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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-001241-MR

COMMONWEALTH OF KENTUCKY — APPELLANT

v. — APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE SHEILA ISAAC, JUDGE
INDICTMENT NO. 98-CR-000139

WILLIAM RAY WOFFORD — APPELLEE

** ** ** ** **

NO. 1998-CA-002457-MR

WILLIAM RAY WOFFORD — APPELLANT

v. — APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE SHEILA ISAAC, JUDGE
INDICTMENT NO. 98-CR-000139

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION

AFFIRMING IN 1998-CA-001241-MR

AND 1998-CA-002457-MR

** ** ** ** **

BEFORE: BUCKINGHAM, HUDDLESTON and SCHRODER, Judges.

HUDDLESTON, Judge: William Wofford pled guilty in Fayette Circuit Court to one count of sodomy in the third degree and one count of being a persistent felony offender in the second degree (PFO II). The court sentenced Wofford to one year in prison on the sodomy

count, enhanced to ten years because of the PFO II conviction, and then probated the sentence for five years.

The Commonwealth argues that the plain language of Kentucky Revised Statute (KRS) 532.080(5) prohibits probation for a PFO II felon. When the circuit court sentenced Wofford on May 11, 1998, the statute provided, in part, that "[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."[1]

In 1994 the General Assembly amended KRS 532.080(7).[2] KRS 532.080(7) addresses persistent felony offenders in the first degree. The statute as amended does not prohibit probation for a person convicted of PFO I when the underlying offense is a class D felony. Thus, the PFO I statute allows greater leniency, by allowing for the possibility of probation, to the more recidivist felon.

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[1] The General Assembly amended Kentucky Revised Statute (KRS) 532.080(5), effective July 15, 1998, to allow probation for a PFO II Class D felon. KRS 532.080(5), as amended in 1998, provides, in part, that "[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, unless all offenses for which the person stands convicted are Class D felony offenses which do not involve a violent act against a person, in which case probation, shock probation, or conditional discharge may be granted."

[2] 1994 Kentucky Acts, Chapter 396, Section 11, House Bill 390. KRS 532.080(7) states, in part, that "[i]f 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."

Wofford suggests that such a result is not rationally related to a legitimate state purpose and is, therefore, unconstitutional. The Commonwealth contends that the disparate treatment is rationally related to the legislative purpose of reducing prison overcrowding.

In 1996 the General Assembly amended KRS 532.080 to make the 1994 amendment retroactive.[3] The purpose of the statute was to reduce prison and jail overcrowding.[4] Following the 1994 and 1996 amendments to KRS 532.080, defendants convicted of being a PFO I with an underlying Class D felony were eligible for probation, while defendants convicted of being a PFO II with an underlying Class D felony were not. The Kentucky Supreme Court observed in Chapman v. Gorman[5] that "[l]egislative distinctions between persons, under traditional equal protection analysis, must bear a rational relationship to a legitimate state end." Thus, the issue is whether allowing persons convicted of Class D felonies with a PFO I enhancement to be eligible for probation while not providing Class D offenders with PFO II convictions the same opportunity for probation is rationally related to the legislative goal of reducing the prison and jail population.

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[3] 1996 Kentucky Acts, Chapter 247, House Bill 267, effective April 4, 1996.

[4] Id.

[5] Ky., 839 S.W.2d 232, 239 (1992) (citing Clements v. Fashing, 457 U.S. 957, 102 S. Ct. 2836, 73 L. Ed. 2d 508 (1952). See also Chapman v. Eastern Coal Corp., Ky., 519 S.W.2d 390 (1975) (While Chapman still stands for the proposition for which it is cited herein, the decision has been superseded by statute as recognized in Wells v. Estridge, Ky. 646 S.W.2d 41 (1982)).

In Commonwealth v. Meyers[6] this Court, sitting en banc, held "that PFO II Class D felons are eligible for probation, shock probation, and conditional discharge as are PFO I Class D felons." Meyers pled guilty to possession of drug paraphernalia and PFO II[7] and received a five year sentence probated for five years.[8] In holding the statute unconstitutional, this Court said that:

> It seems to us that by allowing the more recidivist felony offenders probation, shock probation, or conditional discharge while denying lesser offenders the same privilege, undermines the policy interest behind the penal goal. Indeed, the result is quite absurd. The inveterate felony offenders might be treated more leniently than the less frequent offenders. Legislation that rests upon such irrationality cannot withstand constitutional scrutiny. We can think of no plausible basis to support the constitutionality of the classification. As such, we are of the opinion such differentiation cannot withstand the rational basis test. We view the classification void of rational justification and violative of equal protection of the law.[9]

The Meyers decision dictates the outcome of the instant case. Accordingly, we affirm the Fayette Circuit Court's order

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6 Ky. App., ___ S.W.2d ___, (1999), WL 1206719, at *4.

7 Id. at *1.

8 Id.

9 Id. at *3.

granting probation to Wofford because "PFO II Class D felons are eligible for probation . . . ."[10]

In a related case Wofford v. Commonwealth, 1998-CA-002457-MR, Wofford appeals the revocation of his probation. Fayette Circuit Court found that Wofford violated the terms of his probation by "failing to maintaining [sic] employment, failing to maintain good behavior and failure to cooperate with sex offender treatment." Wofford argues that the court erred by admitting a hearsay report that evaluated his potential for treatment in the Sexual Offender Treatment Program.

This Court noted in Messer v. Commonwealth[11] that "whether the trial court revoked upon one violation or three is of no consequence to the appellant so long as the evidence supports at least one violation." Even if we assume the circuit court erred by admitting the report as Wofford suggests, the Commonwealth has established by a preponderance of the evidence[12] that he did not maintain employment or good behavior. Wofford admitted that he terminated his employment and that while on work release he spent a day with his family.

The circuit court did not err when it probated Wofford nor when it revoked his probation. We affirm both judgments.

ALL CONCUR.

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[10] Id. at *4.

[11] Ky. App., 754 S.W.2d 872, 873 (1988).

[12] See Murphy v. Commonwealth, Ky. App., 551 S.W.2d 838, 841 (1977) (stating that "it will be incumbent on the Commonwealth to show by a preponderance of the evidence that the appellant has violated the terms of his probation").

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