Commonwealth of Kentucky
Supreme Court

No. 2013-SC-00608-DG

JAMES KIDD **APPELLANT**

v.

Appeal from Lee Circuit Court
Hon. Thomas P. Jones, Judge
Indictment No. 09-CR-0034

COMMONWEALTH OF KENTUCKY **APPELLEE**

Brief for Commonwealth

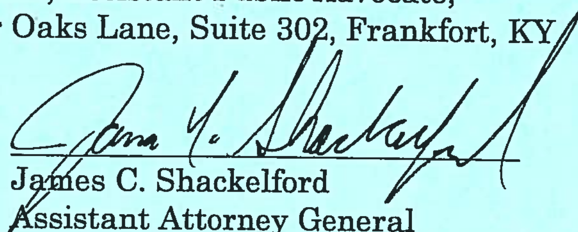
Submitted by,

JACK CONWAY
Attorney General of Kentucky

James C. Shackelford
Assistant Attorney General
Office of Criminal Appeals
Office of the Attorney General
1024 Capital Center Drive
Frankfort, Kentucky 40601
(502) 696-5342

CERTIFICATE OF SERVICE

I certify that the record on appeal was not withdrawn from the Supreme Court Clerk's Office and that a copy of the Brief for Commonwealth has been served October 8, 2014 as follows: by mailing to the trial judge, Hon. Thomas P. Jones, Judge, P.O. Box O, Beattyville, KY 41311; by sending electronic mail to Hon. Heather Combs, Commonwealth Attorney; and by delivery through Kentucky Messenger Mail to Hon. Brandon Neil Jewell, Assistant Public Advocate, Department for Public Advocacy, 100 Fair Oaks Lane, Suite 302, Frankfort, KY 40601.



James C. Shackelford
Assistant Attorney General

INTRODUCTION

The circuit court revoked Appellant's probation upon a conviction of trafficking in a controlled substance. The Court of Appeals affirmed and this Court granted discretionary review.

STATEMENT REGARDING ORAL ARGUMENT

The Commonwealth believes that the issues raised on appeal may be adequately addressed by the parties' briefs. The Commonwealth does not request oral argument.

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COUNTERSTATEMENT OF THE CASE

Appellant pled guilty to trafficking in a controlled substance in 2009. He was sentenced to ten years imprisonment, probated for five years.[1] One of the conditions of probation required Appellant to "move out of the state for 5 years."[2]

In April 2010 the trial court allowed Appellant to enter and remain in the state for two months to be with his sister who was suffering from terminal lung cancer.[3] The trial court entered a second order allowing Appellant to remain in the state until August 24, 2010.[4]

The trial court signed a bench warrant March 7, 2012 ordering Appellant's arrest because the court had received information that Appellant was in Owsley County.[5] The Commonwealth moved to revoke probation two days later on the grounds Appellant was staying in Owsley Count.[6] The Uniform Citation shows police arrested Appellant in Booneville (Owsley County) on March 22, 2012.[7]

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[1] TR 48-57.

[2] TR 53.

[3] TR 60-61.

[4] TR 62-63.

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[7] TR 69.

The trial court held an evidentiary hearing on May 15, 2012 and entered a written order revoking probation on May 31, 2012. Order Revoking Probation.[8] Before evidence was taken at the evidentiary hearing, defense counsel tried to characterize the violation as "a technical violation" because Appellant was visiting his sick mother.[9] The trial court disagreed with the characterization that Appellant's conduct was a "technical violation," noting the court's prior orders granting him leave to visit sick relatives.[10] The trial court considered these orders to be important because, "These Orders should have given the Defendant notice of two important points: that he could seek permission to return to Kentucky when a family member was ill and that the length of his stay in Kentucky was of grave importance to the Court."[11] The trial judge also emphasized that he had expressly conditioned probation upon Appellant leaving Kentucky.[12]

Appellant's probation and parole officer testified Appellant was placed on unsupervised probation and that he had no knowledge of Appellant being in Kentucky until someone called him after Appellant was arrested.[13]

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[8] TR 80-84.

