

RENDERED: April 1, 2005; 10:00 a.m.  
NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2004-CA-000132-MR

TOMMY LYNN POLLEY

APPELLANT

v. APPEAL FROM BOONE CIRCUIT COURT  
HONORABLE JOSEPH F. BAMBERGER, JUDGE  
ACTION NO. 00-CR-00371

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: TACKETT AND VANMETER, JUDGES; MILLER, SENIOR JUDGE.<sup>1</sup>  
MILLER, SENIOR JUDGE: Appellant, Tommy Lynn Polley (Polley),  
brings this appeal from a November 26, 2003, order of the Boone  
Circuit Court overruling his *pro se* motion, filed pursuant to  
Kentucky Revised Statutes (KRS) 418.040; Kentucky Rules of  
Criminal Procedure (RCr) 11.42; and Kentucky Rules of Civil  
Procedure (CR) 60.02(f); to declare KRS 532.043(3)(a) and (b)<sup>2</sup>

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<sup>1</sup> Senior Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

<sup>2</sup> (1) In addition to the penalties authorized by law, any person convicted of, pleading guilty to, or entering an Alford plea to a felony offense under KRS Chapter 510, KRS 529.030, 530.020, 530.064, 531.310, or 531.320 shall be subject to a period of conditional discharge following release from:

unconstitutional, and to correct his sentence. Before us, Polley contends that KRS 532.043(3)(a) and (b) and KRS 532.043(5) are a violation of the separation of powers doctrine and double jeopardy. We affirm.

On October 24, 2000, a Boone County grand jury indicted Polley on one felony count of first-degree sodomy<sup>3</sup> for having deviate sexual intercourse with his seven-year old daughter. On January 12, 2001, Polley pleaded guilty, pursuant to a plea agreement with the Commonwealth, to an amended charge of second-degree sodomy;<sup>4</sup> a prison sentence of five years; and post-incarceration, three-year conditional discharge as required under KRS 532.043. On March 30, 2001, Polley was sentenced pursuant to his plea.

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(a) Incarceration upon expiration of sentence; or

(b) Completion of parole.

(2) The period of conditional discharge shall be three (3) years.

(3) *During the period of conditional discharge, the defendant shall:*

(a) *Be subject to all orders specified by the Department of Corrections; and*

(b) *Comply with all education, treatment, testing, or combination thereof required by the Department of Corrections.*

(4) Persons under conditional discharge pursuant to this section shall be subject to the supervision of the Division of Probation and Parole.

(5) *If a person violates a provision specified in subsection (3) of this section, the violation shall be reported in writing to the Commonwealth's attorney in the county of conviction. The Commonwealth's attorney may petition the court to revoke the defendant's conditional discharge and reincarcerate the defendant as set forth in KRS 532.060.*

(6) The provisions of this section shall apply only to persons convicted, pleading guilty, or entering an Alford plea after July 15, 1998.

Emphasis added.

<sup>3</sup> Kentucky Revised Statutes 510.070, Class A Felony.

<sup>4</sup> Kentucky Revised Statutes 510.080, Class C Felony.

On September 25, 2003, Polley, *pro se*, filed the motion that is the subject of this appeal, contending that KRS 532.043(3)(a) and (b) violate the separation of powers doctrine, and citing Kentucky Constitution Sections 27,<sup>5</sup> 28,<sup>6</sup> 109<sup>7</sup> and 116.<sup>8</sup> On November 26, 2003, the trial court overruled Polley's motion, finding KRS 532.043 constitutional. This appeal follows.

Polley initially argues that KRS 532.043(3)(a) and (b) violate the separation of powers doctrine under two separate theories. First, he argues that the three-year mandatory conditional discharge of KRS 532.043(3)(a) and (b) infringes on the exclusive authority of the judiciary to make court procedures by permitting the executive branch (through the Department of Corrections), to "fashion the conditions of conditional discharge." He further argues, under this same

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<sup>5</sup> The powers of the government of the Commonwealth of Kentucky shall be divided into three distinct departments, and each of them be confined to a separate body of magistracy, to wit: Those which are legislative, to one; those which are executive, to another; and those which are judicial, to another.

<sup>6</sup> No person or collection of persons, being of one of those departments, shall exercise any power properly belonging to either of the others, except in the instances hereinafter expressly directed or permitted.

