, 729 N.W.2d 682 (Neb. 2007) attached at Appendix Tab 5; State v. Archuleta, 812 P.2d 80 (Utah 1991) attached at Appendix Tab 6. Courts have applied Bearden where child support payments were ordered as a condition of probation from a non-support conviction. State v. Bowsher, 2009 WL 4756433 (Ohio App. 3 Dist.2009) (reversing revocation in a non-support case where defendant allegedly failed to pay child support and told trial court his failure to pay was because his lack of ability to

do so- trial court abused its discretion by not inquiring into the defendant's ability to pay his support, case was remanded for an inquiry in accord with Bearden) attached at Appendix Tab 7; Andrade v. State, 2008 WL 4820999 (Ark.App.2008) (holding that "in the absence of a determination that the failure to pay is willful, a probationer cannot be punished by imprisonment solely because of a failure to pay.") attached at Appendix Tab 8; State v. Coleman, 1998 WL 54365 (Ohio App. 10 Dist.1998) attached at Appendix Tab 9.

In considering the procedural impact of the inquiry of whether the defendant made a bona fide effort to meet the financial conditions of probation, and, if so, are alternatives to incarceration appropriate, the above courts illustrate what the trial court here should have done. Of particular import is the requirement that the trial court make sufficient findings for an appellate court to review its adherence to Bearden. In Marriner, *supra* at p. 3, the Court noted that the district court's statements "were sufficient to permit informed appellate review," In Davis, *supra* at 1-2, the Court, after citing Bearden, held that the government can "establish willful failure to pay by producing evidence the defendant has funds available to pay restitution and did not do so. ... Willfulness requires the government to prove the law imposed a duty on the defendant, the defendant knew of this duty, and he voluntarily and intentionally violated that duty." In Archuleta, *supra* at 84, the Court held that Bearden required "a finding that the probationer did not make bona fide efforts to meet the conditions of his probation." In Coleman, *supra* at 3, the Court held that the trial court erred when it "made no findings with respect to appellant's ability to pay or the reasons for nonpayment."

Courts are clearly interpreting Bearden to apply to different financial conditions of probation, even if they are not a direct result of a loss occasioned by the offense. In McCrimin, *supra* at 684, the defendant was convicted of aiding and abetting a fraudulent insurance act and

was ordered to pay payments of \$200 per month toward his child support arrearage as a condition of probation. Nebraska law authorizes a court to order child support as a condition of any probation. Yet the Nebraska Court held that the *Bearden* inquiries would have to be followed before he could be revoked if he claimed he did not have the ability to pay his child support. In *Archuleta, supra* at 83-4, the defendant was convicted of two counts of theft. He was ordered to pay a fine and restitution but was also ordered to pay current and past support as a condition of probation. The Utah Court of Appeals agreed that *Bearden* applied and failure to pay his fine and court-ordered child support had to be willful to support revocation of his probation.

It makes sense that *Bearden* applies to any financial condition of probation. As the Court explained in *Bearden*, the financial condition is in lieu of imprisonment is the penalty the trial court deemed appropriate for that crime and defendant, and any attempt to change that determination and imprison the defendant should only come after the court finds he had the ability to pay and willfully refused to do so. It would be irrational to prevent the incarceration of a poor person who could not pay restitution to a victim for money he stole but the same poor person could be imprisoned despite a good faith inability to pay other financial conditions of probation. So even if this Court somehow disagrees that the requirement to pay current and back child support in the instant case constituted restitution, *Bearden* and the due process clause of the Fourteenth Amendment still require the same findings by the trial court. Furthermore, in the instant case, like *Bearden*, the financial conditions were direct redress for the crime itself, i.e. the failure to pay his child support.

Of critical significance is the fact that, since rendering the opinion in the instant case, the Court of Appeals has now rendered a published opinion on this very issue in *Gamble v. Commonwealth*, 293 S.W.3d 406 (Ky. App. 2009), attached at Appendix Tab 10. *Gamble*

involved an identical case arising from the exact same county and court as Randy Marshall's case, with the exception that Gamble did not testify on his own behalf. The Court of Appeals in Gamble recognizes the existence of the non-final, unpublished opinion in Marshall as well as another unpublished opinion in Jenkins v. Commonwealth, 2004 WL 360999 (Ky.App.2004) (2002-CA-001041-MR). Attached at Appendix Tab 11.

The Court of Appeals reversed its earlier reasoning in those cases and held:

'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.FN4 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.FN5 Other jurisdictions support this view. See State v. McCrimon, 15 Neb.App. 452, 729 N.W.2d 682, 686 (2007); State v. Archuleta, 812 P.2d 80, 84 (Utah App.1991); Greene v. District Court of Polk County, 342 N.W.2d 818, 819-21 (Iowa 1983); Brown v. U.S., 579 A.2d 1158, 1164 (D.C.1990).

