COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
2013-SC-000420-D

MIKAIL SAJJAAD MUHAMMAD — APPELLANT

ON REVIEW FROM COURT OF APPEALS

V. NO. 2013-CA-000018
OLDHAM CIRCUIT COURT NO. 12-CI-00807

KENTUCKY PAROLE BOARD — APPELLEE

REPLY BRIEF FOR APPELLANT

Submitted by:

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Certificate

The undersigned does hereby certify that the original and 10 copies of this Reply Brief for Appellant will be hand-delivered this 24th day of September, 2014, to the Office of the Clerk, Supreme Court of Kentucky, Room 209, State Capitol, 700 Capital Ave., Frankfort, Kentucky 40601, for filing, and that a true and correct copy of this brief was served by mail, postage prepaid, this 24th day of September, 2014, upon John Cummings, Counsel for Kentucky Parole Board, Justice and Public Safety Cabinet, Office of Legal Services, 275 E. Main Street, Frankfort, KY 40602; Hon. Karen Conrad, Chief Circuit Judge, Oldham County Courthouse, 100 W. Main Street, La Grange, KY 40031; and Sam Givens, Clerk of the Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky, 40601.

AARON REED BAKER

PURPOSE OF REPLY BRIEF

This Reply Brief for Appellant responds to the arguments raised in the Parole Board's brief.

TABLE OF POINTS AND AUTHORITIES

ARGUMENT

A. Habeas is not only the appropriate mechanism for bringing Appellant's action, but the only method available to him.

Appellee argues that because Appellant is challenging the decision of the Parole Board to revoke his postincarceration supervision, the proper mechanism would have been to proceed under a writ of mandamus. Appellee has never previously raised this argument. It is well-established that an appellant "will not be permitted to feed one can of worms to the trial judge and another to the appellate court." Kennedy v. Commonwealth, 544 S.W.2d 219 (Ky. 1976)(overruled on other grounds). Nevertheless, Appellant will address the argument. Every case cited by Appellee deals with the situation where the decision of the Parole Board, not the authority to make that decision, is being challenged. Appellee's situation is clearly distinguishable. If the Parole Board had retained the authority to make a decision on the revocation of Appellant's postincarceration supervision, it would not be disputed that his new conviction was sufficient grounds for revocation. Thus, it is not the decision itself that it being challenged. Rather, the issue is that the Commonwealth's Attorney had already made a binding agreement on behalf of the entire Commonwealth that the Parole Board would not revoke Appellant. The cases cited by Appellee are not on point.

Appellee's next argument is the assertion that because the Parole Board has been granted, by statute, the authority to decide revocation, Appellant was not being illegally detained, and therefore the writ of habeas corpus was not available to him. This argument is far too simplistic. Appellant was incarcerated in the custody of the Kentucky Department of Corrections, despite a plea agreement with the Commonwealth's Attorney that he would not be. This was an illegal detention. The Parole Board relies on Board of Prison Com'rs v. Crumbaugh, 170 S.W. 1187 (Ky. 1914) for the proposition that an

inmate is not illegally detained when the Parole Board has issued a warrant for his detention. However, the facts in Crumbaugh are that the inmate was paroled, and thereafter "was carrying his gun around and molesting people in the neighborhood." Id. Notably, there was no binding agreement made by the Commonwealth in that case *not* to exercise the authority to reincarcerate the inmate.

The plea agreement in this case was a binding agreement that the Commonwealth would not reincarcerate the Appellant on his postincarceration supervision. Instead, Appellant was reincarcerated and was being held in the custody of the Department of Corrections illegally. Since he was detained by the Kentucky Department of Corrections in violation of a plea agreement, the writ of habeas corpus was available to him.[1]

Appellee next addresses the argument that the writ of habeas corpus is not available where a direct appeal or collateral attack would suffice. Appellee begins by misconstruing Appellant's argument that "[i]f the sentence were vacated, [he] might proceed to trial and prevail, but he would not get back the time already spent in prison." This is not an argument for habeas as a more expeditious form of relief, but an argument about the *sufficiency* of relief under RCr 11.42. While an RCr 11.42 proceeding would take longer, that concern is addressed by the rule that habeas is only available where an inmate is entitled to immediate release. The bigger problem with RCr 11.42 is that the only relief available is vacating Appellant's plea—he would then have to prevail at a trial to prevent revocation of his postincarceration supervision. Even with such an unlikely

[1] Although the Kentucky Parole Board has intervened and continued this action as the "real party in interest," the writ was properly issued to the original defendant—the warden of the facility where Appellant was incarcerated. Counsel for the Kentucky Parole Board is the only attorney who has ever appeared for the Commonwealth in this case, despite it being instituted against a separate, but correct, agency. This fact alone lends support to Appellant's argument that the executive branch of the Commonwealth is properly viewed as a single entity when interpreting plea bargains.

outcome, he would never get back the time already served in prison (i.e. his performance under the bargain).