[9] VR Sup. 05/15/2012, 10:23:28; 10:24:11.

[10] Order, pp. 1-2, TR 80-81.

[11] Order, p. 2, TR 81.

[12] Order, p. 3, TR 82.

[13] VR Sup. 05/15/2012, 10:31:44.

Appellant had never contacted the probation officer about returning to Kentucky.[14] Victim's Advocate Sharla Plowman testified she had prepared the motion to revoke probation because she had received several phone calls that Appellant had returned to the state with specific information as to his location. However, she could not remember who made the calls.[15]

Plowman affirmatively testified that Owsley County Deputy Sheriff Havicus arrested Appellant in Owsley County.[16] On cross-examination, Plowman said nobody verified the accuracy of the phone calls she had received.[17] The trial court then remarked, "But then he got arrested in, got arrested by Deputy Havicus in Owsley County." Plowman replied, "In Owsley County at the address I gave him."[18] The trial court noted it was looking at the post-arrest complaint.[19] Appellant chose not to testify or present any other evidence at the hearing.[20]

The trial court noted Deputy Havicus's documentation of the arrest and remarked that he knew Appellant and could see him standing there and

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[14] *Id.*

[15] *Id.* at 10:34:37.

[16] *Id.* at 10:35:26.

[17] *Id.* at 10:35:45.

[18] *Id.* at 10:36:17.

[19] *Id.* at 10:36:20.

[20] *Id.* at 10:40:15.

concluded Appellant had been in Kentucky.[21] In its written order, the trial court said that it was relying upon the fact that Appellant had been found and arrested by the sheriff's deputy in Owsley County as proof Appellant had violated the condition he remain outside the state.[22]

Contrary to Appellant's assertions, the trial court considered graduated sanctions. Before evidence was taken, there was a discussion about applying some sort of graduated sanctions.[23] The trial court initially said, "It's not in his judgment for graduated sanctions. It's just something we discussed we might be wanting to do at some point but he's not subject to graduated sanctions."[24] Nevertheless, at the end of the hearing, the trial court said it would consider a lesser sanction than revoking Appellant for the full ten years.[25] The trial court thought defense counsel had made some good points in arguing for graduated sanctions. It would enter a calendar notation that probation was revoked but would review Appellant's record since being placed on probation before making a final decision on sanctions.[26] It was fifteen days after the evidentiary hearing before the trial court decided to

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[21] *Id.* at 10:43:22.

[22] Order, p. 2, TR 81.

[23] VR Sup. 5/15/2012, 10:51:15-10:53:25.

[24] VR Sup. 5/15/2012, 10:27:20.

[25] VR Sup. 5/15/2012, 10:51:15-10:53:25.

[26] *Id.*

fully revoke Appellant's probation.[27]

Appellant's violation of the express terms of his probation, especially in light of the trial court's two previous orders, created a risk of further violations:

> [H]e knowingly took a risk when he returned to Kentucky without first seeking Court permission. There is a substantial risk that the Defendant will therefore commit another violation during any extended period of probation. The Defendant is in need of correctional treatment that can be provided most effectively by his commitment to a correctional institution, and further probation based upon the above violation would unduly depreciate the seriousness of the Defendant's crime.[28]

The Court of Appeals affirmed in *James Kidd v. Commonwealth*, No. 2012-CA-001130-MR (Ky.App. Aug. 2, 2013) and this Court granted discretionary review.

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[27] Order, TR 80-84.

[28] Order, pp. 2-3; TR 82-83.

ARGUMENT

KRS 439.3106 applies only to the Department of Corrections which makes Appellant's arguments based upon that statute inapplicable. The Commonwealth first explains why KRS 439.3106 applies only to the Department of Corrections in Argument I. Assuming *arguendo* that the statute applies to the state's trial courts, the Commonwealth explains how the trial court met the requirements of the statute in Argument II. Finally, the Commonwealth explains in Argument III why Appellant's right to confrontation was not violated through the use of hearsay testimony.

