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

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**

v.

COMMONWEALTH OF KENTUCKY — **CROSS/APPELLEE**

REPLYBRIEF FOR APPELLEE/CROSS-APPELLANT, RANDY MARSHALL

Respectfully Submitted,

KATHLEEN KALLAHER SCHMIDT
ASSISTANT PUBLIC ADVOCATE
DEPT. OF PUBLIC ADVOCACY
SUITE 302, 100 FAIR OAKS LANE
FRANKFORT, KENTUCKY 40601
(502) 564-8006

COUNSEL FOR APPELLEE/CROSS-APPELLANT

The undersigned does certify that copies of this Reply Brief for Cross-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 March 14, 2011. The record on appeal was not checked out for the purpose of this Reply Brief.

Kathleen Schmidt

KATHLEEN KALLAHER SCHMIDT

Purpose of Reply Brief

The purpose of this Reply Brief is to address the arguments of the Appellee that merit a response. If counsel does not respond specifically to any argument made by the Appellee it should not be taken as a concession but only that counsel feels the issue has been adequately addressed in the Brief for Appellant and any further argument would be cumulative.

Statement of Points and Authorities

Argument

The Appellant does not appear to dispute the basic holding of *Gamble v. Commonwealth*, 293 S.W.3d 406 (Ky. App. 2009) that past due child support constitutes restitution and thus the requirements of *Bearden v. Georgia*, 461 U.S. 660, 672-3 (1983) must be met before probation or conditional discharge can be revoked. Therefore, this Court should adopt that finding in this case and give its approval to *Gamble*.

But the facts of *Gamble* were different than in the instant case, and account for why Gamble may not have been entitled to relief but Mr. Marshall is. In *Gamble*, the defendant asserted his Fifth Amendment privilege (wrongly, the Court concluded) and refused to testify. Thus he was unavailable to answer questions about his ability and efforts to pay his support. So the trial court could not assess his ability to pay and thus could not apply *Bearden*.

The Court of Appeals went on to pose questions about the interplay between *Bearden* and restitution that was agreed to as part of a guilty plea but that portion of the opinion was *dicta* at best. In fact, the Court did not answer the question because it had not been raised or briefed by the parties. The Cross-Appellee now argues that *Bearden* should not apply where a defendant agreed to pay a certain amount of child support as part of a plea agreement. The Cross-Appellee's logic does not follow.

First, the Cross-Appellee characterizes the discussion in the *dicta* in *Gamble* as modifying its holding. Since the Court did not reach a conclusion on this issue but

affirmed the trial court on the grounds stated above, Mr. Marshall believes this is a mischaracterization. Gamble was not denied relief because he entered a guilty plea.

In any event, *Bearden* should apply even to restitution agreed to as part of a guilty plea because the question of whether a probationer has made a good faith effort but has no ability to pay can only be answered by looking at the circumstance at the time of the revocation hearing. The defendant could have suffered a material change in his financial circumstances after agreeing to the conditions of probation, and even though he made the bargain in good faith, became unable to pay restitution despite his bona fide efforts to do so. In fact, both the facts and rationale of *Bearden* support this position. Thus due process under the Fourteenth Amendment would be violated if the benefits of *Bearden* were denied to those who had agreed to pay restitution as part of a plea agreement.

The defendant in *Bearden* entered a guilty plea. The trial court probated his sentence and ordered him to pay a fine and restitution as a condition of probation. Bearden was working at the time and borrowed some money to make the first payment. Then he lost his job about a month later and could not find other work, despite trying to do so. *Id.* at 662-3. The focus of the Court's analysis was not whether the defendant bargained for the restitution and fine but whether due process was violated by imposing a prison sentence for a defendant for whom the court had previously decided a loss of freedom was inappropriate but only changed its mind when the defendant became unable to pay despite good faith efforts to do so. The distinction was between defendants who willfully refused to pay and defendants who did their best to pay and could not do so under the current circumstances.

