COMMONWEALTH OF KENTUCKY
SUPREME COURT
NO. 2013-SC-000828

HON. ANN BAILEY SMITH (CHIEF JUDGE, JEFFERSON DISTRICT COURT) — APPELLANT

v.

COMMONWEALTH OF KENTUCKY, *ex rel.* MICHAEL J. O'CONNELL, et al. — APPELLEES

APPEAL FROM JEFFERSON CIRCUIT COURT
Honorable Judith McDonald-Burkman
No. 13-CI-003689

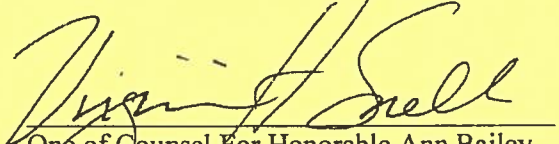
REPLY BRIEF FOR APPELLANT HON. ANN BAILEY SMITH, CHIEF JUDGE, JEFFERSON DISTRICT COURT

Virginia Hamilton Snell
Deborah H. Patterson
Sara Veeneman
WYATT, TARRANT & COMBS, LLP
2800 PNC Plaza
500 W. Jefferson St.
Louisville, Kentucky 40202
502.589.5235

Counsel for Honorable Ann Bailey Smith, Chief Judge Jefferson District Court

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of this Reply Brief has been served upon the following, by U.S. Mail, on this the 3rd day of September, 2014: Samuel P. Givens, Jr., Kentucky Court of Appeals, 360 Democrat Dr., Frankfort, Kentucky 40601, Hon. Judith McDonald-Burkman, Judicial Center, 700 W. Jefferson St., 8th Floor, Louisville, Kentucky 40202, David A. Sexton, Assistant Jefferson County Attorney, Fiscal Court Building, 531 Court Place, Suite 900, Louisville, Kentucky 40202, J. Bruce Miller, J. Bruce Miller Law Group, 325 W. Main St., 20th Floor, Louisville Kentucky 40202, and Michael J. O'Connell, Jefferson County Attorney, Jefferson Hall of Justice, 600 W. Jefferson St., Louisville Kentucky 40202



One of Counsel For Honorable Ann Bailey Smith, Chief Judge Jefferson District Court

STATEMENT OF POINTS AND AUTHORITIES

May It Please The Court:

The County Attorney prefaces his Brief announcing that he "never made the assertion" that he could unilaterally dismiss a traffic case. Whatever he asserted, it cannot determine the holding of the Court. But his "prefatory statement" is telling, nevertheless, in revealing the manner in which Appellees' Brief handles the record and the law. After instructing Mr. Higgins there was "no need" to appear in court, the County Attorney unilaterally stamped his case jacket "dismissed" before handing it to the Judge (Appellant's Brief, App. B ("Opinion") at 12). The County Attorney repeatedly says he filed a written motion to dismiss, but he only did so in June 2013, weeks after the April hearing when the Judge advised "you did not get approval of the trial court," to which he responded: "We don't need it, your honor" (Appellant's Brief, App. K at 5). If the County Attorney did not insist on the unilateral right to dismiss cases, the Circuit Court would not have needed to order him to seek the District Court's permission (Appellant's Brief, App. A ("Writ") at 4). Even today, the County Attorney continues to send letters inviting offenders to sign up for DSL on the promise "your citation will be dismissed." The Legislature certainly can give county attorneys the ability to establish traffic safety programs. But once a citation is issued, the judiciary alone has the power to dismiss and, as a condition, impose court costs.

I. THE IMPOSITION OF COURT COSTS IS NOT CONTRARY TO LAW

The County Attorney devotes more than ten pages to his statutory construction argument, relying on one subsection of KRS 24A.175; two inapposite cases involving issues regarding whether an indigent defendant has to pay court costs; statements of purported legislative intent made by single legislators, which under Kentucky law have

no binding or persuasive effect; and an informal Attorney General opinion even he admits has no binding authority.

But, at bottom, the County Attorney's position flows from one erroneous predicate: court costs may only be imposed upon conviction. As discussed in Judge Smith's opening brief, KRS 24A.175 simply does not say that. KRS 24A.175(3) makes court costs **mandatory** in the case of a conviction. But it says nothing about whether they **may** be imposed in other situations. Accepting the County Attorney's argument to the contrary would require this Court to write additional words into KRS 24A.175, violating a fundamental rule of statutory construction. *See Commonwealth v. Harrelson,* 14 S.W.3d 541, 546 (Ky. 2000). Moreover, other statutes and rules make clear that court costs are imposed in plenty of situations other than "upon conviction."

