

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-000720-MR

COMMONWEALTH OF KENTUCKY

APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE SHEILA ISAAC, JUDGE
ACTION NO. 98-CR-00056

MARION NORRIS

APPELLEE

OPINION
AFFIRMING

* * * * *

BEFORE: COMBS, DYCHE, and GUIDUGLI, Judges.

COMBS, JUDGE. The Commonwealth of Kentucky appeals from a final judgment and sentence of the Fayette Circuit Court entered on March 16, 1998, in which the court sentenced Norris to five years in prison but placed him on probation. Finding no error, we affirm.

On November 3, 1997, a Lexington police officer noticed Norris driving his truck in an erratic manner. After pulling him over, the police officer observed that Norris was unsteady on his feet as he exited the truck, that his speech was slurred, and that his eyes were bloodshot. Norris's three-year-old daughter

was also in the truck. The policeman arrested Norris for driving under the influence and for failing to have proper proof of insurance and vehicle registration. During a search of the truck, the policeman found a black bag containing twenty-three individually wrapped plastic baggies containing marijuana, scales, and two wire clips. Upon searching Norris, the policeman also discovered a .22 caliber handgun in his coat pocket.

In January 1998, the Fayette County Grand Jury indicted Norris for a series of offenses as follows: one felony count of possession of a handgun by a convicted felon (Kentucky Revised Statute (KRS) 527.040) (Class C felony), one felony count of trafficking in a controlled substance within 1,000 yards of a school (KRS 218A.1411) (Class D felony), one misdemeanor count of carrying a concealed weapon (KRS 527.020), one misdemeanor count of possession of drug paraphernalia (KRS 218A.500), one count of operating a motor vehicle under the influence (KRS 189A.010), one count of operating a vehicle with a child not in a child restraint (KRS 189.125), one count of operating a vehicle without insurance (KRS 304.39-080), and one count of operating a vehicle without a registration receipt (KRS 186.170).

On January 30, 1998, Norris entered a guilty plea pursuant to a plea agreement with the Commonwealth to possession of a handgun by a convicted felon, the amended charge of possession of marijuana, carrying a concealed weapon, possession of drug paraphernalia, operating a motor vehicle under the influence, and having no child restraint. Under the plea agreement, the Commonwealth dismissed the two counts for

operating a motor vehicle without insurance and without a registration receipt; it recommended sentences of five years for being a felon in possession of a handgun, twelve months for possession of marijuana, six months for carrying a concealed weapon, six months for possession of drug paraphernalia, two days for driving under the influence, and a \$25.00 fine for having no child restraint.

On March 16, 1998, the trial court sentenced Norris consistent with the Commonwealth's recommendation to a total sentence of five years. However, the court suspended service of the sentence, placed him on probation for a period of five years, and ordered him to complete drug treatment. On March 23, 1998, the Commonwealth filed a notice of appeal challenging the grant of probation.

The Commonwealth argues that the trial court erred in placing Norris on probation. More specifically, it contends that under KRS 533.060, the trial court was prohibited from granting probation because Norris was ineligible for probation under the statute.¹ The Commonwealth maintains that because possession of a handgun by a convicted felon is a Class C felony, Norris was ineligible for probation.

¹As an initial matter, we note that the Commonwealth failed to raise the issue of Norris' probation eligibility before the trial court prior to filing its appeal. Although this preservation problem would generally prevent review by this Court, the appeal involves a jurisdictional sentencing issue dealing with the trial court's statutory authority to grant probation – a matter which is not subject to waiver. See, e.g., Gaither v. Commonwealth, Ky., 963 S.W.2d 621, 622 (1997); Hughes v. Commonwealth, Ky., 875 S.W.2d 99, 100 (1994).

This case concerns the interpretation of several statutes; as purely legal issues are involved, *de novo* review is our standard. Floyd County Bd. of Educ. v. Ratliff, Ky., 955 S.W.2d 921, 925 (1997); Keeton v. City of Ashland, Ky. App., 883 S.W.2d 894, 896 (1994). Prior to considering the specific statutes involved in this case, we briefly address principles of statutory construction involved in our analysis.

Inherent in the legislature's authority to define criminal conduct and to set the sentence for violations of criminal statutes is the power either to limit or to prohibit probation or parole. Mullins v. Commonwealth, Ky. App., 956 S.W.2d 222, 223 (1997). Generally, the words employed in a statute are to be construed according to their ordinary and common meaning. See Lynch v. Commonwealth, Ky., 902 S.W.2d 813, 814 (1995); Alderman v. Brady, Ky. App., 957 S.W.2d 264, 266 (1997); KRS 446.080(4).

