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**Commonwealth of Kentucky
Supreme Court**

File No. 2007-SC-0922

Case No. 2006-CA-000897 and 2006-CR-001792

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SUPREME COURT CLERK

LARRY THOMAS JONES ET AL.

APPELLANT

v.

Appeal from Hickman Circuit Court
Hon. William Shadoan, Judge
Case No. 2000-CR-00001

And

Appeal from Calloway Circuit Court
Hon. Dennis R. Faust, Judge
Case No. 2001-CR-00128

COMMONWEALTH OF KENTUCKY

APPELLEE

Brief for Commonwealth

Submitted by,

JACK CONWAY

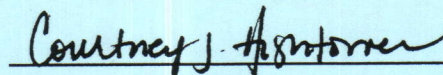
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CERTIFICATE OF SERVICE

I certify that the record on appeal has been returned to the Clerk of this Court and that a copy of the Brief for the Commonwealth has been mailed 1st Class, U. S. Mail, Postage Pre-paid this 26th day of May, 2009, to; Hon. William L. Shadoan, Judge, Hickman Circuit Court, 132 N. 4th St., Wickliffe, Ky. 42087; via electronic mail to: Hon. Timothy Langford, Commonwealth Attorney, P. O. Box 167, Hickman, Ky. 42050; Mailed 1st Class U. S. Mail postage Pre paid to Hon. Dennis R. Faust, Judge, Calloway Circuit Court, Judicial Building, 12 N. 4th St., Murray, Ky. 42071; electronically mailed to: Hon. Mark Blankenship, Commonwealth's Attorney, 304 N. 5th St., Murray, Ky. 42071 and delivered via state messenger mail to: Hon. Jamesa L. Drake, Assistant Public Advocate, Department for Public Advocacy, 100 Fair Oaks Lane, Suite 302, Frankfort, Ky. 40601



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INTRODUCTION

Larry Thomas Jones, hereinafter referred to as appellant Jones, entered a guilty plea to four counts of First Degree Sexual Abuse. Appellant received a sentence of six (6) years in the penitentiary. Gerald Way Henley, hereinafter referred to as appellant Henley, entered a guilty plea to two counts of First Degree Sexual Abuse. Appellant Henley received a total sentence of three (3) years in the penitentiary.

STATEMENT CONCERNING ORAL ARGUMENT

The Commonwealth does not believe oral argument is necessary in this appeal, as the issues are plainly set forth in the briefs and the circuit record. However, should this court decide that oral argument would be helpful, the Commonwealth will gladly appear before the Court to present its case.

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COUNTERSTATEMENT OF THE CASE

Larry Thomas Jones

On April 5, 2001, appellant Jones entered a guilty plea to four counts of first degree sexual abuse. Appellant Jones received a sentence of six (6) years in the penitentiary. (Jones Transcript of the Record, hereinafter referred to as "Jones TR", 6). In a memorandum regarding appellant Jones' termination from the sex offender treatment program, it was established that appellant Jones was serving his sentence at the Kentucky State Reformatory and was paroled on July 28, 2004. Appellant Jones was received into the mandatory sex offender treatment program at the Western Kentucky Correctional Complex on December 17, 2004. However, on March 8, 2005, due to excessive unexcused absences, appellant Jones was terminated from the program. Appellant Jones' parole was revoked and he was ordered to serve the remainder of his six year sentence. (Jones TR, 16). He was then placed on mandatory conditional discharge following his release from custody. (Id.). In the order revoking his conditional release, it was established that appellant Jones was engaging in substance abuse, most recently cocaine and marijuana. (Jones TR, 18). Following a hearing, the court then revoked appellant Jones' conditional release because appellant Jones had committed another felony offense within the ninety days of his conditional release. (Jones TR, 19).

Gerald Way Henley

On May 24, 2001, Gerald Henley, hereinafter referred to as appellant Henley, was indicted on two counts of First Degree Sexual Abuse. (Henley Transcript of Evidence, hereinafter referred to as Henley TR, 1). On September 10, 2001, appellant

Henley entered a guilty plea to two counts First Degree Sexual Abuse. Final Judgment was entered on September 11, 2001. (Henley TR, 34). On March 8, 2006, the Commonwealth filed a motion to revoke appellant Henley's conditional discharge for violating numerous terms of his conditional discharge. (Henley TR, 38). On March 29, 2006, the trial court revoked appellant Henley's conditional discharge. (Henley TR, 62).