I. KRS 439.3106 applies only to the Department of Corrections.

A. This Court should apply accepted appellate rules and affirm the lower court decisions even if upon different grounds.

The parties briefed the issue to the Court of Appeals on the assumption KRS 439.3106 bound the trial court as well as the Department of Corrections. The Court of Appeals rendered its opinion operating on the same assumption.[29]

Nevertheless, "[T]he rule is settled that if the decision below is correct,

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[29] The Commonwealth is aware that this Court granted the Commonwealth's motion for discretionary review on this issue in *Commonwealth v. Joesph Andrews*, No. 2013-SC-00004. The decision in that appeal had not been rendered when the Commonwealth filed its brief in this case.

it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason." *Helvering v. Gowran*, 302 U.S. 238, 245 (1937) (citations omitted); *accord N.L.R.B. v. Kentucky River Cmty. Care, Inc.*, 532 U.S. 706, 722 n.3 (2001).

This Court held that the Court of Appeals committed reversible error when it would not consider an alternate rationale for upholding the trial court's order denying a defendant's motion to suppress. *Commonwealth v. Fields*, 194 S.W.3d 255, 257 (Ky. 2006). The Court has repeatedly held that a judgment may be affirmed on appeal by any reason appearing in the record. *See Kentucky Farm Bureau Mut. Ins. Co. v. Shelter Mut. Ins. Co.*, 326 S.W.3d 803, 812 n. 3 (Ky.2010); *McBeath v. Commonwealth*, 244 S.W.3d 22, 38 (Ky. 2007); *Noel v. Commonwealth*, 76 S.W.3d 923, 929 (Ky.2002); *Tamme v. Commonwealth*, 973 S.W.2d 13, 31 (Ky.1998); *Jarvis v. Commonwealth*, 960 S.W.2d 466, 469 (Ky.1998); *Smith v. Commonwealth*, 788 S.W.2d 266, 268 (Ky.1990).

Because of this rule, the Supreme Court "has repeatedly stated that 'where the prevailing party seeks only to have the judgment affirmed, it is entitled to argue without filing a cross-appeal that the trial court reached the correct result for the reasons it expressed and for any other reasons appropriately brought to its attention.'" *Fischer v. Fischer*, 348 S.W.3d 582, 591-92 (Ky. 2011) *quoting Com., Corrections Cabinet v. Vester*, 956 S.W.2d

204, 205–06 (Ky.1997).

B. KRS 439.310 through KRS 439.3108 are applicable to the Department of Corrections.

KRS 439.310 reads as follows:

> The commission, with the approval of the secretary and the Governor, shall appoint a person charged with the administration of probation and parole laws, with the approval of the commissioner, shall appoint a number of probation and parole officers and other employees sufficient to administer the provisions of KRS 439.250 to 439.560; but no employee shall be appointed except in the manner hereinafter provided. The person charged with the administration of probation and parole laws shall have attained at least a bachelor's degree from an accredited college, and in addition, shall be a person with training and experience in probation, parole or other related form of welfare work.

KRS 439.310 makes clear that the provisions of KRS 439.250 to 439.560, including KRS 439.3106, were intended to create a framework in which the Department of Corrections supervises probationers and parolees. KRS 439.310 provides that probation and parole officers, along with other employees, are to administer the provisions of KRS 439.250 to 439.560. Further, KRS 439.3101 thru KRS 439.3108 refer to the "Department" with regard to the administration of probation and parole laws and "Department" means the Department of Corrections. KRS 439.250(3). In reading all of these statutes together, they set forth a system of managing an individual

who is on probation or parole.

KRS 439.3101(1) provides, "The department shall promulgate administrative regulations that require the supervision and treatment of supervised individuals in accordance with evidence-based practices." Subsection (2) sets forth minimum provisions of the Department must adopt in its regulations. KRS 439.3102 requires the department with training and KRS 439.3103 requires the department to submit a written report on its efforts. KRS 439.3104 sets forth how the department shall conduct its initial assessment risk of an individual upon intake into community supervision. KRS 439.3104(3)(c) indicates that it is the department which shall apply the results of any risk and needs assessment to compliant and noncompliant behavior. KRS 439.3105 establishes an administrative caseload supervision program for the department in monitoring high and low risk supervised individuals. KRS 439.3105(3) specifically indicates that if a supervised individual engages in criminal activity or exhibits signs or symptoms of substance abuse, it is the department's duty to determine the consequence.

