RENDERED: AUGUST 15, 2008; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001671-MR

JOHN REES — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JUDITH E. MCDONALD-BURKMAN, JUDGE
ACTION NO. 05-CR-000089

DANIEL OTTMAN;
HON. JUDITH MCDONALD BURKMAN;
AND ROB EGGERT — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: FORMTEXT CLAYTON, MOORE, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: John Rees bring this appeal from a July 18, 2007, Order of the Jefferson Circuit Court finding Rees in contempt. We affirm.

As a juvenile, Daniel Ottman pleaded guilty to assault in the first degree and was subsequently sentenced to ten-years' imprisonment. Upon

reaching the age of eighteen, Ottman returned to the trial court for resentencing pursuant to Kentucky Revised Statutes (KRS) 640.030. Therein, the court sentenced Ottman to carry out the remainder of his ten-year sentence of imprisonment.

Ottman subsequently filed a motion for shock probation, and on June 6, 2007, the trial court entered an order granting that motion. However, on the following day, the court set aside the order expressing concern that Ottman was considered a violent offender under KRS 439.3401 and, therefore, ineligible for probation or shock probation.[1] After further consideration, the court reinstated Ottman's shock probation by order entered June 19, 2007, and specifically concluded:

> Following the Court's setting aside of its Order Granting Shock Probation, the Court conferred with the Commonwealth and defense counsel. Both counsel agree that the current state of the law in Kentucky with respect to youthful offenders convicted of felonies in the Circuit Court allows such persons to seek and receive probation under KRS 640.030(2)(a).
>
> This issue is currently before the Supreme Court (*Commonwealth v. Hickman*, 2006-SC-000332-DG).[2]

Rees, who is Commissioner of the Department of Corrections, then sent a letter to the trial court on June 21, 2007, stating again his belief that Ottman

[1] Upon receipt of the court order, John Rees immediately contacted the circuit judge expressing his belief that applicable law did not permit the release of Daniel Ottman by shock probation.

[2] *Commonwealth v. Hickman*, 2006-SC-000332-DG is still pending before the Supreme Court at the time of this opinion. We note that the Court of Appeals, in *Hickman v. Commonwealth*, 2005-CA-000640-MR, held that a youthful offender classified as violent offenders under Kentucky Revised Statutes (KRS) 439.4301 was eligible to receive probation under KRS 640.030.

was ineligible for shock probation under the law of Kentucky. Rees further stated that he would not release Ottman despite the trial court's order of June 19, 2007.

Upon receipt of the letter from Rees, the circuit judge immediately ordered that Ottman be transported to a hearing in circuit court on June 25, 2007. At the hearing, the court ordered his release from custody.

Upon Ottman's motion for Rees to show cause why he should not be held in contempt, the trial court conducted a contempt hearing on July 13, 2007. At the conclusion, the court found Rees in contempt of court for refusing to obey the June 19, 2007, order and fined him $500 plus the costs of Ottman's counsel. Rees's motion to alter, amend, or vacate was denied by the court. This appeal follows.

Rees does not argue that his conduct was not contemptuous. Rather, Rees contends that he cannot be found in contempt for failing to follow the court's June 19, 2007, order because the order was void. Specifically, Rees alleges that the trial court's June 19, 2007, order was void because the court lacked jurisdiction to grant Ottman shock probation. For the reasons hereinafter stated, we disagree.

Generally, a void judgment has no effect and may be disregarded. *Gullet v. Gullet*, 992 S.W.2d 866 (Ky.App. 1999). And, it is well-established that a person may not be held in contempt for failure to comply with a void order. *Davis v. City of Bowling Green*, 289 S.W.2d 506 (Ky. 1956).

KRS 439.265(4) provides that a violent offender may not receive shock probation. Rees correctly points out that Ottman was classified as a violent

offender under KRS 439.3401(1)(c) due to his conviction for first-degree assault causing serious injury. We, however, do not believe that KRS 439.265(4) is controlling. We are of the opinion that Ottman was eligible to receive probation and shock probation under KRS 640.030. KRS 640.030 governs the sentencing of youthful offenders who have been convicted or plead guilty to a felony offense. KRS 640.030(2) provides in relevant part:

> 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 . . . . At the conclusion of the treatment program, the individual shall be returned to the sentencing court for a determination under paragraph (a) or (c) of this subsection; or
>
> (c) Whether the youthful offender shall be incarcerated in an institution operated by the Department of Corrections[.]

We believe KRS 640.030 was intended to create an exception for youthful offenders to the general sentencing guidelines. Thus, Ottman's status as a youthful offender made him eligible for probation at the time of his resentencing hearing under KRS 640.030. As Ottman was eligible for probation under KRS 640.030, we believe he was clearly eligible for shock probation under the statute.

Cf. Porter v. Com., 869 S.W.2d 48 (Ky.App. 1993)(holding that KRS 532.045 which prohibits "probation" should be interpreted as also prohibiting shock probation). Thus, we believe that KRS 640.030(2) entitles Ottman to be considered for shock probation.

In sum, we hold that the circuit court acted within its jurisdiction and that the order reinstating Ottman's shock probation was not void.[3] As a result, Rees was properly held in contempt for his intentional and willful refusal to obey the court's order.

For the foregoing reasons, the Order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Jeff Middendorf
Justice and Public Safety Cabinet
Office of Legal Services
Frankfort, Kentucky

BRIEF FOR APPELLEES:

Michael L. Goodwin
Louisville, Kentucky

[3] This holding should not be misconstrued to support the conclusion that the June 19, 2007, order reinstating Ottman's shock probation would be void if Ottman were ineligible for shock probation under current statutory law.