RENDERED: October 1, 1999; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-000462-MR

CLARK J. GROSS — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JOHN R. ADAMS, JUDGE
ACTION NO. 91-CR-0789

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
VACATING AND REMANDING
** ** ** ** **

BEFORE: BUCKINGHAM, COMBS and McANULTY, JUDGES.

McANULTY, JUDGE: This is an appeal from the trial court's order denying Appellant's second motion for shock probation. The Commonwealth filed a motion to dismiss the appeal, on the ground that the motion for shock probation was not timely filed. Said motion was passed to the panel for a decision upon the merits. On appeal, the Commonwealth further asserts that Appellant is entitled to file only one motion for shock probation and his failure to appeal the denial of the first motion is fatal. We find that Appellant's motion for shock probation was timely filed and that KRS 439.265 entitles Appellant to file successive motions. We further find that under the current state of the

law, Appellant is permitted to be considered for shock probation and that the trial court erred in concluding otherwise.

The procedural history in this case is extensive and must be discussed in order to assess the timeliness of Appellant's motion for shock probation. Appellant Clark Gross ("Gross") was convicted by a jury of First Degree Rape and Second Degree Burglary and sentenced to a total of thirteen years by a Judgment entered March 9, 1992. Gross appealed on March 13, 1992 and his conviction was affirmed by a panel of this Court in a decision made final on December 15, 1993. The Supreme Court denied discretionary review.

During the pendency of the direct appeal, Gross moved for modification of sentence. The trial court denied the motion on April 22, 1992, refusing to invade the province of the jury. Once the Supreme Court denied discretionary review of the direct appeal, Gross again moved for modification of sentence on December 22, 1993, raising for the first time that the trial court failed to consider him as a candidate for probation when he was sentenced in 1992. In support of his motion, Gross pointed to a discrepancy between two separate reports prepared by the Department of Probation and Parole. The first presentence investigation report, dated February 26, 1992, indicated that First Degree Rape was not a probatable offense. However, the updated presentence/postsentence investigation report stated that Gross was eligible for probation under KRS 532.045. Gross asserted that the latter analysis of the law was correct and that he should have been considered for probation when originally

sentenced. The trial court agreed and entered an order modifying the original sentence and granting probation conditioned, among other things, that Gross serve six months in the Fayette County Detention Center.

The Commonwealth appealed the modification and grant of probation, asserting the trial court's lack of jurisdiction to amend the sentence under CR 59.05. A panel of this Court affirmed the trial court, finding that the trial court had jurisdiction pursuant to CR 60.02(a) to correct a mistake of law regarding Gross's eligibility for probation. The opinion further concluded that the rape charge for which Gross was convicted was a probatable offense in that it did not involve a minor.

The Supreme Court held that the trial court lacked jurisdiction and reversed the judgment of this Court and remanded the matter to the Fayette Circuit Court for entry of order reinstating the original judgment. Commonwealth v. Gross, Ky., 936 S.W.2d 85 (1996), r'hg denied January 30, 1997. The Supreme Court did not address the question of Gross's eligibility for probation.

Thereafter, on February 3, 1997, the trial court ordered Gross to report to the Fayette County Detention Center on February 7, 1997, "to begin service of the previously imposed sentence." Meanwhile, because Gross had complied with the conditions of his probation and had served six months in the county detention center before the Supreme Court held that the court lacked jurisdiction to amend the judgment, the court

credited Gross with 180 days of jail time served in an order dated February 6, 1997.

On March 20, 1997, Gross filed a motion for shock probation. The trial court summarily denied the motion in an order dated July 29, 1997. On August 1, 1997, Gross filed a motion styled as a Renewed Motion for Shock Probation. Once again, the trial court denied the motion without discussion in an order dated October 30, 1997. As a result, Gross subsequently moved for findings of fact and conclusions of law regarding the trial court's denial of shock probation.

