

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-000775-MR

MATTHEW JOHN BROWN

APPELLANT

v. APPEAL FROM FLEMING CIRCUIT COURT
HONORABLE JOHN W. MCNEILL, III, JUDGE
ACTION NO. 04-CR-00019

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: ABRAMSON AND BARBER, JUDGES; EMBERTON,¹ SENIOR JUDGE.

BARBER, JUDGE: Appellant, Matthew John Brown, appeals the judgment entered in his Fleming Circuit Court conviction for burglary, third degree, theft of property over \$300, and persistent felony offender, second degree. Brown requests a new sentencing hearing. We affirm the ruling of the Fleming Circuit Court.

Brown was charged with stealing from a farm owner who had entrusted him with the care of his property. The farm owner

¹ Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

testified that the value of the stolen items exceeded \$100,000. Brown entered a conditional guilty plea, leaving himself the right to appeal his Motion to Alter, Amend or Vacate judgment based on an evidentiary ruling by the trial court. When accepting the guilty plea, the trial court made sure that Brown was aware that he could receive the maximum sentence for each of the charged offenses, and that Brown knew that the sentences could run either concurrently or consecutively. The record shows that Brown stated that he understood, and entered a knowing and voluntary plea.

At the time of the underlying plea, Brown had previously been sentenced to serve four years on unrelated drug charges. The Commonwealth asked that Brown's sentence in this case be served consecutively to the sentence already imposed in the drug case. The Commonwealth recommended a sentence of five years for each offense, enhanced to ten years on each sentence by the PFO status. The Commonwealth recommended that the sentences be served concurrently. The Commonwealth asked that the sentences run consecutively with any prior imposed sentence. The trial court imposed a five-year sentence on each of the two charges, each of which was enhanced to eight years by the persistent felony offender count. The court ordered all three sentences (8 years, 8 years and 4 years on the prior drug charges) to run consecutively.

Brown filed a motion pursuant to CR 59.05 to alter, amend or vacate the sentence, alleging that the trial court was inflamed by the testimony of the farm owner. The trial court denied the motion. Brown argues that the trial court gave improper deference to the statement by the victim during the sentencing hearing. The victim testified that Brown had "ruined" him through his actions. The victim also offered a lengthy diatribe about the effect of drugs on the country. The court admitted being swayed by the testimony of the victim. The court also stated that Brown's mother, a former client of the judge, had given emotional testimony regarding her son. The court noted that it took all the testimony into account.

Brown asserts that KRS 421.520 does not grant victims of burglary in the third degree the right to offer a victim impact statement, expressly granting that right to victims of burglary in the first or second degree. This Court has held it permissible for the victim of a third degree burglary to testify at sentencing. See Brand v. Commonwealth, 939 S.W.2d 358, 360 (Ky.App. 1997). In light of that opinion, we believe there was no reversible error in the trial court decision to permit the victim to testify.

Brown argues that where victim impact testimony is unduly prejudicial it may violate a defendant's due process rights. Payne v. Tennessee, 501 U.S. 808, 111 S.Ct. 2597, 115

L.Ed.2d 720 (1991). Brown claims that because the victim in this case "strayed from a discussion of the financial and emotional impact upon him to a discussion of the evils of society created by drug addicted opportunists. . . ." his due process rights were violated. The Commonwealth notes that Brown made no objection or response to the statement of the victim. We agree with Brown that such statements had no relevance in this case, but believe that the court was able to distinguish the relevant statement from the other remarks made by the victim.

Brown also contends that the statute does not grant the victim a right to testify, as it just permits a written statement by victims of burglary in the first or second degree. Brown argues that he was denied the benefit of pleading guilty when the court permitted the witness to give testimony about the impact the crime had upon him. The law permits a court to use a written victim impact statement, but does not expressly exclude other victim impact evidence. Shofner v. Commonwealth, 149 S.W.3d 401,402 (Ky. 2004). The trial court may consider other evidence relating to the impact the crime had on the victim. Sherroan v. Commonwealth, 142 S.W.3d 7, 23 (Ky. 2004). The victim impact statement is simply another means of providing the judge with evidence which may be relevant to sentencing.

Woodall v. Commonwealth, 63 S.W.3d 104, 124 (Ky. 2001). No reversible error has been shown.

Brown also complains that the court improperly overruled his request for consideration of probation or conditional discharge. Counsel for the defendant noted that Brown was technically eligible for probation. The court replied "That motion is overruled, if you are getting ready to make it." Brown asserts that the court's statement shows that the court did not give due consideration to probation or conditional discharge. The final judgment states that the court had given consideration to probation. The Commonwealth claims that this shows that no reversible error occurred. Brown claims that he was entitled to a proper probation hearing.

Probation is not a right, but a matter of "legislative grace." Commonwealth v. Vincent, 70 S.W.3d 422, 425 (Ky. 2002). Probation may be granted at the discretion of the trial court. Aviles v. Commonwealth, 17 S.W.3d 534, 536 (Ky.App. 2000). In the present case, the trial court did not seem inclined to grant probation, but did note in the judgment that it had considered all the relevant factors in making the determination to deny probation. Under such circumstances, no reversible error was found.

For the foregoing reasons, the trial court's judgment and sentencing is affirmed.

ALL CONCUR.

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