

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

NO. 2014-CA-001149-MR

TORIE DEWAYNE QUALLS

APPELLANT

v. APPEAL FROM HARDIN CIRCUIT COURT  
HONORABLE PAMELA ADDINGTON, JUDGE  
ACTION NO. 06-D-00176-001

HARDIN CIRCUIT COURT and  
COMMONWEALTH OF KENTUCKY

APPELLEES

OPINION  
VACATING AND REMANDING

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BEFORE: JONES, D. LAMBERT, AND THOMPSON, JUDGES.

JONES, JUDGE: Torie Dewayne Qualls (“Appellant”), appeals from a Hardin Circuit order revoking his bond and subsequently ordering \$2,000 in bond money to be forfeited to the Hardin County Attorney, Child Support Division, to be applied to his child support arrearage. After careful review, we VACATE the court’s order and REMAND for further proceedings consistent with this opinion.

## I. FACTUAL AND PROCEDURAL BACKGROUND

This case stems out of Appellant's repeated failures to appear as directed and failures to comply with various court orders. First, in Case No. 06-D-00176-001, Appellant failed to appear in Family Court on February 19, 2007, and failed to provide proof of counseling. He was arrested on February 20, 2007, and lodged in the Hardin County Jail. He paid a \$1,500.00 Cash Bail Bond which states "Full amount of bail paid into the court, to be forfeited should you fail to appear as required by the Court." Further, conditions were attached to Appellant's bond, which stated that Appellant should have no further violations of the law and should report to Hardin County Pretrial Services. The attached conditions further state: "By signing this contract, defendant acknowledges and accepts the conditions of release and understand[s] that violation of the terms of this contract will result in the revocation of the defendant's release/bail bond and/or additional criminal charges." This document was also signed by Appellant on February 22, 2007.

On May 29, 2007, Appellant again failed to appear in Hardin Family Court and failed to provide proof of counseling. A domestic violence bench warrant was issued on May 29, 2007, and served on Appellant on June 1, 2007. Appellant paid a \$500.00 Cash Bond and further agreed to "maintain all conditions required by Family Court."

After these two occurrences, it appears from the record that Appellant was at least attempting to comply with all court orders until he was arrested in June

of 2008 for unrelated new criminal charges. Thereafter, on June 29, 2009, the Hardin Family Court remanded the Domestic Violence case because “Mr. Qualls has been sentenced to a jail term of over five years.”

On May 9, 2014, Appellant wrote a letter to the Hardin Circuit Clerk requesting that his bond money be returned. Additionally, on May 13, 2014, Appellant filed a motion for exoneration of bail bond money pursuant to RCr<sup>1</sup> 4.50(2). On May 27, 2014, the court entered a Notice of Filing of Ex Parte Communication and Order for Notification and hearing date. The court set a hearing for June 23, 2014, and ordered that all attorneys of record and parties not represented by counsel shall receive notice and be present for said hearing. Further, notice of this hearing was sent to all attorneys of record, all parties, and to the Hardin County Attorney, Child Support Division. This order was entered by the Hardin Clerk on June 2, 2014, with notation that a copy of the order was given to petitioner, respondent, and the child support division. Appellant’s inmate mail log also reveals that he received incoming mail from the Hardin Circuit Court Clerk on June 4, 2014, evidencing that he received notice of the court’s order.

On June 3, 2014, the Child Support Division responded to the notification from the court, stating that it had no knowledge of whether Appellant was entitled to have bond money returned or if said bond is subject to forfeiture. However, it stated that if Appellant has violated conditions of his bond and forfeiture is appropriate, it requested it to be paid to Appellant’s child support case

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<sup>1</sup> Kentucky Rules of Criminal Procedure.

