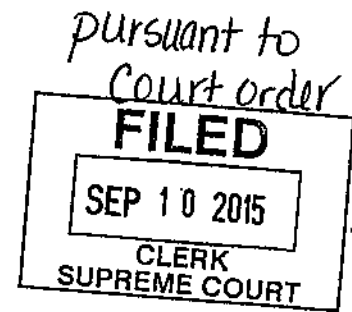


COMMONWEALTH OF KENTUCKY
SUPREME COURT
CASE NUMBER: 2014-SC-000241-D



JONATHAN H. MCDANIEL

APPELLANT

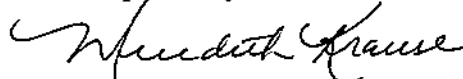
VS. ON REVIEW FROM COURT OF APPEALS
2012-CA-001299
CALLOWAY CIRCUIT COURT, NO. 09-CR-00181

COMMONWEALTH OF KENTUCKY

APPELLEE

REPLY BRIEF FOR APPELLANT

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on September 4, 2015, the foregoing "Brief for Appellant" was served by first class mail upon the following: Hon. C. Mark Blankenship, Commonwealth Attorney, 309 North 4th Street Murray, KY 42071; Hon. Dennis R. Foust, Judge, Marshall County Courthouse 80 Judicial Dr., Unit 101 Benton, KY 42025; Hon. Christian Miller, Assistant Attorney General, 1024 Capital Center Dr., Frankfort, KY 40601; Hon. Jack Conway, Attorney General, 1024 Capital Center Dr., Frankfort, KY 40601; Sam Givens, Clerk, Court of Appeals, 360 Democrat Dr., Frankfort, KY 40601

I also certify that the record has been returned to the Supreme Court of Kentucky.



PURPOSE OF REPLY BRIEF

This Reply Brief for Appellant responds to the Commonwealth's argument that Appellant's claims are not ripe for review.

ARGUMENT

Appellee argues that because Appellant's postincarceration supervision has not yet been revoked, that Appellant's claim is not yet ripe and cannot be decided by this Court. (Appellee's Response, pp. 8-10; hereinafter AR 8-10). This argument is erroneous for several reasons.

First, Appellee argues that Appellant has never previously raised the claims that are now before this Court on review. (AR 15-16). 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). The Appellant however, was without counsel in the circuit court. When he received counsel on appeal, his issues were refined, but not changed. Both the circuit court and the Court of Appeals ruled on the merits of the Appellant's claims without citing ripeness as a reason for denying the claims. (Previously attached as Appellant's Brief Appendix, Tab 1 and Tab 2, respectively). The Court of Appeals' opinion gave rise to a new claim by addressing whether the motion should be construed as being brought under RCr 11.42 or CR 60.02, making the appeal to this Court the first opportunity for Appellant to address that issue. (Appellant's Brief Appendix, Tab 2).

Ironically, Appellee does precisely what he claims Appellant has done – attempt to feed one can of worms to the circuit court and Court of Appeals and another to this Court. The Commonwealth's response to Appellant's post-conviction motion in circuit court did not address the ripeness of Appellant's claim. The Attorney General's responsive Brief in the Court of Appeals did not raise the issue of ripeness. Now, however, the Attorney General seeks to utilize ripeness as a procedural bar. However, they cannot raise procedural issues for the first time on appeal when no objection was made below and the trial court did

not rely upon or even mention such error in its ruling. In *Jackson v. Commonwealth*, the Commonwealth raised the issue of verification noncompliance for the first time on appeal and the Court stated that “the Commonwealth failed to advise the trial court of the deficient pleadings. Because the Commonwealth **failed to raise this issue before the trial court, it is not preserved for review.**” 2006-CA-001821, 2007 WL 2460727, *1 (Ky. App. 2007)(unpublished) (emphasis added). Similarly, in the case at bar, the Commonwealth should not now be allowed, on appeal, to assert a procedural bar due to lack of ripeness when they failed to raise the objection either in the trial court or the Court of Appeals and neither the trial court nor the Court of Appeals made reference to ripeness in their opinions.

Second, the Commonwealth now argues that Appellant’s brief must be construed as a motion under RCr 11.42 and also argues that the claim is unripe. (AR 8-14) These claims simply cannot coexist absent a finding that, should Appellant’s post-incarceration supervision be revoked in the future, Appellant would be entitled to assert his claims under the tolling provision of RCr 11.42 (10)(a) and/or (b).

RCr 11.42 (3) states that, “The motion shall state all grounds for holding the sentence invalid of which the movant has knowledge. Final disposition of the motion shall conclude all issues that could reasonably have been presented in the same proceeding.” RCr 11.42 (10) imposes a three-year statute of limitations from the date an appellant’s judgment becomes final to bring such a motion. Tolling exceptions apply where “(a) [] the facts upon which the claim is predicated were unknown the movant and could not have been ascertained by the exercise of due diligence; or (b) [] the fundamental constitutional right asserted was not established within the time period provided for herein and has been held to apply retroactively.”

