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

NO. 2009-CA-000440-MR

MELISSA HARROD, ADMINISTRATOR  
OFFENDER INFORMATION SERVICE;  
LADONNA THOMPSON, COMMISSIONER,  
DEPARTMENT OF CORRECTIONS

APPELLANTS

v.

APPEAL FROM FRANKLIN CIRCUIT COURT  
HONORABLE PHILLIP J. SHEPHERD, JUDGE  
ACTION NO. 08-CI-01955

ANTHONY EDWARDS

APPELLEE

OPINION  
REVERSING

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BEFORE: ACREE, CAPERTON AND KELLER, JUDGES.

ACREE, JUDGE: Appellants seek reversal of the Franklin Circuit Court's

determination that the Violent Offender Statute, Kentucky Revised Statutes (KRS)

439.3401(4),<sup>1</sup> is inapplicable to all individuals sentenced as youthful offenders.

Because the circuit court applies our Supreme Court's holding in *Commonwealth v. Merriman*, 265 S.W.3d 196 (Ky. 2008) too broadly, we reverse.

The appellee, Anthony Edwards, pleaded guilty to three counts of robbery in the first degree. Upon reaching his eighteenth birthday, Edwards was given a hearing pursuant to KRS 640.030(2), after which the court determined that Edwards should be released on probation from his previously imposed ten-year sentence. Edwards subsequently violated his probation and probation was revoked. He was then delivered to the custody of the Department of Corrections and classified as a violent offender.

Edwards filed a declaration of rights with the Franklin Circuit Court, arguing that he should not be classified as a violent offender. Relying on *Merriman*, the circuit court determined that Edwards's classification as a violent offender was improper. However, the trial court's determination was based on an overbroad reading of *Merriman*. After carefully analyzing the Unified Juvenile Code, considering the distinctions between probation and parole, and then applying the Supreme Court's holding in *Merriman*, we conclude that KRS 439.3401(4) is not wholly inapplicable to youthful offenders.

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<sup>1</sup> KRS 439.3401(4) states: "A violent offender may not be awarded any credit on his sentence authorized by KRS 197.045(1), except the educational credit. A violent offender may, at the discretion of the commissioner, receive credit on his sentence authorized by KRS 197.045(3). In no event shall a violent offender be given credit on his sentence if the credit reduces the term of imprisonment to less than eighty-five percent (85%) of the sentence."

Pursuant to the Unified Juvenile Code, a person under the age of eighteen who commits a felony is subject to classification as a youthful offender. *See* KRS 640.010. Once so classified, the minor's case is transferred to the circuit court. *Id.* If the minor pleads guilty or is convicted, he "shall be subject to the same type of sentencing procedures and duration of sentence, including probation and conditional discharge, as an adult convicted of a felony offense[.]" KRS 640.030.

If the youthful offender's sentence has not expired, or he has not been released on probation or parole as of his eighteenth birthday, the individual is returned to the sentencing court for reconsideration. KRS 640.030(2). KRS 640.030(2) gives the court three options. The court may place the youthful offender on probation or conditional discharge, may order him to enroll in a six month treatment program, or may incarcerate him in an institution operated by the Department of Corrections. KRS 640.030(2)(a-c). If the circuit court determines that the youthful offender must continue in incarceration, the Department of Juvenile Justice (DJJ) has the discretion, after consultation with the Department of Corrections, to allow him to stay in a juvenile justice facility. KRS 640.075.

If the DJJ permits the youthful offender to stay in the juvenile facility, he is also allowed to petition the circuit court for reconsideration of probation after completing an additional twelve months of service. KRS 640.075(4). Thus, the statute is giving the youthful offender an additional chance to petition for consideration of probation. This reconsideration only applies to individuals who have not been released to the Department of Corrections. *Id.* The statute goes on

to state that, “*except as provided in KRS 439.3401*, [the youthful offender may also] be considered for early parole[.]” KRS 640.075(4) (emphasis supplied).