<sup>7</sup> The judicial power of the Commonwealth shall be vested exclusively in one Court of Justice which shall be divided into a Supreme Court, a Court of Appeals, a trial court of general jurisdiction known as the Circuit Court and a trial court of limited jurisdiction known as the District Court. The court shall constitute a unified judicial system for operation and administration. The impeachment powers of the General Assembly shall remain inviolate.

<sup>8</sup> The Supreme Court shall have the power to prescribe rules governing its appellate jurisdiction, rules for the appointment of commissioners and other court personnel, and rules of practice and procedure for the Court of Justice. The Supreme Court shall, by rule, govern admission to the bar and the discipline of members of the bar.

theory, that the statute's vagueness<sup>9</sup> violates his federal and state due process rights and infringes on the authority of the legislative branch to set sentences by not specifically prescribing what the executive branch (through the Department of Corrections) is authorized to set as conditions of a conditionally discharged sentence. Ultimately, then, he believes that the authority of the legislative branch to authorize a sentence of conditional discharge and the authority of the judicial branch to impose conditional discharge and the conditions therein has been improperly delegated in this instance to the executive branch. Secondly, he argues that KRS 532.043(5) infringes on the authority of the legislature by allowing the judiciary to revoke the conditional discharge after he has been sentenced, which he argues is more in the nature of parole, an executive branch function, than probation, a judicial branch function.

The issue of whether a statute is unconstitutional is a question of law subject to *de novo* review. Moore v. Ward, 377 S.W.2d 881, 883 (Ky. 1964). Statutes are presumed to be constitutional, and Polley bears the burden of proving that the statute in question is clearly, unequivocally, and completely a violation of the constitution. Martinez v. Commonwealth, 72

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<sup>9</sup> United States Constitution, Fifth and Fourteenth Amendments.

S.W.3d 581, 584 (Ky. 2002); Cornelison v. Commonwealth, 52 S.W.3d 570, 572-73 (Ky. 2001).

As background, the separation of powers doctrine precludes each of the three branches of government from encroaching on the domain of the two other branches. Manns v. Commonwealth, 80 S.W.3d 439 (Ky. 2002). Section 27 of the Kentucky Constitution creates three branches of government and Section 28 precludes one branch from exercising any power properly belonging to either of the other two branches.

Polley first contends that by putting the conditions of the mandatory three-year conditional discharge under the authority of the Department of Corrections, KRS 532.043(3)(a) and (b) infringes on the authority of the legislature to set sentences and of the judiciary to impose conditional discharge and the conditions therein.<sup>10</sup> Addressing first Polley's claim of encroachment on judicial authority, it is the function of the legislature to designate the elements of criminal conduct and the penalty for crimes. Mullins v. Commonwealth, 956 S.W.2d 222, 223 (Ky.App. 1997). The judiciary's role is to impose sentences within the statutory limits prescribed the legislature, and the judiciary's discretion is limited by the

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<sup>10</sup> The Attorney General argues that one of these constitutional challenges is not preserved for appeal. As Polley's motion before the trial court was *pro se*, it is somewhat difficult to precisely discern his issues, however, we believe that Polley's motion sufficiently raised this particular issue for our review.

sentences set by the legislature. Bartrug v. Commonwealth, 582 S.W.2d 61, 63 (Ky.App. 1979). In imposing the conditional discharge set by KRS 532.043, the trial court was operating within the parameters of its authority. Thus, we reject Polley's contention that KRS 532.043(3)(a) and (b) infringes on the judiciary's power to impose conditional discharge.

Addressing next Polley's claim of encroachment on legislative authority, we also reject Polley's due process and vagueness assertions. During the term of post-incarceration, KRS 532.043(3)(a) and (b) require a defendant to be subject to the orders of the Department of Corrections and to comply with all of the department's requirements with regard to education, treatment, testing or combination thereof. It is well established that the legislature may delegate power to the executive branch through an administrative agency. State Racing Commission v. Latonia Agricultural Association, 136 Ky. 173, 123 S.W. 681 (Ky. 1909). The agency is then given some discretion in promulgating regulations to implement the general policy set forth by the legislature, and said regulations are ultimately subject to legislative oversight. York v. Commonwealth, 815 S.W.2d 415 (Ky.App. 1991); Vanhoose v. Commonwealth, 995 S.W.2d 389, 395 (Ky.App. 1999). We find no error herein.