There is a much more compelling argument regarding the availability of RCr 11.42 to Appellant, but the Appellee has attempted to paint it as unpreserved.[2] The argument is that RCr 11.42, regardless of the adequacy of the relief available under it, is not available to Appellant because the three-year time limited under RCr 11.42(10) has passed on his original 2008 conviction that imposed postincarceration supervision, and he is no longer serving the sentence on his more recent conviction that gave rise to this case, which makes RCr 11.42 unavailable to him in that case.

Appellee also attempts to blame the statute of limitations issue on Appellant, saying that "Appellant could have continued to pursue his RCr 11.42 motion filed in Fayette Circuit Court on grounds of ineffective assistance of counsel, instead of dismissing it in favor of a habeas action." The fact that the Fayette County Commonwealth's Attorney hadn't yet moved to dismiss the motion does not make it timely. It wasn't. Appellee's suggestion of filing a CR 60.02 motion is also unhelpful—a 60.02 also would not have provided sufficient relief.

B. The Commonwealth's Attorney's plea agreements are binding on the entire Commonwealth.

Appellee accuses Appellant of failing to cite any authority for the proposition that a Commonwealth's Attorney's plea bargaining authority would allow him to make promises regarding postincarceration supervision revocation. Appellee's argument is too

[2] Appellee's brief asserts that "[t]hese arguments were not raised by Appellant in the action below." Brief for Appellee at 7-8. This is false. The argument was raised in Appellant's Motion for Reconsideration in the Court of Appeals. There was no opportunity to raise it in briefing since expedited appeals from habeas actions are not briefed at the Court of Appeals. So, while Appellee is correct that an issue not raised in an intermediate appellate court may not be raised on appeal to the next higher court, it is incorrect in saying that this argument is a new one. It was raised at the first possible instance in the Court of Appeals.

clever by half. The Commonwealth's Attorney has broad authority to make plea agreements. The fact that postincarceration supervision did not exist under the common law is immaterial. Neither the Persistent Felony Offender statute nor shock probation existed in common law, and yet Commonwealth's Attorneys can agree to drop PFO counts or recommend shock probation. Lie detector tests did not exist at common law, and yet the Commonwealth's Attorney can bargain that if one is passed, a murder charge will be dropped. *See* Workman v. Commonwealth, 580 S.W.2d 206 (Ky. 1979)(overruled on other grounds).

Appellee offers no authority for the proposition that the Commonwealth's Attorney is limited in what executive branch functions he can use to plea bargain.

Appellee suggests that because the Commonwealth's Attorney was removed from the postincarceration supervision revocation process by H.B. 463, he cannot use it as a bargaining chip. There is a vast chasm of difference between taking away the responsibility to make a revocation recommendation and taking away the ability to use non-revocation as a bargaining chip. No provision in H.B. 463 says that the Commonwealth's Attorney can't use postincarceration supervision revocation as a bargaining chip. The change in H.B. 463 was a clear response to a separation of powers problem recognized by this Court in Jones v. Commonwealth, 319 S.W.3d 295 (Ky. 2010). The removal of the Commonwealth's Attorney from the revocation process by H.B. 463 was a purely procedural consideration, not a constitutional one.

Appellee compares binding the Parole Board in this plea agreement to a plea agreement binding the Kentucky Medical Board or the Kentucky Bar Association ("KBA"). These comparisons are ridiculous on their face. The Parole Board is an agency

within the executive branch. Its function, unlike most other executive branch agencies, is an integral part of the Commonwealth's criminal justice system. It is closely related to the Commonwealth's Attorneys and the Department of Corrections. As any Kentucky-licensed attorney should know, the KBA is an independent agency of this Court. The KBA is not accountable to Kentucky's legislative or executive branches of government. Ex Parte Auditor of Public Accounts, 609 S.W.2d 682 (Ky. 1980). As for the State Board of Medical Licensure, the question of whether the Commonwealth's Attorney can make a plea agreement which is binding on that entity is an interesting one. The Appellee cites no authority to suggest that he could not, relying instead on the mere appearance that such a state of affairs would be impermissible. Perhaps it would. The State Board of Medical Licensure is an independent board under state government. KRS 311.530(1). As the governor has the authority to appoint members, it would appear to be an executive or quasi-executive agency. It is clearly not, however, a part of the Commonwealth's criminal justice system. Appellee's analogy is not helpful as it creates more questions than it answers. The Kentucky Parole Board is different from the examples cited by Appellee because it is a part of the overall executive structure created to deal with crime and punishment in the Commonwealth, just as the Commonwealth's Attorney is.

