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Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-000395-MR

B.W. APPELLANT

APPEAL FROM FAYETTE CIRCUIT COURT
v. HONORABLE MARY C. NOBLE, JUDGE
ACTION NO. 03-CR-00444

COMMONWEALTH OF KENTUCKY APPELLEE

AND NO. 2005-CA-002583-MR

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OPINION
REVERSING IN PART, VACATING IN PART, AND REMANDING

** ** ** ** **

BEFORE: ABRAMSON AND GUIDUGLI, JUDGES; BUCKINGHAM,[1] SENIOR JUDGE.

ABRAMSON, JUDGE: In January 2003, B.W. and two other juveniles went on a robbery spree. During a brief period they forced their way into two Lexington residences and stole items from several people they held at gunpoint. All three juveniles were transferred to Fayette Circuit Court pursuant to KRS 635.020 to be proceeded against as youthful offenders, and all eventually pled guilty to various counts of first and second-degree robbery. The two juveniles who were not yet eighteen when they were sentenced were remanded to the custody of the juvenile authorities until their eighteenth birthdays, at which point, pursuant to KRS 640.030, they were returned to the circuit court for final sentencing. Both were granted probation. B.W., on the other hand, turned eighteen in April 2003, shortly before his indictment. At that point, apparently, he was remanded to the adult detention facility and was thereafter proceeded against as an adult rather than a youthful offender. In particular, when the court sentenced B.W. in July 2003, it did not order the Department of Juvenile Justice (DJJ) to conduct his pre-sentence investigation, and it did not consider the option then available under KRS 640.030 of committing B.W. to DJJ for six months of rehabilitative treatment and postponing

[1] Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

his final sentence until the completion of that treatment. Instead, the Department of Corrections prepared B.W.'s pre-sentence investigation report (PSI), and the court, after sentencing him as an adult to twenty-five years' imprisonment, remanded B.W. to the adult authorities.

In October 2004, B.W. moved for CR 60.02 relief from his sentence on the ground that he had been improperly sentenced as an adult rather than as a youthful offender. The Commonwealth and the court both conceded the error and agreed that the sentence should be reopened, but a dispute arose over the relief to which B.W. was entitled. B.W. claimed that his PSI should be prepared anew by DJJ, and that the court should consider anew whether to probate him. The Commonwealth did not object to a new PSI, but argued that, as a violent offender under KRS 439.3401, B.W. was not eligible for probation. At the conclusion of the January 7, 2005, hearing on the matter, the circuit court agreed with the Commonwealth. The court acknowledged that DJJ ought to have prepared B.W.'s original PSI, but ruled that ordering a new PSI at that point would be an empty gesture, since B.W. had long since left DJJ's custody and was no longer eligible for DJJ services. The court also agreed with the Commonwealth that the violent offender statute barred B.W.'s probation.

At that point B.W. moved the court to reconsider his consecutive sentences and to order that they be served concurrently instead. The Commonwealth argued that given the gravity of B.W.'s offenses his consecutive sentences and twenty-five year total sentence were appropriate. Taken by surprise by B.W.'s motion, the trial court first expressed doubt about its authority to alter B.W.'s consecutive sentences, because they were within the confines of the law. The court then added that even if it had the authority to change B.W.'s sentence it would not do so, because in its estimation the original sentence was "proper and just." Finally, B.W. moved to have the court reconsider its rulings in six months. He noted that had he been correctly sentenced originally, he could have been remanded to DJJ for six months and then "finally" sentenced after that period. To correct the error, he argued, his new sentence should likewise be "finally" reconsidered later. By order entered January 14, 2005, the court granted B.W.'s motion. Although the trial court sentenced him anew to the same twenty-five year sentence imposed in July 2003, it set the matter for review in July 2005.

Challenging what he characterizes as the trial court's erroneous refusal to reconsider his consecutive sentences, B.W. appealed from the January 14, 2005, order. In appeal No. 2005-CA-000395-MR he emphasizes the trial court's apparent

uncertainty about its authority to reconsider concurrent sentences and contends that the court erred by deeming itself bound by the original sentence.

