

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2005-CA-000123-MR

JAMES OSCAR MERRIMAN

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE GARY D. PAYNE, JUDGE  
ACTION NO. 02-CR-01088

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: BARBER, HENRY, AND KNOPF, JUDGES.

HENRY, JUDGE: James Oscar Merriman, who at the age of 16 committed a crime qualifying him as a youthful offender, appeals from a January 12, 2005 final judgment of the Fayette Circuit Court denying his motion for probation, pursuant to KRS 439.3401, and re-sentencing him as an adult. Upon review, we affirm.

On August 23, 2002, Merriman, who was 16 at the time, shot Chad Hager in the face with a .357 Magnum handgun, resulting in the loss of Hager's right eye. The incident

occurred at the residence where Hager lived with his mother. Hager's mother was not home at the time, but six of the boys' friends were there when the shooting occurred. All of those present were between the ages of 12 and 16, and many had been drinking during the course of the day.

Prior to the shooting, Hager brought the handgun to show the others and told them that the gun was loaded. The juveniles were sitting at a dining room table, and their conversation was increasing in volume as they prepared to smoke some marijuana. Merriman told the group that "the next person who talks gets shot." In response to this, Hager said, "Shut up. I like to talk when I'm getting drunk." Merriman then pointed the handgun at Hager and shot him in the face.

Merriman was subsequently arrested, indicted, and convicted by a Fayette County jury as a youthful offender<sup>1</sup> on the charge of first-degree assault, a Class B felony pursuant to KRS 508.010. Specifically, the jury determined that Merriman was guilty of causing "a serious physical injury to Chad Hager by shooting him with a gun," and that he "wantonly engage[ed] in conduct which created a grave risk of death to another and thereby injured Chad Hager under circumstances manifesting extreme indifference to human life." The jury recommended a

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<sup>1</sup> Kentucky Revised Statutes ("KRS") 600.020(63) defines a "youthful offender" as "any person, regardless of age, transferred to Circuit Court under the provisions of KRS Chapter 635 or 640 and who is subsequently convicted in Circuit Court."

sentence of twelve years in prison, and the trial court sentenced Merriman accordingly. However, because Merriman was a minor at the time of sentencing, he was committed to the custody of the Department of Juvenile Justice (hereinafter "DJJ") and ordered to be brought back before the court upon turning eighteen for further disposition.

On March 24, 2003, Merriman was transferred to the Northern Kentucky Youth Development Center. According to representatives of the DJJ, Merriman presented with a number of emotional and psychological issues that needed to be addressed, including anger, lack of remorse or empathy, and disregard for authority. However, they also noted that from the beginning he demonstrated a willingness to address his issues and to make an investment in change, and that he immediately became a positive leader for his peers. Merriman's treatment director, Jon Connelly, also stated the following about Merriman:

[H]e show[s] quality insight into his issues, and developed the cognitive ability to recognize the right way to make choices and what his high risk situations are: better anger management skills were built; considerable insight in remorse and victim empathy were developed; and behavior, language, and leadership skills demonstrated a better attitude for all authority, laws, and rules.

Ultimately, Merriman met all of the treatment goals established for him at the development center, qualifying him for a move to a less restrictive facility.

Accordingly, on November 3, 2003, Merriman was transferred to the Bowling Green Group Home, where he continued to show positive progress. He completed a number of independent living skills classes dealing with such areas as employment skills, personal health and safety, food preparation and purchasing, transportation skills and vehicle maintenance, money management, banking, consumer skills, and apartment living skills. Eventually, Merriman was allowed to live in the apartment area of the facility, where he paid mock bills, managed his own money, and prepared meals for himself. Merriman's counselor at the group home, who also served as the superintendent of the facility, reported that Merriman:

... utilized individual and group counseling to be a role model as well as to address his concerns and issues on a daily basis. He has worked very hard at this program and has completed anger management group. [Merriman] continues to attend each group acting as a mentor and a role model for other residents. He not only internalizes what he has learned during his stay at this program but he also puts it to use in every day situations. [Merriman] does not minimize or justify for his actions in the past that led him to make negative choices. He realized the pain that he caused others and works to help those he can.

