

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2003-CA-002164-MR

AARON HARDIN

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE JAMES M. SHAKE, JUDGE  
ACTION NO. 00-CR-000394

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
VACATING AND REMANDING

\*\* \*\* \* \* \* \* \*

BEFORE: TACKETT, TAYLOR, AND VANMETER, JUDGES.

TACKETT, JUDGE: Aaron Hardin appeals from an order of the Jefferson Circuit Court, which held that he was statutorily ineligible for shock probation because of his conviction for wanton murder. Hardin appeals, arguing that he is eligible for shock probation because he was convicted as a youthful offender under KRS Chapter 640, which specifically authorizes shock probation for youthful offenders, regardless of the offense.

The Commonwealth has moved to dismiss this appeal, arguing that even though the court's reasoning was faulty, Hardin's motion was untimely because it should have been made when he was first committed to the custody of the Department of Juvenile Justice after his conviction, and that even if timely it is not properly the subject of an appeal, because the shock probation statute prohibits an appeal from the denial of shock probation. We deny the Commonwealth's motion, vacate the order of the circuit court and remand the matter for a determination of the merits of Hardin's motion for shock probation.

Hardin was convicted of wanton murder for the shooting death of his brother, when the two were at home playing with a loaded firearm. Hardin maintained that the shooting was an accident, but ultimately he was tried as a youthful offender in circuit court pursuant to the automatic transfer statute, and convicted of wanton murder, for which the jury recommended a sentence of twenty-two years' imprisonment. Hardin performed well in juvenile placements before he turned eighteen, and when he was re-sentenced after his eighteenth birthday, the remainder of his recommended sentence was probated. But while Hardin was on probation, he was involved in a motor vehicle accident while driving without a license, and fled the scene of the accident. Rather than revoke Hardin's probation for the offense, the circuit court ordered Hardin to serve thirty days in jail.

Unfortunately, while in jail, Hardin accepted marijuana from another inmate, and Hardin's probation was revoked as a result.

Hardin moved for shock probation within the period prescribed by statute after he was delivered to state custody to begin serving his sentence. The circuit court denied the motion on the ground that Hardin was ineligible because of the nature of the offense. This appeal followed.

Addressing the Commonwealth's motion to dismiss first, we deny that motion because the court did not consider the merits of Hardin's request for shock probation. The statute prohibits an appeal from a denial on the merits of a motion for shock probation, but does not prohibit an appeal where a motion is denied for reasons other than the merits of the motion.

The Commonwealth concedes that the court's reason for holding that Hardin was ineligible for shock probation was incorrect, noting that the statute on youthful offenders provides a specific exception to the general rule that a person convicted of murder is not eligible for shock probation. But the Commonwealth argues that the court's decision should be affirmed because Hardin's motion should have been made within 180 days of his commitment to DJJ as a youthful offender. Because Hardin did not make the motion until he violated the probation set when he turned eighteen, the Commonwealth argues that he is not eligible for shock probation.

The Commonwealth's argument turns on whether the hearing held when a child reaches majority is a re-sentencing, which would start a new period for shock probation. The purpose of the hearing is to determine whether the offender should receive probation or serve the remainder of his sentence in a correctional facility, or serve an additional six months in a treatment facility operated by DJJ before a final determination is made.

Our youthful offender statute sits at the crossroads between punishment and treatment. On the one hand, our statutory scheme recognizes that certain offenses, and certain types of offenders, warrant serious consequences, and provides a framework that gives the courts the option to impose them. Our statutes also recognize that a young person, even though the child's record or the offense committed may be serious, may still be rehabilitated and become a law-abiding adult, and so the courts are given the option, when the child turns eighteen, to place the offender on probation regardless of the severity of the offense. Given the purpose of the statute, we believe that the technical result urged by the Commonwealth is an unnecessarily harsh one.

Also, we do not believe that the weight of authority supports the Commonwealth's interpretation. Our courts have recognized that the same rights apply at the age of majority

hearing as at an adult sentencing. Commonwealth v. Jeffries, 95 S.W.3d 60 (Ky. 2002), Gourley v. Commonwealth, 37 S.W.3d 792 (Ky. App. 2001). At the same time, our courts recognize that though similar to an adult sentencing, the age of majority hearing is different. For example, the Gourley case, above, mandates that DJJ, not the Department of Probation and Parole, should prepare the pre-sentencing report for the sentencing court. Above all, our courts treat the age of majority hearing as something more akin to a re-sentencing, although we recognize that the court's discretion is not completely unfettered in that a court may not modify the length of the sentence imposed in exchange for granting probation. Stallworth v. Commonwealth, 102 S.W.3d 918 (Ky. 2003).

We believe that the intent of our statutory scheme would be better implemented by treating the age of majority hearing as a re-sentencing for purposes of the shock probation statute. The court, then, would have the authority to grant shock probation to a youthful offender who violates the probation imposed at the age of majority hearing. The court, of course, may elect not to do so, if the court does not believe that shock probation is warranted.

For the foregoing reasons, the decision of the Jefferson Circuit Court is vacated and remanded for

consideration of the merits of Hardin's motion for shock probation.

ALL CONCUR.

BRIEF FOR APPELLANT:

Elizabeth B. McMahon  
Assistant Public Defender  
Louisville, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo  
Attorney General of Kentucky

Matthew D. Nelson  
Assistant Attorney General  
Frankfort, Kentucky