IV-D #3807032 and he would be given credit toward his arrears. The Certificate of Service states that a copy of the notification was mailed to Appellant at the Kentucky State Reformatory on June 5, 2014. It is unclear whether the County Attorney served the Appellant in accordance with CR 5.02.<sup>2</sup>

On June 23, 2014, the Hardin Family Court held a hearing on the bond issue. After review, the Family Court ordered that Appellant “has not complied with various prior court orders and therefore shall deny his motion.” Further, the Family Court ordered that, “the bond money posted in the above-styled case shall be paid to the Hardin County Attorney’s office and shall be applied to the child support arrearages of the Respondent (Appellant).” This Order was entered on July 1, 2014. It is from this order that Appellant now appeals.

## II. ANALYSIS

Appellant argues that the procedure utilized by the Hardin Family Court before ordering the forfeiture of his bond was insufficient to protect his due process rights. Additionally, Appellant argues that since he was incarcerated, the Family Court should not have declared a forfeiture of bail without first appointing a guardian *ad litem* to represent him pursuant to CR 17.04(1). *See Davidson v. Boggs*, 859 S.W.2d 662 (Ky. App. 1993).

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<sup>2</sup> The certificate of service states that on June 5, 2014, a copy of the response was sent to Appellant and to Licandra Howard via first class mail. However, the mail log provided by Appellant only lists one incoming mail, which was on June 4, 2014, from the Hardin Circuit Court. This conflicts with the certification of service on the Commonwealth’s document, dated June 5, 2014.

It is well-settled in Kentucky that an indigent civil litigant is not constitutionally entitled to appointment of counsel except in extremely limited circumstances. If imprisonment is a potential consequence of a civil contempt action, then counsel may be appointed. *Lewis v. Lewis*, 875 S.W.2d 862 (Ky. 1993). If a prisoner fails to defend a civil action brought against him, a guardian *ad litem* must be appointed for him before judgment may be entered. CR 17.04; *Davidson v. Boggs*, 859 S.W.2d 662 (Ky. App. 1993).

However, CR 17.04 has no application where, as here, the action is brought by, rather than against, the prisoner. Except in these limited circumstances, there is no constitutional right to counsel in a civil case. *May v. Coleman*, 945 S.W.2d 426, 427 (Ky. 1997) (citing *Parsley v. Knuckles*, 346 S.W.2d 1 (Ky. 1961)). Thus, as this is an action brought by Appellant to have his bond money returned, rather than against him, the trial court did not commit error in failing to appoint counsel for him.

The purpose of posting bonds “is to secure the defendant’s being arrested and brought to justice.” *Clemons v. Commonwealth*, 152 S.W.3d 256, 260 (Ky. App. 2004), citing to *Abrams v. Commonwealth*, 254 S.W.2d 983, 984 (Ky. 1934); *see also Johnson Bonding Company, Inc. v. Commonwealth*, 487 S.W.2d 911, 913 (Ky. 1972). Bonds are permitted by the court “for the convenience of a person not yet proved to be guilty, and to protect the state against the expense of keeping such persons in jail.” *See Abrams, supra*. Bonds are discretionary and the decision to impose, forfeit, or remit bonds lies solely with the trial court. *Clemons*,

152 S.W.3d at 260. *Abraham v. Commonwealth*, 565 S.W.2d 152, 158 (Ky. App. 1977); see also *United Bonding Ins. Co., Kent Cox, Agent v. Commonwealth*, 461 S.W.2d 536, 538 (Ky. 1971).

Bonds are also used to impose certain non-financial conditions to control the defendant's behavior while on pretrial release. The majority of jurisdictions allow courts to forfeit a defendant's bond if one of these conditions is breached. *Clemons*, 152 S.W.3d at 260; See, e.g., *State v. Korecky*, 777 A.2d 927, 933–934 (N.J. 2001).<sup>3</sup>

In *Clemmons*, the court explained Kentucky case law has yet to broach the subject of whether bond forfeiture is appropriate for violation of non-financial conditions. However, the Court noted the language of the applicable statute and procedural rule clearly indicate the General Assembly's intent that courts have the option to forfeit for such violations. KRS 431.545 plainly states that bond forfeiture is appropriate if a defendant “shall willfully fail to appear or