Therefore, even if the DJJ exercises its discretion and allows a youthful offender to stay in a juvenile facility after his eighteenth birthday, thereby giving him another opportunity to petition the court for reconsideration of probation, he is nonetheless subject to the provisions of KRS 439.3401 as those provisions relate to early parole. *Id.* However, to the extent that the Unified Juvenile Code permits reconsideration of probation by the circuit court, KRS 439.3401 does not interfere.<sup>2</sup>

Kentucky Courts recognize a distinction between probation and parole. *Prater v. Commonwealth*, 82 S.W.3d 898, 903 (Ky. 2002). Probation was traditionally considered a pre-conviction action “taken before the prison door [was] closed[.]” *Id.* at 904. Parole suspends a penalty that has already been imposed. *Id.*

Although the sentencing provisions of the Kentucky Penal Code now permit trial courts to enter a judgment sentencing a defendant to a *sentence of probation* without the procedural hurdles required under preexisting law, the pre-judgment and post-judgment distinction remains because “[t]he actual length of [a defendant’s] sentence is determined by the parole board as was done under the pre-existing process.”

*Id.* (footnote omitted) (emphasis in original). This distinction was clearly recognized by the legislature in its enactment of KRS 640.030 and 640.075.

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<sup>2</sup> For example, KRS 439.3401 would not permit the reconsideration of probation afforded under KRS 640.075(4).

The legislature specifically gave the circuit court the authority to reconsider probation; *i.e.*, to reconsider the imposed sentence. Parole on the other hand is a function of the executive branch – the parole board – and deals with the length of service required for the sentence imposed. *See Prater*, 82 S.W.3d at 905, 907 (noting that the distinction between parole and probation is necessitated by the separation of power between the judicial and executive branches). In essence, the Unified Juvenile Code gives the circuit court an opportunity to adjust the sentence, not to determine how much of the sentence must be served. Therefore, the reconsideration of probation afforded under the Unified Juvenile Code is unaffected by the parole limits set forth in KRS 439.3401(4).<sup>3</sup> Such a finding is consistent with the statute and the reasoning set forth in *Merriman*. *See Merriman*, 265 S.W.3d at 200.

In *Merriman*, the Supreme Court held that “the Violent Offender Statute cannot act to prevent consideration of probation or conditional discharge on the youthful offender’s 18<sup>th</sup> birthday[.]” *Id.* The court reasoned that allowing such a prohibition would “clearly [undercut] the rehabilitative purposes of the Juvenile Code by removing a youthful offender’s incentive to do well and cooperate with the Department of Juvenile Justice while he is in their custody.” *Id.* In other words, ensuring that the right to reconsideration is not compromised encourages

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<sup>3</sup> It is also important to note that the circuit court would not be precluded from selecting the treatment program option under KRS 640.030(2)(b) because this would be a sentencing adjustment as well. Therefore, it is not precluded by KRS 439.3401(4).

the youthful offender to rehabilitate. Thus the court was protecting the youthful offender's opportunity for the second chance afforded him by KRS 640.030(2).

While it is true that the last line of the court's opinion states, "the Violent Offender Statute cannot be read to apply to youthful offenders[,]" the context in which that holding is made is limited to the conflict between KRS 439.3401(4) and KRS 640.030(2). Only when taken out of context can this sentence be read to prohibit the application of the violent offender statute to youthful offenders without regard to whether their incarceration is within the control of the judicial branch or the executive branch. Indeed, as discussed above, the Unified Juvenile Justice Code specifically contemplates the application of KRS 439.3401 to juvenile offenders as it relates to any consideration for early parole. *See* KRS 640.075(4); *see also* KRS 640.080 ("The Parole Board may, with regard to a youthful offender, exercise any of the powers which it possesses pursuant to KRS Chapter 439, except as provided in KRS Chapters 600 to 645.").

In this case, Edwards received a hearing pursuant to KRS 640.030(2). This hearing resulted in his release on probation – a second chance he would not have received but for his status as a youthful offender. However, Edwards violated his probation and it was revoked. The Uniform Juvenile Code affords him no more opportunities to petition the circuit court for reconsideration of probation and he is subject to the limits on early parole set forth in KRS 439.3401(4).

For the foregoing reasons, the decision of the circuit court is reversed and remanded for a decision consistent with this opinion.

CAPERTON, JUDGE, CONCURS.

KELLER, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

KELLER, JUDGE, DISSENTING: I respectfully dissent from the majority's opinion in this matter. I would affirm the trial court's well-written and reasoned judgment in this matter.

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