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**SUPREME COURT GRANTED DISCRETIONARY REVIEW:  
OCTOBER 15, 2008  
(FILE NO. 2007-SC-0922-DG)**

# **Commonwealth of Kentucky**

## **Court of Appeals**

NO. 2006-CA-000897-MR

GERALD HENLEY

APPELLANT

v. APPEAL FROM CALLOWAY CIRCUIT COURT  
HONORABLE DENNIS R. FOUST, JUDGE  
ACTION NO. 01-CR-00128

COMMONWEALTH OF KENTUCKY

APPELLEE

### OPINION AFFIRMING

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BEFORE: THOMPSON, JUDGE; BUCKINGHAM AND HENRY, SENIOR JUDGES.<sup>1</sup>

BUCKINGHAM, SENIOR JUDGE: Gerald Henley appeals from an order of the

Calloway Circuit Court revoking his three-year conditional discharge and ordering his

reincarceration. The issue on appeal is whether KRS 532.043(5) is unconstitutional as a

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<sup>1</sup> Senior Judges David C. Buckingham and Michael L. Henry sitting as special judges by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statute (KRS) 21.580.

violation of the separation of powers clause of the Kentucky Constitution because the statute gives the judicial branch, rather than the executive branch, the power to revoke conditional discharge. We conclude that the statute is constitutional and thus affirm.

In July 2001 Henley pled guilty in the Calloway Circuit Court to two counts of first-degree sex abuse and was sentenced to three years in prison. The court further sentenced Henley to an additional three-year period of conditional discharge, to take effect upon his release from incarceration or parole from his initial sentence, pursuant to KRS 532.043. After serving out his initial three-year sentence, Henley was released on three-years conditional discharge.

In March 2006, the Commonwealth moved the trial court to revoke Henley's conditional discharge due to his violating its conditions. Prior to the revocation hearing, Henley moved the court to declare KRS 532.043(5) unconstitutional. The court denied the motion, subsequently revoked Henley's conditional discharge, and ordered his reincarceration for three years. This appeal by Henley followed.

“The issue of whether a statute is unconstitutional is a question of law subject to de novo review.” *Wilfong v. Commonwealth*, 175 S.W.3d 84, 91 (Ky.App. 2004).<sup>2</sup> “[A]cts of the General Assembly carry a presumption of constitutionality. A statute will not be invalidated as unconstitutional unless it clearly, unequivocally, and completely violates provisions of the constitution.” *Id.* Further, the party questioning the constitutionality of a statute bears the burden of proving its contention. *Id.*

“Section 27 of the Kentucky Constitution creates three distinct branches of government and Section 28 precludes one branch from exercising any power properly

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<sup>2</sup> In *Wilfong*, KRS 532.043 withstood a challenge that it violated the separation of powers doctrine in a different manner. *Id.* at 92.

belonging to either of the other two branches.” *Wilfong*, 175 S.W.2d at 91. “The separation of powers doctrine precludes each of the three branches of government from encroaching upon the domain of the other two branches.” *Id.*

KRS 532.043 provides in part that, in addition to the penalties authorized by law, persons committing certain felony offenses shall also be subjected to three-years' conditional discharge following their incarceration upon expiration of their sentence or completion of their parole.<sup>3</sup> KRS 532.043(1) and (2). The statute also provides that the defendant shall be subject to the orders of the Department of Corrections and to the supervision of the Division of Probation and Parole. KRS 532.043(3) and (4). Finally, KRS 532.043(5) provides as follows:

If a person violates a provision specified in subsection (3) of this section, the violation shall be reported in writing to the Commonwealth's attorney in the county of conviction. The Commonwealth's attorney may petition the court to revoke the defendant's conditional discharge and reincarcerate the defendant as set forth in KRS 532.060.

Henley states that “[b]ecause the Executive Branch, through Probation and Parole, administers conditional discharge, allowing the Judicial Branch to revoke conditional discharge violates the separation of powers.” Henley acknowledges that courts may revoke probation, but he states that “conditional discharge is not akin to probation.” Rather, he argues that conditional discharge “mirrors parole,” which may be revoked only by the Department of Corrections. He reasons that the three-year conditional discharge period is essentially an added period of parole.

In *Mullins v. Commonwealth*, 956 S.W.2d 222, 223 (Ky.App. 1997), this court noted that probation is a function of the judicial branch while parole is a function of

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<sup>3</sup> In 2006 the General Assembly enlarged the conditional discharge period to five years.

the executive branch. In *Pedigo v. Commonwealth*, 644 S.W.2d 355, 358 (Ky.App. 1982), this court plainly stated that “[f]or all purposes, except supervision, or the lack thereof, there is no difference between conditional discharge and probation.”

While conditional discharge is normally probation without supervision, Henley notes that conditional discharge under KRS 532.043 is subject to supervision by the Division of Probation and Parole. *See* KRS 532.043(4). Therefore, he argues that the form of conditional discharge employed under KRS 532.043 is merely an extension of parole.

In *Prater v. Commonwealth*, 82 S.W.3d 898 (Ky. 2002), the Kentucky Supreme Court distinguished between probation and parole and stated that “parole relates to action taken after the door has been closed.” *Id.* at 904, *quoting Lovelace v. Commonwealth*, 147 S.W.2d 1029, 1033 (Ky. 1941). Further, the court stated that “[a] parole . . . suspends the execution of a penalty already imposed.” *Id.* From this analysis, it is apparent that the conditional discharge under KRS 532.043 is akin to probation rather than parole. Conditional discharge in this instance releases a defendant from a sentence imposed by the court prior to his further incarceration with the executive branch. The defendant has not been again placed in the physical custody of the executive branch (although he or she continues under its supervision). The service of the defendant's sentence remains under the control of the judicial branch. With parole, on the other hand, the defendant is committed to the physical custody of the executive branch (Department of Corrections) and is subject to release and possibly reincarceration by that branch only. *See Prater, supra.*

Therefore, we conclude that KRS 532.043(5) does not violate the separation of powers clause by giving the power of revocation of conditional discharge to the courts. Thus, we hold that the KRS 532.043(5) is constitutional.

The order of the Calloway Circuit Court is affirmed.

ALL CONCUR.

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