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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2010-CA-001006-MR

JAMEEL COX

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE THOMAS L. CLARK, JUDGE
ACTION NO. 08-CR-01666

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: CAPERTON, KELLER AND LAMBERT, JUDGES.

KELLER, JUDGE: Jameel Cox (Cox) appeals from a final judgment of the Fayette Circuit Court and its decision to deny him probation. Having carefully reviewed the record, we affirm.

FACTS

On June 26, 2009, Cox, as a youthful offender, pled guilty to first-degree criminal attempt to robbery; second-degree robbery; second-degree burglary; and two counts of possession of a handgun by a minor, first offense. On August 21, 2009, Cox was sentenced to five years (four years to run concurrent and one year to run consecutive) on the first-degree criminal attempt to robbery; ten years on the second-degree robbery; five years (four years to run concurrent and one year to run consecutive) on the second-degree burglary; and twelve months to run concurrently on both counts of possession of a handgun by a minor. Cox was subsequently placed with the Department of Juvenile Justice (DJJ) until his eighteenth birthday.

As required by Kentucky Revised Statute (KRS) 640.030(2),¹ a sentencing hearing was scheduled for December 11, 2009, after Cox reached the age of eighteen. However, the parties agreed to continue Cox's hearing to April 16, 2010, to give Cox additional time to work on his treatment plan from DJJ at the Northern Kentucky Youth Development Center. On April 7, 2010, Cox filed a motion in support of probation and an alternative sentencing plan. The alternative sentencing plan stated that Cox had received his GED as well as his high school diploma. It also provided that Cox scored very well on the ACT test. The final

¹ KRS 640.030(2) provides that “[i]f an individual sentenced as a youthful offender attains the age of eighteen (18) prior to the expiration of his sentence, and has not been probated or released on parole, that individual shall be returned to the sentencing court.”

sentencing report tendered to the court by the Northern Kentucky Youth Development Center provided that Cox was doing well in his treatment plan; he maintained a positive attitude; he showed leadership in group counseling by engaging other residents; he openly discussed his criminal history in individual counseling and showed a willingness to work through unresolved issues and past disruptive behaviors; and he exhibited respectful behavior to his peers and the staff.

At the April 16, 2010, sentencing hearing, Cox's attorney asked the court if Dr. Lori Bradbury-Robinson (Dr. Robinson), the treatment director for the Northern Kentucky Youth Development Center, could make a statement regarding Cox's progress at the facility and the court agreed. Dr. Robinson stated that Cox was a model resident, he completed every treatment goal possible, and did everything they asked him to do. Cox also made a statement and apologized to his parents, the victims, and the trial court and stated that he was a changed person.

The trial court noted that it reviewed the motion in support of probation, the alternative sentencing plan, and the final sentencing report. Additionally, the trial court noted that it considered the nature and circumstances of the crimes and the seriousness of the offenses. The trial court then denied Cox's motion for probation and sentenced him to carry out the remainder of his sentence. This appeal followed.

ANALYSIS

On appeal, Cox contends that the trial court abused its discretion by denying him probation. Specifically, Cox argues that the trial court based its decision solely on the fact that Cox committed serious offenses. We disagree.

KRS 640.030(2) provides that, following his eighteenth birthday, a youthful offender must be returned to the sentencing court if time remains on his sentence.

The sentencing court must then make a determination and decide:

- (a) Whether the youthful offender shall be placed on probation or conditional discharge;
- (b) Whether the youthful offender shall be returned to the Department of Juvenile Justice to complete a treatment program, which treatment program shall not exceed the youthful offender's attainment of the age of eighteen (18) years and five (5) months. At the conclusion of the treatment program, the individual shall be returned to the sentencing court for a determination under paragraph (a) or (c) of this subsection; or
- (c) Whether the youthful offender shall be incarcerated in an institution operated by the Department of Corrections[.]

The trial court “has broad discretion in dealing with whether to probate or conditionally discharge the juvenile, to send him for treatment, or to commit him to an adult correctional system upon attainment of the age of majority.” *Gourley v. Commonwealth*, 37 S.W.3d 792, 795 (Ky. App. 2001).

In *Johnson v. Commonwealth*, 967 S.W.2d 12, 15 (Ky. 1998), the Supreme Court of Kentucky concluded that a youthful offender has no guarantee of probation and under KRS 640.030(2), the sentencing court may only make a

decision regarding probation after considering the factors set forth in KRS 533.010. Under KRS 533.010, a court must first consider the nature and circumstances of the crime, as well as the history, character, and condition of the defendant. “After considering these factors, the trial court is instructed that it *should* grant probation or conditional discharge unless it believes imprisonment is necessary for protection of the public based on any of the three enumerated factors, . . .” *Johnson*, 967 S.W.2d at 15 (emphasis in original). The three enumerated factors are as follows:

- (a) There is substantial risk that during a period of probation or conditional discharge the defendant will commit another crime;
- (b) The defendant is in need of correctional treatment that can be provided most effectively by his commitment to a correctional institution; or
- (c) A disposition under this chapter will unduly depreciate the seriousness of the defendant’s crime.

KRS 533.010(2).

In this case, Cox contends that the trial court only considered the seriousness of his crimes, and that it failed to consider any other factors set forth in KRS 533.010. Having carefully reviewed the record, we disagree.

As noted above, at the sentencing hearing the trial court noted that it evaluated Cox’s character and condition and the nature and circumstances of the crimes he committed. Additionally, the trial court noted that it considered the alternative sentencing plan, the final sentencing report, the nature and

circumstances of the crimes, and the seriousness of the offenses. Further, in its judgment, the trial court determined that imprisonment was necessary for protection of the public because Cox was in need of correctional treatment that can be provided most effectively by his commitment to a correctional institution. The trial court also concluded that imprisonment was necessary for protection of the public because probation would unduly depreciate the seriousness of Cox's crime due to the dangerous nature of his offenses; the deliberate nature of the offenses; and Cox's failure to benefit from previous probation.

Based on the preceding, we conclude that the trial court did consider and properly applied the factors set forth in KRS 533.010. We recognize that Cox has taken significant and laudable steps toward rehabilitation and encourage him to continue along that path. However, we cannot say the trial court abused its discretion in denying Cox probation.

CONCLUSION

For the foregoing reasons, we affirm the judgment of the Fayette Circuit Court.

ALL CONCUR.

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