

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000517-MR

BRADLEY ALLEN DAY

APPELLANT

v.

APPEAL FROM BRACKEN CIRCUIT COURT
HONORABLE LEWIS D. NICHOLLS, JUDGE
ACTION NO. 04-CR-00009

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING AND REMANDING

** ** *

BEFORE: TAYLOR, CHIEF JUDGE, CAPERTON AND CLAYTON, JUDGES.

CAPERTON, JUDGE: Bradley Allen Day appeals from the trial court's order revoking his conditional discharge. On appeal, Day asserts that KRS 532.043 is unconstitutional; in light of the recent Kentucky Supreme Court decision of *Jones v. Commonwealth*, 319 S.W.3d 295 (Ky. 2010), we reverse and remand this matter to the trial court for further consideration.

The facts of this appeal are not in dispute. Day was convicted for sexual abuse first-degree, victim under 12. On July 29, 2009, Day was released on sex offender conditional discharge after serving 2 years, 11 months, and 24 days of a 3 year sentence. Although Day had served the majority of his sentence, his appeal was not final as the Kentucky Supreme Court granted discretionary review on January 13, 2010.

As a part of his conditional discharge, Day was ordered to attend and successfully complete a community based sex offender treatment program (SOTP). Part of the program required Day to accept full responsibility for the offense. Day attended four SOTP meetings but continued to refuse to admit the offense, claiming that he would never admit to an offense that he did not commit. Day was terminated from SOTP for refusal to admit his offense and failure to attend treatment. Thereafter, Day's Probation Officer, Trent Boggs, arrived to conduct a home visit in which Day failed to cooperate by not letting Boggs into his residence. Boggs returned with a warrant based on his visit and Day's termination from SOTP.

The Commonwealth filed a motion to revoke Day's conditional discharge. A hearing was held on February 18, 2010, concerning the revocation of Day's conditional discharge. Defense counsel argued that Day was in the paradoxical position of having to admit guilt, which he had denied from the beginning, while his case was still on appeal. The trial court entered an order revoking Day's conditional discharge. It is from this that Day now appeals.

On appeal, Day presents a single argument, namely, that the sexual offender conditional discharge statute, KRS 532.043, assigns sentencing powers to the judicial branch that properly belong to the executive branch in violation of Sections 27 and 28 of the Kentucky Constitution. While this issue is unpreserved, Day directs this Court to *Jones v. Commonwealth*, 319 S.W.3d 295 (Ky. 2010), which was made final after Day filed this appeal.

In *Jones, supra*, the Kentucky Supreme Court found the same argument presented *sub judice* to be palpable error and stated that it may therefore be considered by an appellate court on appeal. While *Jones* ultimately held KRS 532.043 to be unconstitutional, the trial court below did not have an opportunity to address this matter. As such, we believe it appropriate to reverse and remand this matter to the trial court for further consideration.¹

In light of the aforementioned we reverse and remand this matter to the trial court for further consideration.

ALL CONCUR.

¹ Indeed, the trial court will have to consider *Griffith v. Kentucky*, 479 U.S. 314, 322, 107 S. Ct. 708, 713, 93 L. Ed. 2d 649 (1987) as well.

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