

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 1997-CA-003308-MR

TIMOTHY JERODE WELLS

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE THOMAS B. WINE, JUDGE  
ACTION NO. 97-CR-392

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
REVERSING AND REMANDING  
\* \* \* \* \*

BEFORE: BUCKINGHAM, EMBERTON, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: This appeal involves the resentencing of a juvenile transferred to circuit court pursuant to KRS 635.020(4). The juvenile entered a plea with a recommended sentence and subsequently requested resentencing upon reaching eighteen years of age.

The appellant, Timothy Wells, was a seventeen-year-old juvenile charged with first-degree robbery. He was transferred to circuit court and subsequently entered a guilty plea to first-degree robbery in exchange for a recommended sentence of twelve

years, plus testimony in other actions. At sentencing on March 20, 1997, the trial court sentenced the appellant to twelve years. On August 28, 1997, the appellant requested resentencing upon reaching his eighteenth birthday on September 7, 1997. The court denied the request for resentencing by order entered December 18, 1997, on the grounds that "the probation prohibition under KRS 532.060 is applicable." The court also stated, "[f]urther, even if eligible, the court feels that the nature of the charged offense, as well as the 'breaks' already given to the Defendant would make probation inappropriate."

On appeal, the appellant alleges error in not resentencing upon his reaching his eighteenth birthday, citing Britt v. Commonwealth, Ky., 965 S.W.2d 147 (1998). The Commonwealth counters that Britt does not apply because resentencing would nullify the recommended sentence and is not automatic under KRS 635.020(4); and if resentencing does apply, the December 18, 1997 order amounts to a resentencing. We believe Britt does apply and the appellant was entitled to resentencing upon reaching his eighteenth birthday.

In Britt v. Commonwealth, 965 S.W.2d at 149, 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.

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. Thus, 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 and, at eighteen, he is entitled to a resentencing hearing pursuant to KRS 640.030 (Sentencing after conviction or plea of guilty), which provides:

A youthful offender, if he is convicted of, or pleads guilty to, a felony offense in Circuit Court, 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, except that:

. . . .

(2) Except as provided in KRS 640.070, any sentence imposed upon the youthful offender shall be served in a youth facility or program operated by the Department of Juvenile Justice until the expiration of the sentence, the youthful offender is paroled, the youthful offender is probated, or the youthful offender reaches the age of eighteen (18), whichever first occurs. If 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. At that time, the sentencing court shall make one (1) of the following determinations:  
(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 a period in excess of six (6) months. . . .

(c) Whether the youthful offender shall be incarcerated in an institution operated by the Department of Corrections[.] (Emphasis added.)

For the foregoing reasons, we reverse and remand to the circuit court for resentencing.

BUCKINGHAM, JUDGE, CONCURS BY SEPARATE OPINION.

BUCKINGHAM, JUDGE, CONCURRING. As KRS 640.030(2) requires that the "individual shall be returned to the sentencing court," I agree with the majority that Wells should have been returned to the trial court for a hearing. However, I do not interpret the statute as requiring or allowing a "resentencing." Following the hearing, the trial court is merely required to make one of the three determinations set forth in the statute.

EMBERTON, JUDGE, CONCURS BY SEPARATE OPINION.

EMBERTON, JUDGE, CONCURRING. Though one may disagree with the Britt court's interpretation of Kentucky Revised Statute (KRS 635.020(4)), its language is clear. Thus, the panel has no choice but to remand for the court's determination under KRS 640.030(2).

BRIEF FOR APPELLANT:

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