Appellants both appealed their convictions to the Kentucky Court of Appeals. Appellants argued that KRS 532.043 was unconstitutional because there was a violation of separation of powers clause of the Kentucky Constitution. In the Court of Appeals, the appellants reasoned that conditional discharge, as set forth in the statute KRS 532.043, was more akin to parole than probation, thus the judiciary had usurped the power of the executive branch by deciding if there was a violation of this conditional discharge. In light of the fact that appellant Jones and appellant Henley presented the same issue for appellate review, the Kentucky Court of Appeals granted their motion for consolidation. However, the Kentucky Court of Appeals disagreed with their argument that KRS 532.043 was unconstitutional. The Court of Appeals concluded that there was no violation of the separation of powers clause. The Kentucky Court of Appeals reasoned that conditional discharge is more akin to probation than parole, and probation is a function of the judicial branch. (Please see the Jones and Henley slip opinions in appellants' brief).

ARGUMENT

THE KENTUCKY COURT OF APPEALS CORRECTLY DETERMINED THAT KRS 532.043 WAS CONSTITUTIONAL.

Appellant argues that KRS 532.043 violates the separation of powers clause of the Kentucky Constitution.

A. The issue presented in appellant's brief is unpreserved for review.

In support of their argument that KRS 532.043 violates the separation of powers clause, appellants first argue that entry of a final sentencing order is when the sentencing power of the judiciary gives way to the sentencing power of the executive branch. Appellants then assert that KRS 532.043 violates the separation of powers clause because it allows the judiciary to modify the sentence after it has lost jurisdiction.

However, in the Kentucky Court of Appeals and in their motion for discretionary review, they argued that the power to revoke conditional discharge lay with the executive branch because conditional discharge was more like parole than probation. The arguments made in appellants' brief in this court are different from the arguments the appellants made in the Kentucky Court of Appeals and in their motion for discretionary review. The appellants will not be permitted to feed one can of worms to the trial court and another to the appellate court. Kennedy v. Commonwealth, 544 S.W.2d 219, 222 (Ky., 1976). This court should not review the issue as presented in appellants brief because it is not the same as they presented in the court below or in their motion for discretionary review.

B. The issue presented is moot.

Appellants admit in their brief that this issue is moot because each has

served out his conditional discharge sentence. However, appellants urge this court to review the constitutionality issue because the “underlying dispute is one capable of repetition, yet evading review.” Specifically, appellants argue that because the conditional discharge revocation sentence depends on the amount of time one has already served on the conditional discharge, and because no conditional discharge under KRS 532.043 may be longer than five (5) years, that the challenged action is too short in duration to be fully litigated prior to its cessation or expiration.

The appellants’ argument is without merit. In Jones’ Final Judgment and Henley’s Final Judgment, there is a clause mandating the three conditional discharge following release from incarceration or parole. (Jones TR, 6 and Henley TR, 35). Each of the appellants was given a copy of his Final Judgment. Therefore, each appellant was informed upon entry of his guilty plea that he would be subject to the mandatory three (3) year conditional discharge under KRS 532.043. KRS 532.043(5) specifically allows for the Commonwealth Attorney to petition the court to revoke the defendant’s conditional discharge and reincarcerate the defendant in the event of a violation. The appellants could have challenged the constitutionality of KRS 532.043 on direct appeal immediately after they were finally sentenced. Yet, both of the appellants conveniently waited until they had violated the terms of their conditional discharge, and were facing revocation, before challenging the constitutionality of KRS 532.043. Consequently, appellants’ argument that the underlying dispute was too short in duration to be fully litigated prior to its cessation or expiration is without merit. This court should not review the issue regarding the constitutionality of KRS 532.043 because the issue is moot as it pertains to

these two appellants.

