

Commonwealth Of Kentucky

Court Of Appeals

NO. 1996-CA-002684-MR
AND
NO. 1997-CA-00929-MR

STEVEN JUSTIN HUFF

APPELLANT

V. APPEALS FROM JEFFERSON CIRCUIT COURT
HONORABLE DANIEL A. SCHNEIDER, JUDGE
ACTION NO. 96-CR-1220

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING IN PART AND VACATING AND REMANDING IN PART

** ** * * * * *

BEFORE: GUDGEL, Chief Judge; ABRAMSON and COMBS, Judges.

COMBS, JUDGE: Steven J. Huff (Huff) appeals from an Amended Judgment entered September 17, 1996, and from an Order overruling his motion for shock probation entered on April 4, 1997. After a thorough and detailed review of the record, arguments of counsel, and the applicable law, we reverse and remand in part and affirm in part.

In March 1996, Huff was arrested on charges of Assault in the First Degree, Wanton Endangerment in the First Degree, and Criminal Mischief in the Second Degree. He was fifteen years old

at the time of his arrest and at the time the alleged crimes were committed. At his arraignment, the district court found that there was probable cause that Huff had committed the crimes for which he was charged, that he had used a firearm, and that he was more than fifteen years of age at the time. Based upon this finding, Huff's case was transferred to the circuit court pursuant to KRS 635.020(4). Subsequently, on July 10, 1996, Huff entered a conditional guilty plea to one count of assault under extreme emotional disturbance and to two counts of first-degree wanton endangerment, reserving the right to challenge on appeal the constitutionality of KRS 635.020 (4).

On September 11, 1996, the Jefferson Circuit Court entered its final judgment, accepting Huff's guilty plea and sentencing him to a total of five years' imprisonment. Huff appealed the court's judgment. Thereafter, on February 24, 1997, he filed a motion for shock probation pursuant to KRS 439.265. The Jefferson Circuit Court overruled this motion on April 4, 1997; Huff filed an appeal from the court's order. We shall address and dispose of both of his appeals in this opinion.

We first examine the issue raised by Huff on appeal from the judgment entered September 11, 1996, in which the court ordered that Huff be delivered to "the Department of Corrections after he reaches the age of 18, at such location within this state as the Department shall designate for the purpose of [Huff's] serving the sentence imposed upon him . . ." However, Huff contends that pursuant to KRS 640.030 (4), he is entitled to

a resentencing hearing when he attains that age of 18. The Commonwealth, however, argues that KRS 635.020(4) supersedes KRS 640.030(2) and that, therefore, Huff cannot receive the privilege of a resentencing hearing and possibly a mitigation of his sentence as he no longer qualifies as a youth offender.

This issue has recently been resolved by the Kentucky Supreme Court in Britt v. Commonwealth, Ky., 965 S.W.2d 147 (1998). The Supreme Court stated:

[W]e simply hold that KRS 635.020 (4) does not create a new category of adult offender that precludes children transferred to circuit court pursuant to it from eligibility for the ameliorative provisions of KRS 640.040.

Id. at 149. The Court further explained:

[T]he purpose of KRS 635.020 and KRS 640.010 (2) was to permit the court to impose the same term of years upon a juvenile for which an adult would be liable, but to otherwise leave the circuit judge discretion to probate or conditionally discharge the juvenile, send the child for treatment, or send the child to the adult correctional system upon majority.

Id. at 150. Pursuant to KRS 635.020(4), a juvenile over the age of 14 who commits a crime using a firearm is to be tried and sentenced as an adult. However, that juvenile remains a "youthful offender" for purposes of KRS Chapter 640. Thus, Huff is entitled to a resentencing hearing upon attaining the age of 18. Accordingly, we reverse the portion of the circuit court's opinion that orders Huff to be delivered to the Department of Corrections upon his attainment of the age of 18 and direct the

court at that time to follow the procedure set out in KRS Chapter 640 and elaborated upon in Britt, supra.

We now turn our attention to Huff's appeal from the order of the Jefferson Circuit Court denying his motion for shock probation. Huff alleges that the Circuit Court Judge abused his discretion by not stating specific reasons for denying Huff shock probation. The Commonwealth argues first that the grant or denial of shock probation is not reviewable and in the alternative that Huff's previous conduct supports the judge's denial of shock probation.

The Commonwealth argues that shock probation is not reviewable according to KRS 439.265 (2) (Shock probation in felony conviction - Procedure - Exercise of authority), which provides in part: "Any court order granting or denying a motion to suspend further execution of sentence is not reviewable." Huff argues that Section 115 of the Kentucky Constitution provides the right of at least one appeal. We agree. In Schroering v. McKinney, Ky., 906 S.W.2d 349 (1995), the Kentucky Supreme Court quotes the Court of Appeals concerning the "not reviewable" provision of the shock probation statute:

We think it is obvious that this provision of the statute refers to a review *on the merits* of an order granting or denying a motion for probation. It does not, and could not constitutionally, deprive this court of its power to determine whether an order was within the *jurisdiction* of the circuit court as being within the authority granted by the statute.

Commonwealth, ex. rel. Hancock v. Melton, Ky., 510 S.W.2d 250 (1974). Therefore, we hold that Huff's appeal of the court's denial of shock probation is reviewable by this court.

Nevertheless, we disagree with Huff's contention that the trial court judge abused his discretion by denying him shock probation. KRS 439.265 (3) provides: "The authority granted in this section shall be exercised by the judge who imposed sentence on the defendant...". Huff argues that the trial judge did not support his decision to deny shock probation with specific reasons. The order of the Jefferson Circuit Court, of April 4, 1997, denying shock probation provides in part:

Having given due consideration to the written report of the presentence investigation prepared by the Division of Probation and Parole, and to the nature and circumstances of the crime, and to the history, character and condition of the Defendant, it is hereby ADJUDGED by the Court that:
Defendant's motion IS HEREBY OVERRULED.

The judge carefully considered and weighed numerous factors in determining Huff's eligibility for shock probation - - constituting sufficiently specific reasons to support a denial of Huff's motion. After a review of the record, we find it clear that the trial judge did not abuse his discretion or commit error in denying Huff shock probation. Huff was on house arrest after entering a guilty plea and pending sentencing. During this time, he broke the home incarceration rules, was charged with Third Degree Burglary, and was arrested. Additionally, Huff was due before the parole board in a few months.

In summary, we vacate in part the judgment of the Jefferson Circuit Court with regard to the application of KRS 640.030 (2) to Huff and hold that he is entitled to a resentencing hearing upon attainment of the age of eighteen (18) years. We affirm in part the decision of the Jefferson Circuit Court overruling Huff's motion for shock probation, holding the issue itself to be reviewable but finding no abuse of discretion in the circumstances of this case.

ALL CONCUR.

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