Moreover, the group home representatives who assessed Merriman took the step of recommending that he be probated to the Bowling Green area.

In addition, within three weeks of his transfer to the group home, Merriman obtained a job at a local McDonald's. His supervisor Todd Fenlon described him as "an exemplary employee at McDonald's and a role model for all of my crew," and reported that he always arrived on time for work and showed great work ethic. Merriman eventually was promoted to the position of certified crew trainer and was entrusted with the management and oversight of significant amounts of money in the cash register. Fenlon also reported that Merriman was one of only a few employees to regularly have a perfect register drawer.

Also within three weeks of entering the group home, Merriman obtained his G.E.D. and enrolled in classes at Western Kentucky University, where he obtained a 3.33 grade point average after his first semester. Adam Jolly, one of Merriman's instructors at WKU, reported that he had "through conscientious attendance, prompt attention to assignments, and regular, insightful participation in classroom discussion, made important contributions to our college community."

On December 14, 2004, shortly before he was to turn eighteen and to be re-sentenced as an adult pursuant to KRS 640.030(2), Merriman filed a motion in the Fayette Circuit Court

in which he asked the court to conditionally discharge or probate the balance of his sentence pursuant to KRS 640.030(2)(a). The Commonwealth responded to this motion by arguing that Merriman was not eligible for conditional discharge because he qualified as a "violent offender" under KRS 439.3401(1) and because subsection (3) of that statute dictates that such an offender "shall not be released on probation or parole until he has served at least eighty-five percent (85%) of the sentence imposed." The Commonwealth also argued that KRS 640.040 does not exempt youthful offenders from the application of KRS 439.3401 by implication simply because it explicitly exempts them from the application of KRS 533.060, and that the "exemption by implication" argument was considered and rejected by this court in Mullins v. Commonwealth, 956 S.W.2d 222 (Ky.App. 1997).

On December 30, 2004, the circuit court issued an opinion and order agreeing with the Commonwealth's arguments and finding that the Mullins decision was applicable here. The court pointed out that "[t]he question for the Court is not whether the legislature should have exempted youthful offenders from the restrictions of the violent offender statute, but whether it actually did so. The answer is that it did not." Accordingly, the court held that Merriman "is not eligible for probation or conditional discharge in this case despite his

favorable record while in the custody of the Department of Juvenile Justice."

Thus, on January 12, 2005, the circuit court entered a final judgment re-sentencing Merriman as an adult and remanding him to the custody of the Department of Corrections. The court held:

Probation is denied pursuant to KRS 439.3401 (Violent Offender Statute). The Court finds that the Defendant was convicted of a Class B Felony (Assault 1<sup>st</sup> Degree) involving serious physical injury to a victim, and further finds that a youthful offender is not exempt from the limitations on probation, parole, or conditional discharge imposed by KRS 439.3401.

This appeal followed.

The crux of Merriman's appeal centers on the applicability of KRS 439.3401 to this case. This statute, in relevant part, defines a "violent offender" as "any person who has been convicted of or pled guilty to the commission of a capital offense, Class A felony, or Class B felony involving the death of the victim or serious physical injury to a victim." KRS 439.3401(1). KRS 439.3401(3) further provides: "A violent offender who has been convicted of a capital offense or Class A felony with a sentence of a term of years or Class B felony who is a violent offender shall not be released on probation or parole until he has served at least eighty-five percent (85%) of the sentence imposed."

