

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001356-MR

JONATHAN DYER

APPELLANT

v. APPEAL FROM GARRARD CIRCUIT COURT
HONORABLE C. HUNTER DAUGHERTY, JUDGE
ACTION NO. 03-CR-00054

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: KELLER AND THOMPSON, JUDGES; SHAKE,¹ SENIOR JUDGE.

THOMPSON, JUDGE: Pursuant to a guilty plea, Jonathan Dyer was convicted as a youthful offender. He appeals an order of the Garrard Circuit Court that denied his motion to correct his criminal sentence pursuant to CR 60.02(e) and (f) on the basis that the trial court failed to consider probation at the time of sentencing. The circuit court found that it properly considered and denied Dyer probation at the

¹ Senior Judge Ann O'Malley Shake sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

time of sentencing as required by KRS 640.030(2), applicable to youthful offenders. We affirm.

A juvenile complaint was issued against Dyer accusing him of murder, two counts of first-degree robbery, first-degree burglary, and complicity to first-degree assault and tampering with physical evidence. After his case was transferred to circuit court, he was indicted for the charges stated in the complaint.

Dyer entered a guilty plea and at the time of sentencing on July 16, 2004, Dyer was eighteen-years old. He appeared in court and, after unsuccessfully moving to withdraw his plea, was sentenced in accordance with the terms of the plea agreement and a total sentence of thirty-two years' imprisonment was imposed. At the hearing, the circuit court denied probation on the basis that: (1) "Defendant is in need of correctional treatment that can be provided most effectively by the defendant's commitment to a correctional institution;" (2) "probation, probation with an alternative sentencing plan, or constitutional discharge would unduly depreciate the seriousness of the Defendant's crime;" and (3) "Defendant is ineligible for probation, probation with an alternative sentencing plan, or conditional discharge because of the applicability of KRS 532.080, KRS 439.3401, or KRS 533.060."

Dyer argued in his CR 60.02 motion that the reference to KRS 439.3401 in the sentencing judgment warranted relief. The trial court denied the CR 60.02 motion, finding that the trial court considered probation and properly

rejected it as an alternative sentence regardless of the reference to KRS 439.3401 in the sentencing judgment.

Dyer relies on the Kentucky Supreme Court's holding in *Commonwealth v. Merriman*, 265 S.W.3d 196 (Ky. 2008). In that case, the issue presented was whether a juvenile, convicted as a youthful offender, was subject to the provisions of the Violent Offender Statute. *Id.* at 197. Pursuant to KRS 439.3401(3), a violent offender convicted of a Class A felony with a sentence of a term of years or a Class B felony "shall not be released on probation or parole until he has served as least eight-five percent (85%) of the sentence imposed." In contrast, KRS 640.030(2) requires that a youthful offender who is eighteen-years old prior to the expiration of his sentence be afforded a "resentencing" hearing at which time the court has the option of placing the youthful offender on probation or conditional discharge, returning him to the Department of Juvenile Justice to complete a program of up to five months, or incarcerating him in adult prison. The court held that the mandates contained in KRS 640.030(2), including the sentencing options that the trial court must consider, are controlling and, as a result, the Violent Offender Statute cannot prevent consideration of probation or conditional discharge on the youthful offender's eighteenth birthday. *Id.* at 200.

Dyer is correct that *Merriman* states the Violent Offender Statute does not apply to youthful offenders and that, although he was eighteen-years old at the time of sentencing, he remained a youthful offender. *Gourley v. Commonwealth*,

37 S.W.3d 792 (Ky.App. 2001). However, in Dyer's case, we conclude that there was no reversible error.

Merriman involved two youthful offenders both of whom were denied probation exclusively on the basis that KRS 439.3401 rendered them ineligible for probation. Although the court held that the trial court was required to consider the statutorily mandated sentencing options, including probation, it did not mandate that probation be granted. It held only that when a youthful offender is eighteen-years old prior to the expiration of his sentence, the trial court is required to consider probation as a sentencing option. Thus, in the cases presented in *Merriman*, the trial courts applied the Violent Offender Statute and did not consider probation as a sentencing option.

Dyer's case presents a materially different scenario. The trial court treated Dyer as a youthful offender and expressly stated that it considered probation as a sentencing option. After its consideration of probation, the trial court found that it was not appropriate because Dyer was in need of correctional treatment that could most effectively be provided by his commitment to a correctional institution and that probation would unduly depreciate the seriousness of his crimes. Therefore, any error was harmless.

Based on the foregoing, the Garrard Circuit Court's order denying Dyer's CR 60.02 motion is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Jonathan Dyer, *Pro se*
Eddyville, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Michael L. Harned
Assistant Attorney General
Frankfort, Kentucky