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AUGUST 18, 1999 (98-SC-000971)

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-002988-MR

COMMONWEALTH OF KENTUCKY — APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE LEWIS G. PAISLEY, JUDGE
ACTION NO. 97-CR-1000

TOYA M. BEELER — APPELLEE

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: GUIDUGLI, JOHNSON, AND SCHRODER, JUDGES.

GUIDUGLI, JUDGE. The Commonwealth appeals an order of the Fayette Circuit Court probating the five-year sentence imposed upon Toya Beeler after her conviction for welfare fraud and second-degree persistent felony offender (PFO II). The Commonwealth argues that the court erred when it found Kentucky Revised Statute (KRS) 532.080 unconstitutional and that Beeler was eligible for probation. After reviewing the record, the applicable law, and the arguments of counsel, we vacate and remand.

A grand jury indicted Beeler for welfare fraud and PFO

II on September 9, 1997. According to evidence in the record, Beeler failed to report a change in her eligibility and continued to receive AFDC, food stamps, and medical benefits when she was not entitled to them. Approximately $8,000.00 of the $13,459.52 she received was in the form of medical benefits resulting from her hospitalization for diabetes. The PFO II charge was based on a 1993 conviction for second-degree burglary. On September 26, 1997, Beeler withdrew her former plea of not guilty and entered a plea of guilty. The Commonwealth recommended a one-year sentence on the first count, enhanced to five years under the PFO II count, and restitution. The court accepted her guilty plea and set a date for sentencing.

At sentencing, Beeler asked the court to consider probating her sentence. The Commonwealth objected, arguing that Beeler was ineligible under KRS 532.080. The court stated that it was considering probation, but could only do so by declaring the statute unconstitutional. The court advised the defendant to serve notice on the Attorney General of her constitutional challenge to KRS 532.080. See, Jacobs v. Commonwealth, Ky. App., 947 S.W.2d 416 (1997). The court continued the matter, and Beeler filed a written motion for probation challenging the constitutionality of KRS 532.080 with service on the Attorney General. By order entered November 17, 1997, the court sentenced Beeler to one year for welfare fraud, enhanced the sentence to five years on the PFO II count, probated the

sentence for five years, and ordered her to pay restitution. This appeal followed.

The Commonwealth maintains that Beeler was ineligible for probation under KRS 532.080(5), and that the statute is constitutional. We agree.

Having pleaded guilty to PFO II, Beeler's sentence is determined by KRS 532.080(5). Under that statute,

> A person who is found to be a persistent felony offender in the second degree shall be sentenced to an indeterminate term of imprisonment pursuant to the sentencing provisions of KRS 532.060(2) for the next highest degree than the offense for which convicted. **A person who is found to be a persistent felony offender in the second degree shall not be eligible for probation, shock probation, or conditional discharge.**

(Emphasis added). Under the express language of the statute, Beeler was not eligible for probation.

The circuit court declared the statute unconstitutional and granted Beeler probation because a similarly situated PFO I defendant would have been eligible for probation. KRS 532.080(7) provides:

> **If the offense the person presently stands convicted of is a Class A, B, or C felony,** a person who is found to be a persistent felony offender in the first degree shall not be eligible for probation, shock probation, or conditional discharge, nor for parole until having served a minimum term of incarceration of not less than ten (10) years.

(Emphasis added). The General Assembly added the highlighted provision in 1994. 1994 Kentucky Acts, Chapter 396, Section 11,

House Bill 390. KRS 532.080(5), relating to second-degree PFOs, remained unchanged.

The legislature amended KRS 532.080 again in 1996. 1996 Kentucky Acts, Chapter 427, House Bill 267, effective April 4, 1996. The 1996 amendment made the 1994 amendment retroactive. Section 2 of the 1996 act reads: "Whereas this statute will reduce current prison and jail overcrowding, an emergency is declared to exist, and this Act takes effect upon its passage and approval by the Governor or upon its otherwise becoming law." The act became law on April 4, 1996.[1]

Thus, under the law as it existed in 1997, a defendant with two prior felony convictions who stood convicted of a Class D felony was eligible for probation, and would be eligible for parole after serving twenty percent of his sentence. KRS 532.080(6),(7), 501 Kentucky Administrative Regulations (KAR) 1:030 Sec. 4(a). A defendant with one prior felony conviction who stood convicted of a Class D felony was not eligible for probation, and would be eligible for parole after serving twenty percent of his sentence. KRS 532.080(5), 532.060(2); 501 KAR 1:030 Sec. 4(a).