In an opinion and order dated February 11, 1998, the trial court considered Gross's eligibility for shock probation and concluded that he was not eligible. The trial court noted that because Gross was convicted of rape, he is classified as a "violent offender" under KRS 439.3401(1). The court further observed that a violent offender shall not be released on parole until he has served at least eighty-five percent (85%) of the sentence imposed. KRS 439.3401(3). In addition, the court stated that it had previously concluded that because the statute did not mention probation, that probation was not precluded. The court mentioned that this Court had agreed that Gross was eligible for probation but that the Supreme Court had not ruled on this issue, reversing based on the lack of jurisdiction. In light of the absence of an express ruling by the Supreme Court, the trial court declined to find that Gross is eligible for shock probation This appeal followed.

In order to succeed on appeal, Gross has several hurdles to overcome. Firstly, he must show that his motion for shock probation was timely filed. Secondly, he must establish that the statute permits the filing of successive motions. Thirdly, he must demonstrate that he is eligible, as a violent offender, for shock probation.

As previously mentioned, the Commonwealth has filed a motion to dismiss this appeal which was passed to a decision on the merits. The crux of the Commonwealth's argument in the motion to dismiss is that because Gross had served and was credited with 180 days jail time before he filed either motion for shock probation, his motions were untimely and he is precluded from appealing.

KRS 439.265 establishes the availability of shock probation to those serving time on a felony conviction. That statute provides, in pertinent part, as follows:

> (1) Subject to the provisions of KRS Chapter 439 and Chapters 500 to 534, any Circuit Court may, upon motion of the defendant made not earlier than thirty (30) days nor later than one hundred eighty (180) days after the defendant has been incarcerated in a county jail following his conviction and sentencing pending delivery to the institution to which he has been sentenced, or delivered to the keeper of the institution to which he has been sentenced, suspend the further execution of the sentence and place the defendant on probation upon terms the court determines. Time spent on any form of release following conviction shall not count toward time required under this section.
>
> (2) The court shall consider any motion filed in accordance with subsection (1) of this section within sixty (60) days of the filing date of that motion, and shall enter its ruling within ten (10) days after

> considering the motion. The defendant may, in the discretion of the trial court, have the right to a hearing on any motion he may file, or have filed for him, that would suspend further execution of sentence. Any court order granting or denying a motion to suspend further execution of sentence is not reviewable.[1]

In essence, this statute creates a narrow window of opportunity in which a defendant may file for shock probation, after 30 days served but before 180 days served. This window of opportunity has been strictly enforced by the courts. Commonwealth ex rel. Mulloy v. Meade, Ky. App. 554 S.W.2d 399, 401 (1977); Commonwealth ex rel. Hancock v. Melton, Ky., 510 S.W.2d 250, 252 (1974).

However, this is not a simple case of the Defendant being sentenced, starting to serve his time and then merely resting on his laurels and failing to timely file the motion. Rather, this case has gone through two appeals processes and the defendant served his 180 days pursuant to a sentence which was valid and in effect until the Supreme Court held otherwise. As the Commonwealth had appealed the amended sentence which was favorable to the defendant, he had no impetus to move for shock probation.

Although not precisely on point, the reasoning in Terhune v. Commonwealth, Ky. App., 907 S.W.2d 779 (1995) is

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[1] The provision that any court order granting or denying a motion for shock probation is not reviewable refers only to a review on the merits and does not deprive the appellate court of its authority to determine whether an order was within the jurisdiction of the circuit court. Terhune v. Commonwealth, Ky.App., 907 S.W.2d 779, 782 (1995), citing Commonwealth ex rel. Hancock v. Melton, Ky., 510 S.W.2d 250, 252 (1974).

instructive. In Terhune, the defendant was sentenced under one indictment to 13 years and was then sentenced under another indictment to 10 years, to be served consecutively with the 13 year sentence. The defendant timely filed a motion for shock probation on his 13-year sentence. The trial court denied the motion. The defendant then moved for shock probation on his 10-year sentence. The trial court denied the motion as untimely, relying on the fact that defendant had not begun to serve the ten year sentence because it was to be served after the 13-year sentence ended. A panel of this Court held that the defendant's motion in the 10-year sentence was timely filed, as he filed the motion more than 30 days but less than 180 days after he had been "delivered to the keeper of the institution to which he had been sentenced." In so holding, this Court stated that "[t]he legislature has chosen not to deny a defendant consideration of shock probation on a second or consecutive sentence" and that the statute "places no qualifications on whether the sentence was a subsequent sentence." Terhune at 782.