There is no debate between the parties that Merriman qualifies as a violent offender pursuant to KRS 439.3401(1); he was indicted and convicted on the charge of first-degree assault - a Class B felony - with his actions causing serious physical injury to a victim. However, Merriman contends that KRS 439.3401(3) does not apply to youthful offenders because it fails to allow for the consideration of probation or parole. He argues that such a failure is antithetical to the Kentucky Uniform Juvenile Code, and that it conflicts with certain provisions of that same Code. Accordingly, the relevant question for our contemplation here is whether KRS 439.3401(3) applies to juvenile offenders. After careful consideration, we conclude that it does.

In Mullins v. Commonwealth, a panel of this court dealt with another situation in which a juvenile offender was denied probation due to his being designated as a violent offender pursuant to an older version of KRS 439.3401. We ultimately held that the statute - as it then existed - did not prohibit a trial court from considering probation for a violent offender because the statute made no mention of probation in its language. Id. at 223.<sup>2</sup>

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<sup>2</sup> KRS 439.3401(3) was subsequently amended by the General Assembly in 2000 to include a prohibition against release on probation for violent offenders until 85% of their sentences were served.



We further held, however, that KRS 640.040 did not exempt youthful offenders who used firearms in the commission of their crimes from the application of KRS 439.3401 by implication simply because the statute explicitly exempted such offenders from the application of KRS 533.060. Id. at 223-24; see also KRS 640.040(3) ("No youthful offender shall be subject to limitations on probation, parole or conditional discharge as provided for in KRS 533.060."). KRS 533.060 prohibits a person convicted of a Class A, B, or C felony involving the use of a firearm from being eligible for probation, shock probation, or conditional discharge. KRS 533.060(1). As a basis for our conclusion, we held that KRS 635.020(4) "created a new classification under which offenders fourteen to seventeen years of age who commit a felony with a firearm are to be treated as adults for all purposes related to that crime. Those juveniles that qualify are now 'adult offenders' and as such are not to be treated as juveniles pursuant to Chapter 640, but as adult offenders pursuant to RCr 3.07." Mullins, 956 S.W.2d at 224.

As noted above, the trial court relied upon Mullins in determining that Merriman was ineligible for probation or conditional discharge, holding that "[t]he question for the Court is not whether the legislature should have exempted youthful offenders from the restrictions of the violent offender statute, but whether it actually did so. The answer is that it

did not." However, Merriman argues that Mullins does not control the outcome of the instant case. He specifically contends that the Mullins court should have limited its holding to the fact that KRS 439.3401, at that time, did not include probation in its prohibitions, and that the remainder of the opinion dealing with the application of KRS 439.3401 to juvenile offenders was mere dicta.

Merriman also contends that the Kentucky Supreme Court rejected the Mullins court's rationale for concluding that KRS 439.3401 applies to juvenile offenders in Britt v. Commonwealth, 965 S.W.2d 147 (Ky. 1998). In Britt, the Supreme Court concluded 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. Rather, we believe, as explained below, that subsection (4) of KRS 635.020 was designed merely to facilitate transfer of juveniles accused of committing a felony with a firearm to the circuit court by bypassing the proof required under KRS 640.010." Id. at 149. The Court ultimately concluded 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." Id. at 150. While Britt does appear to reject the conclusion reached in Mullins that KRS

635.030(4) "created a new classification under which offenders fourteen to seventeen years of age who commit a felony with a firearm are to be treated as adults for all purposes related to that crime," Mullins, 956 S.W.2d at 224, we note that it makes no specific mention of Mullins, nor does it address the application of KRS 439.3401 to juvenile offenders.

Moreover, while the specific reasoning behind this court's holding in Mullins that KRS 439.3401 applies to juvenile offenders has been brought into question by Britt, we believe that the ultimate conclusion therein remains sound because it is consistent with the clear language of the statute. As our courts have repeatedly held, in interpreting a statute, the "plain meaning" of the words therein controls, unless to do so would constitute an absurd result. Wheeler & Clevenger Oil Co., Inc. v. Washburn, 127 S.W.3d 609, 614 (Ky. 2004). "The plain meaning of the statutory language is presumed to be what the legislature intended, and if the meaning is plain, then the court cannot base its interpretation on any other method or source." Revenue Cabinet v. O'Daniel, 153 S.W.3d 815, 819 (Ky. 2005). In other words, we assume that the legislature "meant exactly what it said, and said exactly what it meant." Id.

