

RENDERED: SEPTEMBER 9, 2005; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001533-MR

LEROY HENDERSON WHITESIDE

APPELLANT

v. APPEAL FROM WARREN CIRCUIT COURT
HONORABLE JOHN R. GRISE, JUDGE
INDICTMENT NO. 04-CR-00176

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** **

BEFORE: DYCHE AND GUIDUGLI, JUDGES; PAISLEY, SENIOR JUDGE.¹

DYCHE, JUDGE: On January 26, 2004, the Warren District Court, Juvenile Division, held a hearing to decide whether Leroy Henderson Whiteside should be transferred to the Warren Circuit Court to be tried as a youthful offender. In finding that the

¹ Senior Judge Lewis G. Paisley sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

Commonwealth had met its burden, the Warren District Court listed as the specific reason for transfer:

[A]lleged offense involved robbery and assault. Based on child's record and seriousness of this offense, transfer serves the interests of the child and the community, since services through juvenile justice system have proven unsuccessful.

Whiteside was indicted the following March, and on June 29, 2004, he entered a plea of guilty to Robbery in the First Degree in exchange for the recommendation of a ten year sentence.

The record indicates that the Commonwealth noted its opposition to probation. However, at the sentencing hearing on July 19, 2004 (which was ten days before Whiteside's nineteenth birthday), defense counsel argued that Whiteside should benefit from the more lenient sentencing provisions (including probation) of KRS 640.030. The trial court disagreed, and it ruled that Whiteside, because he had committed a violent crime (specifically first degree robbery), was ineligible for probation. The agreed upon ten year sentence was imposed. Whiteside appeals.

Whiteside finds fault with the trial court's refusal to consider probation. He maintains that "this court should hold that youthful offenders are eligible for probation, notwithstanding their status as a violent offender." He asks

that this matter be reversed and remanded "for a new sentencing hearing where probation would be considered."

We disagree. Because Whiteside entered a guilty plea to first degree robbery, there is no dispute that he fit the definition of a violent offender under KRS 439.3401. An adult defendant classified as a violent offender is ineligible for probation under KRS 533.010(2). "A youthful offender, who is convicted of, or pleads guilty to, a felony offense in Circuit Court, shall be subject to the same type of sentencing procedures and duration of sentence, including probation and conditional discharge, as an adult convicted of a felony offense" KRS 640.030.

A youthful offender has no guarantee of probation and under KRS 640.030(2), the sentencing court may only make a decision regarding probation after considering the factors set forth in KRS 533.010. KRS Chapter 533 "Probation and Conditional Discharge," the statute which applies to the probation of adult offenders, is equally applicable to youthful offenders.

Commonwealth v. Jeffries, 95 S.W.3d 60, 62 (Ky. 2002)(citing Johnson v. Commonwealth, 967 S.W.2d 12, 15 (Ky. 1998)). The trial court did not err in ruling that Whiteside was ineligible for probation.

Whiteside also argues that he should have been permitted to withdraw his guilty plea. He concedes that this issue is not preserved for appeal but urges consideration,

stating that, because probation was “an implicit part of the plea agreement,” the trial court’s finding of ineligibility “effectively rejected that agreement.” The record does not support this argument. The trial court conducted a thorough colloquy with Whiteside before accepting his plea. Whiteside stated affirmatively on three occasions that no promises had been made concerning probation. He was sentenced to the exact terms of the agreement reached with the Commonwealth. The trial court was under no obligation to afford Whiteside the opportunity to withdraw his plea of guilty.

The judgment of the Warren Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Timothy G. Arnold
Assistant Public Advocate
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

James C. Shackelford
Assistant Attorney General
Frankfort, Kentucky