

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-001533-MR

CHRISTOPHER ANTHONY TRUBIANO

APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE GREGORY M. BARTLETT, JUDGE
ACTION NO. 17-CR-00433

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: KRAMER, MAZE, AND L. THOMPSON, JUDGES.

KRAMER, JUDGE: Christopher Trubiano pled guilty in Kenton Circuit Court to use of an electronic communications system to induce or procure a minor to commit a sexual offense, a Class D felony. *See* Kentucky Revised Statute (KRS) 510.155. Thereafter, on September 18, 2018, the circuit court entered two separate orders. First, in an order dated September 7, 2018, the circuit court convicted

Trubiano of the aforementioned offense and sentenced him to forty-two months imprisonment. Further, upon considering a written report from the Division of Probation and Parole, the nature and circumstances of the offense, along with Trubiano's history and character, the circuit court found that probation, probation with an alternative sentencing plan, or conditional discharge would "unduly depreciate the seriousness of [Trubiano's] crime" and *denied his requests* in those respects.

Second, in an order dated September 12, 2018, the circuit court determined Trubiano was altogether *ineligible* for probation consideration pursuant to KRS 532.047 and *Stull v. Commonwealth*, 443 S.W.3d 10 (Ky. App. 2014).

Trubiano now appeals. In his brief, he summarizes his argument as follows:

[E]ven though [Trubiano] stood convicted of a sex offense under KRS 510, and therefore falls under the violent offender classification in KRS 439.3401, he was still eligible for a probated sentence.

A person convicted of certain Class C and D sex offenses and designated as a violent offender is eligible for a probated sentence as provided by KRS 532.045. The mistaken counterargument relies on the authority of KRS 532.047, which provides "[p]robation shall not be granted to, nor shall the execution or imposition of sentence be suspended for, a person who has been designated as a violent offender as defined in KRS 439.3401, unless such probation is granted in accordance with KRS 439.3401."

The very wording of KRS 532.047 allows for the possibility of probation as long as the sentence complies with KRS 439.3401, the Violent Offender Statute, which does indeed address the possibility of probation for violent offenses.

Stated differently, Trubiano's sole argument on appeal is that the circuit court had the authority to grant his requests for probation.

With that said, we affirm the circuit court's judgment for two reasons.

First, as indicated, the circuit court rejected Trubiano's request for probation consideration on alternative bases: (1) it lacked the authority to grant his request; and (2) assuming it did not lack the requisite authority, the circuit court also refused to grant his request because doing so would "unduly depreciate the seriousness of [his] crime." Accordingly, to succeed on appeal, the onus was upon Trubiano to demonstrate the circuit court erred in *both* respects. *See Milby v. Mears*, 580 S.W.2d 724, 727 (Ky. App. 1979). However, Trubiano has entirely ignored the second basis of the circuit court's decision and has offered no argument of error in that respect. Thus, even if Trubiano's sole argument on appeal were correct, this Court would not be at liberty to reverse. *Id.*

Second, Trubiano's argument on appeal is incorrect. The provisions of KRS 532.047 prohibit probation for anyone designated as a "violent offender" under the provisions of KRS 439.3401. A "violent offender" is defined as "any person who has been convicted of or pled guilty" to "the commission or attempted

commission of a felony sexual offense described in KRS Chapter 510.” As indicated, the crime of use of an electronic communications system to induce or procure a minor to commit a sexual offense is codified in Chapter 510. Thus, Trubiano’s conviction of that crime qualifies him as a violent offender and renders him ineligible for probation. Pursuant to *Stull*, 443 S.W.3d at 12,¹

KRS 532.047 authorizes probation for violent offenders *if* the probation is granted in accordance with the provisions of KRS 439.3401. The provisions of KRS 439.3401 authorize probation and/or parole for a category of violent offenders who have served at least twenty years in the penitentiary. The statute also authorizes probation and/or parole for violent offenders convicted of a capital offense or a Class A felony with a sentence of a term of year[s] or a Class B felony after the offender has served at least eighty-five percent of the sentence imposed. The provision does not apply in this case where [Trubiano] was convicted of a Class D felony and has not served the minimum twenty years in the penitentiary.

In short, the circuit court committed no error in rejecting Trubiano’s request for probation consideration. We therefore AFFIRM.

ALL CONCUR.

¹ Trubiano takes issue with the above-quoted holding of *Stull* and asks this Court to overrule it. Beyond the fact that we agree with the decision in *Stull*, overruling this Court’s precedent requires *en banc* consideration of the question. *Taylor v. King*, 345 S.W.3d 237, 242 (Ky. App. 2010) (citing Supreme Court Rule 1.030(7)(d).) We decline to do so.

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