

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2018-CA-000252-MR

JORDAN A. WISE

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT  
HONORABLE THOMAS D. WINGATE, JUDGE  
ACTION NO. 16-CR-00264-001

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: COMBS, D. LAMBERT AND SMALLWOOD,<sup>1</sup> JUDGES.

SMALLWOOD, JUDGE: Jordan Wise appeals from a judgment and sentence of the Franklin Circuit Court reflecting a jury verdict of guilty on one count each of first-degree robbery and fourth-degree assault. Wise argues that the trial court

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<sup>1</sup> Judge Gene Smallwood authored this opinion prior to the expiration of his term of office. Release of the opinion was delayed by administrative handling.

erred in sentencing him to 10 years in prison because the jury had been misadvised as to parole eligibility. We find no error, and AFFIRM the judgment and sentence on appeal.

On August 17, 2016, the Franklin County grand jury indicted Wise on one count of first-degree robbery<sup>2</sup> and one count of second-degree assault<sup>3</sup> stemming from a home invasion. The matter proceeded to a jury trial beginning on November 8, 2017, whereupon the jury was instructed on robbery in the first and second degrees, as well as assault in the second and fourth degrees. Wise was convicted on one count each of first-degree robbery and fourth-degree assault.<sup>4</sup>

At the penalty phase, counsel for both parties either told the jury or otherwise affirmed that Wise would be eligible for parole after serving 20% of his sentence. This claim was in error, as both counsels were under the mistaken impression that Wise was not subject to violent offender sentencing under KRS 439.3401. The jury then returned a recommended sentence of 12 years in prison.

At Wise's sentencing on January 26, 2018, the Commonwealth advised the court that subsequent research revealed that Wise was subject to the violent offender statute which implicated service of 85% of his sentence before parole eligibility. Accordingly, and in an apparent attempt to remedy its error, the

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<sup>2</sup> Kentucky Revised Statutes (KRS) 515.020.

<sup>3</sup> KRS 508.020.

<sup>4</sup> KRS 508.030.

Commonwealth sought a 10-year sentence rather than the 12-year sentence recommended by the jury. Wise's counsel maintained that he was not a violent offender so that parole eligibility was 20%. The Court sentenced Wise to 10 years, the minimum sentence for first-degree robbery. This appeal followed.

Wise now argues that the Franklin Circuit Court erred in sentencing him to 10 years in prison after both counsels misadvised the jury as to Wise's parole eligibility during the penalty phase. He argues that he was denied due process because he was either not advised or wrongfully advised as to parole eligibility upon a conviction of first-degree robbery. Wise contends that after the court learned that Wise was subject to the violent offender statute, it had a duty to grant a mistrial. Wise maintains that the failure to do so constitutes reversible error.

Having closely examined the record and the law, we cannot conclude that the Franklin Circuit Court erred in sentencing Wise to 10 years in prison arising from the jury's guilty verdict. We must first note that Wise acknowledges that his counsel raised no claim of error before the Franklin Circuit Court on this issue.

[Kentucky Rule of Civil Procedure (CR)  
76.12(4)(c)[(v)] in providing that an appellate brief's contents must contain at the beginning of each argument a reference to the record showing whether the issue was preserved for review and in what manner emphasizes the importance of the firmly established rule that the trial

court should first be given the opportunity to rule on questions before they are available for appellate review. It is only to avert a manifest injustice that this court will entertain an argument not presented to the trial court. (citations omitted).

*Elwell v. Stone*, 799 S.W.2d 46, 48 (Ky. App. 1990) (quoting *Massie v. Persson*, 729 S.W.2d 448, 452 (Ky. App. 1987)). A statement of preservation is required

so that we, the reviewing Court, can be confident the issue was properly presented to the trial court and therefore, is appropriate for our consideration. It also has a bearing on whether we employ the recognized standard of review, or in the case of an unpreserved error, whether palpable error review is being requested and may be granted.

*Oakley v. Oakley*, 391 S.W.3d 377, 380 (Ky. App. 2012). Compliance with CR 76.12 is mandatory. *See Hallis v. Hallis*, 328 S.W.3d 694, 696 (Ky. App. 2010).

Although the failure to comply with CR 76.12 is not automatically fatal, we would be well within our discretion to strike the briefs or dismiss the appeals for failure to comply. *Elwell, supra*. Wise has not revealed whether this error was raised below, and has not preserved it for review.

*Arguendo*, even if this issue were raised below and properly preserved, we would find no error. As the Commonwealth properly notes, if we remanded the matter for resentencing, the jury would be advised that the applicable sentencing range for first-degree robbery is ten to twenty years and that Wise would be eligible for parole after service of 85% of his sentence. Therefore, the

minimum sentence Wise could receive on remand is the same sentence imposed by the Franklin Circuit Court. This renders the matter moot. Further, we do not find persuasive Wise's argument that he was deprived of the opportunity to accept a plea in lieu of going to trial. The only offer made in the case was a plea of ten years for first-degree robbery which both counsel advised at oral arguments, be soundly rejected. The purported error would have occurred, if at all, after the jury returned its verdict. In the alternative, Wise seeks an opinion vacating his conviction and remanding the matter for retrial. Wise, however, has not challenged the underlying conviction, has raised no claim of error supporting a reversal of the guilty phase verdict, nor cited any authority that error in the sentencing phase denied his due process rights regarding the guilty phase of the trial. We found no palpable error effecting Wise's substantial rights under Kentucky Rules of Criminal Procedure (RCr) 10.26.

Even if Wise had raised and preserved a claim of error for our consideration, any purported error was remedied by the Franklin Circuit Court's imposition of the minimum sentence available for first-degree robbery which was two years less than the jury's recommendation. We disagree with the appellant that the Court's ruling in *Padilla v. Kentucky*, 559 U.S. 356, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010), requires a mistrial. In *Padilla*, the defendant entered a guilty plea upon the wrong advice of his counsel as to the consequences of his guilty

plea. In the case before us, appellant refused the plea offer and chose to go to trial, where he was convicted. While error may have occurred in the penalty phase, he was given only the minimum sentence for first-degree robbery. Wise was guaranteed only a fair trial, not a perfect trial free of all error. *Michigan v. Tucker*, 417 U.S. 433, 94 S. Ct. 2357, 41 L. Ed. 2d 182 (1974). As nothing could be accomplished by resentencing, we find no error.

For the foregoing reasons, we AFFIRM the judgment and sentence of the Franklin Circuit Court.

ALL CONCUR.

BRIEFS AND ORAL ARGUMENT  
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BRIEF AND ORAL ARGUMENT  
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