

RENDERED: DECEMBER 29, 2010; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2008-CA-001288-MR

ANDRE LAW

APPELLANT

ON REMAND FROM THE KENTUCKY SUPREME COURT  
2009-SC-000682-DG

v. APPEAL FROM PULASKI CIRCUIT COURT  
HONORABLE JEFFREY T. BURDETTE, JUDGE  
ACTION NO. 06-CR-00199

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
REVERSING AND REMANDING

\*\* \*\* \* \* \* \* \*

BEFORE: LAMBERT AND TAYLOR, JUDGES; HENRY,<sup>1</sup> SENIOR JUDGE.

LAMBERT, JUDGE: This appeal is before us on remand from the Kentucky

Supreme Court for reconsideration in light of its decision in *Jones v.*

---

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

*Commonwealth*, 319 S.W.3d 295 (Ky. 2010). Upon reconsideration, we reverse and remand for proceedings consistent with this opinion.

The facts underlying this case were stated in our previous opinion as follows:

On July 26, 2006, Law was indicted in Pulaski Circuit Court for one count of rape in the third degree and one count of sodomy in the third degree, both Class D felonies. These crimes allegedly occurred on May 31, 2006. On March 15, 2007, Law pleaded guilty to both counts with the Commonwealth's recommendation for a total of one year to serve for these crimes. Law was also subject to a five-year conditional discharge as a sex offender. Final judgment was entered on May 3, 2007, and Law was sentenced to one year total to serve with a conditional discharge of five years. Both Law and the Commonwealth state that Law was sentenced as a non-violent offender, however the May 3, 2007, judgment reflects that he was sentenced as a violent offender. Law's conditional discharge period was later amended to three years pursuant to KRS 532.043.

On May 17, 2007, Law was credited with 323 days custody as of April 19, 2007, and was released from custody by way of a serve out on May 26, 2007. However, the probation department filed an affidavit on July 23, 2007, indicating that Law had been arrested on July 11, 2007, on a warrant from Wayne County on two felony charges (burglary and robbery in the second degree). Law pleaded guilty to the new charges and received a five-year sentence. The Pulaski Circuit Court revoked Law's conditional discharge on May 15, 2008, due to his new convictions in Wayne County. The Court ordered that his sentence for the Wayne County convictions run consecutively with the remaining time on his conditional discharge.

In our opinion rendered on September 18, 2009, this Court affirmed the trial court's order revoking Law's conditional discharge pursuant to KRS 532.043(5)

and KRS 533.040(3) as complying with the requisite ninety-day revocation period.

We reversed the portions of the Pulaski Circuit Court's order that improperly reflected time served and listed Law as a violent offender and remanded to the trial court with instructions to make the changes to its orders in conjunction with our opinion. Subsequently, on September 23, 2010, our Supreme Court rendered *Jones v. Commonwealth*, 319 S.W.3d 295 (Ky. 2010) and then remanded the instant case to us for reconsideration in light of its decision in *Jones*.

In *Jones*, the Supreme Court held that KRS 532.043(5) violates the separation of powers doctrine of Sections 27 and 28 of the Kentucky Constitution by giving the judicial branch, rather than the executive branch, the power to revoke conditional discharge imposed after a period of incarceration.<sup>2</sup> The Court reasoned that the statute violates the separation of powers doctrine by impermissibly conferring an executive power to the judiciary. The Court explained that conditional discharge is similar to parole, where:

[T]he Parole Board (executive branch) sets the conditions of release, as well as the terms of supervision, after a prisoner has been sentenced by the court and has begun servicing his or her sentence. *See* KRS 439.340. "Parole recognizes those justifications [for incarceration] existed at sentencing and there now exists a change of circumstances or a rehabilitation of a prisoner." "[T]he power to grant parole is a purely executive function." Upon breach of a condition of parole, the parole officer seeks revocation, and an administrative hearing is held before the Parole Board. Appeals are then made to the

---

<sup>2</sup> "Conditional discharge" under KRS 532.043 is a special form of post-sentence conditional release, which applies only to those convicted of certain sex offenses. It is not to be confused with conditional discharge under KRS Chapter 533, which is imposed in lieu of incarceration.

Circuit court, as with other executive, administrative appeals.

*Jones*, 319 S.W.3d at 298 (internal citations and footnotes omitted). The Court reasoned that in the case of conditional discharge, unlike with parole, the Parole Board or another executive branch is not making the initial decision to revoke the conditional discharge, but rather the judicial branch is making that decision.

The statute in question in this case, KRS 532.043, also mixes the roles of the judicial and executive branches of government. Under KRS 532.043, the General Assembly added a period of conditional discharge to the sentence of incarceration of persons convicted of certain offenses. The three-year (now five-year) period of conditional discharge is to be served beginning upon the person's final release from incarceration or parole. The conditions and supervision of the felony conditional discharge are set by the executive branch. Violations, however, are reported to the judicial branch (the court in the county of conviction) by the Commonwealth Attorney, for revocation (as opposed to an appeal of a decision by the Parole Board). Thus, the statute imposes upon the judiciary the duty to enforce conditions set by the executive branch.

*Id.* at 298-299. (Internal citations and footnotes omitted). Thus, the mixture of the role of the judiciary and the executive branch is fatal to the statute.

In the instant case, the trial court revoked Law's conditional discharge pursuant to KRS 532.043(5), and based on *Jones*, impermissibly invaded the province of the executive branch. Accordingly, the trial court's May 28, 2008, order revoking conditional release and imposition of sentence is reversed, and this case is remanded with instructions to dismiss the revocation proceedings.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Kathleen K. Schmidt  
V. Gene Lewter  
Department of Public Advocacy  
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Jack Conway  
Attorney General  
  
Joshua D. Farley  
Assistant Attorney General  
Frankfort, Kentucky