KRS 439.3106 is the initial statute to refer to alternate sanctions:

> Supervised individuals shall be subject to:
>
> (1) Violation revocation proceedings and possible incarceration for failure to comply with the conditions of supervision when such failure constitutes a significant risk to prior victims of the supervised individual or the community at large, and cannot be appropriately managed in the

> community; or
>
> (2) Sanctions other than revocation and incarceration as appropriate to the severity of the violation behavior, the risk of future criminal behavior by the offender, and the need for, and the availability of, interventions which may assist the offender to remain compliant and crime-free in the community.

If there is a probation violation, KRS 439.3106 sets out the two options (1) revocation proceedings and possible incarceration or (2) other appropriate sanctions. KRS 439.3107(1) says, "The department shall, by January 1, 2012, adopt a system of graduated sanctions for violations of community supervision. ..." Subsection(2) requires the department to establish "an administrative review process" and subsection(3) requires the department to "establish by administrative regulation an administrative process to review graduated sanctions contested by supervised individuals ...."

KRS 439.3108 addresses how the department shall modify conditions of community supervision for the purpose of imposing graduated sanctions in accordance with KRS 439.3107. KRS 439.3108(7) even addresses what happens when a supervised individual successfully completes a graduated sanction.

Moreover, the legislature also intended to keep incarceration as a possible penalty when a supervised individual violates the terms of his probation. See *Jarrell v. Commonwealth*, 384 S.W.3d 195 (Ky.App.2012).

However, in cases in which the court has made graduated sanctions a condition of probation, KRS 439.3106 thru KRS 439.3108 provide a framework for the Department of Corrections to manage supervised individuals. In the event of a violation of supervision, the system of graduated sanctions allows the department to impose alternate sanctions on a supervised individual, in lieu of initiating revocation proceedings.

In construing a statute, a court "must look to the provisions of the whole statute and its object and policy." *Crosby v. Commonwealth*, 147 S.W.3d 56, 58 (Ky. 2004) (citations omitted). There is no mention of the trial courts in any of the statutes discussed above. They are aimed directly at the Department of Corrections. They were never intended to apply to the trial judges of the Commonwealth.

C. KRS 533.010, KRS 533.020, and KRS 533.020 provide trial courts authority and discretion in revoking probation.

KRS 533.010(1) provides that a defendant may be sentenced to probation or probation with an alternate sentencing plan for non-death penalty sentences in certain circumstances and provided they are not otherwise ineligible. KRS 533.030(1) allows probation to "such as the court, in its discretion deems reasonably necessary to insure that the defendant will lead a law-abiding life ...." The trial court's discretion is again emphasized in KRS 533.030(2) which lists a number of conditions the trial court can impose "in addition to any other reasonable condition."

KRS 533.010(6) then provides, in part: "Upon initial sentencing of a defendant or *upon modification or revocation of probation*, when the court deems it *in the best interest of the public and the defendant*, the court may order probation with the defendant to serve one of the following alternative sentences ...." (emphasis added).

KRS 533.020(1) again underscores the discretion of the trial court in the event a defendant violates the terms of probation:

> Conditions of probation shall be imposed as provided in KRS 533.030, but the court may modify or enlarge the conditions or, if the defendant commits an additional offense or violates a condition, revoke the sentence at any time prior to the expiration or termination of the period of probation.

These statutes provide wide discretion to the trial court to set and modify terms of probation and to revoke probation when "in the best interest of the public and the defendant." This broad discretionary authority granted by these statutes would be in conflict with the more limited authority in KRS 439.3106 if the latter statute controlled the discretion of the trial courts. When there is an apparent conflict between two statutes, reviewing courts "must attempt to harmonize seemingly divergent statutory directives if it is reasonably possible to do so." *Commonwealth v. Stambaugh*, 327 S.W.3d 435, 438 (Ky. 2010); *see also Commonwealth v. White*, 3 S.W.3d 353, 354 (Ky. 1999); *Commonwealth v. Halsell*, 934 S.W.2d 552 (Ky. 1996).