FN4. A portion of the child support that the conditional discharge order required Gamble to make was for child support arrearages and a portion was for current support.

FN5. In short, we disagree with the panels of this court that held in the Marshall and Jenkins cases that failure to pay child support is treated differently under Bearden from failing to pay fines or restitution in probation revocation cases.

Gamble, *supra* at 410.

The Court of Appeals did not reverse Gamble's revocation because he refused to testify, citing his Fifth Amendment right not to incriminate himself, offering no evidence of his good faith effort to pay his child support, and preventing the trial court from inquiring of him why he did not pay his support. The Cross-Appellee, the Commonwealth of Kentucky, did not file a motion for discretionary review asking this Court to review the Court of Appeal's published decision in Gamble.

The decision in Gamble applying the requirements of Bearden to flagrant non-support revocation hearings is consistent with the above-cited cases and is the correct interpretation of Bearden. Furthermore, the approach and rationale of Bearden, Clayborn and Gamble is in harmony with Section 18 of the Kentucky Constitution which states, "The person of a debtor, where there is not strong presumption of fraud, shall not be continued in prison after delivering up his estate for the benefit of his creditors in such manner as prescribed by law." Section 18 evinces a strong preference for refusing to imprison a Kentucky citizen for failing to pay a financial obligation unless he has affirmatively and wrongfully chosen not to do so.

Without question, if the Court of Appeals heard Randy Marshall's case today, it would almost certainly reverse and vacate the decision of the trial court (remember, the same trial court as in Gamble). Unlike the defendant in Gamble, Marshall testified and offered evidence of his inability to pay his child support despite his good faith efforts. The trial court failed to follow the critical steps of inquiring into why Marshall had not paid his child support, make a finding whether Marshall had made a good faith effort to pay his support, and then, if so, make a finding that alternatives to Marshall's incarceration were considered. The trial court abused its discretion in revoking Marshall's conditional discharge without complying with these due process requirements and by failing to find Marshall did not willfully refuse to pay his child support. The trial court also abused its discretion in ordering that Marshall should be imprisoned because he should have been able to find a job, just like illegal immigrants.

The Commonwealth presented evidence only that Marshall had not paid all of his support ordered as a condition of his conditional discharge. The trial court did not inquire into the reasons why the defendant could not pay. The trial court was advised of Marshall's situation through defense counsel's questions when Marshall testified on his own behalf. However, the

trial court never specifically asked Marshall why he was unable to pay nor did the trial court question any of the details of Marshall's explanation for why he had been unable to meet his support obligation.

The age old axiom that "you cannot get blood from a stone" is represented perfectly in the present case. The issue was whether Randy Marshall's conditional discharge should have been revoked, and his three year sentence imposed, because he failed to meet his entire child support obligation on one of his four children, Jade Carmen. Marshall's expenses prior to incarceration were for only the most basic of living expenses. He owned the tools that allowed him to eke out a living as a handyman and used part of his income to purchase supplies to complete the jobs. He paid for a roof over his head in someone else's home.

The rest of his money went to paying off whatever child support claim was more pressing. He did this to avoid jail. In effect, the court system whipsawed Marshall between one child or another. He found himself unable to pay everything and frantically tried to avoid prison by paying off the more pressing claim at that moment (most notably the McCracken County claim). This system, born of desperation, eventually failed him.

The trial court failed to inquire or analyze whether, under the evidence presented, Randy Marshall failed to pay despite a bona fide effort to get the money to pay his child support for Jade. Instead, the trial court summarily asserted (based on no evidence presented at the hearing) that since illegal immigrants can get a job, that Marshall could have gotten one too.

This completely disregarded the evidence that Marshall had been working at the time he was placed on conditional discharge, but lost that job through no fault of his own when the apartments he worked for were put up for sale, maintenance projects were put on hold, and the apartments were ultimately sold. He supported his testimony with a letter from the property

manager he had worked for. He also explained how he reasonably waited for a promise of a better job from the new owners which would have paid him \$15 an hour and allowed him to pay his support but that the job fell through and left him not only unemployed but also homeless because he had been living at the apartments he maintained. It also ignored the fact that Randy was working two jobs currently but they did not provide much cash flow. He was not sitting around refusing to work. He had tried to find steady jobs but could not even get hired at fast food places like McDonald's.

The trial court also completely ignored the fact that Randy was paying child support for another child in another county in order to avoid the more pressing threat of jail there. He had a third child support obligation on his boys in Mississippi. Marshall was self-employed at the time and was making a bona fide effort to get the needed funds to pay for all of his children and meet his court imposed obligations.

The facts in Marshall's case are similar to those in *Bearden* and *Clayborn* in which the defendants testified about their meager incomes and their efforts to obtain employment, yet the trial courts did not make an appropriate finding based on the record that a good faith effort was being made to raise the money they were ordered to pay and their failure to pay was not willful.

