

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2002-CA-002239-MR

DONALD EUGENE CALDWELL

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE MARY C. NOBLE, JUDGE  
INDICTMENT NO. 02-CR-02091

COMMONWEALTH OF KENTUCKY

APPELLEE

### OPINION

### AFFIRMING

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BEFORE: BUCKINGHAM, COMBS, AND DYCHE, JUDGES.

DYCHE, JUDGE. In the midst of a drug transaction, Donald Caldwell shot and killed Thomas Earl Lewis with a shotgun. Caldwell attempted to prove that he was acting in self defense, in that Lewis was about to pull a small caliber handgun from his pocket when Caldwell shot him. Caldwell was convicted by a jury of Reckless Homicide (KRS 507.050) and sentenced by the trial court to four and one-half years' imprisonment for his crime. This appeal followed. We affirm.

Caldwell first asserts that the trial court erred in not granting his motion for a directed verdict at the conclusion of all the evidence.

Rarely is a defendant relying upon self-defense entitled to a directed verdict. Only in the unusual case in which the evidence conclusively establishes justification and all of the elements of self-defense are present is it proper to direct a verdict of not guilty.

West v. Commonwealth, Ky., 780 S.W.2d 600, 601 (1989). "If under the evidence as a whole it would not be clearly unreasonable for a jury to find the defendant guilty, he is not entitled to a directed verdict of acquittal." Trowel v. Commonwealth, Ky., 550 S.W.2d 530, 533 (1977).

From the evidence presented herein, this is not the unusual case in which Caldwell is entitled to a directed verdict of acquittal. His version of the events leading to Lewis's death are subject to credibility questions, especially considering the fact that the gun was still in Lewis's pocket, and the questions concerning the origin and post-shooting treatment of the shotgun. It was not clearly unreasonable for a jury to convict Caldwell upon this evidence. It was not bound to accept his version of the facts.

Caldwell next complains about the introduction of a photograph which supposedly showed the crime scene from the

vantage point of a witness who testified that she did not see the shooting. Although the photograph's relevancy and accuracy are subject to question, its admission is, at worst, harmless error. RCr 9.24.

Caldwell's final argument is that the trial court erred in not considering probation as required by KRS 533.010. He bases his argument on the oral statement made by the trial court at sentencing that "the court cannot consider probation in your case. It is difficult, if not impossible, to consider probation when a life is lost." While it would appear from those statements that the trial court failed to comply with the statute, its judgment indicates otherwise. "It is elementary that a court of record speaks only through its records." Allen v. Walter, Ky., 534 S.W.2d 453, 455 (1976). While we will not engage in retroactive mind-reading, examining the colloquy between the court and Caldwell at sentencing as a whole, we believe that the court meant that it would be difficult to **grant** probation in a case where a life was lost. In any event, the written record indicates that probation was considered, and reasons for its denial are in the written record. We find those reasons to be valid; there was no abuse of discretion.

The judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

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