Here, there is a false conflict because, when fairly read, KRS 439.3106 only applies to the Department of Corrections. It is perfectly plausible to require very specific guidelines and protocols for an administrative agency tasked with the gigantic task of supervising all those on probation and parole while at the same time granting broader discretion with a circuit judge. In most instances, the Department will undoubtedly go through its protocols and consider graduated sanctions before recommending revocation. That does not mean the trial court's discretion is circumscribed when probation violations come to its attention through means other than the Department.

II. The trial court did not abuse its discretion in fully revoking Appellant's probation.

This discussion assumes *arguendo* that KRS 439.3106 is applicable to trial courts.

A trial court's decision to revoke probation is reviewed only for an abuse of discretion. *Commonwealth v. Lopez*, 292 S.W.3d 878, 881 (Ky. 2009); *see also Southwood v. Commonwealth*, 372 S.W.3d 882, 884 (Ky. App. 2012).

The statute Appellant considers at issue provides:

> Supervised individuals shall be subject to:
>
> (1) Violation revocation proceedings and possible incarceration for failure to comply with the conditions of supervision when such failure constitutes a significant risk to prior victims of the supervised individual or the community at large, and cannot be appropriately managed in the

> community; or
>
> (2) Sanctions other than revocation and incarceration as appropriate to the severity of the violation behavior, the risk of future criminal behavior by the offender, and the need for, and availability of, interventions which may assist the offender to remain compliant and crime-free in the community.

KRS 439.3106.

A. If specific findings of fact were required, Appellant waived appellate review by not requesting the trial court make specific findings. In any event, there was sufficient reason to justify revocation.

Appellant first takes the trial court to task for supposedly not finding that he posed a significant risk to the community and could not be appropriately managed in the community as seeming required by KRS 439.3106(1). Appellant acknowledges that the Court of Appeals found this "sub-issue" to be unpreserved but nevertheless insists it is preserved simply by arguing to the trial court he was entitled to graduated sanctions.[30] Those are two separate issues, however.

CR 52.01 requires specific findings of fact "[i]n all actions tried upon the facts without a jury or with an advisory jury" and "in granting or refusing temporary injunctions or permanent injunctions." A probation revocation is neither. CR 52.01 exempts most motion rulings from its scope: "Findings of

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[30] Brief for Appellant, p. 8.

fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41.02 [dealing with involuntary dismissals]." Moreover, as noted by the Court of Appeals in another decision,"The statutory language of KRS 439.3106 does not require the court to make specific findings of fact." *Southwood v. Commonwealth*, 372 S.W.3d 882, 884 (Ky. App. 2012).

Even if specific findings of fact were required, CR 52.02 specifically precludes reversal "unless such failure is brought to the attention of the trial court by a written request for a finding on that issue or by a motion pursuant to Rule 52.02." This Court has recently noted the applicability of CR 52.04 upon failing to request specific findings required by RCr 9.78 (suppression motions), *Rawls v. Commonwealth*, 434 S.W.3d 48, 61 (Ky. 2014); *see also Helphenstine v. Commonwealth*, 423 S.W.3d 708, 713-14 (Ky.2014). "[A]" defendant waives appellate review by declining to request more detailed findings." *Rawls* at 61. Here, Appellant failed to request specific findings either verbally or in writing. He has waived appellate review.

Appellant cites to *Rasdon v. Commonwealth*, 701 S.W.2d 716 (Ky.App. 1986) on the necessity of written findings in probation revocation proceedings. The Court of Appeals' statement on that issue was pure *dictum* because the court itself noted, "[T]his issue is also moot." *Id.* at 719. That court did not discuss CR 52 and, more fundamentally, the case to which the

court cited does **not** require the type of specific findings Appellant seeks to require. Instead, the Supreme Court has simply stated that when probation or parole is revoked, the prisoner is entitled to "'a written statement by the factfinders as to the evidence relied on and reasons for revoking (probation or) parole.'" *Gagnon v. Scarpelli*, 411 U.S. 778, 786 (1973) *quoting Morrisey v. Brewer*, 408 U.S. 471, 489 (1972). Here, the trial court entered a written order satisfying due process.

