

Commonwealth Of Kentucky

Court Of Appeals

NO. 2002-CA-000521-MR

BOBBY PERGRAM

APPELLANT

v. APPEAL FROM MONTGOMERY CIRCUIT COURT
HONORABLE BETH LEWIS MAZE, JUDGE
INDICTMENT NO. 01-CR-00001

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

** ** * * *

BEFORE: HUDDLESTON, PAISLEY and TACKETT, Judges.

HUDDLESTON, Judge: Bobby Pergram appeals from a judgment convicting him of two counts of menacing and sentencing him to 180 days' incarceration. He also takes issue with the circuit court's refusal to grant him probation in lieu of incarceration.

On November 9, 2000, Pergram claims to have awakened from a nightmare wherein he recollected a prior incident with a police officer in Montgomery County. Having earlier heard of

that officer's promotion to lieutenant and having consumed several beers, Pergram telephoned the Mt. Sterling Police Department to express his feelings regarding the promoted officer. There is some dispute as to whether the ensuing conversation took place on the 911 line or if Pergram called back on a non-emergency line, but in either event, he eventually had a conversation with Deputy Sheriff Buck Adkins, who was present at the police station, in which he voiced his negative feelings about the other officer. At the end of the conversation, the deputy expressed his concern stemming from the 911 call and suggested that he visit Pergram's home. However, Pergram responded negatively to this suggestion and declined to reveal his address before the conversation ended.

After falling back asleep, Pergram says that he was awakened by a call from his neighbor, Gary Sewell, who informed him that several vehicles were driving through the neighborhood spotlighting the surrounding property. Pergram went outside to investigate, taking a handgun with him. By this time, Montgomery County Sheriff's Deputy Brian Cooper and Deputy Adkins had parked in Pergram's driveway, exited their vehicles, and began to approach Pergram's house. While the following details are disputed, we will for present purposes present a version on which both sides agree and reserve for later discussion any discrepancies.

Upon approaching Pergram, Deputy Cooper did not initially identify himself, but instead greeted Pergram with "How's it going, buddy?" When he saw Pergram's gun, he retreated to his car. At some point thereafter following the deputies' efforts to identify themselves, Pergram reentered his house and came back outside without his gun. Upon his exit, Pergram was arrested, during the course of which he was pepper sprayed by the deputies.¹

The deputies' stated reason for going to Pergram's house was to serve an outstanding arrest warrant that they believed was for Pergram. At various times, Cooper and Adkins testified that the warrant was for either Robert W. Pergram, Bobby Pergram, or Ward Pergram. However, neither of the testifying officers ever saw this alleged warrant, and it was never produced despite repeated attempts by Pergram to discover it.

The real reason for the deputies' visit to Pergram's house is revealed through the dispatch notes taken by the Mt. Sterling Police Department that night. Those notes indicate

¹ Based on the above incident, a search warrant was procured for Pergram's home on the ground that the officers believed Pergram to have been a convicted felon in possession of a firearm. However, because Pergram had not been convicted of a felony, this charge was dismissed and is not at issue here. Pergram takes issue with his seized property not having been returned following the dismissal, but his proper remedy does not lie as part of this appeal.

that the deputies were acting on a charge of harassing communications,² a Class B misdemeanor, stemming from Pergram's telephone call earlier that evening.

At a hearing on Pergram's motion to dismiss the charges against him based on a lack of probable cause, the circuit court ruled that regardless of any potential impropriety of the deputies in going to Pergram's house, events transpiring after their arrival gave them probable cause to arrest Pergram for the felony offense of wanton endangerment. According to the circuit court, any remaining dispute was one of fact for the jury.

The circuit court never explicitly ruled on the propriety of the deputies' initial entrance onto Pergram's property. Indeed, there is a possibility that the deputies were on Pergram's property illegally, in violation of the Fourth Amendment.³ However, we need not explicitly decide the matter, for even if the entry were improper, it would not invalidate Pergram's conviction.

Although indicted for wanton endangerment,⁴ Pergram was convicted of two counts of the lesser included charge of

² See Ky. Rev. Stat. (KRS) 525.080.

