

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2002-CA-000792-MR

EION RYAN FINLEY

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE F. KENNETH CONLIFFE, JUDGE  
ACTION NOS. 00-CR-000361 AND 01-CR-002044

COMMONWEALTH OF KENTUCKY

APPELLEE

### OPINION

### VACATING AND REMANDING

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BEFORE: EMBERTON, CHIEF JUDGE; BARBER, AND COMBS, JUDGES.

BARBER, JUDGE: Appellant Eion Ryan Finley appeals from a final judgment pursuant to a guilty plea. Finley pleaded guilty to first degree robbery, first degree burglary, fourth degree assault and two counts of terroristic threatening. Finley received concurrent sentences of ten years in one action, and a ten year consecutive sentence in the other action. Finley made a motion for probation or alternative sentencing under KRS

640.030(2), due to his being a youthful offender. Both requests were denied.

Finley, age fifteen at the time of the charged offenses, was initially charged in the first action in juvenile court, but the cases were transferred to circuit court. In that case, on the charges of first degree burglary, fourth degree assault and terroristic threatening, Finley was given a ten year concurrent sentence. The Commonwealth had no objection to probation of that sentence. The trial court imposed the recommended ten year sentence, but probated the sentence for a period of five years.

Several months later, the Commonwealth filed a motion to revoke Finley's probation due to aggression in the home. The trial court granted Finley's motion for anger management counseling in lieu of revocation of probation. Six months later, the Commonwealth filed a second motion to revoke Finley's probation for violation of the conditions of probation, and additional charges including burglary, theft and wanton endangerment. Finley stipulated to violating the conditions of his probation, and the parties agreed to placement at a Department of Juvenile Justice residential facility until he turned eighteen.

While awaiting placement at the facility, Finley

was charged with first degree robbery for an additional offense which had occurred prior to the revocation of probation hearing. Following a guilty plea, the Commonwealth recommended a ten year sentence to be served consecutively with the ten year sentence which had already been imposed on Finley. As part of the plea agreement, the Commonwealth agreed to take no stand on probation when Finley returned to court at age eighteen for final sentencing. Prior to the final sentencing hearing, Finley filed a motion requesting probation or a six-month return to the residential facility, both sentencing options permitted under KRS 640.030(2). At the hearing, Finley offered the testimony of witnesses regarding his progress while in the residential facility. The trial court denied Finley's request to present testimony from his witnesses and stated that the testimony was not required or permitted. The trial court denied the motion for alternative sentencing or probation, and ordered that Finley serve the remainder of the initial ten year sentence and the additional concurrent ten year sentence in the custody of the Department of Corrections.

KRS 640.030(2) requires the sentencing court to render a final sentence in a juvenile action once the offender turns eighteen. At that time the court may either grant the defendant probation, remand him to the Department of Juvenile Justice for an additional six month treatment program, or order the

defendant to serve out his sentence in the custody of the Department of Corrections.

KRS 533.010(2) and RCr 11.02 require that a sentencing court consider probation and alternative sentencing prior to sentencing a defendant. Finley asserts that the trial court failed to give proper consideration to probation or alternative sentencing in denying him a fair opportunity to present evidence at a meaningful sentencing hearing. Finley cites to the trial court's statement that it "would not probate anybody under these circumstances" as showing that the court had determined the sentence to be imposed prior to the hearing. He states that Edmonson v. Commonwealth, Ky., 725 S.W.2d 595 (1987), bars a court from predetermining the sentence to be imposed, and requires the court to review all evidence available prior to imposing a sentence. Finley asserts that the trial court's refusal to permit testimony regarding his progress and prognosis in treatment is in error and constitutes a failure to review all relevant evidence.

When resentencing a former juvenile offender, the trial court has the discretion to sentence the juvenile to an adult facility or to adopt alternatives to the usual sentence. Gourley v. Gourley, Ky. App., 37 S.W.3d 792, 795 (2001). As the Commonwealth notes, when resentencing a youthful offender who has since turned eighteen, the trial court is not required to be

any more lenient than it would be with an adult offender who committed the same crime. Johnson v. Commonwealth, Ky., 967 S.W.2d 12, 15 (1998). A court must, however, consider all relevant evidence prior to making a decision as to sentencing. Lynch v. Lynch, Ky. App., 737 S.W.2d 184, 186 (1987).

During any sentencing hearing the defendant must be given the opportunity to controvert any facts entered against him, and to correct any errors in the record before the court. KRS 532.050(6). Witness testimony at a sentencing hearing is also permissible. Schroering v. McKinney, Ky., 906 S.W.2d 349, 350 (1995). Finley asked to be permitted to present the testimony of expert witnesses as to his progress during rehabilitation, and the need for an additional six months of treatment. This testimony is relevant to the issue of sentencing, and the evidence should be considered by the trial court prior to determining the sentence. Failure to permit relevant evidence into the record for consideration before sentencing requires remand for a new sentencing hearing. Darnell v. Commonwealth, Ky., 558 S.W.2d 590 (1977). For this reason, the sentence imposed by the circuit court is vacated, and the case is remanded for a new sentencing hearing.

ALL CONCUR.

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