

RENDERED: OCTOBER 1, 2004; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-000577-MR

BRIDGITTE MCCLEAVE

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE WILLIAM L. GRAHAM, JUDGE
ACTION NO. 01-CR-00073

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** *

BEFORE: JOHNSON, TAYLOR, AND VANMETER, JUDGES.

VANMETER, JUDGE: This is an appeal from an amended judgment entered by the Franklin Circuit Court after appellant Brigitte¹ McCleave entered a guilty plea to the amended charge of first-degree manslaughter. Appellant contends that the trial court erred by finding that she was ineligible for probation even though she was a victim of domestic violence. We affirm.

¹ Appellant's first name has been spelled in various ways throughout these proceedings. Although lower court documents and the notice of appeal show appellant's name as "Bridgitte," she signed the notice of appeal as "Brigitte" and her briefs on appeal show her name as "Brigitte."

Appellant and her brother, Anthony McClease, were adult residents of their parents' home. It is undisputed that Anthony physically abused appellant and other family members on numerous occasions. During the late evening hours of April 23, 2001, Anthony was intoxicated when he entered the house and engaged in a confrontation with appellant. Anthony allegedly raised his hand to strike appellant, who responded by stabbing him in the abdomen with a kitchen knife. Appellant then informed their father of what had occurred, and she called 911 for assistance. Despite surgical efforts, Anthony died several hours later.

Appellant, who was charged with murder, eventually entered an *Alford* plea to first-degree manslaughter. On January 27, 2003, after an evidentiary hearing pursuant to KRS 439.3402, the trial court concluded that the domestic violence exception to the violent offender provisions of KRS 439.3401 did not apply to appellant, and that she was ineligible for probation. However, the court subsequently reconsidered and set aside its January 27 order. On February 26, 2003, the court entered an amended judgment which noted that appellant had appeared with counsel "in open court on 2-21-03 (*)." The asterisk was explained at the bottom of the page as follows:

(*) (Order Setting Aside Judgment of 1-27-03 entered Feb. 6, 2003)

(*) Pursuant to KRS 439.3402, the Court has determined the defendant to be a victim of domestic violence or abuse with regard to this offense and thus, [to] be exempt from the Parole Restrictions stated within KRS 439.3401. The defendant will be eligible for Parole in the manner specified in KRS 439.3401.

Further, the amended judgment noted that "the Court finds: Mt for Probation/denied" for two reasons, marked as follows:

[XX] the Victim suffered death or physical injury;

[] imprisonment is necessary for protection of the public because:

[] there is a likelihood that during a period of probation with an alternative sentencing plan or conditional discharge Defendant will commit a Class D or Class C felony or a substantial risk that Defendant will commit a Class B or Class A felony;

[XX] Defendant is in need of correctional treatment that can be provided most effectively by the defendant's commitment to a correctional institution;

[] probation, probation with an alternative sentencing plan, or conditional discharge would unduly depreciate the seriousness of the Defendant's crime;

[] Defendant is ineligible for probation, probation with an alternative sentencing plan, or conditional discharge because of the applicability of KRS 532.060[.]

This appeal followed, but it subsequently was held in abeyance pending the circuit court's ruling on appellant's motion for shock probation. On November 12, 2003, the trial court entered an order noting that it previously had denied probation based on the victim's death and appellant's need for correctional treatment. The court gave similar reasons for denying shock probation. The appeal was returned to this court's active docket.

Appellant contends that the trial court erroneously found that even though she was a victim of domestic violence, she was ineligible for probation. We disagree.

KRS 439.3401 specifies that a violent offender is ineligible for release on probation or parole until that offender has served at least twenty years or eighty-five percent of the sentence, depending on the offense and the length of the sentence imposed. However, KRS 439.3401(5) provides an exception for "a person who has been determined by a court to have been a victim of domestic violence or abuse pursuant to KRS 533.060 with regard to the offenses involving the death of the victim or serious physical injury to the victim." KRS 533.060(1) in turn provides that a person who used a firearm in the commission of a Class A, B or C felony is ineligible for "probation, shock probation, or conditional discharge, except" when the victim "had previously or was then engaged in an act or

acts of domestic violence against" the defendant or a family member.

Here, the parties do not dispute that appellant is a domestic violence victim who is exempt from the KRS 439.3401 provisions which otherwise would restrict her ability to be considered for parole. However, the Commonwealth disagrees with appellant's assertion that under *Commonwealth v. Vincent*, Ky., 70 S.W.3d 422 (2002), the trial court erred by finding appellant ineligible for probation despite the KRS 533.060(1) exemption of domestic violence victims from statutory restrictions against the granting of probation to those who commit Class A, B, or C felonies while armed with firearms.

Regardless of whether KRS 533.060(1) applies to situations in which defendants are armed with knives rather than with firearms, it is clear that appellant's argument on appeal lacks merit. Neither *Vincent* nor the domestic violence exceptions to KRS 439.3401 and KRS 533.060(1) require courts to grant probation or parole to all domestic violence victims. Instead, those authorities merely provide that certain felons, who would be statutorily ineligible for probation or parole but for the fact that they are domestic violence victims, may be considered for probation or parole just as if there were no statutory prohibitions against probation or parole for persons who committed similar crimes.

Here, despite appellant's assertion, the record does not show that the trial court ultimately found her to be statutorily ineligible for probation. Regardless of whether the trial court may have made comments to the contrary before the initial judgment, the court's subsequent amended judgment clearly reflects that the court considered appellant's motion for probation but denied that motion because the victim died and because appellant needed correctional treatment. The amended judgment further shows that the court specifically declined the opportunity to find that appellant was statutorily ineligible for "probation, probation with an alternative sentencing plan, or conditional discharge[.]" Thus, there is no merit to appellant's allegation that the trial court erroneously concluded "that a victim of domestic violence is never eligible for probation after committing a crime involving the death of the perpetrator of the domestic abuse."

The court's judgment is affirmed.

ALL CONCUR.

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