

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-000220-MR

BERRY BOYINGTON

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE KEN G. COREY, JUDGE
ACTION NO. 96-CR-000888

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION & ORDER
DISMISSING APPEAL

** ** * * *

BEFORE: GUIDUGLI, HUDDLESTON AND MCANULTY, JUDGES.

GUIDUGLI, JUDGE. Appellant, Berry Boyington (Boyington), filed this, his second appeal, after he was denied probation or additional treatment in a juvenile facility pursuant to KRS 640.030(2) upon his turning eighteen (18) years old. In his appeal, Boyington conceded that Judge Ken Corey's order of January 16, 1998, complied with the sentencing requirements of KRS 533.010(2), but argues that the trial court failed "to show of record not only that less restrictive alternatives were considered, but also that they were either attempted or were not feasible and that it was 'absolutely necessary' to choose a more

restrictive alternative" pursuant to KRS 600.020(2)(c) and KRS 640.030(2). Appellant also contends that the trial court's order "does not show that it was 'absolutely necessary' to send appellant to the Department of Corrections." Based upon these arguments, Boyington seeks the following relief from this Court: "the Court (of appeals) is urged to vacate Judge Corey's order and remand with directions to conduct a KRS 640.030(2) proceeding that complies with all purposes of the Unified Juvenile Code."

In his first appeal to this Court, Boyington raised the following issues:

(1) whether the 1994 amendments to the Unified Juvenile Code unconstitutionally prescribe circuit court jurisdiction in violation of the Kentucky Constitution, Section 112(5) and Section 113(6); (2) whether KRS 635.020(4) ad [sic] KRS 640.010(2) can be reconciled; and (3) whether Boyington was eligible for probation.

In an unpublished opinion (No. 96-CA-1748-MR), rendered June 26, 1998, this Court affirmed in part, vacated in part and remanded the action. That unpublished opinion was rendered subsequent to the circuit court's order which is the subject of appellant's present appeal.

The portion of the lower court's order which was vacated dealt with Boyington's eligibility for probation pursuant to KRS 640.040(4). Addressing that issue, this Court stated:

Boyington's final argument [is] that he should have been eligible for probation under KRS 640.040(4). The Commonwealth contends Boyington is ineligible for probation under 635.020(4) and KRS 533.060(). This Court abated this appeal indefinitely pursuant to an order entered on June 23, 1997, pending disposition by the Supreme Court of Kentucky of Britt v. Commonwealth, Ky., ___ S.W.2d

_____, (1998). In an opinion rendered on March 19, 1998, the Kentucky Supreme Court held that "juveniles transferred to circuit court pursuant to the 1994 version of KRS 635.020(4) are to be considered 'youthful offenders' eligible for the ameliorative sentencing provisions of KRS Chapter 640."

In accordance with Halsell, supra, and Britt¹ supra, this Court affirms the circuit court conviction, vacates the sentence and remands, with direction to sentence Boyington in accordance with the provisions set forth in KRS Chapter 640.

In that this Court remanded Boyington's first appeal and directed the court to sentence him pursuant to the provisions set forth in KRS Chapter 640, the same relief which he seeks in this, his second appeal, the issue before this Court is moot. Therefore, it is ORDERED that the appeal be, and the same is hereby DISMISSED as moot.

Daniel T. Guidugli
JUDGE, COURT OF APPEALS

ENTERED: April 16, 1999

McANULTY, JUDGE, CONCURS.

HUDDLESTON, JUDGE, CONCURS IN RESULT ONLY.

BRIEF FOR APPELLANT:

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¹Commonwealth v. Halsell, Ky., 934S.W.2d 552 (1996) ; Britt v. Commonwealth, Ky., 965 S.W.2d 147 (1998).