

RENDERED: December 23, 2004; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001613-MR

CHRISTOPHER HENSON

APPELLANT

v.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE PATRICIA M. SUMME, JUDGE
ACTION NO. 98-CR-00461

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** **

BEFORE: SCHRODER AND TACKETT, JUDGES; EMBERTON, SENIOR JUDGE.¹

SCHRODER, JUDGE: Christopher Henson appeals the denial of relief from the imposition of a guardian ad litem fee imposed as a condition of criminal abuse under KRS 510.140.² We believe the question at this point is not the validity of the condition but

¹ Senior Judge Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

² This case is to be heard by the same panel that heard Case No. 2002-CA-002570.

whether the appellant is indigent at the time conditional discharge is revoked. Since the circuit judge did not revoke his conditional discharge, we affirm.

Christopher Henson (Henson) was convicted (Alford plea) of second-degree sexual abuse³ and sentenced to twelve months in jail, conditionally discharged for two years on conditions, one of which was to pay the \$1,689.00 guardian ad litem fee of the attorney representing the minor victim. A panel of this Court upheld the condition on appeal (Case No. 2000-CA-002131), and discretionary review was denied on February 12, 2003. On July 2, 2003, Henson tried again by filing a motion in circuit court for relief of payment because he was disabled and indigent. He maintained his sole income was \$572.00 a month social security disability and SSI and that his expenses for food, shelter, and other necessities used all of his income, leaving no room for payments on the fee. Henson contends revocation proceedings for failure to pay the guardian ad litem fee would violate due process where the defendant is indigent.

The validity of requiring Henson to pay the guardian ad litem fee was decided earlier by a panel of this Court (Case No. 2000-CA-002131) and that decision became the law of the case. See Sand Hill Energy, Inc. v. Smith, Ky. App., 142 S.W.3d

³ KRS 510.140.

153, 170 n.25. (2004). The Court noted at that time that the issue of indigency was not preserved, so the Court affirmed the trial court on that issue only. The law of the case doctrine would also require us to affirm. Id. Also, Henson cannot now appeal an issue that should have been appealed in the earlier appeal. Commonwealth, Transportation Cabinet v. Morrison, Ky. App., 715 S.W.2d 899, 900 (1986), requires that an appellant raise all issues he could raise in his direct appeal, waiving or failing to preserve any issue not raised. See also Charash v. Johnson, Ky. App., 43 S.W.3d 274, 278 (2000).

Nor can we consider Henson's motion one for relief under CR 60.02. The indigency condition existed at the time of sentencing and is not a newly discovered condition.

There is another reason why we would not want to release Henson of this condition. Even though he may have been disabled at the time of sentencing, he may not remain so throughout his period of conditional discharge. He may become able to work again, or he may inherit, receive a monetary gift, or even win the lottery. Until the court attempts to revoke probation, Henson's indigency status is an open question. If the only ground for revoking his conditional discharge is his alleged indigency, he would be entitled to a due process hearing to determine the validity of his defense. There was not a motion to revoke before the circuit court when Henson requested

relief from the condition, so the request was premature and until there exists a case or controversy, we likewise decline to hear the merits of what could be argued at a revocation hearing. See Associated Industries of Kentucky v. Commonwealth, Ky., 912 S.W.2d 947 (1995), for the "case or controversy" issue and ripeness; Commonwealth v. Maricle, Ky., 15 S.W.3d 376, 380 (2000).

For the foregoing reasons, the judgment of the Kenton Circuit Court is affirmed.

ALL CONCUR.

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