Because an RCr 11.42 motion must also include all claims for holding a sentence invalid, the Kentucky appellate courts have found that:

The structure provided in Kentucky for attacking the final judgment of a trial court in a criminal case is not haphazard and overlapping, but is organized and complete. That structure is set out in the rules related to direct appeals, in RCr 11.42, and thereafter in CR 60.02.” CR 60.02 is not intended merely as an additional opportunity to relitigate the same issues which could “reasonably have been presented” by direct appeal or by RCr 11.425 proceedings. The obvious purpose of this principle is to prevent the relitigation of issues which either were, should or could have been litigated in a similar proceeding.

Stoker v. Commonwealth, 289 S.W. 3d 592 (Ky. App. 2009). (internal citations omitted).

Thus, ruling that Appellant’s motion must be construed as an RCr 11.42, taking in into consideration that such motion must contain all claims for holding a sentence invalid, and such a motion must be brought within three years of judgment, makes the issues contained therein ripe. Otherwise, the only Appellants who would be able to challenge the revocation of the post-incarceration supervision would be those who were revoked within three-years of judgment. Given the nature of the crimes for which post-incarceration supervision is imposed, the likelihood of serving a sentence and even being placed on post-incarceration supervision within the first three years following judgment is rare.

The Commonwealth has also argued that Appellant’s motion cannot be construed as a CR 60.02 motion, thereby foreclosing relief brought under CR 60.02 (e) and (f) which allow for a claim to be brought within a reasonable time period. Absent an otherwise viable avenue of relief, the Commonwealth must be suggesting that relief would be available to Appellant under the tolling provision of RCr 11.42 (10). Should the Court find that Appellant’s motion is not a CR 60.02 motion, then, either Appellant’s motion is a RCr 11.42 motion, requiring all claims that can be brought at the time to be brought, thus making Appellant’s claim ripe or the Commonwealth must concede that the claim could not be either known during the time in which to file a motion under RCr 11.42 or the fundamental

constitutional right asserted was not established within the time period, thus triggering the tolling provision of RCr 11.42 (10) and enabling Appellant to bring such an RCr 11.42 motion within a reasonable time following any revocation. Otherwise, under the Commonwealth's proposed construct, virtually no Appellant could obtain relief once their post-incarceration supervision was revoked.

Finally, this Court should find that Appellant's claim is ripe because to find otherwise would work an undue hardship on the Appellant. In *W.B. v. Commonwealth, Cabinet for Health and Family Services*, 388 S.W. 3d 108 (Ky. 2012), this Court found that "ripeness involves weighing two factors: (1) the hardship to the parties of withholding court consideration; and (2) the fitness of the issues for judicial review." (citing *Abbott Labs v. Gardner*, 387 U.S. 136, 149, 87 S.Ct. 1507; *Artway v. Attorney General of New Jersey*, 81 F.3d 1235, 1246-47 (3d Cir.1996)), *W.B.*, *supra* at 114.

The Commonwealth completely fails to address the hardship to Appellant should this Court decline to address the merits of Appellant's claims at this juncture. Appellant's Brief on Appeal highlights the significant deprivation of due process Appellant would suffer should his post-incarceration supervision be revoked including an increased likelihood of revocation due to a lack of discretion in initiating revocation procedures (Appellant's Brief on Appeal p. 13, hereinafter BA 13), the lack of safeguards to ensure the reliability of outcomes inherent in the new revocation procedures (BA 13-14), a decreased ability to present evidence (BA 15), lack of a fair and impartial judiciary (BA 15-16), lack of counsel (BA 16), limited reviewability and avenues for appeal (BA 18-19) and lack of fair warning (BA 19-22). Appellant first filed his post-conviction motion on May 23, 2012. It has taken over three years for this case to be heard by this Court. Should Appellant's post-incarceration supervision be revoked, Appellant would likely have to serve a lengthy

sentence before this Court would have an opportunity to resolve the claim again. Meanwhile, Appellant would suffer significantly due to reincarceration.

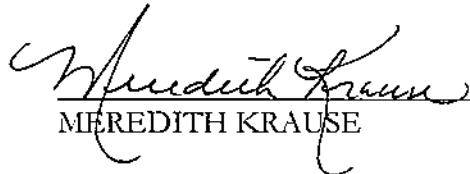
Appellant's claims are also fit for judicial review. The post-incarceration supervision revocation procedure is laid out in 501 KAR 1:070 et seq. There are no questions of fact that remain unanswered, and the existing record is adequate to resolve Appellant's claims. Because Appellant's claims are both fit for judicial review and failure to address the claims would work an undue hardship on the Appellant, this Court should find that this case is ripe for review and issue a ruling on the merits of the case.

CONCLUSION

This Court should find that Appellant's claims are ripe for review and issue a ruling on the merits of the case in favor of Appellant. The Commonwealth failed to raise the issue of ripeness at every stage of these proceedings and should be barred from doing so at this time. Further, the Commonwealth's proposed findings would render it impossible for nearly all Appellants under post-incarceration supervision an opportunity to challenge the lack of due process in the new revocation procedure. Appellant's claims are fit for judicial review and failing to review them at this time would work a significant hardship on Appellant.

WHEREFORE, for the reasons stated herein and in Appellant's Brief on Appeal, Appellant respectfully asks this Court to reverse the Court of Appeal's order denying his post-conviction motion and hold that the current procedures in place to revoke post-incarceration supervision violate due process protections and the use of the current revocation procedures against him would be an ex post facto violation and therefore unconstitutional.

Respectfully submitted,


MEREDITH KRAUSE