In examining KRS 439.3401, it obviously and unambiguously defines a violent offender as "any person who has been convicted of or pled guilty to the commission of a capital

offense, Class A felony, or Class B felony involving the death of the victim or serious physical injury to a victim," and provides that such offenders "shall not be released on probation or parole until he has served at least eighty-five percent (85%) of the sentence imposed." KRS 439.3401(1) & (3) (Emphasis added). These provisions make no effort to distinguish between adult and juvenile offenders, and there is nothing within the juvenile code to indicate that it must be distinguished. Accordingly, on its face, it must be considered to be applicable to juvenile offenders.

Merriman argues that such a conclusion contradicts the general principle that "[t]he Juvenile Code was enacted with the stated goal of rehabilitating juvenile offenders, when feasible, as opposed to the primary punitive nature of the adult penal code." Phelps v. Commonwealth, 125 S.W.3d 237, 240 (Ky. 2004), citing KRS 600.010(2)(d); KRS 600.010(2)(f). However, the Code further provides that it is intended to hold children accountable for their conduct "through the use of restitution, reparation, and sanctions, in an effort to rehabilitate delinquent youth." KRS 600.010(2)(f). Accordingly, while rehabilitation is a key aim of this legislation, so, too, is the idea of accountability.

Moreover, we are hesitant to find that applying KRS 439.3401 to youthful offenders is inappropriate because it

negates the intent and purpose of the Juvenile Code, as we have long held that matters of criminal conduct and the penalties for such conduct are strictly within the purview of the legislature. See Wilfong v. Commonwealth, 175 S.W.3d 84, 92 (Ky.App. 2004). Here, the legislature - by the plain language of KRS 439.3401 - has indicated its desire to have that statute apply to any person involved in a crime resulting in serious physical injury - with no exceptions. Merriman's citations to KRS 640.040(1) (indicating that no youthful offender under the age of 16 may be executed), KRS 640.040(2) (indicating that no youthful offender shall be subject to the provisions for sentencing persistent felony offenders), and KRS 640.040(3) (indicating that youthful offenders are not subject to the provisions of KRS 533.060 with respect to the granting of probation, parole, or conditional discharge) in support of his position that there is a traditional legislative distinction between juvenile and adult disposition and sentencing only serve to emphasize this point. If the General Assembly intended KRS 439.3401 to be inapplicable to juvenile offenders, it could have indicated such in the statute. As it did not, we are loathe to create such an exception - by implication or otherwise. See George v. Commonwealth, 885 S.W.2d 938, 940 (Ky. 1994).

Merriman also argues that KRS 439.3401 and KRS 640.030 are inconsistent with one another, and that we must therefore

harmonize them in such a manner that both statutes may stand. He specifically contends that KRS 439.3401(3)'s blanket prohibition of parole or probation for violent offenders conflicts with KRS 640.030's directions to trial courts as to the final disposition of youthful offenders who are in the custody of the DJJ and who reach the age of 18 prior to the expiration of their sentences.

Specifically, KRS 640.030(2) provides that, while a youthful offender "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," if he reaches the age of 18 prior to the expiration of his sentence and has not been probated or paroled, the sentencing court "shall make one (1) of the following determinations": whether the offender should be placed on probation or conditional discharge; whether the offender should be returned to the DJJ for further treatment; or whether the offender should be incarcerated in an institution operated by the Department of Corrections. KRS 640.030(2).