C. The Attorney General received no notice of this constitutional challenge.

The pertinent sections of KRS 418.075 read as follows:

1) In any proceeding which involves the validity of a statute, the Attorney General of the state shall, before judgment is entered, be served with a copy of the petition, and shall be entitled to be heard, and if the ordinance or franchise is alleged to be unconstitutional, the Attorney General of the state shall also be served with a copy of the petition and be entitled to be heard.

(2) In any appeal to the Kentucky Court of Appeals or Supreme Court or the federal appellate courts in any forum which involves the constitutional validity of a statute, the Attorney General shall, before the filing of the appellant's brief, be served with a copy of the pleading, paper, or other documents which initiate the appeal in the appellate forum. This notice shall specify the challenged statute and the nature of the alleged constitutional defect.

Although appellants did present the issue regarding the constitutionality of KRS 532.043 to the trial court at the appellants' revocation hearings, no notice was ever given to the Attorney General's Office regarding this constitutional challenge. The statute specifically requires that notice be given to the Attorney General before the judgment is entered. The fact that appellants failed to do this provides this court with sufficient basis to reject the challenge in this case. Brashars v. Commonwealth, 25 S.W.3d 58 (Ky.2000).

Appellants argue that because the Kentucky Court of Appeals did not address the issue of notice in its opinion, the Commonwealth forfeited any opportunity to raise this argument in this Court by failing to file its own motion for discretionary review.

This is not the law in Kentucky. The Commonwealth is entitled to argue any theory which supports the decision of the Kentucky Court of Appeals. See Noel v. Commonwealth, 76 S.W.3d 923 (Ky.2002).

D. The Kentucky Court of Appeals correctly determined that the judiciary had the power to revoke appellant's conditional discharge because conditional discharge is more akin to probation than parole.

The Commonwealth will first address the issue presented in appellants' motion for discretionary review, the one decided by the Kentucky Court of Appeals.

There is little difference between probation and conditional discharge. Pedigo v. Commonwealth, 644 S.W.2d 355 (Ky.App.1983). Probation is a function of the judicial branch while parole is a function of the executive branch. Mullins v. Commonwealth, 956 S.W.2d 222 (Ky.App.1997). The decision to grant or revoke probation is a decision within the sound discretion of the trial court. Tiryung v. Commonwealth, 717 S.W.2d 503 (Ky.App.1986); Terhune v. Commonwealth, 907 S.W.2d 779 (Ky.App.1995); Kiser v. Commonwealth, 829 S.W.2d 432 (Ky.App.1992). Whether to grant shock probation is also within the discretion of the trial court. Wilson v. Commonwealth, 839 S.W.2d 17 (Ky.App.1992). KRS 533.030(5) and KRS 533.060(2) contemplate shock probation as being similar to conditional discharge and other forms of probation. Id.

Pedigo and Wilson establish that conditional discharge is more like probation, than parole. Tiryung, Terhune and Kiser establish that the power to revoke conditional discharge is properly in the jurisdiction of the trial court. See also KRS 533.010, KRS 533.020, KRS 533.040 and KRS 533.050. The statutes clearly

contemplate conditional discharge as similar to probation, rather than parole. The power to change these statutes lies within the legislature, not the judiciary. Mullins, *supra*.

The Sixth Circuit has also determined that conditional discharge is the functional equivalent of probation. United States v. Miller, 56 F.3d 719, 722 (6th Cir.1995) ("We thus hold that conditional discharge [under Kentucky law] is the 'functional equivalent' of an unsupervised probation under U.S.S.G. § 4A1.1(d)."); Harris v. United States, 204 F.3d 681, 682-83 (6th Cir.2000) (determining that Ohio's equivalent of a "conditional discharge" sentence qualifies as a term of probation of at least one year under §4A1.2(c)(1)); Other courts, have reached a similar conclusion, holding that "conditional discharge" and "unsupervised probation" alike constitute "probation" for purposes of § 4A1.2(c)(1). See United States v. Lloyd, 43 F.3d 1183, 1188 (8th Cir.1994); United States v. Caputo, 978 F.2d 972, 977 (7th Cir.1992); United States v. McCrudden, 894 F.2d 338, 339 (9th Cir.1990) ("The guidelines make no provision for treating 'unsupervised' probation as less than probation.").

