

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

NO. 2017-CA-001615-MR

DERRICK BECKER

APPELLANT

v. APPEAL FROM CAMPBELL CIRCUIT COURT  
HONORABLE JULIE REINHARDT WARD, JUDGE  
ACTION NO. 16-CR-00032

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: ACREE, KRAMER, AND NICKELL, JUDGES.

ACREE, JUDGE: Derrick Becker appeals the Campbell Circuit Court's order denying him shock probation. Becker argues he has a statutory right to have his motion for shock probation decided on the merits under KRS<sup>1</sup> 439.265(2). The

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<sup>1</sup> Kentucky Revised Statutes.

Commonwealth correctly points out that Becker failed to preserve this issue for review. We affirm the circuit court.

### **BACKGROUND**

Becker pleaded guilty to ten counts of possession of a matter portraying sexual performance by a minor, a violation of KRS 531.335, a Class D felony. Becker is currently serving his sentence at the Campbell County Detention Center. On June 14, 2017, Becker filed a motion for shock probation under KRS 439.265. Becker filed his motion in compliance with the statute. However, on August 4, 2017, the circuit judge presiding over the case retired and referred the case to Hon. Julie Reinhardt Ward. The circuit court then set the matter for a hearing on August 31, 2017, “to determine whether a hearing should be held and if so, dispose of Defendant’s motion.”

During the hearing, the circuit court expressed concern that it lost jurisdiction to rule on Becker’s motion for shock probation because the prior judge failed to rule in a timely fashion, as required by KRS 439.265(2). The circuit court declined to hear Becker’s motion and did not rule on the merits. It found “[the motion] is automatically deemed overruled if it’s not ruled on within the period of time.” The circuit court further found:

that because the previous [judge] did not consider the Defendant’s motion within 60 days of the date of filing and did not enter a ruling within 70 days of the date of filing as required under KRS 439.265(2), that this [circuit

court] does not retain jurisdiction in the matter. The Defendant's Motion is therefore Denied. This is a final, appealable Order.

This appeal followed.

### **ANALYSIS**

We are not called to review the merits of Becker's motion for shock probation. Instead, we are first called to review whether this Court has jurisdiction to decide this matter. Becker asked this Court to determine whether KRS 439.265 requires the circuit court to consider and rule on the merits of his motion for shock probation. It is well-established that this Court may review a circuit court's order regarding shock probation to ascertain whether the circuit court's actions were jurisdictional rather than on the merits of the shock motion. *See Commonwealth ex rel. Hancock v. Melton*, 510 S.W.2d 250 (Ky. 1974); *Terhune v. Commonwealth*, 907 S.W.2d 779 (Ky. App. 1995). To this extent, the Court does have authority to review this matter.

Although this Court may retain jurisdiction to decide Becker's claim, his arguments on appeal are procedurally moot. "It is an unvarying rule that a question not raised or adjudicated in the court below cannot be considered when raised for the first time in this court." *Combs v. Knott Cty. Fiscal Ct.*, 283 Ky. 456, 141 S.W.2d 859, 860 (1940). *See Benefits Ass'n of Ry. Employees v. Secrest*, 239 Ky. 400, 39 S.W.2d 682, 687 (1931). "Our jurisprudence will not permit an

appellant to feed one kettle of fish to the trial judge and another to the appellate court.” *Applegate v. Commonwealth*, 577 S.W.3d 83, 90 (Ky. App. 2018) (citations and internal quotation marks omitted).

Here, Becker did not present his procedural objections to the circuit court. In reviewing the record, this Court found no reference to the arguments he now makes on appeal; the argument, therefore, is not preserved for review. In fact, Becker’s attorney *agreed* that the circuit court lacked jurisdiction. Becker made no arguments to the circuit court whatsoever. In sum, Becker’s attorney made none of the statutory interpretation arguments he now presents to this Court.

We are sympathetic to the fact that Becker’s quandary occurred because the circuit court failed to render a decision within the statutory deadlines. However, if there is a statutory deficiency as Becker argues, the remedy lies with the General Assembly to amend a statute, not with the judiciary.

For the foregoing reasons, the judgment of the Campbell Circuit Court is affirmed.

ALL CONCUR.

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