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SUPREME COURT

COMMONWEALTH OF KENTUCKY
KENTUCKY SUPREME COURT
FILE NO. 2013-SC-000608

JAMES O. KIDD APPELLANT

v.

APPEAL FROM COURT OF APPEALS
FILE NO. 2012-CA-001130
APPEAL FROM LEE CIRCUIT COURT
HON. THOMAS P. JONES, JUDGE
INDICTMENT NO. 2009-CR-00034

COMMONWEALTH OF KENTUCKY APPELLEE

REPLY BRIEF FOR APPELLANT, JAMES O. KIDD

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CERTIFICATE REQUIRED BY CR 76.12(6):

The undersigned does certify that copies of this Reply Brief were mailed, first class postage prepaid, to the Hon. Thomas P. Jones, Judge, P.O. Box O, Beattyville, Kentucky 41311; the Hon. Heather Combs, Commonwealth's Attorney, 116 Main Street, Irvine, Kentucky 40336; the Hon. John S. Nelson, Defense Attorney, 452 Washington Street, P.O. Box 725, Stanton, Kentucky 40380-0725; and to be served by messenger mail to Hon. Jack Conway, Attorney General, Office of Criminal Appeals, 1024 Capital Center Drive, Frankfort, Kentucky 40601 on October 24, 2014.

BRANDON NEIL JEWELL

PURPOSE

The purpose of this Reply Brief is to respond to argumentation, legal authority, and analysis contained in the Attorney General's Brief. If Mr. Kidd chooses not to respond to a particular point or argument, this means he reasserts the arguments made in his Opening Brief.

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STATEMENT OF POINTS AND AUTHORITIES i

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CONCLUSION 10

This Court should not consider the Attorney General's new argument.

After litigation occurred in the trial court, in the three briefs filed in the Court of Appeals, in the motion for discretionary review, in the response to the motion for discretionary review, and in Mr. Kidd's Opening Brief in this Court, the Attorney General raised a new issue and argument in his Response Brief in this Court. The Attorney General now claims that KRS 439.3106 only applies to the Department of Corrections. (AG Brief, pg. 6-13). This Court should not consider this issue.

The Attorney General cites to several cases with language in them that an appellate court can affirm a trial court for any reasons in the record. (AG Brief, pg. 6-7). However, with regard to cases more specifically on point, the Attorney General primarily relies on Fischer v. Fisher, 348 S.W.3d 582 (Ky. 2011). (AG Brief, pg. 7-8).

However, Fischer dealt with whether the party that prevailed in the Court of Appeals had to file a cross motion for discretionary review in order to raise the issues that **it had already raised in the trial court and the Court of Appeals** after the losing party's motion for discretionary review had been granted. This Court concluded that it did not. The Attorney General's reliance on Fischer is misplaced because the Attorney General never raised the issue and argument that it now presents regarding whether KRS 439.3106 only applies to the Department of Corrections in the trial court, the Court of Appeals, or in this Court.

Fischer repeatedly states that the issue must have been raised in the trial court or Court of Appeals:

> John argues that the Court of Appeals' decision can still be affirmed for several reasons, **all of which were argued on appeal below but which were not resolved by the court.**

> **Where the appellee in this Court has raised an issue at the Court of Appeals,** which declines to address it but nevertheless renders judgment wholly in favor of the appellee, a subsequent failure to raise that issue in this Court by way of a cross-motion for discretionary review should not be an absolute bar to this Court's consideration of it.
>
> This Court's conclusion regarding whether an issue is still "live" for purposes of requiring a cross-motion for discretionary review may seem somewhat at odds with the earlier portions of this opinion, which treat issues not raised at trial as procedurally defaulted. The difference, however, is that the issues we are now discussing **were raised, both at the trial court and appellate court**. The Court of Appeals simply declined to address them.
>
> As noted in Brown, an appellee "can ... by way of bolstering the judgment against the possibility that the appellate court may accept the appellant's claim of error, make the point that he was nevertheless entitled to the judgment ***on a theory that was properly presented*** but erroneously rejected by the trial court." 628 S.W.2d at 619 (italics emphasis in Fischer, bold emphasis added).
>
> Judicial economy requires that a party actually raise an issue for it to be treated as live on appellate review; it does not require that a prevailing party use what amounts to a separate appeal to maintain an ongoing dispute over an issue **that was raised** but, for whatever reason, not decided below.
>
> Consequently, to the extent that Taub requires a prevailing party to file a cross-motion for discretionary review **on issues raised but not addressed by the Court of Appeals**, it is overruled.