Appellant has alternately requested palpable error review. If the Court reviews for palpable error, it will find the trial court acted within its discretion in revoking probation.

The Court of Appeals upheld probation revocation in another case under similar facts in light of KRS 439.3106. *Jarrell v. Commonwealth*, 384 S.W.3d 195, 202-03 (Ky. App. 2012). The trial court in *Jarrell* orally expressed concerns at the evidentiary hearing about the defendant's violation of an express term of probation. *Id.* at 202. Here, the trial court was concerned because the Appellant ignored an express and important condition of probation, even knowing the trial court was open to temporary reprieves from its order of probation.[31] In *Jarrell*, the trial court found there was a substantial risk the defendant would violate the law and that the defendant's need for correctional treatment could best be served by commitment to a

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[31] Order, pp. 1-2, TR 80-81.

correctional facility. *Id.* at 202-203. Here, the trial court found Appellant likely to violate probation again.[32] It considered all of Appellant's post-probation conduct and found Appellant in need for treatment at a correctional facility.[33] In *Jarrell,* the trial court found that probation would unduly depreciate the seriousness of the defendant's. offense. *Id.* at 203. Here, the trial court also found that further probation would depreciate the seriousness of Appellant's offense.[34]

The only real difference between this case and *Jarrell* is that the defendant in *Jarrell* violated probation on the day of his sentencing and before he had the benefit of the remedial effects of probation. Here, the Appellant already had the benefit of the remedial effects of probation but violated the only express, non-standard condition of probation. This made him a great risk of violating probation again than the defendant in *Jarrell.* Appellant knew the trial court likely would have granted him permission to enter the state. Yet, he deliberately flouted the terms of his probation. Thus, there was sufficient evidence of both the violation and the need for revocation.

B. The trial court considered other sanctions.

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[32] Order, pp. 3-4; TR 82-83.

[33] Order, p. 4, TR 83.

[34] Order, p. 4, TR 83.

Appellant also claims, "Sanctions other than incarceration were required. The trial court erred in its belief that Mr. Kidd was not subject to graduated sanctions."[35] The trial court noted that graduated sanctions were not in the judgment sentencing him to probation.[36] However, the trial court then listened to counsel's argument and said it would review the entirety of Appellant's conduct since being probated and might invoke something less than full revocation.[37] The trial court fully considered a lesser sanction and simply determined that full revocation was necessary. It did not abuse its discretion in doing so.

Finally, Appellant makes the blanket assertion that he "suffered a grievous loss, a deprivation of liberty, by the government not following known procedures, by depriving Mr. Kidd of a state law entitlement, by applying state law arbitrarily, and by acting unreasonably, arbitrarily, and fundamentally unfairly."[38] Appellant's shotgun allegation does not identify any procedure not followed or any state law entitlement to which he was denied. He does not explain how state law was applied arbitrarily and does not explain how he was denied due process of law. It is therefore impossible

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[35] Brief, p. 12.

[36] VR Sup. 5/15/2012, 10:27:20.

[37] *Id.* at 10:51:15-10:53:25.

[38] Brief, p. 13 (footnote omitted).

to respond to these vague assertions and this Court should consider them to be without merit.

III. Appellant was not denied the right of cross-examination as it pertains to probation revocation hearings.

Appellant mistakenly claims the trial court denied his right to cross-examine witnesses. While there is a right to cross-examine witnesses at a probation revocation hearing, it is limited in nature and *not* co-extensive with the constitutional right of confrontation. Appellant had the opportunity to cross-examine both witnesses and actually did cross-examine Sharla Plowman.[39]