³ See, e.g., Mash v. Commonwealth, Ky., 769 S.W.2d 42 (1989).

⁴ KRS 508.060 et seq.

menacing.⁵ The elements of menacing are that the defendant placed the victim in reasonable fear of immediate physical injury and that in so doing, was not privileged to act in self protection.⁶ The determination of whether Pergram was privileged to act in self protection was an issue of fact for the jury.

The jury was presented with two scenarios. In one, as testified to by Pergram, the deputies did not identify themselves. He brought a handgun with him to investigate an entry onto his property by unknown persons, of whom he was afraid. He did not point the gun directly at the officers, but placed it on the hood of the pickup truck behind which he was standing. He was unable to see that behind the bright lights were two sheriff's cruisers occupied by law enforcement officers; because of the darkness of the night and the contrast of the spotlights, he could not see anything other than the lights themselves. After he realized the identities of the deputies, he put his gun back in the house and returned to speak with them unarmed. Under this version of the facts, Pergram's acts were reasonable in that he was protecting himself from

⁵ KRS 508.050.

⁶ 1 Cooper, Kentucky Instructions To Juries (Criminal), § 3.60.

potential assailants he did not recognize were law enforcement officers.⁷

Under the version of events presented by the deputies, Pergram was not totally unaware of their arrival. Based on his telephone conversation earlier, Pergram could have expected that the deputies would visit him. Furthermore, he continued the confrontation even after he was aware of their identities. According to their testimony, Pergram continued to point a gun at them despite knowing that they were sheriff's deputies acting in their capacity as law enforcement officers visiting his home subsequent to his earlier 911 call. In this scenario, Pergram's actions were analogous to resisting an arrest attempted by known law enforcement officers, which may not be done even when the arrest is unlawful.⁸

Whether or not Pergram pointed a gun at the deputies after he was aware of their identities as law enforcement, thereby making his conduct not privileged self-defense, was an issue of fact for the jury to decide. Although a different trier of fact may have reached a different conclusion upon review of the same evidence, this is not our function. Following a jury verdict we must take all the evidence

⁷ See, e.g., Cooper, supra, at § 11.13.

⁸ Id.; Baze v. Commonwealth, Ky., 965 S.W.2d 817 (1997); KRS 503.060(1).

supporting the prevailing party, here, the Commonwealth, as true.⁹ So long as there is substantial evidence to support the jury's decision, it will not be disturbed on appeal.¹⁰ Because in this case the jury's verdict was based on the evidence presented, we will not disturb its finding.

Pergram also claims that the circuit court abdicated its responsibility under KRS 533.010 to consider probation in lieu of incarceration. Pergram contends that the circuit court stated it would not consider probation as an alternative which could follow a conviction by a jury. However, the court did not make such an expansive statement. Rather, the court merely said during Pergram's sentencing hearing that it would follow the jury's recommended sentence of 180 days' incarceration. In its written judgment, the court noted that its reasons for imposing this sentence were that Pergram is in need of correctional treatment that can be provided most effectively by commitment to a correctional institution and that probation would unduly depreciate the seriousness of his crime.

Although the circuit court could have elaborated at greater length regarding its reasoning for not granting probation, we are unwilling to state from the record before us

⁹ See e.g., Lewis v. Bledsoe Surface Mining Co., Ky., 798 S.W.2d 459, 461 (1990).

¹⁰ Id. at 461-462; see also NCAA v. Hornung, Ky., 754 S.W.2d 855, 860 (1988).

that the circuit court wholly abdicated its responsibility. The circuit court is granted wide latitude in this area; we are not convinced that it abused that discretion. It was within the circuit court's discretion to evaluate Pergram's need for correctional treatment as well as the seriousness of his crime; indeed, the circuit court is in the best position to make such evaluations. Absent a clear abuse of discretion, we will not disturb a discretionary circuit court decision.

The judgment is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Kaye L. Leighton
PATRICK & LEIGHTON, PLLC
Mount Sterling, Kentucky

BRIEF FOR APPELLEE:

Albert B. Chandler III
Attorney General

William L. Daniel, II
Assistant Attorney General
Frankfort, Kentucky