

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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED “NOT TO BE PUBLISHED.” PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD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 OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

Supreme Court of Kentucky

2006-SC-000046-MR
&
2006-SC-000700-MR

FINAL

DATE 3/12/09 Kelly Keabe D.C.
APPELLANT

DYLAN JAMAR FRANCE

V. ON APPEAL FROM WARREN CIRCUIT COURT
HONORABLE JOHN R. GRISE, JUDGE
NO. 04-CR-00081

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

REMANDING

This is a companion case to the series of appeals which have recently come before this Court concerning the applicability of the Violent Offender Statute, KRS 439.3401, to adjudicated youthful offenders.

Appellant, Dylan Jamar France, pled guilty to committing five (5) counts of first-degree sodomy and was sentenced to twenty-two (22) years incarceration as a youthful offender under KRS Chapter 640. Appellant was less than eighteen (18) years old when he subjected a nine (9) year old child to a series of sexual abuses.

Upon turning eighteen, Appellant was given a final sentencing hearing, as required by KRS 640.030(2), but was denied the opportunity

to present his motion for probation because the trial judge determined, as a threshold matter, that he was not eligible for probation pursuant to KRS 532.047 or KRS 439.3401. Appellant now appeals this denial of a probationary hearing as a matter of right. Ky. Const. §110(2)(b). The sole issue raised on appeal is whether KRS 439.3401 should be applied to youthful offenders.

This Court's recent decision in Commonwealth v. Merriman, 265 S.W.3d 196 (Ky. 2008) is dispositive of the present matter. In Merriman, we held that, under the Juvenile Code, youthful offenders are entitled to a hearing upon their eighteenth birthday, whereby the court shall determine whether probation, conditional discharge, or incarceration is appropriate. 265 S.W.3d at 200. Here, however, the trial court denied Appellant's motion for probation on the basis that he was ineligible because he was a violent offender under KRS 439.3401. Because we have held that "the Violent Offender Statute cannot be read to apply to youthful offenders," the trial court's determination was in error. Merriman, 265 S.W.3d at 201. As such, the case must be remanded to the Warren Circuit Court for a hearing pursuant to KRS 640.030(2), in accordance with Merriman, and consistent with our Opinion herein.

All sitting. All concur.

COUNSEL FOR APPELLANT:

Rebecca Lynn Hobbs
Department of Public Advocacy
100 Fair Oaks Lane, Suite 302
Frankfort, KY 40601

COUNSEL FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

David Wayne Barr
Assistant Attorney General
Office of the Attorney General
Office of the Criminal Appeals
1024 Capital Center Drive
Frankfort, KY 40601