

# Commonwealth of Kentucky

## Court of Appeals

NO. 2006-CA-001792-MR

LARRY THOMAS JONES

APPELLANT

v. APPEAL FROM HICKMAN CIRCUIT COURT  
HONORABLE HUNTER B. WHITESELL II, SPECIAL JUDGE  
ACTION NO. 00-CR-00001

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: THOMPSON, JUDGE; BUCKINGHAM AND HENRY, SENIOR JUDGES.<sup>1</sup>

BUCKINGHAM, SENIOR JUDGE: Larry Thomas Jones appeals from an order of the Hickman Circuit Court revoking his three-year conditional discharge and ordering his reincarceration. The issue on appeal is whether KRS 532.043(5) is unconstitutional as a violation of the separation of powers clause in the Kentucky Constitution because the

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<sup>1</sup> Senior Judges David C. Buckingham and Michael L. Henry sitting as special judges by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statute (KRS) 21.580.

statute gives the judicial branch, rather than the executive branch, the power to revoke conditional discharge. We conclude that the statute is constitutional and thus affirm.

In April 2001 Jones pled guilty and was sentenced by the Hickman Circuit Court to six years in prison. After being paroled in July 2004, Jones violated the conditions of his parole and was reincarcerated. After completing his sentence, he was placed on three-years conditional discharge. See KRS 532.043(1) (a) and (2). While on conditional release, Jones was charged with violating its conditions. A hearing was held, and the court revoked Jones's conditional release and ordered his reincarceration for three years. The court rejected Jones's challenge to the constitutionality of the KRS 532.043(5). This appeal followed.

“The issue of whether a statute is unconstitutional is a question of law subject to de novo review.” Wilfong v. Commonwealth, 175 S.W.3d 84, 91 (Ky.App. 2004).<sup>2</sup> “[A]cts of the General Assembly carry a presumption of constitutionality. A statute will not be invalidated as unconstitutional unless it clearly, unequivocally, and completely violates provisions of the constitution.” Id. Further, the party questioning the constitutionality of a statute bears the burden of proving its contention. Id.

“Section 27 of the Kentucky Constitution creates three distinct branches of government and Section 28 precludes one branch from exercising any power properly belonging to either of the other two branches.” Wilfong, 175 S.W.2d at 91. “The

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<sup>2</sup> In Wilfong, KRS 532.043 withstood a challenge that it violated the separation of powers doctrine in a different manner. Id. at 92.

separation of powers doctrine precludes each of the three branches of government from encroaching upon the domain of the other two branches.” Id.

KRS 532.043 provides in part that, in addition to the penalties authorized by law, persons committing certain felony offenses shall also be subjected to three-years' conditional discharge following their incarceration upon expiration of their sentence or completion of their parole.<sup>3</sup> KRS 532.043(1) and (2). The statute also provides that the defendant shall be subject to the orders of the Department of Corrections and to the supervision of the Division of Probation and Parole. KRS 532.043(3) and (4). Finally, KRS 532.043(5) provides as follows:

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.

Jones states that “[b]ecause the Executive Branch, through Probation and Parole, administers conditional discharge, allowing the Judicial Branch to revoke conditional discharge violates the separation of powers.” Jones acknowledges that courts may revoke probation, but he states that “conditional discharge is not akin to probation.” Rather, he argues that conditional discharge “mirrors parole”, which may be revoked only by the Department of Corrections. He reasons that the three-year conditional discharge period is essentially an added period of parole.

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<sup>3</sup> In 2006 the General Assembly enlarged the conditional discharge period to five years.

In Mullins v. Commonwealth, 956 S.W.2d 222, 223 (Ky.App. 1997), this court noted that probation is a function of the judicial branch while parole is a function of the executive branch. In Pedigo v. Commonwealth, 644 S.W.2d 355, 358 (Ky.App. 1982), this court plainly stated that “[f]or all purposes, except supervision, or the lack thereof, there is no difference between conditional discharge and probation.”

While conditional discharge is normally probation without supervision, Jones notes that conditional discharge under KRS 532.043 is subject to supervision by the Division of Probation and Parole. See KRS 532.043(4). Therefore, he argues that the form of conditional discharge employed under KRS 532.043 is merely an extension of parole.

In Prater v. Commonwealth, 82 S.W.3d 898 (Ky. 2002), the Kentucky Supreme Court distinguished between probation and parole and stated that “parole relates to action after the door has been closed.” Id. at 904, quoting Lovelace v. Commonwealth, 147 S.W.2d 1029, 1033 (Ky. 1941). Further, the court stated that “[a] parole . . . suspends the execution of a penalty already imposed.” Id. From this analysis, it is apparent that the conditional discharge under KRS 532.043 is akin to probation rather than parole. Conditional discharge in this instance releases a defendant from a sentence imposed by the court prior to his further incarceration with the executive branch. The defendant has not been again placed in the physical custody of the executive branch (although he or she continues under its supervision). The service of the defendant's sentence remains under the control of the judicial branch. With parole, on the other hand,

the defendant is committed to the physical custody of the executive branch (Department of Corrections) and is subject to release and possibly reincarceration by that branch only. See Prater, supra.

Therefore, we conclude that KRS 532.043(5) does not violate the separation of powers clause by giving the power of revocation of the conditionally discharged sentence to the courts. Thus, we hold that the KRS 532.043(5) is constitutional.

Jones's second argument is that the court erred in revoking his conditionally discharged sentence because he had done everything in his power to comply with the conditions that had been imposed upon him by the Division of Probation and Parole. The court stated in its order that Jones had twice tested positive for cocaine and had also tested positive for marijuana while on conditional discharge.

Our review is limited to determining whether the trial court abused its discretion in revoking the conditionally discharged sentence. See Tiryung v. Commonwealth, 717 S.W.2d 503, 504 ((Ky.App. 1995). We see no abuse of discretion by the court in revoking Jones's conditional discharge and ordering his reincarceration due to Jones's use of illegal drugs.

The order of the Hickman Circuit Court is affirmed.

ALL CONCUR.

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