

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

NO. 2010-CA-001056-ME

SAMUEL E. BATTON

APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT  
HONORABLE CHRISTOPHER J. MEHLING, JUDGE  
ACTION NO. 07-J-01059

COMMONWEALTH OF KENTUCKY EX REL.  
LISA-ANN NOBLE; AND HON. CHRISTOPHER  
J. MEHLING, JUDGE, KENTON CIRCUIT COURT

APPELLEES

OPINION  
AFFIRMING

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

BEFORE: CLAYTON AND NICKELL, JUDGES; ISAAC,<sup>1</sup> SENIOR JUDGE.

ISAAC, SENIOR JUDGE: Samuel E. Batton appeals from an order revoking his conditional discharge for failure to pay child support. He argues: (1) the trial court was required to set a purge amount to avoid incarceration and the trial court failed

---

<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.

to make a finding that he was unable to work because of mental health issues. For the reasons stated below, we affirm.

On August 1, 2007, the Commonwealth filed a paternity complaint naming Batton as the father of a minor child. Genetic testing confirmed Batton was the father. On May 5, 2008, the trial court adjudicated Batton to be the legal father of the child and ordered Batton to pay \$175 per month for child support, provide health insurance for the child, pay \$40 per month toward the arrearage, pay \$90 for the genetic testing, and pay 50% of unreimbursed medical expenses. The court also ordered both parents to obtain a GED.

Batton failed to make the required payments and owed \$2275 in arrearage. Following a hearing on April 1, 2009, the trial court found Batton in contempt of court and sentencing was continued until July 1, 2009. The court ordered Batton to provide proof that he was attempting to obtain his GED and to provide the applications for jobs he was seeking. Following a hearing on July 1, 2009, the court sentenced him to serve five weekends in jail and ordered him to pay an additional \$25 per month toward the arrearage. The court conditionally discharged an additional 180 days for two years. No appeal was taken from this order.

Batton again failed to make the child support payments as ordered by the court. Following a hearing on April 7, 2010, the trial court revoked the conditional discharge. The court ordered Batton to serve 30 days in jail and

conditionally discharged the remaining 135 days of the sentence for two years.

This appeal followed.

Batton argues that the trial court was required to set a purge amount to avoid incarceration and that the trial court failed to make a finding that he was unable to work because of mental health issues.

Batton cites the cases of *Lewis v. Lewis*, 875 S.W.2d 862 (Ky. 1993), and *Com. Ex rel. Bailey v. Bailey*, 970 S.W.2d 818 (Ky.App. 1998), in support of his position. While Batton correctly states the holdings of these cases, they are inapplicable to the issue before us. The finding of contempt was made on April 1, 2009, and Batton was sentenced for contempt on July 1, 2009. No appeal was taken from the order and sentence of contempt. Any issue regarding a purge amount should have been made at that time. Batton has appealed from the April 23, 2010 order revoking his conditional discharge. This order was not a separate finding of civil contempt.

Nevertheless, this Court has held that trial courts must satisfy the requirements of *Bearden v. Georgia*, 461 U.S. 660, 103 S. Ct. 2064, 76 L. Ed. 2d 221 (1983), in proceedings to revoke probation or conditional discharge for failure to pay child support. *Gamble v. Commonwealth*, 293 S.W.3d 406, 410 (Ky.App. 2009). The U.S. Supreme Court held 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. at 672-73, 103 S. Ct. at 2073.

Although the order revoking conditional discharge did not contain specific findings, the trial court entered informal written findings into the record on April 8, 2010, following the hearing. The trial court found that Batton: (1) had failed to present any medical evidence to support his claim of disability; (2) had a job, but lost it because of fighting; and (3) had not made the payments required by previous orders. Based on these findings, we are convinced that the trial court considered Batton's ability to pay and implicitly concluded that he had not made bona fide efforts to acquire the resources to pay. Moreover, this Court has held that even oral findings in this context are sufficient as long the reviewing court is able to ascertain the basis of the trial court's decision. *Gamble, supra*.

Accordingly, the order of the Kenton Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Karen Shuff Maurer  
Assistant Public Advocate  
Department of Public Advocacy  
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Katherine McLindon  
Assistant Kenton County Attorney  
Covington, Kentucky