Pretrial diversion, of course, is a classic example where court costs are imposed, despite the fact that the criminal defendant is not convicted. As Judge Smith has consistently maintained, RCr 8.04 grants judges the authority to impose court costs in pretrial diversion cases. It expressly states that the prosecutor and the defendant "may agree, subject to the approval of the trial court, that the prosecution will be suspended for a specified period after which it will be dismissed on the condition that the defendant not commit a crime during that period, or other conditions agreed upon by the parties," and that "[t]he agreement **may include conditions that could be imposed upon probation**" (emphasis added). KRS 533.030 sets forth the conditions to be imposed upon probation and explicitly authorizes trial courts to order that the defendant "[p]ay the costs of the proceeding as set by the court." 533.030(2)(g).

The County Attorney has not – and cannot – dispute that judges may impose court costs in diversion cases, situations which indisputably do not involve convictions. In

fact, the County Attorney's Office itself has a common practice of including mandatory court costs as a condition to its other diversion agreements, such as its "dismiss if no new tickets in six months" deal and, in certain circumstances, with the marijuana education program. So instead, he insists that Drive Safe Louisville ("DSL") is not a diversion program. But, despite the County Attorney's attempt to "take it back," his own Office conceded multiple times that DSL is a diversion program during the March 22 and April 30, 2013 hearings.

It bears repeating that KRS 186.574 itself requires county attorneys who choose to sponsor these programs to annually report the number of offenders "**diverted**" into the programs. KRS 186.574(6)(c)(2). In compliance with that statutory requirement, in a November 22, 2013 letter from the Executive Director of the Prosecutors Advisory Council, Regina Carey reported to the General Assembly the number of annual "**diversions**" into the county-attorney sponsored traffic safety provisions. See Exhibit H to Appellant's Opening Brief. Moreover, as Judge Smith found in her Opinion, county attorneys in a number of counties across the Commonwealth refer to their programs as "diversion" programs (Opinion at 7). Try as he may, the County Attorney cannot finesse his DSL into anything other than a diversion program.

The County Attorney also relies heavily on two cases to support his contention that court costs are only permitted in cases involving a convictions. *See Travis v. Commonwealth*, 327 S.W.3d 456 (Ky. 2010) and *Buster v. Commonwealth*, 381 S.W.3d 294 (Ky. 2012).[1] Both cases involve questions regarding whether and when court costs may be imposed on indigent defendants who were convicted of felonies. *Travis* holds

[1] The County Attorney mistakenly refers to the *Buster* case as the "*Brother* case" throughout his brief.

that a court may not impose costs on an indigent defendant; *Buster* holds that a court must decide whether a defendant qualifies as indigent at the time of sentencing (as opposed to when he is released from jail). Yet, the County Attorney seizes on dicta in both cases. In *Travis,* the Court merely notes that court costs and fines were part of the punishment imposed upon the convicted defendants. In *Buster*, the Court finds that the determination of whether to impose court costs should be made "at the time of judgment" as opposed to when the defendant has served his prison sentence. Again, just because costs are imposed as a part of a sentence upon conviction – or at "judgment" – does not mean they are not authorized in any other situation, such as diversion.

II. HOUSE BILL 480 DID NOT "RESTRUCTURE" CRIMINAL JUSTICE SYSTEM TO ELIMINATE COURT COSTS.

The County Attorney insists that the creation of county attorney traffic safety programs represents a "broad restructuring of the goals of the criminal justice system" (Appellees' Brief at 23). Hardly. The tag along amendment to KRS 186.574 simply creates another option for traffic offenders that fits well within the existing framework for processing traffic cases. He also insists that RCr 8.04 "provides no basis to impose court costs" (Brief at 24). But RCr 8.04(1) governs "Pretrial diversion" generally and contemplates suspending a prosecution and later dismissing the case upon completion of "conditions," which here means completion of a county attorney safety program. RCr 8.04 just as clearly states that any agreement or diversion between the County Attorney – the prosecutor – and the defendant – Mr. Higgins – is "subject to the approval of the trial court" and may include "conditions that can be imposed upon probation."

Contrary to Appellees' rhetoric, no language in RCr 8.04 limits it to "misdemeanors." RCr 8.04 does not even contain the word "misdemeanor" and obviously applies to all matters before the District Court, which includes Mr. Higgins'

offense. RCr 8.04 itself cannot be limited to "convictions" because it exists to govern "diversion" and the conditions the District Court may impose upon dismissal. RCr 8.04(5) expressly recognizes there is no "conviction" upon the expiration of the period of suspension and completion of the agreement – here the safety program – "the indictment, complaint or charges" are "dismissed with prejudice."