Appellee argues that the Commonwealth Attorney has no authority to exercise the power of the Parole Board. He is not. He is exercising his own plea bargaining power. The Commonwealth's Attorney is not making the decision whether or not to revoke postincarceration supervision. This is demonstrated by the fact that he has no power *to* decide to revoke a defendant's postincarceration supervision. Agreeing *to* a revocation

would be outside his powers. Instead, he is agreeing for that decision not to be made at all. It is a subtle, but important, distinction.

Appellee next turns to apparent authority, arguing that the Commonwealth's Attorney cannot have apparent authority to make such agreements because it requires the principal to hold out the agent as possessing such power. The Commonwealth's Attorney is an agent of the Commonwealth of Kentucky. The Commonwealth has certainly held out the Commonwealth's Attorney as having authority to make wide-ranging and binding plea agreements. This apparent authority has been previously recognized by this Court, which held that "[i]t is plain that the Commonwealth, acting through its agents **who had apparent if not actual authority**, entered into an agreement with Workman to abandon their prosecution of him if he passed a polygraph examination given by the Kentucky State Police." Workman, *supra*, at 207 (emphasis added).

C. Equitable principles require specific performance of this plea agreement, even if it is deemed unlawful or unauthorized.

"If the government breaks its word, it breeds contempt for integrity and good faith. It destroys the confidence of citizens in the operation of their government and invites them to disregard their obligations. That way lies anarchy." Workman, *supra*.

It does not matter whether the Commonwealth had the power to make this agreement. The agreement was made, and the Appellant upheld his end. Allowing the Commonwealth to renege on its bargain would breed contempt for the ability of the Commonwealth's criminal justice system to operate fairly.

The cases cited by the Appellee in its argument against specific performance are not remotely on point. Skiles v. Commonwealth, 757 S.W.2d 212 (Ky.App. 1988) discusses the illegal downward departure from a plea agreement. McClanahan v.

Commonwealth, 308 S.W.3d 694 (Ky. 2010) dealt with hammer clause in excess of the statutory maximum. Plea agreements, in addition to being governed by general contract principles, are also governed by constitutional principles.[3] That a defendant may not, in his ignorance, agree to a sentence in excess of the statutory maximum does not mean that specific performance of a plea agreement *against the Commonwealth* is not permissible.

Despite Appellee's best efforts to characterize this as a settled issue in Kentucky law, it would appear that this case presents a question of first impression in regards to specific performance of an *arguably* illegal plea bargain. Appellee makes the obvious statement that the cases cited by Appellant from other jurisdictions are not controlling. This Court is certainly aware of the persuasive, rather than authoritative, value of cases from outside Kentucky. Amusingly, though, the Appellee then makes the statement that "[a] number of jurisdictions follow Kentucky's approach," which would seem to be an argument by Appellee that the cases from those specific jurisdictions should sway this Court. Unfortunately, the Appellee utterly fails to cite to any cases that support his proposition that other jurisdictions follow Kentucky's non-existent approach.

Given, then, that Kentucky law produces no cases directly on point, and that other jurisdictions cited by Appellant in his original Brief provide persuasive support for enforcing this plea agreement, and Appellee having failed to cite any other jurisdictions' cases to the contrary, the argument stands that an unlawful or unauthorized plea agreement must be specifically enforced when there is no other sufficient remedy.

Appellee makes an unpersuasive argument that H.B. 463's purpose in reducing

[3] "[I]f the offer is made by the prosecution and accepted by the accused, either by entering a plea or by taking action to his detriment in reliance on the offer, then the agreement becomes binding and enforceable. Constitutional as well as contractual rights become involved." Commonwealth v. Reyes, 764 S.W.2d 62 (Ky. 1989).

recidivism would be undermined by enforcement of this bargain. As this Court is aware, one of the primary motives behind H.B. 463 was the reduction in incarceration rates. *See* KRS 196.288. The imposition of the balance of a five-year period of postincarceration supervision on top of a three-year prison sentence for theft is precisely the sort of piling on of incarceration periods that drives up prison costs. Perhaps more importantly, Appellee's argument ignores a much more fundamental public policy at issue here: the Commonwealth must not be allowed to "welsh on its bargain." Workman, *supra*, at 207.