Fischer, 348 S.W.3d at 586, 595, 597, 595, 597, and 597 respectively.

Even the Attorney General's own quote from Fischer states this:

> "'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.'"**

(AG Brief, pg. 7-8 quoting Fischer, 348 S.W.3d 591-592 quoting Commonwealth Corrections Cabinet v. Vester, 956 S.W.2d 204, 205-206 (Ky. 1997)).

KRS 439.3106 applies to trial courts and the Department of Corrections

Two of the primary goals behind HB 463 are to decrease the state's prison population and reduce costs due to incarceration. Ky. State Fiscal Note Statement BR 0360-HB 463GA (Feb. 18, 2011). One way of accomplishing these goals is to reduce the number of persons returned to prison for technical violations of probation or parole. Ky. Task Force on the Penal Code and Controlled Substances Act, Minutes of the 2nd Meeting (July 14, 2010), see also Ky. Task Force on the Penal Code and Controlled Substances Act, Minutes of the 5th Meeting (Oct. 19, 2010) and Report of the Task Force on the Penal Code and Controlled Substances Act, Research Memorandum No. 506, Legislative Research Commission, pg. 2 (Jan. 2011, Revised April 21, 2011) (Prison costs $19,000 per year while probation or parole costs $960 per year.). In the legislative history, it was even said that reducing the number of revocations resulting in incarceration is one of the "keys" to accomplishing these goals because 50 percent of admissions are due to probation and parole revocations. Ky. Task Force on the Penal Code and Controlled Substances Act, Minutes of the 7th Meeting (Dec. 14, 2010).

Yet, the Attorney General adamantly believes that this intent should be ignored and that an injured war veteran should spend ten years in prison at tax payer expense for visiting his sick mother.

KRS 439.3106 does not state that it only applies to the Department of Corrections. No other statute states that it only applies to the Department of Corrections. However, the Attorney General wants this Court to add new language to KRS 439.3106 and hold that it only applies to the Department of Corrections because some other statutes dealing with "supervised individuals" or "community supervision" apply to the

Department of Corrections. This argument fails. Just because some statutes apply to the Department of Corrections does not mean all statutes only apply to the Department of Corrections. There are other statutes that fall within KRS 439.250 to 439.265 that are directly applicable to trial courts. For example, KRS 439.265 and KRS 439.267 deal with shock probation in felony convictions and misdemeanor convictions respectively.

The Attorney General throws in that KRS 439.3107 says the department shall adopt a system of graduated sanctions for violation of community supervision and establish a review process regarding graduated sanctions. Both probation and parole fall within the meaning of the term "community supervision." KRS 439.250(6) and (10). That statutes such as KRS 439.3107 apply to the Department of Corrections makes sense because the Department of Corrections is solely responsible for handling matters of parole, such as parole revocations, due to the separation of powers doctrine. Jones v. Commonwealth, 319 S.W.3d 295 (Ky. 2010). However, that some statues apply to the Department of Corrections does not mean that KRS 439.3106, which deals with parole **and probation** violations, only applies to the Department of Corrections. It would not make sense for KRS 439.3106 to only apply to parole violations or the Department of Corrections. Given the intent of HB 463, it would not make sense for a different standard to apply to revoking parole than applies to revoking probation.

Even if KRS 439.3106 only applies to the Department of Corrections, the trial court still erred by revoking Mr. Kidd's probation. KRS 439.341 states that "[p]reliminary revocation hearings of probation… violators shall be conducted by hearing officers. These hearing officers shall be attorneys, appointed by the board and admitted to practice in Kentucky, who shall preform the aforementioned duties and any others

assigned by the board." The Department of Corrections should have conducted a preliminary revocation hearing and KRS 439.3106 applies to the Department of Corrections. KRS 439.3106 is an either/or statute. That is, if a violation is found, the probationer is subject to either revocation proceedings or graduated sanctions. Under KRS 439.3106 and 501 KAR 6:250, graduated sanctions were the appropriate punishment in this case. Mr. Kidd's violation was a "minor violation" under 501 KAR 6:250 §3 (9) and (11). Under 501 KAR 6:250 §5, the sanction warranted for this violation ranged anywhere from a verbal warning to discretionary detention for up to 10 days. Moreover, graduated sanctions were also the appropriate punishment as opposed to revocation because to revoke probation there must be a finding under KRS 439.3106 that the probationer's violation poses a significant risk to prior victims or the community at large **and** the probationer cannot be appropriately managed in the community. As explained in the argument sections below in greater detail, such findings could not be made in this case.[1]

The trial court erred by revoking Mr. Kidd's probation.

