

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000253-MR

CHAD MASENGALE

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE ERNESTO M. SCORSONE, JUDGE
ACTION NO. 08-CR-00890

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
VACATING AND REMANDING

** ** * * * * *

BEFORE: COMBS, CHIEF JUDGE; VANMETER, JUDGE; LAMBERT,¹
SENIOR JUDGE.

COMBS, CHIEF JUDGE: Appellant, Chad Masengale, entered a plea of guilty to three misdemeanors. He now appeals the order of the Fayette Circuit Court which sentenced him as a youthful offender rather than as a juvenile. On appeal, the Commonwealth concedes that the lower court was in error and that a reversal and

¹ Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

remand are necessary. Therefore, at the urging of both parties, we vacate that decision and remand with instructions to enter judgment consistent with this opinion.

The facts of this case are undisputed. Chad Masengale was a juvenile who became involved in a gang-related altercation at the Fayette Mall movie theatre in Lexington, Kentucky. He supplied a handgun to a friend, who used the gun to fire shots at a rival gang. Although these shots were fired into a heavily crowded area, no one was injured in the altercation.

The Commonwealth filed two felony charges against Masengale: complicity to wanton endangerment, first degree, and tampering with physical evidence; it also filed the misdemeanor charge of possession of a handgun by a minor. The case was originally brought in the Fayette District Court, Juvenile Division. Upon motion of the Commonwealth, Masengale was transferred to Fayette Circuit Court as a youthful offender to be tried as an adult pursuant to Kentucky Revised Statute(s) (KRS) 635.020(4).² Appellant was indicted on July 29, 2008; he was charged with the same offenses that had been included in the juvenile petition.

Before the case went to trial, Masengale entered into a plea bargain with the Commonwealth. In exchange for his testimony against another defendant involved in shooting, the Commonwealth agreed to amend the two felony charges

² KRS 635.020(4) provides that a child charged with a felony in which a firearm was used shall have his case be transferred to the Circuit Court for trial as an adult. If convicted in Circuit Court, he shall be subject to the same penalties as an adult offender.

to misdemeanors as follows: the charge of complicity to wanton endangerment, first degree, was amended to facilitation of wanton endangerment, first degree; the charge of tampering with physical evidence was amended to attempted tampering with physical evidence. The third charge (already a misdemeanor) remained intact.

Masengale entered a guilty plea on November 14, 2008. Prior to final sentencing and again at final sentencing, he invoked KRS 640.040, which mandates that a youthful offender convicted of a misdemeanor or certain felony offenses **shall be disposed** of pursuant to KRS 635.060. Pertinent sections of that statute set forth as follows: (1) KRS 635.060(2) – if a child is placed on probation after he reaches the age of seventeen years and six months, the period of probation shall not exceed one year; (2) KRS 635.060(5) – if a child is sixteen years of age or older, confinement in an approved, secure juvenile detention facility cannot exceed 90 days. Masengale’s age brings him within the purview of both provisions.

The trial court sentenced Masengale to one year for each misdemeanor, to be served concurrently, but it probated that sentence for a period of **two years** conditioned on his serving 40 days in jail. Appellant contends that his sentence was excessive. Because he was charged with a misdemeanor, he argues that he should have been sentenced under KRS 640.040(4) as a juvenile, requiring the court to defer to KRS 635.060 for sentencing guidelines. According to KRS 635.060, his sentence would have been limited to no more than 90 days in jail with no more than one year of probation. Masengale argues that the lower

court erred as a matter of law in sentencing him to one year for each misdemeanor and by placing him on probation for a period of two years.

In addition to invoking KRS 640.040(4) in support of his contention, Masengale also relies on *Canter v. Commonwealth*, 843 S.W.2d 330 (Ky. 1992). In *Canter*, the defendant was charged with murder in the death of her child. *Id.* at 330. After a trial, she was convicted of criminal abuse, first degree, a Class C felony. *Id.* at 331. She was sentenced to eight years in prison. *Id.* at 331. On appeal, Canter argued that because she was convicted of a Class C felony, the court was not allowed to sentence her to an eight-year sentence and that it should have sentenced her under KRS 635.060 because she was a youthful offender as defined pursuant to KRS 640.040(4). The Supreme Court agreed, reversing the sentencing order and remanding the case for Canter to be sentenced as a juvenile.

As in *Canter*, Masengale was originally tried as a youthful offender/adult but was later convicted of a lesser charge falling within the purview of KRS 640.040(4). Thus, sentencing under KRS 635.060 was automatically required. Accordingly, this case must be remanded so that Masengale may be sentenced pursuant to KRS 635.060.

Therefore, at the urging of both parties, we vacate the judgment and remand for re-sentencing in accordance with this opinion.

ALL CONCUR.

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