While B.W.'s appeal was being perfected, the trial court conducted its own promised reconsideration of B.W.'s sentence. The matter was heard in August 2005, and by that time the trial court's opinion about B.W.'s eligibility for probation had changed. Persuaded that B.W.'s sentencing had been badly mishandled and noting that both of B.W.'s robbery cohorts had been probated, the trial court ruled that the violent offender statute did not apply to youthful offenders and indicated that it would entertain B.W.'s motion for shock probation. That motion was duly filed, and by order entered November 23, 2005, the court granted B.W. probation. In appeal No. 2005-CA-002583-MR, the Commonwealth challenges that ruling and the trial court's about-face concerning the applicability of the violent offender statute to youthful offenders.

The two appeals have been consolidated for review, and we now reverse in part, vacate in part, and remand. We agree with the Commonwealth that B.W. was not eligible for probation, so the order probating him must be reversed. We also agree with B.W. that he was entitled to have his underlying consecutive sentences reconsidered. We vacate the underlying sentences,

therefore, and remand so that the trial court may reconsider whether to impose them concurrently or consecutively.

The parties do not dispute that B.W. was originally sentenced as an adult, that he should have been sentenced as a youthful offender pursuant to KRS 640.030 and KRS 640.040, and that it was appropriate under CR 60.02 to reopen his sentence and belatedly apply those statutes to whatever extent possible. *Cf. Gourley v. Commonwealth,* 37 S.W.3d 792 (Ky. App. 2001) (remanding for complete resentencing where record did not establish that youthful offender had been sentenced in accord with KRS 640.030). At the time of B.W.'s initial, July 2003, sentencing, KRS 640.030 provided in pertinent part that

> [a] youthful offender, who 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: . . . (3) If a youthful offender has attained the age of eighteen (18) prior to sentencing, that individual shall be returned to the sentencing court at the end of a six (6) month period if that individual has been sentenced to a period of placement or treatment with the Department of Juvenile Justice. The court shall have the same dispositional options as currently provided in subsection (2)(a) [probation or conditional discharge] and (c) [commitment to the Department of Corrections] of this section.

As B.W. notes, therefore, he could have been remanded for six months of DJJ treatment before being finally sentenced in accord with whatever final sentencing options were available.

B.W. asserts, and the trial court ruled, that probation under KRS 640.030(2)(a) was an available option. The Commonwealth maintains that probation was not an option because KRS 439.3401(1) designates those, such as B.W., who commit first-degree robbery as "violent offenders," and because KRS 439.3401(3) provides that such 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."

Relying on *Britt v. Commonwealth*, 965 S.W.2d 147 (Ky. 1998), the trial court ruled that the limitation on violent offender probation does not apply to youthful offenders. *Britt* concerned the application of KRS 640.040(3), which provides that "[n]o youthful offender shall be subject to limitations on probation, parole or conditional discharge as provided for in KRS 533.060." The *Britt* court held that this express exemption from KRS 533.060, which denies probation to those convicted of serious felonies involving the use of a firearm, applies even to those youthful offenders subject to expedited transfer to circuit court because of a firearm-related offense. Although KRS Chapter 640 contains no similarly express exemption from KRS 439.3401, the trial court apparently believed that the express

exemption from KRS 533.060 addressed in *Britt* implied a like exemption from KRS 439.3401 so as to effectuate what the *Britt* court referred to as the "ameliorative sentencing procedures authorized for youthful offenders." *Britt v. Commonwealth*, 965 S.W.2d at 150.

In *Commonwealth v. Taylor,* 945 S.W.2d 420 (Ky. 1997), however, our Supreme Court rejected the notion that youthful offenders are implicitly exempt from probation restrictions. On the contrary, the Court noted that in general youthful offenders are "subject to the same sentencing procedures as an adult, including probation." *Id.* at 423. Absent an express exemption, therefore, such as the express exemption from KRS 533.060, youthful offenders are subject to the same probation restrictions as are adults. Accordingly, the Court ruled that a certain juvenile sex offender was not exempt from KRS 532.045(2), which prohibits probation for offenders of that type. Thus, although we share the trial court's concern that foreclosing probation for all juvenile violent offenders tends to undermine what is otherwise a sharp statutory distinction between juveniles and adults, we nevertheless agree with the Commonwealth that the trial court erred by deeming B.W. exempt from KRS 439.3401. As noted, KRS Chapter 640 contains no express exemption from that statute, and in light of *Taylor* the trial court erred by inferring one. Accordingly, we reverse the

November 23, 2005, order of the Fayette Circuit Court probating B.W. and remand so that he may be resentenced.