Polley's final separation of powers contention alleges that KRS 532.043(5), through the mechanism of KRS 532.060(3),<sup>11</sup> violates separation of powers by improperly allowing the judiciary to revoke the conditional discharge after he has been sentenced, which is more in the nature of parole, an executive branch function, than probation, a judicial branch function. We decline to address this issue as Polley did not raise this theory before the trial court. Shelton v. Commonwealth, 992 S.W.2d 849, 852 (Ky.App. 1998).

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<sup>11</sup>(1) A sentence of imprisonment for a felony shall be an indeterminate sentence, the maximum of which shall be fixed within the limits provided by subsection (2), and subject to modification by the trial judge pursuant to KRS 532.070.

(2) The authorized maximum terms of imprisonment for felonies are:

(a) For a Class A felony, not less than twenty (20) years nor more than fifty (50) years, or life imprisonment;

(b) For a Class B felony, not less than ten (10) years nor more than twenty (20) years;

(c) For a Class C felony, not less than five (5) years nor more than ten (10) years; and

(d) For a Class D felony, not less than one (1) year nor more than five (5) years.

(3) *For any felony specified in KRS Chapter 510, KRS 530.020, 530.064, or 531.310, the sentence shall include an additional three (3) year period of conditional discharge which shall be added to the maximum sentence rendered for the offense. During this period of conditional discharge, if a defendant violates the provisions of conditional discharge, the defendant may be reincarcerated for:*

(a) *The remaining period of his initial sentence, if any is remaining; and*

(b) *The entire period of conditional discharge, or if the initial sentence has been served, for the remaining period of conditional discharge.*

(4) The actual time of release within the maximum established by subsection (1), or as modified pursuant to KRS 532.070, shall be determined under procedures established elsewhere by law.

Emphasis added.

Polley's final contention alleges a violation of federal and state double jeopardy provisions.<sup>12</sup> He specifically alleges that he was subjected to the imposition of two sentences on a single conviction by being sentenced under both KRS 510.080 (sodomy) and KRS 532.043. Although unpreserved, we address this issue under the authority of Sherley v. Commonwealth, 558 S.W.2d 615, 618 (Ky. 1977) ("failure to preserve this issue for appellate review should not result in permitting a double jeopardy conviction to stand"). We, however, decline to find a double jeopardy violation as it has no application herein.

Both the Fifth Amendment to the United States Constitution and Section Thirteen of the Kentucky Constitution state that no individual shall be twice put in jeopardy of life and limb for the same offense. These clauses protect a criminal defendant from three distinct abuses: (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments for the same offense. Hourigan v. Commonwealth, 962 S.W.2d 860, 862 (Ky. 1998). Polley argues a violation of the third abuse, multiple punishments for the same offense. A reading of KRS 532.043(5) and the statute referenced therein, KRS 532.060, clearly puts to rest Polley's argument as both statutes do not impose multiple punishments for the same

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<sup>12</sup> United States Constitution, Fifth Amendment; Kentucky Constitution, Section 13.

offense, but rather *fashion an additional* punishment particular to those in Polley's situation:

KRS 532.043(3) During the period of conditional discharge, the defendant shall:  
(a) Be subject to all orders specified by the Department of Corrections; and  
(b) Comply with all education, treatment, testing, or combination thereof required by the Department of Corrections.

KRS 532.043(5): If a person violates a provision specified in subsection (3) of this section, the violation shall be reported in writing to the Commonwealth's attorney in the county of conviction. The Commonwealth's attorney may petition the court to revoke the defendant's conditional discharge and reincarcerate the defendant as set forth in KRS 532.060.

KRS 532.060(3): For any felony specified in KRS Chapter 510, KRS 530.020, 530.064, or 531.310, the sentence shall include an additional three (3) year period of conditional discharge which shall be added to the maximum sentence rendered for the offense. During this period of conditional discharge, if a defendant violates the provisions of conditional discharge, the defendant may be reincarcerated for:  
(a) The remaining period of his initial sentence, if any is remaining; and  
(b) The entire period of conditional discharge, or if the initial sentence has been served, for the remaining period of conditional discharge.

The imposition of the additional three-year conditional discharge sentence pursuant to KRS 532.043(5) and 532.060(3) merely adjudicates the status and punishment of Polley, similar to persistent felony offender proceedings or enhancement of the

penalty for a controlled substance violation when a firearm is used. White v. Commonwealth, 770 S.W.2d 222 (Ky. 1989); Adams v. Commonwealth, 931 S.W.2d 465 (Ky.App. 1996). There is no double jeopardy violation.

For the foregoing reasons, the order of the Boone Circuit Court is affirmed.

ALL CONCUR.

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