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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

No. 2002-CA-001790-MR

HEATH D. TONEY

APPELLANT

v. APPEAL FROM PULASKI CIRCUIT COURT
HONORABLE DANIEL J. VENTERS, JUDGE
ACTION NO. 01-CR-00084

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING
** **

BEFORE: BARBER, COMBS, AND KNOPF JUDGES.

KNOPF, JUDGE: Heath D. Toney appeals from an order of the Pulaski Circuit Court, denying his pleading styled - Motion Pursuant To CR 60.02(f) In Conjunction with CR 59.05 And RCr 13.04 To Amend Judgment.

On March 16, 2001, Toney approached two employees at the back door of a McDonald's restaurant in Pulaski County, brandished a handgun and said: "I'm going to rob you." When one of the employees rang the restaurant doorbell, Toney fled. Later that day, Toney entered a grocery store in Rockcastle

County, showed a handgun to the store clerk by pulling it halfway from his pocket and demanded money. The clerk complied, and Toney left the store. He was apprehended shortly thereafter by police.

On August 3, 2001, Toney entered guilty pleas to criminal attempt to commit first degree robbery in Pulaski County and first degree robbery in Rockcastle County. A sentencing hearing was held on August 17, 2001, at which Toney maintained that he was eligible for probation with an alternative sentencing plan, pursuant to KRS 533.010.

On September 4, 2001, the trial court entered a final judgment on the guilty pleas, rejecting Toney's request for probation with alternative sentencing. He was sentenced instead to serve five years of imprisonment for the first charge and eleven years for the second charge, to run concurrently. The trial court did not indicate on the judgment form which factor had determined its decision not to grant probation with alternative sentencing, although the available options included the following: "[t]he defendant is not eligible for probation, probation with an alternative sentencing plan, or conditional discharge because of the applicability of KRS 532.080 or KRS 533.060."

Toney subsequently filed a pro se motion for shock probation that was denied. He then filed the motion to amend

the judgment pursuant to CR 60.02, claiming that the trial court had violated his liberty and due process rights by failing to consider probation. On August 7, 2002, the trial court overruled appellant's motion, stating that it had previously determined appellant was ineligible for probation because he was convicted for the offense of robbery involving the use of a firearm. Toney is appealing this ruling.

As a preliminary matter, it should be noted that a motion made pursuant to CR 60.02 is a procedurally improper method of challenging the sentence imposed on the appellant. Such a motion is available only if the movant has already exhausted other avenues of relief.

The structure provided in Kentucky for attacking the final judgment of a trial court in a criminal case is not haphazard and overlapping, but is organized and complete. That structure is set out in the rules related to direct appeals, in RCr 11.42, and *thereafter* in CR 60.02. It [CR 60.02] is for relief that is not available by direct appeal and not available under RCr 11.42. The movant must demonstrate why he is entitled to this special, extraordinary relief.¹

Section 115 of the Kentucky Constitution provides any litigant the right to appeal his sentence, even if he has

¹Gross v. Commonwealth , Ky., 648 S.W.2d 853, 856 (1983).

entered a guilty plea.² Since Toney could have raised this issue by a direct appeal, relief is not available by CR 60.02 motion. Therefore, this appeal concerns the denial of a motion that should have been dismissed.

As Toney's reply brief notes, however, the motion was filed pro se, and pro se litigants are not held to the same procedural standards as litigants represented by counsel.³ In light of this policy, Toney's appeal of his sentence will be considered.

Toney's appeal challenges the trial court's interpretation of two statutes governing the imposition of sentencing. Toney first presented this argument in his sentencing memorandum; the issue is therefore preserved for appeal.⁴

The relevant portions of the two statutes are set out below.

KRS § 533.010 states in part

²See Gaither v. Commonwealth, Ky., 963 S.W.2d 621, 622 (1998); Haymon v. Commonwealth, Ky., 657 S.W.2d 239 (1983) cited in Ware v. Commonwealth, 34 S.W.3d 383, 385 (2000).

³See Beecham v. Commonwealth, Ky., 657 S.W.2d 234, 236 (1983); see also Case v. Commonwealth, Ky. App., 467 S.W.2d 367, 368 (1971).

⁴"The Court of Appeals is without authority to review issues not raised in or decided by the trial court." Regional Jail Authority v. Tackett, Ky., 770 S.W.2d 225, 228 (1989) (citations omitted).

(1) Any person who has been convicted of a crime and who has not been sentenced to death may be sentenced to probation, probation with an alternative sentencing plan, or conditional discharge as provided in this chapter. . . .

(3) In the event the court determines that probation is not appropriate after due consideration of the nature and circumstances of the crime, and the history, character, and condition of the defendant, **probation with an alternative sentencing plan shall be granted** unless the court is of the opinion that imprisonment is necessary for the protection of the public because:

(a) There is a likelihood that during a period of probation with an alternative sentencing plan or conditional discharge the defendant will commit a Class D or Class C felony or a substantial risk that the defendant will commit a Class B or Class A felony;

(b) The defendant is in need of correctional treatment that can be provided most effectively by commitment to a correctional institution; or

(c) A disposition under this chapter will unduly depreciate the seriousness of the defendant's crime.

KRS § 533.060 states in part

(1) When a person has been convicted of an offense or has entered a plea of guilty to an offense classified as a Class A, B, or C felony and the commission of the offense involved the use of a weapon from which a shot or projectile may be discharged that is readily capable of producing death or other serious physical injury, the person shall not be eligible for **probation, shock probation, or conditional discharge** . . .