The County Attorney relies on footnote 10 in *Flynt v. Commonwealth*, 105 S.W.3d 415, 418 (Ky. 2003), but the sole issue in *Flynt* inquired: "May a circuit court [regarding felonies] permit a defendant to participate in a pretrial diversion program over the Commonwealth's objection?" *Id.* at 417. This Court did not decide how RCr 8.04 applies to traffic cases and expressly observed, in interpreting KRS 533.262, that "the district courts may employ other pretrial diversion programs . . . ." *Id.* at 417-18. This Court could not have addressed the issue here because KRS 186.574(6) did not exist in 2003 when this Court decided *Flynt*.

Having only an amendment that is silent on court costs, a separate statute governing court costs, and RCr 8.04 specifically authorizing court costs, the County Attorney falls back on legislative history, devoting many pages to Representative Damron's letter. But Mr. Damron himself evidences doubt in admitting that he will sponsor legislation to prohibit court costs "if it becomes an issue." Failed attempts to do so at the last session indicate that it is an issue, and that the existing amendment does not prohibit court costs. On one hand, the County Attorney wants to trumpet all the "history" surrounding the amendment in 2012, but then argue that courts cannot speculate about the legislature's collective intent in failing to pass a bill in 2014. Truth is, speculation is improper whether a bill passes or fails. "[L]egislative history focuses on the actual language adopted as law by the legislature through the years, and thus avoids the nuances

and biases that might appear in extra-statutory materials such as committee reports or a single legislator's post-enactment comments." *Jefferson County Bd. Of Educ. v. Fell*, 391 S.W.3d 713, 723 (Ky. 2012), and cases in Appellant's Brief at 21-23.

In short, the brief amendment slipped into the end of KRS 186.574 presents no alteration in the criminal justice system. The County Attorney asserts "there is no tension between KRS 186.574(6) and RCr 8.04," but that is true **only** under Judge Smith's reading of RCr 8.04. Traffic cases have routinely been diverted in Jefferson District Court and dismissed with prejudice on payment of court costs. Judge Smith's construction of KRS 186.574(6) in light of RCr 8.04 and KRS 24A.175 harmonizes the statutory framework. Conversely, the County Attorney's interpretation creates unconstitutional "tension" between RCr 8.04 and KRS 186.574(6) because his position disregards the Criminal Rules.

III. INTERPRETING AMENDMENT TO INFRINGE ON JUDICIAL AUTHORITY VIOLATES CONSTITUTION.

The County Attorney tries mightily to divert the Court away from the constitutional issues in this appeal, except of course the one he raises without a cross-appeal. But any embellishment of KRS 186.574(6) that usurps a court's power under this Court's own rules – and assigns a county prosecutor the legislative, executive and judicial authority to build a war chest – must reconcile with the Kentucky Constitution.

Attorney General unequivocally refused to defend statute. Appellees omit some important facts in telling this Court it cannot consider Appellant's constitutional arguments because the Attorney General was not notified. Appellant's letter to the Attorney General did more than just "constitute[] service under KRS 418.075(1)," as Appellee quite questionably states. It also specifically "provide[d] notice under KRS 418.075**(2)**," and advised the Attorney General that in the event the action proceeds to the

Court of Appeals or the Kentucky Supreme Court, the constitutionality of KRS 186.574(6) as argued in the attached Circuit Court pleadings may be at issue. Further, the Attorney General did more than just file a notice of intention not to intervene at the Circuit Court, he confirmed that he would not **ever** be intervening: "Due to the large volume of constitutional challenges, and the adequate representation of all interests by the present parties, the Attorney General respectfully declines to participate in the defense of the statute." *See* Appellees' Brief, App. at 59-61.

The public policy underlying KRS 418.075 is clear: "All that is required is the Attorney General be given the *opportunity* to intervene and be heard on the matter." *Commonwealth v. Hamilton*, 411 S.W.3d 741, 751 (Ky. 2013) (emphasis is the Court's). Here, given that notice and opportunity, the Attorney General specifically and unequivocally declined to participate in defending the statute, which was his prerogative. *Id.* (recognizing the Attorney General's statutory discretion not to participate). Appellees cite to no case law that would require Appellant to keep hounding the Attorney General; their authorities address instances where no notice was given in the lower court.[2]

"We don't need it, your honor." Facts get in the way of the County Attorney's attempt to backtrack from his previous arguments that a county attorney does not need court involvement to dismiss uniform citations. In addition to flat out telling Judge Smith that, and handing the court Mr. Higgins' case file already stamped "DISMISSED," in form letters recruiting traffic law violators into DSL, the County Attorney advises: "*You may be eligible to participate in this program instead of appearing in court.*" He further

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[2] Further, and contrary to Appellees' mandatory bar, this Court has proceeded to consider a statute's constitutionality even without the notification. *See Popplewell's Alligator Dock No. 1, Inc. v. Revenue Cabinet*, 133 S.W.3d 456, 466 (Ky. 2004).

promises participants that their citation will be dismissed; no points will be assessed to their license; the violation will not appear on their records and no statutory fines and other expenses will be assessed against them.

