

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2001-CA-000182-MR

BILLY BROWN

APPELLANT

v. APPEAL FROM LETCHER CIRCUIT COURT  
HONORABLE CHARLES E. LOWE, JR., JUDGE  
ACTION NO. 98-CR-00087

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: BARBER, COMBS AND JOHNSON, JUDGES.

JOHNSON, JUDGE: Billy Brown has appealed from the orders of the Letcher Circuit Court which denied his motion for shock probation and his motion to reconsider and motion to set for argument. Having concluded that the trial court did not abuse its discretion in denying Brown's motions, we affirm.

On November 13, 1998, a Letcher County grand jury indicted Brown for sodomy in the second degree,<sup>1</sup> and unlawful

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<sup>1</sup> Kentucky Revised Statutes (KRS) 510.080.

transaction with a minor in the second degree.<sup>2</sup> The indictment alleged that on November 4, 1999, Brown provided a juvenile with a controlled substance and on November 5, 1999, Brown engaged in deviate sexual intercourse with a juvenile less than 14 years of age. Following several delays, including the appointment of two special judges, Brown filed on August 2, 2000, a motion to enter a guilty plea to unlawful transaction with a minor in the second degree and the amended charge of sodomy in the third degree.<sup>3</sup> Brown was on probation at the time of his arrest on the underlying charges, and as a part of the plea agreement, he agreed to revocation of that probation.

On October 6, 2000, the trial court entered a final judgment and order of imprisonment, sentencing Brown to prison terms of three and one-half years on each count, with the prison terms to run concurrently. On December 20, 2000, Brown filed a motion for shock probation. The trial court summarily denied Brown's motion in an order entered on January 10, 2001. Brown then filed a motion to reconsider the trial court's denial of his request for shock probation and a motion to set for argument. On January 17, 2001, the trial court denied Brown's

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<sup>2</sup> KRS 530.065.

<sup>3</sup> KRS 510.090.

motions. This appeal followed.<sup>4</sup>

On appeal, Brown alleges that the trial court erred when it summarily, without giving him the opportunity to be heard and without making any findings, denied his motion for shock probation. Brown recognizes that probation, including shock probation, is a discretionary sentencing option for the trial court, but he contends that the trial court abused its discretion by failing to allow him the opportunity to put forth his evidence as to his entitlement to shock probation.

KRS 439.265(2) relating to shock probation provides, in pertinent part:

The defendant may, in the discretion of the trial court, have the right to a hearing on any motion he may file, or have filed for him, that would suspend further execution of sentence. Any court order granting or denying a motion to suspend further execution of sentence is not reviewable.

In Schroering v. McKinney,<sup>5</sup> the trial court granted shock probation, and the widow of the victim obtained a writ of mandamus from this Court directing the trial court to reconsider the order for shock probation, to allow the Commonwealth to request a hearing or file written objections and to state in its

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<sup>4</sup> In the notice of appeal Brown refers only to the order of January 17, 2001. However, in an effort to afford Brown full review of the trial court's rulings, we will consider the motion to reconsider as a motion pursuant to Kentucky Rules of Civil Procedure (CR) 59.05, whereby this appeal includes the trial court's order entered on January 10, 2001, which denied the motion for shock probation.

<sup>5</sup> Ky., 906 S.W.2d 349 (1995).

order the extent of consideration given to the victim impact statements.<sup>6</sup> In reversing this Court, the Supreme Court held that pursuant to KRS 439.265(2) appellate review of the procedural issues or the merits of an order granting or denying shock probation is not permissible.<sup>7</sup>

Furthermore, even if we were to review the denial of Brown's motions for an abuse of discretion, clearly the trial court did not abuse its discretion.

"Abuse of discretion in relation to the exercise of judicial power implies arbitrary action or capricious disposition under the circumstances, at least an unreasonable and unfair decision." . . . The exercise of discretion must be legally sound.<sup>8</sup>

Brown pled guilty to engaging in deviate sexual intercourse with a 13-year-old girl consisting of her performing oral sex on him, and to providing her with marijuana. Clearly, the trial court's denial of Brown's motion for shock probation without the benefit of an evidentiary hearing or findings cannot be viewed as an abuse of discretion. Based on these facts, it was certainly reasonable for the trial court to not desire to hear any evidence concerning Brown's basis for requesting shock

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<sup>6</sup> Id. at 350.

<sup>7</sup> Id. at 351.

<sup>8</sup> Kuprion v. Fitzgerald, Ky., 888 S.W.2d 679, 684 (1994) (quoting Kentucky National Park Commission v. Russell, 301 Ky. 187, 191 S.W.2d 214 (1945)).

probation and there was no requirement that it provide findings denying his motion.

For the foregoing reasons, the order of the Letcher Circuit Court is affirmed.

ALL CONCUR.

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