Consequently, as conditional discharge is more akin to probation than parole, there is no violation of the separation of powers clause in allowing the courts to have the authority to revoke conditional discharge under KRS 532.043.

E. The trial court retained jurisdiction by operation of statute.

The Commonwealth will now address the argument as presented in appellants' brief on discretionary review.

Appellants argue that entry of a final sentencing order is when the sentencing power of the judiciary gives way to the sentencing power of the executive

branch. Thus, appellants assert that KRS 532.043 violates the separation of powers clause because it allows the judiciary to modify the sentence after it has lost jurisdiction.

A court may retain jurisdiction over a particular case by operation of rule or statute, and also by operation of its own judgment, provided it is not precluded by any statute from doing so. Griffin v. Commonwealth, 942 S.W.2d 289 (Ky.1997). A statute may confer on the courts the duty to administer certain types of laws, but not to legislate. Commonwealth v. Raines, 847 S.W.2d 724 (Ky.1993), overruled on other grounds in Commonwealth v. Howard, 969 S.W.2d 700 (Ky.1998).

In Hyatt v. Commonwealth, 72 S.W.3d 566 (Ky.2002), the appellant raised a separation of powers issue with regard to the assignment of risk assessment in sex offense registration cases. The appellant claimed that the assignment of the duty to conduct a risk assessment hearing to the circuit court violated the separation of powers doctrine and such hearing should be conducted by the parole board. Id. at 578. The Kentucky Supreme Court rejected this argument, concluding that the legislature determined that the sentencing courts were most familiar with the facts surrounding the offender, and therefore, would be most capable of handling the risk determination efficiently. Id. at 579.

Likewise, under KRS 532.043(5), the legislature has specifically determined that the trial court will make the decision on whether to revoke the defendant's conditional discharge. It is within the power of the legislature to determine what unit of government was best suited to perform certain civil responsibilities. Hyatt, supra at 579. In this case, just like the Hyatt case, the sentencing courts were most

familiar with the facts surrounding the cases and were most capable of deciding whether revocation was appropriate. KRS 532.043 does not violate the separation of powers clause of the Kentucky Constitution.

F. The Kentucky Supreme Court has addressed this issue.

A statute will not be invalidated as unconstitutional unless it clearly, unequivocally and completely violates the provisions of the constitution. Wilfong v. Commonwealth, 175 S.W.3d 84 (Ky.2005). In Wilfong, the appellant challenged the constitutionality of KRS 532.043, arguing that the statute violated the separation of powers doctrine. More specifically, the appellant argued that KRS 532.043 violated the separation of powers doctrine because it infringed upon the judiciary's duty to administer justice. The Kentucky Supreme Court concluded that KRS 532.043 did not violate the separation of powers doctrine by usurping judicial authority or by infringing upon judicial functions. Id. At 93.

In this case, the appellants have argued just the opposite, that KRS 532.043 is unconstitutional as the executive branch should be the body with jurisdiction to revoke the conditional discharge. However, in Wilfong, the Kentucky Supreme Court held that KRS 532.043 did not violate the separate of powers doctrine. Further, the Court specifically concluded that it was the legislature that had the exclusive authority to establish punishment for crimes subject only to substantive constitutional restrictions such as due process, equal protection, ex post facto or cruel and unusual punishment. Id. At 92. The legislature established the punishment for the crime in this case and specifically authorized the judiciary with discretion to revoke the conditional discharge if

there was a violation of the terms. Therefore, it is only the legislature who has the authority to change which body of government has the jurisdiction to revoke conditional discharge under KRS 532.043. Accordingly, the appellants' argument is without merit.

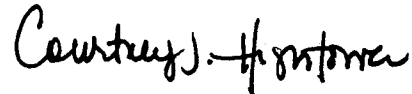
CONCLUSION

Wherefore, based upon all of the foregoing, the decision of the Kentucky Court of Appeals should be affirmed.

Respectfully submitted,

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