

Commonwealth Of Kentucky

Court Of Appeals

No. 1996-CA-002100-MR
No. 1997-CA-000899-MR

PHILLIP CRAIG STIGER

APPELLANT

V. APPEALS FROM JEFFERSON CIRCUIT COURT
HONORABLE THOMAS KNOFF, JUDGE
ACTION NO. 96-CR-1059

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: EMBERTON, GARDNER and SCHRODER, JUDGES.

GARDNER, JUDGE. Phillip Craig Stiger has filed two appeals from his judgment of conviction in Jefferson Circuit Court for first-degree wanton endangerment and from subsequent orders of the court denying his motions for probation and shock probation. After carefully reviewing the record below, Stiger's arguments and the applicable law, this Court affirms in both appeals.

Stiger was indicted and subsequently pled guilty to a charge of first-degree wanton endangerment. At the sentencing, the Commonwealth recommended a three year prison sentence for wanton

endangerment and stated it would oppose probation. Stiger's counsel stated that he would ask for probation and that Stiger entered a conditional plea reserving the right to contest the constitutionality of the new juvenile transfer statute. On July 19, 1996, the circuit court in the judgment of conviction sentenced Stiger to three years in prison. The court noted that it had given due consideration to the pre-sentence investigation report and other factors, but concluded that probation should be denied, because Stiger was in need of correctional treatment that could be provided most effectively by his confinement to a correctional institution.

On January 15, 1997, Stiger filed a motion for shock probation. On January 21, 1997, the circuit court denied this motion because it was outside the time limit authorized by statute. Stiger filed another motion for shock probation on January 23, 1997. A hearing was held, and Stiger argued that the motion was timely because pursuant to Kentucky Revised Statute (KRS) 439.265(1), the 180 day period for filing a motion for shock probation begins from either the incarceration in a county jail following a defendant's conviction and sentencing or from his delivery to the keeper of the institution to which he has been sentenced. The Commonwealth maintained that the time ran from the date of Stiger's incarceration, thus rendering his motion for shock probation untimely. The circuit court agreed and denied the motion stating that it was outside the 180 day limit of KRS 439.265 as the motion was filed on the 190th day. Stiger has appealed from the

court's judgment denying him probation and from the orders denying shock probation. His appeals have been consolidated for our review.

In his first appeal, Stiger argues that he was not an adult offender and that the circuit court's sentencing was improper. He specifically maintains that KRS 635.020(4) did not purport to affect the ameliorative provisions set out in KRS 600.010. He states that under the general principles of statutory construction, it is clear that the concept of adult penalties does not include prohibition of the use of ameliorative provisions set out in KRS 600.010. We have reviewed the record and found no error by the trial court. Hence, we affirm on this appeal.

KRS 635.020(4) provides:

Any other provision of KRS Chapters 610 to 645 to the contrary notwithstanding, if a child charged with a felony in which a firearm was used in the commission of the offense had attained the age of fourteen (14) years at the time of the commission of the alleged offense, he shall be transferred to the Circuit Court for trial as an adult if, following a preliminary hearing, the District Court finds probable cause to believe that the child committed a felony, that a firearm was used in the commission of that felony, and that the child was fourteen (14) years of age or older at the time of the commission of the alleged felony. If convicted in the Circuit Court, he shall be subject to the same penalties as an adult offender, except that until he reaches the age of eighteen (18) years, he shall be confined in a secure detention facility for juveniles or for youthful offenders, unless released pursuant to expiration of sentence or parole, and at age eighteen (18) he shall be transferred to an adult facility operated by the Department of Corrections to serve any time remaining on his sentence.

In Britt v. Commonwealth, Ky., 965 S.W.2d 147, 149 (1998), the Kentucky Supreme Court held, “[t]hat 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.” The 1994 amendment to KRS 635.020(4) was intended to do nothing more than expedite the transfer of juvenile cases involving firearms felonies. Id., at 150. The 1996 amendments to KRS 635.020(4) clarify the General Assembly’s intent that every child transferred to circuit court pursuant to KRS 635.020(4), will be transferred as a youthful offender, thus preserving all ameliorative sentencing procedures authorized for youthful offenders, particularly those set out in KRS 640.030 and 640.040 to that child. Id. In general, a trial court must comply with KRS 533.010 and give due consideration to the possibility of probation after first considering the crime and the defendant. Bell v. Commonwealth, Ky. App., 566 S.W.2d 785, 787 (1978). The trial court must include in the record a statement sufficient to show the necessary consideration of probation. Id.