In the case *sub judice*, the defendant served time under a sentence which was later invalidated by the Supreme Court after the Commonwealth appealed. We believe that the order of the trial court reinstating the original sentence was, for the purposes of KRS 439.265, a new sentence. Therefore, Gross had to file a motion for shock probation anywhere from 30 to 180 days following February 7, 1997. As such, both motions were timely filed. To hold otherwise would, in effect, allow the Commonwealth to thwart a defendant's right to so move by

successfully appealing a sentence which is favorable to the defendant.

Having so determined and Gross having cleared the first hurdle, we move to the next hurdle. We must address the question of whether KRS 439.265 entitles a defendant to file more than one motion for shock probation. This appears to be a case of first impression. We conclude that the language of the statute, in providing a particular time period for the purposes of filing the motion and in neglecting to expressly limit the number of motions, allows a defendant to file successive motions as long as they are timely.

In arguing that Gross was not entitled to appeal from a second motion for shock probation when he did not appeal from the denial of the first motion, the Commonwealth cites Lycans v. Commonwealth, Ky., 511 S.W.2d 233 (1974). Lycans involved an inmate who filed an RCr 11.42 motion, which was denied and the inmate attempted to appeal but failed to properly file a notice of appeal and the appeal was dismissed. The inmate then filed a second 11.42 motion which was likewise denied. The inmate correctly filed the notice of appeal from the second motion but the court affirmed the trial court. In so doing the court held that "when a prisoner fails to appeal from an order overruling his motion to vacate judgment or when his appeal is not perfected or is dismissed, he should not be permitted to file a subsequent motion to vacate", reasoning that "[i]f such a procedure were allowed there would be no end to the successive applications for post-conviction relief." Lycans at 233.

We are of the opinion that the same reasoning does not apply to motions for shock probation. An inmate is specifically limited to one RCr 11.42 motion by subsection (3) of that rule. There is no such limitation stated in KRS 439.265.

Rather, we believe that by creating the window of opportunity in which a defendant is permitted to file a motion for shock probation the legislature intended to allow multiple motions. It is reasonable to assume that the sentencing court may not consider a defendant a good candidate for shock probation after only serving 30 days of his sentence but the same defendant may prove to be a better candidate after serving additional time. Being able to entertain successive motions for shock probation during the period prescribed by the statute affords the court this needed flexibility.

Having determined that Gross was permitted to file a second motion for shock probation and therefore appeal from the denial of the motion, we now turn to the question of whether Gross, as a violent offender, is eligible for shock probation. At the time that the trial court entered its ruling, on February 11, 1998, it stated that this issue had not been addressed by the Supreme Court. Therefore, the court expressly declined to consider Gross as a candidate. However, the trial court overlooked the opinion of this court which ruled that the violent offender statute, which limits the parole by the executive branch, does not similarly limit the judicial branch's consideration of probation. Mullins v. Commonwealth, Ky. App., 956 S.W.2d 222, 223 (1997). It is therefore clear that the trial

court erred in determining that it was not permitted to consider Gross for shock probation.

Accordingly, the decision of the trial court is vacated and remanded for consideration of Gross as a candidate for shock probation.

ALL CONCUR.

BRIEF FOR APPELLANT:

William E. Johnson
Frankfort, KY

Anita M. Britton
Lexington, KY

ORAL ARGUMENT FOR APPELLANT:

William E. Johnson
Frankfort, KY

BRIEF FOR APPELLEE:

A.B. Chandler III
Attorney General

David A. Smith
Assistant Attorney General
Frankfort, KY

ORAL ARGUMENT FOR APPELLEE:

David A. Smith
Frankfort, KY