We turn now to the scope of that resentencing. B.W. contends that in January 2005 when, pursuant to his CR 60.02 motion, the court reopened his sentence and sentenced him anew, the court was authorized to reconsider, and should have reconsidered, the entire sentence including whether to run his then-consecutive sentences concurrently. Noting comments by the trial judge during the hearing to the effect that she doubted the court's authority to alter either B.W.'s probation status or his term of years, B.W. maintains that the court erred by deeming itself unable to consider his request for concurrent sentences. We agree.

The trial court reacquired jurisdiction to sentence B.W. pursuant to CR 60.02, and the Commonwealth does not dispute that the reacquisition of that jurisdiction essentially returned the case to the *status quo* prior to the entry of B.W.'s sentence, authorizing the trial court to impose a new sentence in accord with the youthful offender sentencing statutes and B.W.'s guilty plea. *See Kurtsinger v. Board of Trustees of Kentucky Retirement Systems,* 90 S.W.3d 454, 456 (Ky. 2002) (explaining that by vacating an order pursuant to CR 60.02 the court "returned the case to the *status quo* prior to" the vacated order). The court was authorized therefore, as B.W. contends,

to run his sentences concurrently if it so chose. The record, however, leaves us in doubt that the trial court appreciated the scope of its authority.

B.W. did not request concurrent sentences until late in the hearing when the court had rejected his request for probation. In an attempt to bring the hearing to a conclusion, the court stated that there was nothing improper about the structure or the length of B.W.'s July 2003 sentence, and it doubted, therefore, that it was authorized to modify that sentence. It is true, as the Commonwealth points out, that a few moments later the court stated that it would not alter B.W.'s sentence even if it could and, as the Commonwealth also points out, that the January 14, 2005, order reimposing B.W.'s twenty-five year sentence refers to that sentence as "proper and just." Nevertheless, in the unique circumstances of this case, these added comments by the trial court do not assure us that the court gave B.W.'s request for concurrent sentences the consideration it would have had it been confident of its authority to depart from the initial sentence. As the trial court notes in its order of November 30, 2005, B.W.'s sentencing has been marred from the beginning by the failure of the court and counsel alike to realize that he should be sentenced as a youthful offender. The trial court believed that equity demanded B.W.'s probation but, as explained above, probation is

not an option. B.W.'s sentence, however, should be finally imposed by a court certain of the full scope of its authority to sentence him in accordance with the law and the circumstances of his case. Accordingly, we vacate the sentence the Fayette Circuit Court imposed on January 14, 2005, and left intact on August 8, 2005, and remand for resentencing in accordance with this opinion.

BUCKINGHAM, SENIOR JUDGE, CONCURS.

GUIDUGLI, JUDGE, CONCURS IN RESULT ONLY AND FILES SEPARATE OPINION.

GUIDUGLI, JUDGE, CONCURRING IN RESULT ONLY. While the majority opinion has stated the law correctly, I write separately to express my concern as to the final result caused by the obvious ineffective assistance of B.W.'s counsel. Had B.W.'s counsel done his job properly, B.W. would have been treated as a youthful offender and received the same treatment as his co-defendants. They each served six months in a juvenile facility and were then probated. The Commonwealth did not appeal probation of their sentences and one can assume would not have appealed B.W.'s probated sentence either. Instead, B.W. was improperly treated as an adult and when that legal mistake was finally determined, was sent back to court for resentencing. When he was resentenced, the trial court, as the majority points out, failed to consider concurrent sentencing. However, for

whatever reason the court decided to consider shock probation and eventually granted it. Now this court has determined that shock probation was improperly granted. The result being that B.W. may be resentenced to a sentence of ten to twenty-five years, but more importantly he must serve 85% of any sentence.

I believe based upon the facts of this case and the fact that B.W.'s attorney was so ineffective that we should vacate the plea agreement and allow B.W. to start over. If B.W.'s attorney was negligent in allowing him to be treated as an adult we can assume he was negligent in not knowing about or advising him of the violent offender consequences. In the interest of justice, I would vacate the entered plea. This would allow a new plea agreement to be entered with the assurance that B.W.'s constitutional rights are protected and justice is achieved. A plea agreement in which B.W. pleads to all second-degree robbery charges would insure that he could be sentenced to ten to twenty-five years as before but permit the court to consider probation which it has already deemed appropriate and based upon the facts of his co-defendants' cases would also seem appropriate. Also if, since B.W. has been probated he has not turned his life around or has committed new crimes or is not otherwise eligible for some leniency, the court could reinstate the same sentence it had erroneously imposed initially.

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