The trial court flat out refused to comply with the third step of considering alternatives to incarceration. When defense counsel asked the trial court if it would be willing to consider alternatives to incarceration, the trial court flatly replied "no." The order that Randy Marshall make his current child support payments but also pay \$101.25 per month in arrearages, was clearly a restitution order for losses already suffered by Jade's mother when Marshall failed to make the scheduled payments.

Therefore, the trial court should have considered alternative sentences. It could have considered alternatives such as allowing partial payments to be made while closely monitoring Marshall's income with weekly or monthly reviews. Marshall could have helped by physically taking care of his child for part of the year like he did when she spent summer vacation with him. He could have even been sent to jail for a short period of time each week or put on home incarceration with work release with all his income going to child support. All these would be adequate to meet the Commonwealth's interest in punishment and deterrence while helping collect child support.

A review of the comments of the trial court in Bearden illustrate the deficiency of the trial court's statements in the instant case. After the defendant and his wife testified, the trial court commented on the availability of lawn-mowing and other odd jobs but "made no finding that the petitioner had not made sufficient bona fide efforts to find work, and the record as it presently stands would not justify such a finding." *Id.* at 673. The trial court also rejected Bearden's request that the time for making the payments be extended, saying that the defendant "has long known he had to pay the \$550 and yet did not comply with the court's prior order to pay." *Id.* at 674. The trial court said it only knew one way to enforce orders of the court and that was with a prison sentence. The Supreme Court held, "The focus of the court's concern, then, was that the petitioner had disobeyed a prior court order to pay the fine, and for that reason must be imprisoned. But this is no more than imprisoning a person solely because he lacks funds to pay the fine, a practice we condemned in Williams and Tate." *Id.*

The statements of the trial court in Marshall's case fared no better. As stated in the previous argument, the written order of the trial court made no specific findings about the import of the evidence heard by the court but concluded that Marshall violated conditions of release and

revoked his conditional discharge. His oral comments were quite similar to those in Bearden. The trial court was all-consumed with the fact that Marshall had not paid his support for a year and a half but never inquired and made findings about why he did not pay even though Marshall offered uncontroverted evidence on that issue. The statement that Marshall could find a job if he wanted; even illegal aliens find work, was not a sufficient analysis of the evidence actually presented and in fact was not supported by the evidence introduced.

Marshall also asserts that the Commonwealth has the burden of proving that Marshall willfully refused to pay his support. This Court established that the Commonwealth bears the burden of proving a defendant is reasonably able to provide the child support before a court may find the defendant guilty of flagrant non-support under KRS 530.050. Schoenbachler v. Commonwealth, 95 S.W.3d 830 (Ky. 2003). The same logic should be applicable to revoking a conditional discharge based on the condition that a defendant makes required support payments, as the same considerations are present. Further, in probation revocation proceedings, the Commonwealth has a burden to prove by a preponderance of the evidence that the defendant violated the conditions of his or her probation. Murphy v. Commonwealth, 551 S.W.2d 838, 841 (Ky.App.1977). While the Gamble Court rejected this argument because it could find no legal support for it, Marshall asserts that the decisions in Davis, supra, and Andrade, supra, support the position that the government must show willful failure to pay by a preponderance of the evidence. Certainly, if the defendant offers evidence that he was unable to pay his support, and the government cannot prove otherwise by a preponderance of the evidence, revocation is inappropriate. It is logical that if the trial court must inquire and make a finding about a defendant's ability to pay, at least when the defendant asserts he cannot pay despite good faith efforts, then the government must present some evidence to support a finding that the refusal to

pay was willful. Otherwise, the trial court's finding of the same would not be supported by the evidence.

In the instant case, no evidence was presented that showed Randy was able to make the payments in the Graves County case. Indeed, every piece of evidence introduced by Marshall showed he was completely unable to do so. The prosecutor could not demonstrate, even by a preponderance of the evidence, that Randy Marshall reasonably could make his support payments and willfully refused making his child support payments. In this situation, where the defendant presents an affirmative explanation detailing his efforts and reasons he could not pay, the Commonwealth must bear the ultimate burden of persuasion.

The trial court deprived Randy Marshall of due process of law in violation of the Fourteenth Amendment to the federal constitution and Sections 1, 2, 11 and 18 of the Kentucky Constitution when it failed to consider, and, in this case, find, that he had made a bona fide effort to pay his child support, and did not willfully refuse to pay his obligation under the probation order. Those same constitutional rights were violated when the trial court failed to consider and grant an alternative sentence, as authorized by KRS 533.030, which balanced the Commonwealth's interests with Marshall's as well as the child's interest in receiving support.

Conclusion

The Appellee/Cross-Appellant asserts that this Court must reverse the order revoking his conditional discharge and remand this case for further proceedings.

Respectfully Submitted,



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