IMPORTANT NOTICE
NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

RENDERED: NOVEMBER 26, 2008
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2006-SC-000412-DG

FINAL
DATE 12-17-08 Ella Groanity DC

MICHELLE DUNN — APPELLANT

V.

ON APPEAL FROM COURT OF APPEALS
CASE NO. 2005-CA-000816-MR
KNOX CIRCUIT COURT NO. 02-CR-00094

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

REVERSING, VACATING AND REMANDING

The primary issue presented is whether a youthful offender who has committed a violent felony must be considered for probation upon reaching age eighteen and being returned to the sentencing court pursuant to KRS 640.030(2). The trial court and the Court of Appeals held that Michelle Dunn was not eligible for such consideration because KRS 439.3401, the Violent Offender Statute, prohibits probation for her offense until 85% of the sentence has been served. Having recently decided in Commonwealth v. Merriman and Commonwealth v. Hickman, ___ S.W.3d ___ (Ky. 2008) (2006-SC-000330-DG and 2006-SC-000690-DG, rendered September 18, 2008; modified October 2, 2008), that the Violent Offender Statute does not apply to youthful offenders, we reverse the decision below and remand to the trial court for consideration of probation and the other alternatives available under KRS 640.030(2).

In October of 2002, having been transferred to circuit court for trial as a youthful offender, Dunn accepted a plea agreement and entered guilty pleas to charges of first-degree robbery, first-degree assault, and receiving stolen property – offenses committed when she was fifteen years of age. She received concurrent sentences totaling ten years. On turning eighteen, Dunn was returned to the sentencing court in August of 2004, pursuant to the mandate of KRS 640.030(2), according to which the court "shall" determine whether the individual will be placed on probation or conditional discharge, temporarily returned to the Department of Juvenile Justice to complete a treatment program, or incarcerated in an institution operated by the Department of Corrections.

Appearing in the sentencing court with counsel, Dunn proposed to offer evidence of rehabilitation in support of her request for probation. The court declined to hear any such testimony, being of the opinion that Dunn was a violent offender and ineligible for probation, as she had not served 85% of her ten-year sentence. Our decision in Merriman/Hickman, supra, makes clear that probation is an available course in these circumstances and must be considered by the sentencing court. It is a natural corollary, we believe, that Dunn must be permitted to present relevant evidence on the issue.

As a secondary issue, the Commonwealth argues that Dunn is estopped from claiming that the Violent Offender Statute does not apply to her. In an unsuccessful motion for relief pursuant to RCr 11.42, filed in 2003, Dunn argued that her trial counsel had been ineffective for failing to advise her that she was a violent offender and therefore would be required to serve 85% of her sentence before being considered for probation or parole. The Commonwealth's point is that, in a prior judicial proceeding,

Dunn has admitted, even asserted, that she is a violent offender, and that she should not now be permitted to claim otherwise.

The apparent conflict between KRS 640.030 and KRS 439.3401 was an unsettled issue prior to our decision in Merriman/Hickman, but it was not a contested issue in the RCr 11.42 proceeding. In that proceeding, the Court of Appeals ultimately determined that trial counsel had in fact advised Dunn that she could be classified as a violent offender. Given the circumstances, we are not persuaded that the doctrine of judicial estoppel precludes Dunn's assertion of KRS 640.030 in the present case.

The decision of the Court of Appeals is reversed, the judgment of the Knox Circuit Court entered herein on August 11, 2004, is vacated, and the matter is remanded to the Knox Circuit Court for consistent proceedings under KRS 640.030(2).

Minton, C.J.; Abramson, Cunningham, Noble, Scott, and Venters, JJ., sitting. All concur. Schroder, J., not sitting.

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