Logically, restitution is always imposed by the trial court, whether it results from a specific plea bargain that is accepted by the trial court, or whether the trial court decides to probate a sentence and add a condition that was not part of a plea agreement. Even in the latter situation, the defendant "agrees" to accept the conditions of probation imposed by the trial court, and is always free to reject probation. In the former situation, it is the trial court that orders restitution as part of the judgment in the case.

So the underlying rationale of *Bearden* applies with equal force to restitution as part of a plea agreement as to situations where restitution is forced upon a defendant. Because a defendant's financial circumstances can honestly change in an unforeseen way, a defendant who entered into a plea based on his honest, good faith and accurate assessment of his finances, might end up unable to pay the required amount due to an unanticipated change in circumstances. Anyone who has suddenly lost a job, such as Mr. Marshall and Mr. Bearden did, or lost a home or had a sudden illness, etc. knows what that feels like. To deny those persons an opportunity to explain their efforts to pay solely because they entered into a plea bargain (saving the Commonwealth time and the taxpayers money) rather than have what surely would have been the same amount foist upon them at a trial is illogical. One would assume that a trial court takes into account a defendant's financial circumstances when ordering restitution and would not order it unless there was some factual basis for believing it could be paid.

This seems especially true in a child support situation. The issues are few in these cases- the parent was ordered to pay an amount and either did or did not pay. Realistically, that's it. And the amounts ordered and the amount not paid is also generally not disputed. So it is reasonable to assume if someone like Mr. Marshall had

gone to trial, he would have been convicted (or if he entered into a plea agreement that somehow either required him to serve a sentence or did not include restitution) and if the trial court probated him, he would have been given the very same order to pay that he bargained for in his plea.

This is not an attempt to "game" the system. There was no windfall to Mr. Marshall. It was to the advantage of both the Commonwealth and Mr. Marshall to reach a plea agreement, entered into at a time when he was still working at the apartment buildings with the expectation of even more work. Just like Mr. Bearden, he lost his job and could not find something comparable which would allow him to pay the ordered amount. Mr. Bearden received the same benefit as did Mr. Marshall in the sense that he was given probation on the condition that he pay certain money, whether he specifically bargained for that amount or not. He could have turned down the probation.

Furthermore, what *Bearden* requires is so simple, straightforward and efficient. Unless the defendant waives it, he has a federal constitutional right to be heard and present evidence if revocation is sought. It is not requiring much to expect the judge to inquire as to ability to pay. If the answer is the defendant made a good faith effort to pay, it does not insure that the defendant will remain free- but it requires the trial court to consider alternatives to incarceration that may result in a more just, efficient disposition. It is a waste of taxpayer money to incarcerate a person who cannot fulfill a bargain he honestly believed he could under the circumstances that existed at the time he entered the plea. But the approach in *Bearden* allows a trial court to fashion alternative remedies to incarceration and yet still require compliance with the order or bargain.

It appears other courts have applied *Bearden* in non-support situations where guilty pleas were entered. In *U.S. v. Marriner,* 79 Fed.Appx. 102 (6th. Cir. 2003), the Court of Appeals for the Sixth Circuit noted with approval the application of *Bearden* to a revocation where the defendant pled guilty. The same situation occurred in State v. Bowsher, 2009 WL 4756433 (Ohio App. 3 Dist. 2009) where the defendant pled guilty to non-support and on an appeal of his revocation of probation, the appellate court remanded because a *Bearden* inquiry had not been made. In *State v. Coleman*, 1998 WL 54365 (Ohio App. 10 Dist.1998), the defendant pled guilty yet *Bearden* was applied to his revocation proceedings.

This Court should follow the application of *Bearden* by the Sixth Circuit to guilty plea situations.

The Cross-Appellee argues that Cross-Appellant should be held to his bargain regardless of whether he made a good faith effort to pay and did not willfully refuse. But just as in any revocation, even if the condition violated was part of a plea bargain, it is an abuse of discretion for the trial court to revoke probation if the defendant demonstrates he did all he could and it was impossible for him to comply.