The issue here is whether the terms of KRS 533.060(1) preclude the application of KRS 533.010 (2) and thereby bar Toney from probation with alternative sentencing. Toney has argued that 533.060(1) bars his eligibility for probation, shock probation, or conditional discharge only, and that he is eligible for probation with alternative sentencing under 533.010(3). As the Commonwealth has pointed out, however, the Kentucky Supreme Court has already ruled on this matter, holding in Hughes v. Commonwealth that because KRS 533.060 is the more specific statute, it controls.⁵ In Hughes, the appellant was charged with criminal attempt to commit murder and robbery in the first degree. The Kentucky Supreme Court held that the trial court had correctly determined that it could not consider the appellant's request for an alternative sentencing plan. "[W]e must conclude that KRS 533.060(1) controls KRS 533.010(1) and (2), even though the latter was amended subsequently to allow for 'probation with an alternative sentencing plan,' since the former is the more specific statute."⁶ This court is bound to follow Supreme Court precedent.⁷

⁵Hughes v. Commonwealth, Ky., 875 S.W.2d 99,101 (1994).

⁶*Id.*

⁷Kentucky Supreme Court Rule 1.030(8)(a) states that the "Court of Appeals is bound by and shall follow applicable precedents established in the opinions of the Supreme Court and its predecessor court." See also Cabbage Patch Settlement House

Toney argues that Hughes has "lost its potency" and is no longer controlling law. Admittedly, as Toney says, Hughes was a "close call." This does not negate its precedential value. Furthermore, it is not true, as Toney contends, that the Supreme Court held that Hughes was not entitled to alternative sentencing because it had found that such a sentence would unduly depreciate the seriousness of his offense because of the deliberate nature of his actions. The Court merely stated that this was an additional reason why an alternative sentencing plan was not available.⁸ Finally, appellant argues that the post-Hughes, 1998 amendments to KRS 533.010 evince a strong legislative preference for the availability of alternative sentencing even when a firearm was used in an offense. These amendments have not altered the critical language of the statute, however, and if or until the Supreme Court overrules Hughes, we must follow the holding in that case.

Toney has drawn our attention to a post-Hughes case in which an apparent conflict between three other sections of the sentencing statutes was resolved in favor of permitting the consideration of probation. In Adams v. Commonwealth, this

v. Wheatly, Ky., 987 S.W.2d 784, 786 (1999)("[t]he Court of Appeals is bound by SCR 1.030(8)(a) to follow applicable precedents established by this court").

⁸See Hughes at 101.

Court held that two other sections of the sentencing statutes (KRS 533.080(5) and 533.030(7)) were more specific than KRS 533.060(2).⁹ The Adams decision does not, however, alter the validity of Hughes as precedent relating to the specific statutory sections at issue in this case.

As an alternative argument, Toney contends that his equal protection and due process rights were violated, on the grounds that KRS 533.060(1) unfairly discriminates against offenders such as himself, who use unloaded weapons, by denying them probation, while leaving probation available to offenders who do inflict actual physical harm on their victims. The state's decision to limit the sentencing possibilities for offenders who commit crimes with the type of weapon described in KRS 533.060(1) is easily justified, however.

"Under the rational basis analysis 'a classification must be upheld against an equal protection challenge if there is any reasonably conceivable state of facts that would provide a rational basis for the classification.'"¹⁰

The Kentucky Supreme Court has specifically addressed this issue, holding that:

⁹See Adams v. Commonwealth, Ky. App., 46 S.W.3d 572, 575-76 (2000).

¹⁰Cornelison v. Commonwealth, Ky., 52 S.W. 3d 570, 573 (2001)(quoting Heller v. Doe, 509 U.S. 312(1993)).

We are of the . . . opinion that the General Assembly by imposing the restriction of no probation for an offense involving a firearm . . . makes a reasonable classification of weapons used in the commission of crimes. Firearms are inherently more dangerous to human life than other weapons, and the General Assembly has expressed a public policy in the terms of KRS 533.060 which does not violate either the Constitution of the United States or the Constitution of Kentucky.¹¹

As to Toney's contention that his actions were aberrant and caused little risk to anyone, this court noted in a case involving an individual who used a toy gun to commit a series of robberies that "the victims were faced with the fear of death or serious injury by the appellant's use of what appeared to be a pistol."¹² Similarly, the victims in this case could not have known that Toney's gun was not loaded, and may well have experienced a similar fear of death or serious injury.

Toney's claim of a due process violation is also unconvincing. His counsel submitted a lengthy sentencing memorandum and the trial court held a full pre-sentencing hearing at which his counsel made many of the same arguments made in the appellate brief. Although the trial judge did not indicate on his sentencing order which of the listed options he had chosen to support his decision to deny probation, in his

¹¹ Parrish v. Commonwealth, Ky., 581 S.W.2d 560,563 (1979).

¹² Wine v. Commonwealth, 699 S.W.2d 752,753 (1985).

subsequent denial of Toney's motion he made it very clear that Toney was barred from probation with alternative sentencing because he had used a firearm in the commission of the robbery. The trial court is not given discretion in such a case, and it properly followed the precedent set by Hughes in denying the motion.

For all the foregoing reasons, we find that the trial court acted properly in denying probation with alternative sentencing. Toney's sentence of incarceration is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Kathleen Kallaher Schmidt
Pike and Schmidt Law Office
Shepherdsville, Kentucky

BRIEF FOR APPELLEE:

Albert B. Chandler III
Attorney General of Kentucky

N. Susan Roncarti
Assistant Attorney General
Frankfort, Kentucky