D. The Commonwealth must be estopped from arguing that its bargain is unenforceable because Appellant relied on its promise.

Appellee's mention of promissory estoppel is another straw man argument—promissory estoppel was not raised by Appellant. Instead, Appellant argues that equitable estoppel applies to these facts. Appellee attempts to argue against equitable estoppel as well. First, Appellee argues that the circumstances must be "truly extraordinary" to apply to a government agency. As an example, Appellee offers the situation where an "agency deliberately misleads a party and then acts against the party for relying on the misinformation." Brief for Appellee at 16. In this case, whether deliberately or not, the Commonwealth's Attorney misled Appellant, and the Parole Board acted against Appellant who was relying on the misinformation.

Appellee then rehashes his public policy arguments. As argued above, the public policy of instilling confidence in the Commonwealth's Attorneys' bargains outweighs any public policy against using postincarceration supervision revocation in bargaining. Equitable estoppel is not made inapplicable by public policy considerations.

E. There was no mutual mistake as to the legal effect of the plea agreement.

Appellee's argument is that the plain language of the plea agreement only required the Commonwealth's Attorney not to move to revoke Appellant's

postincarceration. Since he was no longer responsible for that function, the argument goes, he didn't make the motion, and the plea agreement was upheld.

This argument is, to be frank, disgusting.

The language of the plea agreement seemed to mirror the pre-Jones, pre-H.B. 463 statutory scheme for postincarceration supervision. Nevertheless, the Appellee's attempt to suggest that the Court should look strictly at the language of the agreement, and not to its obvious intent, is a jaded attempt to inject a factual dispute into a case that would otherwise be a pure legal question.[4] This Court need not engage in speculation to determine the "intent" of the plea bargain. There can be no doubt that Appellant believed that his plea agreement would not result in the revocation of his postincarceration supervision. The record is clear that it was precisely the impending revocation that motivated him to move to withdraw the first plea in his 2011 case. After withdrawing his plea, the agreement not to revoke was the material term that induced him to re-enter a plea rather than proceed to trial. His trial attorney's affidavit, cited by the Parole Board, further makes clear that she also believed that this agreement would prevent the revocation of his postincarceration supervision.

The only party about whose motives this Court must speculate is the Commonwealth's Attorney. There is no extrinsic evidence in the record about what the Commonwealth's Attorney intended by making the agreement not to move to revoke. Yet there are only two possibilities. The first is that he was not up to speed on his duties post-Jones and post-H.B. 463, and by agreeing not to move to revoke the postincarceration

[4] The added benefit of Appellee's argument is by pretending that there's confusion about the intent of the plea bargain, he can then suggest that the writ of habeas corpus is not an appropriate mechanism for relief because there are factual questions raised by the plea agreement that were not resolved by the summary habeas proceeding.

supervision, he intended to create a bargain that would result in Appellant not being revoked. If that is the case, then the intent of the parties is clear.

The second possibility is that the Commonwealth's Attorney was aware of the change in the law and knew that by agreeing not to move to revoke, he was really not agreeing to anything at all and that Appellant would still be revoked. While we cannot know for certain whether the Commonwealth's Attorney was acting unscrupulously by agreeing to something that he knew full well was not his function any longer, that is not a factual question that this Court must resolve because, in the unlikely event that a Commonwealth's Attorney would act so repugnantly, the Commonwealth would be estopped from arguing that he had never meant to agree to non-revocation, but merely to not make a motion that he wasn't required to make. Estoppel is the proper doctrine to apply, as discussed above, when there is a material misrepresentation by a party to a contract, as this clearly would have been.

CONCLUSION

This is, at its root, a simple case to decide. No mechanism for relief was available to Appellant other than the writ of habeas corpus, and it was the appropriate mechanism under the applicable legal standards. More fundamentally, this case is about whether the Commonwealth may welsh on a bargain it made with Appellant, and under which it induced him to perform by serving his sentence. In any justice system worthy of the name, it simply may not.

Respectfully submitted,

AARON REED BAKER