The government must provide certain due process rights in parole revocation hearings. *Morrissey v. Brewer*, 408 U.S. 471 (1972). The Supreme Court later extended these rights to probation revocation hearings. *Gagnon v. Scarpelli,* 411 U.S. 778 (1973). Among these rights are the right to cross-examine witnesses. *Id.* at 786; *accord Hunt v. Commonwealth*, 326 S.W.3d 437, 439 (Ky. 2010). This Court noted in *Hunt* that probation revocation proceedings are "more informal and require less proof than a criminal trial." *Hunt* at 439 *citing Gagnon* at 786–87. The rules of evidence do not apply and the Commonwealth needs to show violation only by a preponderance of the evidence. *Id.* (citations omitted). In referring to Plowman's limited hearsay

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[39] VR Sup., 05/15/2012, 10:35:26.

testimony about receiving phone calls, Appellant attempts to conflate the non-applicable rules of hearsay with the right to cross-examine witnesses. They are separate rules with different purposes.

As to the specific right to cross-examination, the U.S. Supreme Court has noted its limited nature in probation revocation hearings:

> An additional comment is warranted with respect to the rights to present witnesses and to confront and cross-examine adverse witnesses. Petitioner's greatest concern is with the difficulty and expense of procuring witnesses from perhaps thousands of miles away. While in some cases there is simply no adequate alternative to live testimony, we emphasize that we did not in *Morrissey* intend to prohibit use where appropriate of the conventional substitutes for live testimony, including affidavits, depositions, and documentary evidence.

Gagnon at 782, n.5.

Here, the Commonwealth needed only to show Appellant had returned to Kentucky. The trial court did so when it took judicial notice of its own records at the hearing, including the bench warrant.[40] The trial court also noted the post-arrest complaint on the Uniform Citation. *Id.* at 10:36:42. The trial court's written order specifically relied upon the executed bench warrant and the post-arrest complaint as proof Appellant had been found in

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[40] VR Sup. 05/15/2012, 10:28:44. As also noted in the Commonwealth's Counterstatement of the Case, Sharla Plowman testified she was aware that Appellant had been arrested by a sheriff's deputy in Owsley County.

Kentucky. Order, p. 2; TR 81. This is the sort of "documentary evidence" which *Gagnon* specifically allowed to substitute for live testimony. Even under the rules of evidence, the trial court was entitled to take judicial notice of its own records. *Hutson v. Commonwealth*, 215 S.W.3d 708, 718 (Ky. App. 2006) (the trial court could take judicial notice under KRE 201 of its own records showing prior felony convictions to prove PFO status).

In applying *Morrissey* and *Gagnon*, this Court has specifically held that an officer reading allegations from a Uniform Citation constituted admissible hearsay in a probation revocation hearing. *Barker v. Commonwealth*, 379 S.W.3d 116, 129-30 (Ky. 2012). The court noted that the defendant in that case had not presented a defense to revocation and neither did the Appellant in this case. Appellant presented no evidence at the hearing or elicit any testimony from the Commonwealth's witnesses as to the circumstances of why Appellant had returned to the state. While there was some interchange between the trial court and the attorneys about the reason Appellant had returned, that discussion assumed Appellant had entered Kentucky to visit a sick relative without approval. Appellant presented no actual proof on the matter. Appellant's argument essentially consisted of throwing himself on the mercy of the trial court.

Finally, it is difficult to ignore the fact that Appellant was at the hearing held in a courtroom in Kentucky. This is an instance where the

actual body proves the *corpus delicti.* The fact finder was entitled to infer Appellant voluntarily returned to Kentucky absent proof to the contrary such as fairies magically transporting Appellant across state lines. The courts of this state are not required to believe such fairy tales. *See Cain v. Commonwealth,* 554 S.W.2d 369, 375 (Ky. 1977) ("Their stories, especially Cain's, rival Grimm's Fairy Tales and are utterly uncorroborated.").

The trial court did not deny Appellant his limited right to cross-examine witnesses. Appellant's argument is without merit.

CONCLUSION

For all of the foregoing reasons, this Court should affirm the trial court's order revoking probation.

Respectfully Submitted

JACK CONWAY
Attorney General of Kentucky

James C. Shackelford
Assistant Attorney General
Office of Criminal Appeals
Office of the Attorney General
1024 Capital Center Drive
Frankfort, Kentucky 40061-8204
(502) 696-5342

Counsel for Commonwealth