

RENDERED: October 30, 1998; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

No. 1996-CA-001882-MR
No. 1997-CA-000333-MR
No. 1997-CA-000411-MR

TIMOTHY WHALEY

APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE EDWIN A. SCHROERING, JR., JUDGE
ACTION NO. 96-CR-001035

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION AND ORDER
AFFIRMING IN PART, VACATING IN PART,
AND REMANDING AND DISMISSING
1997-CA-000333-MR AND 1997-CA-000411-MR

* * * * *

BEFORE: KNOFF, MILLER, and SCHRODER, JUDGES

KNOFF, JUDGE. Appellant, Timothy Whaley (Whaley) appeals the judgment against him for one (1) count of assault in the second degree, Kentucky Revised Statute (KRS) 508.020, in 1996-CA-001882-MR. Whaley also appeals the circuit court judgment denying his shock probation in 1997-CA-000333-MR and 1997-CA-000411-MR. We affirm in part, vacate in part, and remand.

Whaley raises several issues on appeal: (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) and KRS 640.010(2) can be reconciled; and (3) whether Whaley was eligible for probation or shock probation.

Whaley's first arguments were resolved by the Supreme Court of Kentucky in Commonwealth v. Halsell, Ky., 934 S.W.2d 552 (1996), when the Court held that the 1994 amendments to the Unified Juvenile Code making all juveniles fourteen (14) or older subject to trial in the circuit court as adult offenders were constitutional:

Having reviewed KRS 635.020 in its entirety, we find that subsection (4) is within the Kentucky General Assembly's constitutional power to limit the jurisdiction of the district court under Kentucky Constitution Section 113(6). Following a determination of reasonable cause to believe a child over the age of 14 has been charged with a felony in which a firearm was used in the commission of the offense, KRS 635.020(4) operates to limit the jurisdiction of the district court to act further. By operation of Section 112(5) of the Kentucky Constitution, the circuit court then becomes vested with jurisdiction as to that particular class of offenders.

Id. at 555.

The Supreme Court of Kentucky has also resolved the argument that KRS 635.020(4) and KRS 640.010(2) are irreconcilable. In Halsell, supra, the Court stated:

[W]e find that the provisions of KRS 630.010(2) can be harmonized with KRS 635.020(4). Whether it can be determined at a preliminary hearing described in KRS 640.010(2) or prior to an adjudicatory hearing as described in KRS 635.020(1), once the district court has reasonable cause to

believe that a child before the court has committed a firearm felony as described in subsection (4) of KRS 635.020, jurisdiction vests in the circuit court, the provisions of KRS 640.010(2)(b) and (c) to the contrary notwithstanding.

Id. at 556.

Whaley's final argument is that he should have been eligible for probation or shock probation under KRS 640.040(4). The Commonwealth contends Whaley is ineligible for probation under KRS 635.020(4) and KRS 533.060(1). Whaley and the Commonwealth entered into an agreement whereby Whaley waived his right to a preliminary hearing and the Commonwealth recommended a five (5) year sentence and maintained that probation was prohibited. Whaley reserved his right to appeal this issue. The trial judge rejected Whaley's request for probation because it was barred by statute. However, the final judgment denies Whaley's request for probation on the merits for three reasons: (1) there was a substantial risk that Whaley would commit another crime while probated; (2) Whaley was in need of correctional treatment best provided in a correctional institute; and (3) probation would unduly depreciate the seriousness of Whaley's offense. Whaley was also denied shock probation on two grounds: (1) that shock probation was barred by statute; and (2) that Whaley's motion for shock probation was untimely filed.

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.”
Britt v. Commonwealth, Ky., 965 S.W.2d 147 (1998). While the trial court judgment reflects that it considered and rejected Whaley’s motion for probation on the merits, the trial court record indicates that probation was primarily denied as statutorily barred. This Court finds that Whaley should receive full and serious consideration for probation on the merits rather than questionable alternative consideration after a determination that probation was statutorily impermissible. As this Court is vacating Whaley’s sentence, the issue of shock probation is not ripe for review.

In accordance with Halsell, supra, and Britt, supra, this Court affirms the circuit court conviction, vacates the sentence, and remands, with directions to sentence Whaley in accordance with the provisions set forth in KRS Chapter 640 in 1996-CA-001882-MR. This Court vacates the order denying Whaley shock probation, and dismisses 1997-CA-000333-MR and 1997-CA-000411-MR.

ALL CONCUR.

ENTERED: October 30, 1998

William L. Knopf
JUDGE, COURT OF APPEALS

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