A. The trial court erred in revoking Mr. Kidd's probation because it did not make a finding regarding each of the elements that must be found in order to revoke.

The Attorney General argues that the trial court was not required to make specific findings. (AG Brief, pg. 15). The Attorney General missed the primary point of this issue; which is, the trial court's failure to make the proper findings demonstrates that the

[1] Even if the statute does not apply to trial courts and the trial court had discretion to revoke Mr. Kidd's probation, Mr. Kidd's probation still should not have been revoked. For the reasons stated herein and in the Opening Brief, the trial court's decision to revoke was still arbitrary, unreasonable and unfair. "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." Commonwealth v. English, 993 S.W.2d 941, 945 (Ky. 1999).

trial court improperly revoked Mr. Kidd's probation. And this is not a case in which the record indisputably supports revocation despite the trial court's lack of proper findings.

This Court has recognized that Due Process and the United States Supreme Court require that a trial judge make findings as to "the evidence relied on and the reasons for revoking probation." Commonwealth v. Alleman, 306 S.W.3d 484, 487-488 (Ky. 2010) (referencing Morrissey v. Brewer, 408 U.S. 471 (1972) and its progeny). Moreover, "general conclusory reasons by the [trial] court for revoking probation" are insufficient. See Alleman, 306 S.W.3d at 487 (citing United States v. Barth, 899 F.2d 199, 202 (2nd Cir. 1990) and United States v. Lacey, 648 F.2d 441, 445 (5th Cir. 1981)). "The basis for requiring a written statement of facts is to ensure accurate fact finding and to provide 'an adequate basis for review to determine if the decision rests on permissible grounds supported by the evidence.' " Id. quoting United States v. Yancey, 827 F.2d 83, 89 (7th Cir. 1987) (quoting Black v. Romano, 471 U.S. 606, 613–14 (1985)). While this Court has found that such a "written statement" of findings does not have to be in writing, such findings fulfilling this purpose still must be made nonetheless. Id.

Under KRS 439.3106(1), probation can be revoked if a probation violation occurred and the probationer's violation poses a significant risk to prior victims or the community at large **and** the probationer cannot be appropriately managed in the community. If a trial court is not required to make findings as to "the evidence relied on and reasons for revoking probation" (which would be case specific evidence supporting the conclusion that must also be found that based upon that evidence a probationer's violation poses a significant risk to prior victims or the community at large and that the probationer cannot be appropriately managed in the community) then the statute is

meaningless, the General Assembly's intent is not being followed, and Due Process is being abandoned.

Whether CR 52.01 mandates that findings be made in revocation hearings is irrelevant. Due Process mandates that findings be made in revocation hearings as to "the evidence relied on and the reasons for revoking probation." The Attorney General's argument regarding CR 52.01 is a red herring.[2]

The Attorney General alternatively claims that even if findings were required, the trial court's written order satisfied the Due Process requirements. (AG Brief, pg. 16). However, the Attorney General makes no argument regarding this claim. Rather, he just makes that conclusory statement.

The trial court's written order was not sufficient because it did not make findings regarding the elements that must be found under KRS 439.3106(1) in order to revoke probation. Rather, the trial court found that Mr. Kidd entered Kentucky when a family member was ill when he was aware such violated a condition of probation and concluded:

> [t]here 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.

Id. at 80, 82-83. There are no findings in this order regarding whether Mr. Kidd's violation posed a significant risk to prior victims or the community at large **and** that he

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[2] Even if CR 52.01 applies and then CR 52.02 also apples, such does not matter. Under, Rawls v. Commonwealth, 434 S.W.3d 48, 61 (Ky. 2014), CR 52.02 deals with findings of fact and the trial court in this case did not make proper findings regarding conclusions of law. Also, the two cases cited by the Attorney General, Rawls and Helphenstine v. Commonwealth, 423 S.W.3d 708 (Ky. 2014), deal with cases in which evidentiary hearings were not at all held. In Helphenstine, the defense even agreed not to hold one. Those cases are factual distinct from the case at bar. Moreover, state rules cannot supersede Constitutional requirements and, as stated supra, Due Process mandates findings be made. Rock v. Arkansas, 483 U.S. 44, 55 (1987).

could not be appropriately managed in the community. Rather, the trial court made conclusory statements regarding an old, and completely different, standard. Again, "general conclusory reasons by the [trial] court for revoking probation" are insufficient. See Alleman, 306 S.W.3d at 487 (citing Barth, 899 F.2d at 202 and Lacey, 648 F.2d at 445.

