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OPINION OF MARCH 9, 2012, WITHDRAWN

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-002158-MR

DEPARTMENT OF CORRECTIONS APPELLANT

v. APPEAL FROM ELLIOT CIRCUIT COURT
HONORABLE REBECCA PHILLIPS, JUDGE
ACTION NO. 08-CI-00109

MARCUS FRIAR APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: CLAYTON, COMBS, AND NICKELL, JUDGES.

CLAYTON, JUDGE: The Department of Corrections appeals the determination of the Elliot Circuit Court holding that Marcus Friar was exempt from being classified as a violent offender. Upon review, we reverse and remand.

Marcus Friar was a juvenile offender when he was convicted in the McCracken Circuit Court of first degree rape and resisting arrest. He was

sentenced to serve fifteen years, but because he was still a juvenile, was remanded to the care and custody of the department of juvenile justice. After he turned eighteen years of age, he appeared before the trial court on August 16, 2004 for re-sentencing as an adult pursuant to Kentucky Revised Statutes (KRS) 640.030.

Friar was given credit for 1,503 days served as a juvenile and the remainder of his sentence was probated for a period of 4 years. On October 10, 2006, he returned to the trial court after testing positive on a drug test. He admitted the use of illegal drugs and waived any hearing considering the revocation of his probation.

Friar was then sentenced to serve the remainder of the original fifteen year sentence. The department of corrections incarcerated him in an adult prison and classified him as a violent offender pursuant to KRS 439.3401. That classification requires service of 85 percent of any sentence before a prisoner may be considered for parole instead of the less punitive 20 percent parole eligibility for non-violent offenders. 501 Kentucky Administrative Regulation 1:030.

Friar then filed a petition for a writ of mandamus seeking an order prohibiting the department of corrections from classifying him as a violent offender. The trial court granted that request and entered the order sought. The department of corrections then filed this appeal.

We first examined the issue of how to classify a juvenile offender who has reached adulthood. *Mullins v. Commonwealth,* 956 S.W.2d 222 (Ky.App. 1997). In that case we held that juvenile offenders who attained the age of

majority are not exempt from the provisions of the violent offender statute, KRS 439.3401. The Kentucky Supreme Court held in the case of *Commonwealth v. Merriman*, 265 S.W.3d 196, 201 (Ky. 2008), that the "Violent Offender Statute cannot be read to apply to youthful offenders." However, in the most recent case of *Edwards v. Harrod*, 391 S.W.3d 755 (Ky. 2013) the Supreme Court discussed the difference between probation and parole further and distinguished *Merriman*. The Court in *Edwards* stated,

> [T]he power to grant parole is a purely executive function. Kentucky Courts have . . . conceptualized 'probation' as the suspension of the *imposition* of a sentence while, after imposition, 'parole' suspends *execution* of a sentence[.] So, it would be inappropriate to apply *Merriman* here by simply equating parole with probation. It is entirely consistent for the General Assembly to direct circuit courts to consider probation for youthful offenders despite the Violent Offender Statute and, at the same time, require the parole board to apply the parole restrictions of the Violent Offender Statute to youthful offenders.
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> Second . . . the youthful offender statutes do not require the parole board to consider all youthful offenders for early parole.
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> . . . .
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> So application of the parole-eligibility restrictions of a Violent Offender Statute does not conflict with or nullify the youthful offender procedures. KRS 640.030(2) indicates that youthful offenders may be paroled prior to their 18-year-old hearing. But the parole board is not required to consider granting parole to youthful offenders. And, under our holding today, the parole board cannot grant parole to youthful offenders who are ineligible under the Violent Offender Statute.

> For the forgoing reasons, the *Merriman* opinion is limited to probation considerations."

Id. at 761-62 (footnotes and citations omitted).

We therefore reverse the decision of the Elliot Circuit Court granting the petition for a writ of mandamus prohibiting the department of corrections from classifying Friar as a violent offender and remand this action to the Elliot Circuit Court consistent with the holding of this opinion.

NICKELL, JUDGE, CONCURS.

COMBS, JUDGE, CONCURS IN RESULT ONLY.

BRIEF FOR APPELLANT:

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