The circuit court found that there was no rational

1The General Assembly amended the statute yet again in 1998. Effective July 15, 1998, both PFO I and PFO II defendants are eligible for probation if all the offenses for which they stand convicted are Class D felonies which do not involve a violent act against a person. Omnibus Crime Bill, HB 455 section 76. The act did not make these changes retroactive. Accordingly, this opinion will only address the statute as it read at the time Beeler was sentenced in 1997.

basis for probation to be available to Class D PFO I defendants but not Class D PFO II defendants, held the statute unconstitutional, and probated Beeler. The parties agree that this is an equal protection claim subject to rational basis scrutiny. See Fourteenth Amendment to the United States Constitution, Sections 1, 2, and 3 of the Kentucky Constitution. The Supreme Court of Kentucky recently addressed this test in a constitutional challenge to KRS 189A.010(1)(e), the DUI "zero tolerance" law, which established a lower blood alcohol limit for drivers under age 18.

> Under the rational basis test, a classification must be upheld against an equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification. Heller v. Doe, 509 U.S. 312, 113 S. Ct. 2637, 125 L. Ed. 2d 257 (1993), citing F.C.C. v. Beach Communications, Inc., 508 U.S. 307, 113 S. Ct. 2096, 124 L. Ed. 2d 211 (1993). . . . In the appellate review of a statute involving classification, the law must be upheld against an equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification. Cf. Heller.
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> The state has no obligation to produce evidence to sustain the rationality of statutory classifications. Heller. A statute is presumed constitutional. Heller, citing Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 93 S. Ct. 1001, 35 L. Ed. 2d 351 (1973).
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> Legislative classification is not subject to a court-room fact-finding process and "may be based on rational speculation

> unsupported by evidence or empirical data." Heller, quoting Beach Communications. Merely because the statute may result in some practical inequity does not cause it to fail the rational basis test for review.
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> So long as the statute's generalization is rationally related to the achievement of a legitimate purpose, the statute is constitutional. Cf. [Commonwealth v.] Smith, [Ky., 875 S.W.2d 873 (1994),] supra. A state does not violate the equal protection clause merely because the classifications made by the statutes are imperfect. Stephens v. State Farm Mutual Auto Insurance Co., Ky., 894 S.W.2d 624 (1995).
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> In order for the statute to survive an equal protection challenge, the classification must be rational and it must also be related to achieving a legitimate state purpose.

Commonwealth v. Howard, Ky., 969 S.W.2d 700, 703-704 (1998). See also, Sanders v. Commonwealth, Ky., 844 S.W.2d 391, 393 (1992); McGinnis v. Royster, 410 U.S. 263, 93 S. Ct. 1055, 35 L. Ed. 2d 282 (1973).

The parties agree that a rational basis exists for classifying persistent felony offenders differently according to the number of prior felonies they have committed. This classification serves the legitimate state purpose of punishing more severely those defendants who repeatedly commit felonies. This is not, however, the rationale the Commonwealth relies on as the basis for making Class D felon PFO I defendants eligible for probation but not Class D felon PFO II defendants. Instead, the Commonwealth first suggests that this choice is rationally

related to the state's interest in eliminating prison overcrowding. We agree.

The 1994 amendment exempted Class D PFO I defendants from the ban on probation and parole before ten years. The 1996 act made this amendment retroactive, with the express intent of reducing prison overcrowding. Although prison overcrowding may also have motivated the General Assembly when it passed the 1994 act, that rationale is not expressed in the language of the act as it was in 1996.

Before the 1994 amendment, every defendant sentenced as a PFO I was ineligible for probation and spent a mandatory ten years in prison before becoming eligible for parole. The amendment not only made Class D felon PFO I defendants eligible for parole earlier but also created the possibility that some would not spend any time in prison. Depending on the number of PFO I and PFO II prisoners incarcerated at a given time, this may not have been the best way to lessen overcrowding. But as Howard, supra, explains, to be constitutional the classification does not have to be perfect and may be based on rational speculation unsupported by evidence or empirical data. Although the effect of this amendment may seem inequitable to those defendants in Beeler's position, it withstands rational basis review. Id. We find that the 1994 amendment to KRS 532.080 was rationally related to the legitimate state goal of reducing prison overcrowding.

The Commonwealth also argues that the difference in probation eligibility is rationally related to the state's interest in ameliorating harsh provisions of KRS 532.080(7). Having concluded the first rationale offered by the Commonwealth is sufficient, we need not address this argument.

Accordingly, since KRS 532.080(5) expressly prohibited probation for second-degree PFO defendants like Beeler and is constitutional, the circuit court erred in probating her five-year sentence. We do not necessarily disagree with the circuit court that, as a factual matter, probation was proper in this case. However, probation was not a legal option at the time Beeler was sentenced. The order of the circuit court is vacated and the case remanded for proceedings consistent with this opinion.

ALL CONCUR.

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