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<sup>3</sup> “The majority rule in other jurisdictions is that bail may be forfeited for a violation of a condition other than nonappearance.” (Citing *State v. Williams*, 730 A.2d 677, 680 (Me.1999)) (affirming forfeiture of bail after finding defendant possessed alcohol in violation of condition of release); *State v. Hernandez*, 830, 511 N.W.2d 535, 538–39 (Neb. App.1993) (holding bond properly forfeited because defendant breached “crime-free” condition); *State v. McLaughlin*, 122 3d 418, 701 N.E.2d 1048, 1051 (Ohio App. 1997) (holding partial forfeiture of appearance bond proper when defendant violated bond condition that he have “no contact” with victim); *Bridges v. Superior Court*, 396 A.2d 97, 101 (R.I. 1978) (“[B]ail system is designed to ensure the accused's presence at court and to keep the accused as much under control of the court as if he were actually in the custody of a court officer.”); *State v. Badzmirowski*, 171 2d 260, 490 N.W.2d 784, 786 (Wis. App.1992) (holding bond properly forfeited when defendant violated bond no-contact condition).

shall willfully fail to comply with the conditions of his release.” Likewise, RCr

4.42(1), (3) states:

(1) If at any time following the release of the defendant and before the defendant is required to appear for trial the court is advised of a material change in the defendant's circumstances or that the defendant has not complied with all conditions imposed upon his or her release, the court having jurisdiction may order the defendant's arrest and require the defendant or the defendant's surety or sureties to appear and show cause why the bail bond should not be forfeited or the conditions of release be changed, or both.

....

(3) Where the court is acting on advice that the defendant has not complied with all conditions imposed upon his or her release, the court shall not change the conditions of release or order forfeiture of the bail bond unless it finds by clear and convincing evidence that the defendant has wilfully [sic] violated one of the conditions of his or her release or that there is a substantial risk of nonappearance.

Thus, under the above reasoning, the trial court has discretion to order forfeiture of the bond if it is shown that the defendant willfully failed to comply with conditions of his release. Accordingly, under RCr 4.42(5), before the court may make the findings required for change of conditions or forfeiture of bail under this rule, the defendant and the defendant's sureties shall be granted an adversary hearing comporting with the requirements of due process.

Appellant, who was incarcerated, was not present at the forfeiture hearing, nor was he appointed counsel to represent him at the hearing. Appellant argues this is a direct violation of his due process rights. We agree.

As it was stated in *Morgan County v. Governor of Kentucky*, 288 532, 156 S.W.2d 498 (Ky. 1941): “Notice and opportunity to be heard and defend are the essentials of due process.” *Id.* at 535, 156 S.W.2d 498 (citing 12 Am.Jur. *Constitutional Law* § 573). The opportunity to examine and cross-examine witnesses, to introduce and refute evidence, is central to the right of due process. *Utility Regulatory Com’n v. Ky. Water Service Co.*, 642 S.W.2d 591 (Ky. App. 1982); 16A Am.Jur.2d *Constitutional Law* 848 (1979).

Although it may have very well been proven at the adversarial hearing that Appellant did willfully fail to comply with conditions of his release, this does not relieve the court of providing Appellant with appropriate proceedings comporting with due process prior to forfeiting his bond money. Appellant should have been granted an adversarial hearing at which he was present and had the opportunity to be heard. A large sum, \$2,000.00, was forfeited from Appellant in a proceeding in which he was neither present for nor represented by counsel. Such a procedure cannot be deemed a harmless error.

### **III. CONCLUSION**

For the reasons stated herein, we vacate the Hardin Circuit Court's order forfeiting Appellant's bond money and remand this matter for proceedings consistent with this opinion.

ALL CONCUR.



BRIEF FOR APPELLANT:

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