The instant case is distinguishable from cases such as Britt v. Commonwealth, supra, where the trial court failed to consider probation or other ameliorative measures. The record in this case shows that during his guilty plea, Stiger reserved the right to seek probation which he later did. The record also reveals that the circuit court did in fact consider probation but concluded that it was not appropriate in this case given Stiger’s past criminal activities and the nature of the wanton endangerment

crime. The court below sufficiently considered probation and put its findings in the record as required by Bell v. Commonwealth, supra. Hence, we affirm the circuit court in Stiger's first appeal.

In his second appeal, Stiger contends that the trial court erred by denying his motion for shock probation on the ground of untimely filing. After reviewing the clear language of the applicable statute and the trial court's actions, this Court concludes that the court erred by denying Stiger's motion on the basis that it was untimely. For reasons set out below, this Court however has concluded that this issue is now moot.

KRS 439.265(1) addresses this matter and provides:

Subject to the provisions of KRS Chapter 439 and Chapters 500 to 534, any Circuit Court may, upon motion of the defendant made not earlier than thirty (30) days nor later than one hundred eighty (180) days after the defendant has been incarcerated in a county jail following his conviction and sentencing pending delivery to the institution to which he has been sentenced, or delivered to the keeper of the institution to which he has been sentenced, suspend the further execution of the sentence and place the defendant on probation upon terms the court determines. Time spent on any form of release following conviction shall not count toward time required under this section.

In general, courts must follow the clear language of statutes. See Lydic v. Lydic, Ky. App., 664 S.W.2d 941, 943 (1983). "All statutes of this state shall be liberally construed with a view to promote their objects and carry out the intent of the legislature. . . ." KRS 446.080(1). "All words and phrases shall be construed

according to the common and approved usage of language. . . ." KRS 446.080(4). If a statute's words are plain and unambiguous, the statute must be applied to those terms without resort to any construction or interpretation. Terhune v. Commonwealth, Ky. App., 907 S.W.2d 779, 782 (1995).

The plain language of KRS 439.265(1) states that a circuit court may consider a motion for shock probation by a defendant which is made not earlier than thirty days nor later than 180 days after the defendant has been incarcerated in a county jail following his conviction and sentencing pending delivery to the institution to which he has been sentenced, or after delivery to the keeper of the institution to which he has been sentenced. The circuit court in the instant case ruled that Stiger's motion was untimely because it was filed on the 190th day. The court apparently calculated the time from the date Stiger was incarcerated following his sentencing. The statute however gives two alternative dates for calculating the time for filing a shock probation motion. The record indicates that Stiger was received at the Kentucky correctional institution on August 19, 1996. Using this date, his motion for shock probation was filed with the circuit court 149 days later, thus making it timely under the statute. We have reviewed Commonwealth v. Gross, Ky., 936 S.W.2d 85 (1996), but find it distinguishable. That case contains dicta which could be construed to favor the Commonwealth's argument, but the Court in that case did not consider the issue at hand. We have uncovered no case which precisely addresses the issue now before

us. Terhune v. Commonwealth, supra, addressed the issue of whether a motion for shock probation was filed prematurely, but clearly noted that the time limits of KRS 439.265(1) are calculated from one of two events: (1) when the defendant has been incarcerated in a county jail following his conviction and sentencing pending delivery to the institution to which he has been sentenced, or (2) when the defendant is delivered to the keeper of the institution to which he has been sentenced.

In the instant case, the circuit court incorrectly concluded that Stiger's motion was not filed timely; however, based on the facts of this case, the matter is now moot. Because many months have now passed since Stiger's motion for shock probation was filed, the circuit court has lost jurisdiction to consider the motion. See KRS 439.265; Commonwealth ex. rel. Hancock v. Melton, Ky., 510 S.W.2d 250, 252 (1974). Further, the basic purpose of the shock probation statute is to rehabilitate a defendant by giving him a taste of the prison system. See Blondell v. Commonwealth, Ky., 556 S.W.2d 682 (1977); Wilson v. Commonwealth, Ky. App., 839 S.W.2d 17 (1992). In the instant case, years have passed since Stiger was convicted thus nullifying the purpose of shock probation. This Court has also learned that Stiger has subsequently been convicted of escape, thus extending his prison sentence. For these reasons, this Court declines to reverse or vacate the circuit court's order regarding shock probation.

For the foregoing reasons, this Court affirms the Jefferson Circuit Court in both appeals.

ALL CONCUR.

BRIEFS FOR APPELLANT:

J. David Niehaus
Frank W. Heft, Jr.
Louisville, Kentucky

BRIEFS FOR APPELLEE:

A. B. Chandler III
Attorney General

Gregory C. Fuchs
Assistant Attorney General
Frankfort, Kentucky