

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2010-CA-000957-MR

CHARLES PENISTON

APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT  
HONORABLE CHRISTOPHER J. MEHLING, JUDGE  
ACTION NO. 06-CI-00481

COMMONWEALTH OF KENTUCKY,  
EX REL SHERY FORD; SHERY FORD;  
AND CHRISTOPHER J. MEHLING, JUDGE  
KENTON FAMILY COURT, DIV. II

APPELLEES

OPINION  
AFFIRMING

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BEFORE: COMBS AND MOORE, JUDGES; ISAAC,<sup>1</sup> SENIOR JUDGE.

ISAAC, SENIOR JUDGE: Charles Peniston appeals from a Kenton Circuit Court order revoking his conditional discharge and sentencing him to serve ten days.

Peniston argues that the trial court erred in failing to set a purge amount prior to

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<sup>1</sup> Senior Judge Sheila R. Isaac sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

incarcerating him and that it abused its discretion in failing to find that his learning disabilities and physical health issues precluded him from employment.

The marriage of Charles and Shery Peniston was dissolved on October 3, 2006. The couple has one daughter. Under the terms of their separation agreement, Charles agreed to pay child support to Shery in the amount of \$55 per week.

On March 19, 2007, the circuit court entered an order finding that Charles owed child support arrearages of \$1,810 which he had agreed to pay off in the amount of \$15 per week.

On March 25, 2008, following a hearing, Charles was found to be in contempt of court for failure to pay both child support and child support arrearages. He received a sentence of 180 days discharged for two years, conditioned upon his completion of 16 hours of community service, staying current on his support and arrearages payments and compliance with all other court orders. No appeal was taken from this order.

On October 28, 2008, after a hearing, Charles was found to be in violation of the terms of the conditional discharge for failing to pay child support. He was ordered to serve ten days in the county jail and sentenced to 170 days discharged for two years upon the condition that he comply with all other court orders, including taking reading classes and obtaining his GED, and remaining current on his child support and arrearage payments.

On May 12, 2010, following a hearing, his conditional discharge was revoked again and he was ordered to serve ten days. The remainder of his sentence was discharged on the condition that he pay child support and arrearages, participate in an adult literacy program and obtain his GED. This appeal followed.

Charles argues that in civil contempt proceedings, imprisonment for debt is only permissible if there is a finding of willfulness or fraud and that an individual must be permitted to purge himself of the debt. Charles was found in contempt of court and sentenced for contempt on March 25, 2008. “The first contempt proceeding was clearly civil in nature since the sentence was discharged conditioned upon [his] compliance with the payment order.” *Dunagan v. Commonwealth*, 31 S.W.3d 928, 930 (Ky. 2000). Charles did not appeal from that order or dispute the finding of contempt. He also made no argument regarding a purge amount at that time. The order from which he has appealed merely revoked his conditional discharge without any separate finding of contempt.

The correct standard to be applied in revocation of conditional discharge proceedings is set forth in *Bearden v. Georgia*, 461 U.S. 660, 103 S.Ct. 2064, 76 L.Ed.2d 221(1983), and adopted in *Gamble v. Commonwealth*, 293 S.W.3d 406, 410 (Ky.App. 2009). *Bearden* states that:

[I]n revocation proceedings for failure to pay a fine or restitution, a sentencing court must inquire into the reasons for the failure to pay. If the probationer willfully refused to pay or failed to make sufficient bona fide efforts legally to acquire the resources to pay, the court may revoke probation and sentence the defendant to imprisonment within the authorized range of its

sentencing authority. If the probationer could not pay despite sufficient bona fide efforts to acquire the resources to do so, the court must consider alternate measures of punishment other than imprisonment. Only if alternate measures are not adequate to meet the State's interests in punishment and deterrence may the court imprison a probationer who has made sufficient bona fide efforts to pay. To do otherwise would deprive the probationer of his conditional freedom simply because, through no fault of his own, he cannot pay the fine. Such a deprivation would be contrary to the fundamental fairness required by the Fourteenth Amendment.

*Bearden*, 461 U.S. 660, 672-673, 103 S.Ct. at 2073.

Charles argues that he was unable to comply with the court's orders through no fault of his own because he has severe learning disabilities and cannot work due to poor health. At the hearing, there was conflicting testimony regarding these contentions. Shery testified that during the years that she and Charles were together, he was employed doing property maintenance; that she had observed him reading and writing; and that he has a MySpace account. The only witnesses on Charles's behalf were his brother and sister. His brother testified that he has helped Charles apply for jobs and also testified that Charles has a valid driver's license, and is able to cut the grass and do other odd jobs.

The trial court made oral findings that Charles had already been found in contempt and had violated his conditional discharge once; that since he was last put on conditional discharge he had made no payments at all; and that there was no medical evidence that he is unable to work. Although specific written findings are always the better practice in order to satisfy the demands of due process and to

ensure an orderly appellate review, the findings in this case were sufficient since Charles was given notice of the reason for the hearing, was present to hear the evidence and the oral comments of the judge and understood why his conditional discharge was being revoked. *See Gamble*, 293 S.W.3d at 413.

Although Charles takes exception to the trial court's basing its decision largely on the fact that there were no medical records or other medical evidence regarding his inability to work, it was not error on the part of the court to find that the lay testimony on this subject was unpersuasive. "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the trial court to judge the credibility of the witnesses." Kentucky Rules of Civil Procedure (CR) 52.01.

The Kenton Circuit Court order revoking Charles Peniston's conditional discharge is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

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