The "rule of lenity" is a well-established principle in statutory construction of penal statutes and is central to this case. See Commonwealth v. Lundergan, Ky., 847 S.W.2d 729, 731 (1993). In discussing the rule of lenity, the Kentucky Supreme Court stated in Woods v. Commonwealth, Ky., 793 S.W.2d 809, 814 (1990):

Penal statutes are not to be extended by construction, but must be limited to cases clearly within the language used. Commonwealth v. Malone, 141 Ky. 441, 132 S.W. 1033 (1911). 'Moreover, doubts in the construction of a penal statute will be resolved in favor of lenity and against a construction that would produce extremely harsh or incongruous results.' Commonwealth v. Colonial Stores, Inc., Ky., 350 S.W.2d 465

(1961); Boulder v. Commonwealth, Ky., 610 S.W.2d 615, 618 (1980) overruled on other grounds.

See also Roney v. Commonwealth, Ky., 695 S.W.2d 863 (1985).

Pursuant to the rule of lenity, where a criminal statute is ambiguous, doubts about the application of the statute must be resolved in favor of the defendant. Adamo Wrecking Co. v. United States, 434 U.S. 275, 284-85, 98 S. Ct. 566, 572-73, 54 L. Ed. 2d 538 (1978); Roney, 695 S.W.2d at 864; Lundergan, supra.

We turn to the specific statute involved in this case. KRS 533.060(1) provides that a person convicted of a Class C felony involving the use of a firearm is not eligible for probation:

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, except when the person establishes that the person against whom the weapon was used had previously or was then engaged in an act or acts of domestic violence and abuse as defined in KRS 403.720 against either the person convicted or a family member as defined in KRS 403.720 of the person convicted. (Emphasis added).

KRS 500.080(14) provides: "'Possession' means to have actual physical possession or otherwise to exercise actual dominion or control over a tangible object." There is no express statutory definition for the term use.

The Commonwealth argues that KRS 533.060(1) should be construed to read "possession" synonymously with "use" within the

phrase: "the commission of the offense involved the use of a weapon from which a shot or projectile may be discharged. . . ." (Emphasis added). Conversely, Norris argues that his conduct did not constitute "use" of a weapon and that the statute requires active use or employment of a weapon – not merely passive possession.

In Haymon v. Commonwealth, Ky., 657 S.W.2d 239 (1983), the Kentucky Supreme Court wrestled with the application of KRS 533.060(1) to a situation involving the possession of a firearm. In Haymon, the defendant pleaded guilty to first-degree burglary involving unlawful entry into a building and being armed with a shotgun while in immediate flight from the premises. The trial court initially denied probation based on the prohibition contained in KRS 533.060(1) dealing with "use" of a weapon. The Supreme Court noted that the term "use" of a weapon was subject to several interpretations involving both the mere passive presence of a weapon as well as the active employment of a weapon. Therefore, the Court held that it could not ascertain the intent of the legislature in order to justify construing KRS 533.060(1) so broadly as to encompass mere possession of a weapon.

We conclude that the phrase 'use of a weapon' as it is used in K.R.S. 533.060(1) is ambiguous in that it is subject to two entirely different but nevertheless logical interpretations. It is not possible to determine which meaning the General Assembly intended to give to the phrase 'use of a weapon' and for that reason the movant is entitled to the benefit of the ambiguity.

Because there was no showing that a weapon was used in any manner to further the commission of the offense, the trial court

was in error in his belief that probation was precluded by the statute.

Id. at 240. See also Bailey v. United States, 516 U.S. 137, 116 S. Ct. 501, 133 L. Ed. 2d 472 (1995), construing the term use of a firearm in federal drug statute to require active employment of the weapon and not mere possession.

The Commonwealth urges us to apply the reasoning expressed in the dissenting opinion in Haymon in applying KRS 533.060(1) to the current situation. As an intermediate appellate court, we are constrained to follow the rationale of the majority opinion as the law of the Commonwealth. Furthermore, the Commonwealth's attempt to distinguish Haymon is unconvincing. Pursuant to Haymon and in accord with the rule of lenity, we conclude that the trial court correctly construed KRS 533.060(1) and that it did not err in adjudging Norris eligible for probation.

For the foregoing reasons, we affirm the judgment of the Fayette Circuit Court.

DYCHE, JUDGE, DISSENTS.

GUIDUGLI, JUDGE, CONCURS.

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