The Cross-Appellee notes that the Gamble Court cites *Polk v. Commonwealth*, 622 S.W.2d 223 (Ky. App. 1981), but *Polk* does not stand for what the Cross-Appellant wants it to. In fact, it appears to support the Cross-Appellant. In *Polk*, the defendant entered into a plea agreement whereby he agreed to pay restitution of a certain amount over five years. He also specifically agreed that non-payment of restitution or declaring bankruptcy would be grounds for revocation. At the hearing, evidence was presented about the defendant's current financial difficulties. The parties, with the trial court,

discussed what options were available but the defendant pre-empted the discussion by saying he'd just take the five years in prison. The opinion notes that Polk had lost his job at one point and the trial court accepted deferred payments until he became employed again. It appears the trial court *de facto* applied *Bearden*. But once the defendant began working again he fell out with his probation officer. The Court of Appeals found that he was not sentenced to prison because he was unable to pay but because he refused to pay, implying that the trial court complied with due process in its procedure. While the Court said he made a firm commitment to pay that amount it also noted he also agreed that paying any other amount would result in revocation. That is not the situation in the instant case.

The cases cited by the Cross-Appellee should not be followed and can be distinguished. In *State v. Nordahl*, 690 N.W.2d 247, 251-252 (N.D. 2004), under state law, once a defendant agreed to restitution he was not entitled to a hearing. Part of the factors the trial court had to consider in setting the amount was the defendant's ability to pay. The Court also reasoned that the defendant knew his financial situation before he entered into the agreement.

In *Dickey v. State,* 570 S.E.2d 634 (Ga. App. 2002), it appeared the defendant had gamed the system, since he agreed to pay over $160,000 in restitution, $100,000 of it by a date certain, and when that date came he had only paid $2. The Court first found that under the *Bearden* inquiry, the defendant had not made a good faith effort to pay. It was only then that the Court discussed whether *Bearden* applied to guilty plea situations. So despite that discussion, the Court did not refuse to apply *Bearden*.

In *State v. Caballero,* 464 So.2d 939 (La. App. 4 Cir.1985), the Court found that when a defendant cannot meet his end of the bargain, the remedy is to withdraw the plea, not revocation. But the bargain was that Caballos pay a $30,000 fine. Once his plea was withdrawn, he then claimed indigency and cited *Bearden.* But that is not at all what the situation is in Mr. Marshall's case.

Commonwealth v. Payne, 602 N.E.2d 594 (Mass. App. Ct. 1992), involved a plea agreement that included a payment of $40,000 by a doctor, payable very close in time to his sentencing to obtain his freedom rather than have a prison sentence imposed. The Court also held that the trial court implicitly followed *Bearden* when at the sentencing hearing he found that the defendant had made no effort pay and had also made no effort to liquidate his assets to pay.

In *State v. Jacobsen,* 746 N.W.2d 405, 410 (N.D. 2008), the Court found that the trial court had followed *Bearden* and considered when the defendant had the means to pay his restitution. It was only then that the Court, citing *Nordahl,* ruled that *Bearden* was inapplicable because the defendant had bargained for his restitution.

All Mr. Marshall knew when he entered his guilty plea was that he had a job helping manage apartment complexes. That changed after the plea was entered. The apartments were sold and the promise of an increased role by the new managers evaporated after Mr. Marshall was strung along waiting for this better financial opportunity. Mr. Marshall is not gaming the situation. The *Bearden* procedure does not allow him to enter into a bargain to escape incarceration then willfully refuse to pay. Mr. Marshall would lose under *Bearden* under that scenario. *Bearden* requires that the trial

curt consider ability to pay, and if a good faith effort was made, also consider alternatives to incarceration.

Conclusion

Mr. Marshall, Cross-Appellant, respectfully requests that this Court reverse the trial court's order revoking his probation.

Respectfully Submitted,

Kathleen Kallaher Schmidt
Assistant Public Advocate
100 Fair Oaks Lane, Suite 302
Frankfort, KY 40601
(502) 564-8006, ext. 103