

RENDERED: OCTOBER 30, 2009; 10:00 A.M.  
NOT TO BE PUBLISHED

# Commonwealth of Kentucky

## Court of Appeals

NO. 2008-CA-002417-MR

DEMARCUS FUQUA

APPELLANT

v. APPEAL FROM CALDWELL CIRCUIT COURT  
HONORABLE CLARENCE A. WOODALL, III, JUDGE  
ACTION NO. 00-CR-00044

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: CLAYTON, DIXON, AND THOMPSON, JUDGES.

THOMPSON, JUDGE: DeMarcus Fuqua appeals an order of the Caldwell Circuit Court denying his motion for resentencing pursuant to KRS 640.030(1). He alleges that KRS 640.030 mandates that his presentence investigation (PSI) report be prepared by the Department of Juvenile Justice and, therefore, its preparation by the Kentucky Department of Probation and Parole constitutes palpable error

mandating reversal. Because the alleged sentencing error was not raised in Fuqua's direct appeal or in his subsequent RCr 11.42 motion, we affirm.

In 2001, a jury found that on April 11, 2000, Fuqua committed robbery in the first degree and sentenced him to twenty-years' imprisonment. On the date of the offense, Fuqua was a juvenile but was an adult at the time of trial and sentencing. Prior to sentencing, the trial judge requested and obtained a PSI report from the Kentucky Department of Probation and Parole. After review of the record and PSI report, the trial court denied probation.

Fuqua filed a direct appeal to the Kentucky Supreme Court which affirmed the judgment on January 8, 2004. Subsequently, he filed an RCr 11.42 motion alleging ineffective assistance of counsel. After his motion was denied, he appealed to this Court which affirmed the trial court on August 4, 2006. In his direct appeal and in his RCr 11.42 motion, Fuqua did not allege any error in the use of the PSI report prepared by the Kentucky Department of Probation and Parole.

Despite his failure to object at the time of sentencing or in his direct appeal or in his RCr 11.42 motion to the use of the PSI report, in October 2008, Fuqua filed a motion for resentencing alleging that because he was a youthful offender, the Department of Juvenile Justice was required to prepare the PSI. The Commonwealth responded that the Department of Probation and Parole acted as the designee of the Department of Juvenile Justice when it prepared the PSI as evidenced by the extensive PSI which included Fuqua's prior juvenile record.

Moreover, it argued that Fuqua's failure to include the issue in his direct appeal and RCr 11.42 motion constituted a waiver of the issue and was not reviewable. The circuit court reviewed the record and concluded that even if the issue was properly presented, the record revealed that probation was considered as a sentencing option and denied Fuqua's motion.

Fuqua's allegation of error is premised on this Court's decision in *Gourley v. Commonwealth*, 37 S.W.3d 792 (Ky.App. 2001), where it was held that KRS 640.030(1) requires that the Department of Juvenile Justice prepare the PSI report in cases involving juvenile offenders. However, Fuqua's reliance on *Gourley* is misplaced because, in that case, the issue was properly preserved by proper objection prior to and at the time of the sentencing hearing and by presenting the issue in a direct appeal.

In contrast, Fuqua allowed seven years to elapse following his conviction and pursued a direct appeal and an RCr 11.42 motion before presenting the issue regarding the PSI report. Contrary to Fuqua's assertion, the failure to follow a statutory sentencing procedure is not a jurisdictional question and, thus, can be waived.

Any plausible interpretation of the Kentucky Supreme Court's decisions in *Wellman v. Commonwealth*, 694 S.W.2d 696 (Ky. 1985), and *Gaither v. Commonwealth*, 963 S.W.2d 621 (Ky. 1997), that sentencing is jurisdictional and cannot be waived was negated in *Myers v. Commonwealth*, 42 S.W.3d 594 (Ky. 2001). The Court stated:

It is simply incorrect to say that a court is without jurisdiction to impose an unauthorized sentence. Rather the imposition of an unauthorized sentence is an error correctable by appeal, by writ or motion pursuant to RCr 11.42 or Cr 60.02.

*Id.* at 596. Fuqua waived his right to object to the preparation of the PSI report by the Department of Juvenile Justice by his failure to present the issue at the time of sentencing, in his direct appeal, or in his RCr 11.42 motion.

Although we deem the alleged error waived, we nevertheless have reviewed the record and find that the trial court treated Fuqua as a youthful offender, including consideration of probation as an alternative sentence. KRS 640.030. Thus, there was no palpable error subject to review. RCr 10.26.

Based on the foregoing, the order of the Caldwell Circuit Court is affirmed.

ALL CONCUR.

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