Merriman argues that this statute indicates that the legislature "intended for sentencing courts to have broad discretion in determining the appropriate disposition of youthful offenders." As a general rule, we do not disagree with this principle and acknowledge the authority cited by Merriman

on this point. See Britt, 965 S.W.2d at 150; Gourley v. Commonwealth, 37 S.W.3d 792, 795 (Ky. 2001). However, Merriman then relies on this general rule to argue that if we find that KRS 439.3401 applies to youthful offenders, it must then be concluded that we are effectively overruling KRS 640.030(2)(a), as well as KRS 600.010 and KRS 15A.065. We disagree. Instead, we simply view KRS 439.3401 as removing from trial courts the discretion to probate or conditionally discharge those youthful offenders who have been convicted of a violent offense until 85% of their sentences have been served. Further, we do not view KRS 640.030 and KRS 439.3401 as being inconsistent with one another, as the former deals generally with youthful offenders who have been convicted of a felony offense, while the latter deals specifically with the narrowly defined category of violent offenders.

Accordingly, we conclude that by its plain language KRS 439.3401 - the "violent offender" statute - is applicable to youthful offenders. In reaching this conclusion, we recognize and applaud the substantial progress that Merriman has made in his rehabilitation in the years following his conviction, and we express our hope that such progress continues into the future. With this said, the severity of his crime cannot be questioned, nor can our legislature's clearly expressed intent to treat such crimes in a serious manner.

The judgment of the Fayette Circuit Court is affirmed.

BARBER, JUDGE, CONCURS.

KNOPF, JUDGE, DISSENTS WITH SEPARATE OPINION.

KNOPF, JUDGE, DISSENTING: Respectfully, I dissent from the majority's reliance on Mullins v. Commonwealth, 956 S.W.2d 222 (Ky. App. 1997), to conclude that KRS 439.3401 applies to youthful offenders. In Mullins, this Court reasoned that the statute was applicable because KRS 635.020(4) created a new classification under which offenders fourteen to seventeen years of age who commit a felony with a firearm are to be treated as adults for all purposes related to that crime. "Those juveniles that qualify are now "adult offenders" and as such are not to be treated as juveniles pursuant to Chapter 640, but as adult offenders pursuant to RCr 3.07. Therefore, a juvenile who qualifies as an adult offender is subject to the same penalties as an adult convicted of manslaughter, first degree, but mentally ill." Id. at 224.

However, in Britt v. Commonwealth, 965 S.W.2d 147 (Ky. 1998), the Kentucky Supreme Court expressly rejected this reasoning, holding that KRS 635.020(4) is nothing more than a provision designed to simplify the transfer of juvenile felony firearm offenders to circuit court. Consequently, the Court concluded that a youthful offender transferred to circuit court under this section remains entitled to all ameliorative



sentencing procedures authorized by KRS Chapter 640, particularly those set out in KRS 640.030 and 640.040. Id. at 150. Although the Britt Court did not expressly cite Mullins, the Supreme Court's reasoning in Britt effectively overruled the holding in Mullins.

I further disagree with the majority's conclusion that Mullins may be distinguished from Britt because those cases addressed different statutes. KRS 640.040 exempts youthful offenders from the limitations on probation, parole or conditional discharge provided for in KRS 533.060. Likewise, KRS 640.030(2)(a) specifically authorizes a court to place a youthful offender on probation or conditional discharge when the youthful offender reaches the age of eighteen. These statutes address specifically the treatment of youthful offenders who have been convicted of a felony offense. In contrast, KRS 439.3401 deals generally with probation and parole eligibility for individuals who have been convicted of a violent offense. It is well-established that when two statutes deal with the same subject matter, one in a broad, general way and the other specifically, the specific statute prevails. DeStock No. 14, Inc. v. Logsdon, 993 S.W.2d 952, 959 (Ky. 1999). Consequently, Merriman's probation eligibility is governed by the provisions of KRS Chapter 640, and not by the limitations contained in KRS

439.3401. Accordingly, I would hold that the trial court retained the discretion to consider probation for Merriman.

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