

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 1998-CA-000541-MR

CHESTER HOWARD

APPELLANT

v. APPEAL FROM OHIO CIRCUIT COURT  
HONORABLE RONNIE C. DORTCH, JUDGE  
ACTION NO. 97-CR-00149

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: GUDGEL, CHIEF JUDGE; KNOX, AND MCANULTY, JUDGES.

KNOX, JUDGE: Chester Howard (Howard) brings this direct appeal of the Ohio Circuit Court's judgment sentencing him to serve three years after being convicted of wanton endangerment in the first degree. After reviewing the record and the arguments of counsel, we affirm.

On November 26, 1997, Howard was involved in an altercation with Bradley Hall. During the incident, Howard shot at Hall with a handgun but failed to hit him. At the time of the incident, Howard was a 15-year-old juvenile. Subsequently, Howard was transferred from district court to circuit court for

prosecution as an adult. See KRS 635.020. In December 1997, the Ohio County Grand Jury indicted Howard on one felony count of wanton endangerment in the first degree (KRS 508.060). Following a one-day trial on February 18, 1998, a jury convicted Howard of the charge and recommended a sentence of three years. At that time, the trial court found Howard guilty of wanton endangerment in the first degree and postponed sentencing pending the preparation of a Presentence Investigation Report (PSI).

On February 27, 1998, the trial court conducted a sentencing hearing. The court allowed Howard to challenge the information contained in the PSI, and asked him if he had anything to say before sentence was rendered. The trial judge also asked the prosecuting attorney for his recommendation on sentencing, to which the Commonwealth's Attorney responded that he opposed probation. The judge then stated that he was denying probation, and ordered Howard to serve a three-year sentence for wanton endangerment in the first degree. At the hearing, the judge informed Howard that if he was still serving his sentence at the time he turned 18 years old, the court would conduct another hearing to consider whether to probate him or order his transfer to an adult prison facility for continued service of his sentence. Howard has appealed the trial court's sentencing order.

Howard argues the trial court erred by allegedly holding that he was ineligible for probation. He points to the trial court's formal sentencing order, which states that the court found Howard "not eligible for probation." Howard suggests that the trial judge may have believed Howard was not eligible

for probation based on this Court's en banc decision in Britt v. Commonwealth, which was decided prior to Howard's sentencing and was subsequently reversed by the Kentucky Supreme Court after Howard was sentenced. See Britt v. Commonwealth, Ky., 965 S.W.2d 147 (1998). Howard maintains that the trial court erroneously denied him an opportunity to be considered for probation as provided by statute. See KRS 533.010. Howard admits that he failed to raise this issue before the trial court; and, therefore asks us to review the trial court's action under RCr 10.26, the substantial or palpable error rule.

Based on a review of the record, we believe that Howard's position is without merit. At the end of the trial, the judge told Howard that he was required to consider probation. He said that generally he treated persons convicted of offenses involving a firearm very strictly and that he had never previously probated a defendant convicted of such an offense. The judge, however, stated that he had not prejudged Howard on the issue of probation, and that he would fully consider that issue at the sentencing hearing. In addition, at the sentencing hearing the court provided Howard an opportunity to review and controvert the information in the PSI. After Howard challenged one statement in the PSI, the court asked the prosecutor for his sentencing recommendation. The prosecutor opposed probation.

The trial judge then stated:

Mr. Howard is not going to be probated. Mr. Howard was found guilty by a jury of having fired a gun at another individual, and if you fire guns or use guns in Ohio County and a jury convicts you, you are not going to be probated, Mr. Howard. It is that simple,

neither you nor anyone else. So probation is hereby denied.

The actions and statements of the trial judge at both the trial and the sentencing hearing clearly show that he believed Howard could have been probated. Neither the trial judge, nor the parties, ever stated that Howard was statutorily ineligible for probation. The judge's comments indicate that he had reviewed the PSI and denied probation because of the seriousness of the offense, rather than an erroneous belief that Howard was ineligible for probation as a matter of law. See KRS 533.010(2).

RCr 10.26 requires the complainant to demonstrate "a palpable error which affects the substantial rights of a party ... and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error." A palpable error involves an error that seriously affects the fairness, integrity or public reputation of the judicial proceedings. See Brock v. Commonwealth, Ky., 947 S.W.2d 24, 28 (1997). Given the fact that the record demonstrates that the trial judge did consider Howard for probation, he has failed to demonstrate any error affecting his substantial rights.

Finally, we note that Howard's reliance on Britt v. Commonwealth, supra, is misplaced. In Britt, the Kentucky Supreme Court held that a juvenile defendant may take advantage of the ameliorative provisions of the Juvenile Code, KRS 640.040 et seq., including exemption from the limitations on probation, even though he is tried as an adult on a felony offense in circuit court. The Court held that Britt was eligible for

probation upon conviction for robbery under KRS 365.020(4), even though KRS 533.060(1) prohibited probation for adult offenders convicted of robbery involving a firearm.

In our situation, Howard was convicted of wanton endangerment in the first degree, a Class D felony, and KRS 533.060(1) does not prohibit probation upon conviction of this offense, even for adult offenders. Thus, Howard's speculative argument that the trial court may have thought the Court of Appeals' decision in Britt dictated that Howard be considered ineligible for probation is based on an erroneous reading of Britt. Secondly, as the Supreme Court noted in its opinion in Britt, the Juvenile Code was amended in 1996 to make every juvenile transferred to circuit court pursuant to KRS 635.020(4) (involving firearm offenses) after July 15, 1997, subject to the exemption on the limitations on probation. Britt is distinguishable from the present situation in that Howard would have been eligible for probation under either KRS 533.060(1) or the 1996 amendments to the Juvenile Code.

Howard has presented no clear evidence that the trial court ever believed the Court of Appeals' opinion in Britt affected or influenced his decision on probation. On the contrary, as discussed above, the record indicates that the trial judge believed Howard was subject to consideration for probation and denied probation on the merits.

For the foregoing reasons, we affirm the judgment and sentence of the Ohio Circuit Court.

ALL CONCUR.

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