The Circuit Court certainly understood the Appellees' position when it ruled against them, agreeing with Judge Smith that summarily stamping "Dismissed" on a case file jacket circumvents the authority of the court under RCr. 9.64 (Writ at 3). "The prosecuting attorney may move for dismissal upon the grounds of completion of the program. However, it is the Court that is vested with the authority to 'grant or deny based upon a fair consideration of all relevant concerns'" (Writ at 4 (citing *Gibson v. Commonwealth*, 291 S.W.3d 686, 691 (Ky. 2009)).

Constitutional cross-appeal issue. No doubt one of the reasons Appellees attempt to recharacterize their argument below is to sidestep their failure to cross appeal from the Circuit Court's adverse ruling on dismissal power. They devote an entire section to the argument that Judge Smith's refusal to simply rubberstamp the County Attorney's belated "motion" to dismiss is a violation of separation of powers. They say "[t]he Jefferson County Attorney . . . is the presumptively best **judge** of whether a pending traffic offense proceeding like the one against Mr. Higgins should be terminated" and that the District Court can only refuse to rubberstamp if the dismissal is "contrary to manifest public interest" (Brief at 30-31 (emphasis added)). The Circuit Court made no such holding with regard to a court's restriction on dismissals; accordingly, a cross appeal was required to preserve Appellees' contrary argument. Nonetheless, the constitutional argument is unavailing because it is the County Attorney's position, not Judge Smith, that violates the separation of powers doctrine.

Appellees rely on *Hoskins v. Maricle*, 150 S.W.3d 1 (Ky. 2004), but there the Supreme Court held that a trial court is within the judiciary's authority and **not** exercising powers belonging exclusively to the executive when it rejects a plea agreement reached between the Commonwealth and the defendant. Accordingly, the trial court had the power to reject a plea agreement, noting that "since at least 1854 [Kentucky law] has permitted a Commonwealth's attorney to *dismiss* an indictment but only '*with the permission of the court.*'" *Id.* at 12-13 (quoting M.C. Johnson, Joshua Harlan & J.W. Stevenson, *Code of Practice in Criminal Cases* [Section] 241 (citations omitted)). The Court further rejected a separation of powers argument almost identical to one urged by the County Attorney here:

> Essentially, Appellants claim that since it lies within the prerogative of the executive department by and through the Commonwealth's attorney to determine what crime to charge and whether to prosecute it, an indictment **"belongs" to the prosecutor** who may prosecute, amend, or dismiss it at his or her discretion **without interposure from the presiding judge**. While that is or has been the law in some common law jurisdictions, **it is not the law of Kentucky**.

Id. at 12 (citations omitted). Respectfully, it is likewise not the law of Kentucky that a county attorney owns a District Court traffic case and can dismiss it – or demand a rubber stamp dismissal – without meaningful interposure from the presiding judge.

Appellees argue here, as below, that the standard for denying a motion to dismiss is the "clearly contrary to manifest public interest" one found in a lone sentence in *Hoskins*. The Circuit Court declined to adopt that standard, relying instead on a later decision of this Court recognizing a trial court's authority to "consider[] the Commonwealth's reasons for a voluntary dismissal, and under RCr. 9.64, [to] **grant or deny based upon a fair consideration of all relevant concerns.**" *Gibson v. Commonwealth*, 291 S.W.3d 686, 691 (Ky. 2009) (emphasis added). Appellees did not

preserve the right to argue a different standard to this Court. Based on a fair consideration of all relevant concerns as set forth in Appellant's briefs, Judge Smith was well within the District Court's constitutional authority to deny dismissal of Mr. Higgins' citation until court costs were paid. Infringing on that authority is unconstitutional.

Constitutional issues before the Court. Appellees expend little effort addressing the actual merits of the significant constitutional issues flowing from their interpretation of KRS 186.574(6). These issues are firmly before the Court and, to quote the Court of Appeals in recommending this transfer, are of "great and immediate public importance." We will not repeat the arguments made and authorities cited but respectfully refer the Court to Appellant's opening brief and likewise the Brief for Amici Curiae Traumatic Brain Injury Trust Fund *et al.* We further respectfully request the Court to set aside that portion of the Writ prohibiting the Appellant from assessing court costs in DSL cases.

Respectfully submitted,

Virginia Hamilton Snell
Deborah H. Patterson
Sara Veeneman
Wyatt, Tarrant & Combs, LLP
500 W. Jefferson St., Suite 2800
Louisville, Kentucky 40202

Counsel for Appellant

61224591.1