B. The trial court erred because the evidence did not support the findings required for revocation under KRS 439.3106(1).

The trial court did not find, and the Attorney General does not argue, that Mr. Kidd being in Kentucky posed a significant risk to prior victims or the community at large. Such is one of the findings that must be made in order to revoke someone's probation under KRS 439.3106(1). This should be treated as a concession that the evidence did not support such a finding and thus this Court should find that Mr. Kidd's probation should not have been revoked. As argued in Mr. Kidd's Opening Brief, Mr. Kidd visiting his sick mother did not pose a significant risk to anyone.

C. Graduated Sanctions:

For the reasons stated in Mr. Kidd's Opening Brief and above at pages 4-5, graduated sanctions were the appropriate punishment in this case.

Preservation:

The Commonwealth never argued that there was a problem with preservation in the Court of Appeals. The Court of Appeals panel erred in finding, sua sponta, the issue was unpreserved. The panel stated that defense counsel did not "allude specifically to the terms of [KRS 439.3106(1)] or request the court to make findings under that section. Kidd Opinion pg. 4. However, this rational is analogous to an appellate court finding that when a trial attorney objects and argues evidence is irrelevant, the objection would not be

preserved because the attorney did not cite to KRE 401. Moreover, the statutory language at issue is mandatory. That is, certain findings have to be made prior to revoking a probationer's probation and incarcerating him or her. Last, even if this issue was not adequately preserved, reversal was still required under RCr 10.26[3] because sending a man to prison for ten years for visiting his sick mother is a manifest injustice.

Due Process:

Mr. Kidd in fact suffered a grievous loss and deprivation of liberty and this invoked Due Process.[4] The Attorney General does not dispute this. However, he purports ignorance as to what procedures Mr. Kidd argues were not followed and what state law entitlement Mr. Kidd argues was denied.

Mr. Kidd clearly argued throughout his Opening Brief that the procedures not followed were the requirements of KRS 439.3106(1) and the Due Process requirement that a trial judge make findings as to the evidence relied on and the reasons for revoking probation in order to revoke probation. The state law entitlement he was denied was probation. The entire appeal is about whether the trial court erred in revoking his probation by not following the proper procedures.

Again, Due Process was invoked because when Mr. Kidd's was faced with the grievous loss of having his probation revoked. Due Process requires fundamental fairness. Payne v. Tennessee, 501 U.S. 808, 825 (1991); California v. Trombetta, 467 U.S. 479, 485 (1984) and Chambers v. Mississippi, 410 U.S. 284, 294 (1973); Alexander

[3] Kentucky Rules of Criminal Procedure RCr 10.26 provides:

> A palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error.

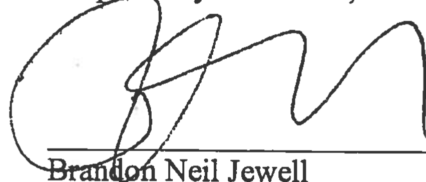
[4] Revoking a probationer's release status inflicts a "grievous loss" and invokes due process. Morrisey v. Brewer, 408 U.S. 471, 481 (1972).

v. Louisiana, 406 U.S. 625 (1972). A state violates a criminal defendant's Due Process right to fundamental fairness if it arbitrarily deprives the defendant of a state law entitlement. Hicks v. Oklahoma, 447 U.S. 343, 346 (1980). See also, Miller v. Johnson Controls, Inc., 296 S.W.3d 392, 397 (Ky. 2009); Fetterly v. Paskett, 997 F.2d 1295, 1300 (9th Cir.1993). The trial court revoking Mr. Kidd's probation by ignoring the known procedures of KRS 439.3106(1) and the Due Process requirement that a trial judge make findings as to the evidence relied on and the reasons for revoking probation in order to revoke probation arbitrarily violated Due Process.

CONCLUSION

For the reasons stated herein and in Mr. Kidd's Opening Brief, this Court must order the Court of Appeals' Opinion be reversed and that the Order revoking Mr. Kidd's probation be vacated and that the time Mr. Kidd spent incarcerated after he was revoked be credited as time spent on probation. Typically, if a trial court feels additional sanctions are needed, it is within the trial court's purview to impose sanctions other than incarceration. However, Mr. Kidd has been punished enough.

Respectfully Submitted,



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