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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-000342-MR

JOHNNY GEORGETOWN — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE KIMBERLY BUNNELL, JUDGE
ACTION NO. 06-CR-00224

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; NICKELL AND TAYLOR, JUDGES.

COMBS, CHIEF JUDGE: The sole issue in this appeal is whether the trial court erred in refusing to consider probation as a possible disposition upon resentencing the appellant after he obtained the age of majority. The trial court declined to consider probation as a sentencing option because it believed that appellant

qualified as a violent offender under Kentucky Revised Statute(s) (KRS) 439.3401 and that he was, therefore, ineligible for probation.

After the court resentenced Georgetown, the Supreme Court of Kentucky addressed and settled the issue of probation eligibility in *Commonwealth v. Merriman,* 265 S.W.3d 196 (Ky. 2008). It held that the violent offender statute, KRS 439.3401, does **not** apply to juveniles who are adjudicated youthful offenders. Having reviewed the record and arguments presented in light of *Merriman*, we hereby vacate the resentencing order entered on January 29, 2008, and remand this case for a new resentencing hearing at which probation is to be considered as a dispositional option.

The undisputed facts pertinent to our review are not complex. On April 27, 2007, the Fayette Circuit Court sentenced appellant as a youthful offender to fifteen-years' imprisonment for assault in the first degree. Pursuant to KRS 640.030(2), appellant was remanded to the Department of Juvenile Justice until his eighteenth birthday. Appellant appeared for resentencing on August 17, 2007, and was remanded to the Department for an additional five months of treatment. On January 4, 2008, appellant appeared for final sentencing. He requested probation, which was denied by an order entered on January 29, 2008. The trial court based its decision upon its conclusion that appellant's status as a violent offender rendered him ineligible for probation.

The record clearly reveals that the question of appellant's eligibility for probation was argued before the trial court at the resentencing hearing on

January 4. Acknowledging that there was no published authority on the issue, appellant's counsel advised the court that there were conflicting unpublished opinions of the Court of Appeals on this very issue: whether youthful offenders convicted of violent crimes were eligible for probation when resentenced after reaching the age of majority. Counsel also informed the trial court that the Supreme Court had granted discretionary review in two of those opinions, one of which was *Merriman.*

The trial court relied upon our opinion in *Merriman* in which this Court had found him ineligible for probation. From the holding in *Merriman*, the court concluded that the violent offender statute did control and that Georgetown was not eligible for probation consideration. Nevertheless, before sentencing him to confinement in an adult institution, the trial judge commended Georgetown on how he had conducted himself within the juvenile justice system and emphasized that her decision was predicated solely upon her conclusion that he was not eligible for probation.

Although the trial court's order of January 29, 2008, properly comports with the state of the law at the time, the subsequent Supreme Court decision in *Merriman* changed what had previously been the practice concerning resentencing of youthful offenders convicted of violent offenses. The Commonwealth candidly concedes that such is the case. There is no question that the *Merriman* rationale applies to Georgetown's situation:

> By the very language in KRS 640.030(2), it is apparent that the Violent Offender Statute cannot act to prevent consideration of probation or conditional discharge on the youthful offender's 18th birthday: The courts are told that they *shall make* one of the three listed determinations. **Of course, after due consideration, the trial court may determine that the youthful offender be incarcerated in an adult institution to serve his sentence, as that is one of the three available options.** But that is not what the trial court did in Merriman's case. Instead, it specifically found that Merriman **could not be considered for probation** or conditional discharge as he was ineligible because he was a Violent Offender. In making this decision, the trial court failed to do what the statute specifically told him to do, "... make one (1) of the following determinations...."
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> In order for the Violent Offender Statute to control over the specific language of KRS 640.030(2), **it must have express language saying that it applies to youthful offenders**. Even then, if the two statutes were viewed as irreconcilable, KRS 640.030(2) would control as the more specific statute. By statutory interpretation, logic, and belief in the good sense of the legislature, the Violent Offender Statute cannot be read to apply to youthful offenders. [Emphases added.]

265 S.W.3d at 200-01.

Thus, Georgetown is entitled to a resentencing hearing in which the possibility of probation is a potential outcome. Accordingly, we vacate the January 29, 2008, order of the Fayette Circuit Court and remand the case for resentencing consistent with *Merriman.*

ALL CONCUR.

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