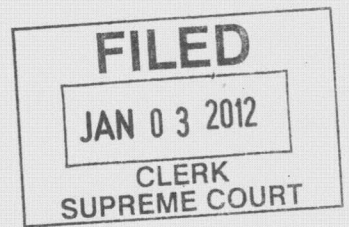


COMMONWEALTH OF KENTUCKY
SUPREME COURT
NO. 2011-SC-000111-D



COMMONWEALTH OF KENTUCKY

APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT,
HONORABLE MITCHELL PERRY, JUDGE PRESIDING
ACTION NO. 09-CR-001439

WILLIAM JOSEPH REED

APPELLEE

REPLY BRIEF FOR APPELLANT
COMMONWEALTH OF KENTUCKY

JACK CONWAY
ATTORNEY GENERAL

A handwritten signature in dark ink, appearing to be "Jeanne Anderson", written over a horizontal line.

Jeanne Anderson
Assistant Attorney General
1024 Capital Center Complex
Frankfort, Kentucky 40601
(502) 696-5342

CERTIFICATE OF SERVICE

I hereby certify that a true copy of this brief has been mailed, first class postage prepaid, this 3rd day of January, 2012, to Hon. Samuel Givens, Jr., Clerk, Office of the Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601-9229; and to the Hon. Bruce Hackett, Chief Appellate Defender, Office of the Louisville Metro Public Defender, 719 West Jefferson Street, Louisville, Kentucky 40202.

JACK CONWAY
ATTORNEY GENERAL

A handwritten signature in dark ink, appearing to be "Jeanne Anderson", written over a horizontal line.
Jeanne Anderson

PURPOSE OF REPLY

The purpose of this reply brief is to counter Appellee's contentions that the Court of Appeals did not violate separation of powers; that the imposed fine was not "agreed to" as a part of the plea agreement; and that his "sentencing issue" can be raised on appeal even from an unconditional plea.

First, Appellee contends that there was no violation of the separation of powers when the Court of Appeals vacated the fine without remand for further proceedings in the trial court. However, by vacating only part of a plea agreement, the higher court was essentially saying, "this is the *real* plea agreement," and it was saying so without the input of the prosecuting authority. The issue for this Court's review is not whether the sentence is illegal. The Commonwealth has always conceded as much. The issue is what remedy should be offered by the higher court in a situation where an illegal sentence is reached via the plea bargaining process.

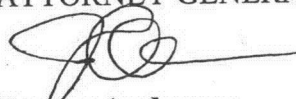
Second, Appellee repeatedly protests that he did not "agree" to the fines, and thus they are not part of the plea agreement itself. But that is a mischaracterization of what was in fact agreed to: the defendant asked that, and the Commonwealth agree, he be allowed to argue at sentencing for the trial court not to impose the fine. (VR 11/5/09; 10:35:15). He did in fact make a motion before the judge, but it was denied. (VR 12/9/09; 10:18:15.) In other words, the defendant's objection during plea negotiations was intended to preserve his right to try to convince the *sentencing* judge to exercise his discretion at sentencing. It was not an objection to preserve an issue for appellate review. The plea was unconditional, and the Appellee's willingness to accept the plea and throw himself at the mercy of the court

regarding imposition of a fine is a different strategy than entering a conditional guilty plea. As such, upon reversal of the illegal sentence, the plea agreement as a whole was voided. It must be remembered that Appellee entered his plea in 2009, before McClanahan v. Commonwealth, 308 S.W.3d 694 (Ky. 2010), was rendered. Before McClanahan, the law in Kentucky was that a defendant could bargain away his statutory rights in exchange for other concessions by the Commonwealth. Appellee did just that, and although the sentence itself must be vacated, the proper remedy by the higher court was to remand the case for further plea negotiations, not a decision simply vacating.

Finally, Appellee argues that the fine is a "sentencing issue" which can be raised on appeal even from an unconditional plea. Although he cites case law that says a "sentencing issue" can be raised thusly, he does not cite case law that dictates what relief an appellate court may offer.

Respectfully submitted,

JACK CONWAY
ATTORNEY GENERAL OF KENTUCKY



Jeanne Anderson
Assistant Attorney General
Criminal Appellate Division Office of the
Attorney General
1024 Capital Center Drive
Frankfort, Kentucky 40601-8204
(502) 696-5342