

Commonwealth Of Kentucky

Court of Appeals

NO. 1999-CA-002631-MR

PATRICIA DURHAM

APPELLANT

ON REMAND FROM KENTUCKY SUPREME COURT
2001-SC-0116-D

v.

APPEAL FROM CASEY CIRCUIT COURT
HONORABLE PAUL BARRY JONES, JUDGE
INDICTMENT NO. 97-CR-00073

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

** ** * * *

BEFORE: BUCKINGHAM, COMBS, AND DYCHE, JUDGES.

DYCHE, JUDGE. In 1997 Patricia Durham was indicted for Assault in the First Degree after she ran over her nephew in her car. At trial Durham testified that she intentionally assaulted the victim because she feared that he would shoot her or her boyfriend. The trial court denied Durham's requested instructions on self-protection¹ and protection of another²

¹ KRS 503.050 provides, in pertinent part:

because the victim was unarmed and because Durham's boyfriend was not in the vicinity at the time of the assault. The jury convicted Durham of Assault in the Second Degree.

We affirmed on direct appeal (No. 1999-CA-002631-MR, released January 12, 2001), holding that the trial court did not err in refusing Durham's requested instructions. On motion for discretionary review (wherein Durham indicated that she had been granted shock probation while her original appeal was pending), the Kentucky Supreme Court vacated and remanded our decision (No. 2001-SC-0116-D, entered September 20, 2001), for consideration of this matter in light of its ruling in Commonwealth v. Hager, Ky., 41 S.W.3d 828 (2001).

Hager revisited the issue of imperfect self-defense claims, holding that, under its facts, the defendant was entitled to the requested jury instructions under KRS 503.120.³

(1) The use of physical force by a defendant upon another person is justifiable when the defendant believes that such force is necessary to protect himself against the use or imminent use of unlawful physical force by the other person.

(2) The use of deadly physical force by a defendant upon another person is justifiable under subsection (1) only when the defendant believes that such force is necessary to protect himself against death, serious physical injury, kidnapping, or sexual intercourse compelled by force or threat.

² In order to protect another, "[u]nder the circumstances as the defendant believes them to be, the person whom he seeks to protect would himself have been justified under KRS 503.050 . . . in using such protection." KRS 503.070(1)(b).

³ KRS 503.120(1) states: "When the defendant believes that the use of force upon or toward the person of another is necessary for any of the purposes for which such belief would establish a justification under KRS 503.050 to 503.110 but the defendant is wanton or reckless in believing the use of any force, or the degree of force used, to be necessary or in acquiring or failing to acquire any knowledge or belief which is material to the justifiability of his use of force, the justification afforded by those

And later, in Higgs v. Commonwealth, Ky., 59 S.W.3d 886, at 889-90 (2001), our Supreme Court stated: "Even if a defendant is mistaken in his subjective belief, he is still entitled to the defense of self-protection, subject only to the wanton or reckless belief qualification described in KRS 503.120(1)."

Even under the newer case law, Durham is still required to prove that the victim was using or threatening to use violence against her or her boyfriend. KRS 503.150(1). Her boyfriend was nowhere in sight, a fact which she acknowledged. Durham also conceded that she had to swerve onto the shoulder of the road in order to strike the victim. The trial court properly refused Durham's requested instructions. Moreover, no instructions regarding imperfect justification (KRS 503.120) were requested by Durham, indicating that her theory of defense was that her subjective belief in self-protection and protection of her boyfriend was reasonable.

The judgment of the Casey Circuit Court is affirmed.

ALL CONCUR.

sections is unavailable in a prosecution for an offense for which wantonness or recklessness, as the case may be, suffices to establish culpability."

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