

RENDERED: January 21, 2005; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2004-CA-000510-MR

PAUL LEON HAYDEN, JR.

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JAMES M. SHAKE, JUDGE
ACTION NO. 00-CR-000577

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: KNOPF AND TACKETT, JUDGES; EMBERTON, SENIOR JUDGE.¹

EMBERTON, SENIOR JUDGE: Paul Hayden appeals from an order of the Jefferson Circuit Court denying his motion for shock probation. He contends that the Commonwealth's objection to the motion was a violation of a plea bargain agreement. We disagree and affirm.

Hayden was indicted on three counts of second-degree rape of a child less than fourteen years of age in violation of

¹ Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

KRS² 510.050. Pursuant to a plea agreement, the Commonwealth agreed to amend each of the second-degree rape charges to third-degree rape, and in return for Hayden's guilty plea, recommend a sentence of five years on each amended count with the sentences on two counts to run consecutively and the remaining count to run concurrent with the two other counts for a total ten-year sentence. It was further agreed that the Commonwealth would take no stand on probation.

Hayden pled guilty to the amended counts of third-degree rape and consistent with the plea agreement, the Commonwealth took no position on probation. In July 2001, the circuit court sentenced Hayden to ten years' imprisonment, probated for a period of five years.

In September 2002, the Division of Probation and Parole filed a Special Supervision Report requesting that Hayden's probation be revoked citing four probation violations including Hayden's failure to complete the Kentucky Sex Offender Treatment Program and that he gave a false or non-existent address to the Kentucky Sex Offender Registry.³ A bench warrant was issued, and on October 27, 2003, the circuit court entered an order revoking Hayden's probation. Hayden did not contest the revocation of his probation but, on February 5, 2004, filed

² Kentucky Revised Statutes.

³ KRS 532.045(6) states that failure to successfully complete the sexual offender treatment program is a basis for probation revocation.

a motion for shock probation. After the Commonwealth filed a response opposing shock probation, the circuit court denied the motion.

In Wilson v. Commonwealth,⁴ the court considered whether the Commonwealth's agreement not to oppose probation precluded it from objecting to the defendant's motion for shock probation filed after Wilson was sentenced to a term of imprisonment. The court explained that shock probation is a form of probation distinguishable only because the probation may be granted only during a brief period following incarceration and held that the Commonwealth was bound by the plea agreement and could not object to shock probation.⁵

The facts in this case are clearly distinguishable from Wilson. Hayden was not sentenced to serve a term of imprisonment but was granted a probated sentence. His current incarceration is not the result of his original sentence but because of the violation of the terms of his probation. There is no language in the original plea agreement that prevents the Commonwealth from objecting to shock probation following the revocation of Hayden's probation.

The order is affirmed.

⁴ 839 S.W.2d 17 (Ky.App. 1992).

⁵ Id. at 20.

ALL CONCUR.

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