

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-001964-MR

RONALD G. LIPTON

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JOHN W. POTTER, JUDGE
ACTION NO. 84-CR-1606 AND 85-CR-585

COMMONWEALTH OF KENTUCKY

APPELLEE

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

BEFORE: BARBER, JOHNSON, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: This is an appeal from an order denying a PFO II Class D felon's motion for prerelease probation in which appellant asked the court to declare KRS 532.080(5) unconstitutional. Since it is possible that the trial court denied appellant's motion because of his PFO II status, we vacate the order and remand for the trial court to reconsider appellant for prerelease probation in light of Commonwealth v. Meyers, Ky. App., 8 S.W.3d 58 (1999), the recent decision of this Court adjudging KRS 532.080(5) unconstitutional.

In 1985, appellant, Ronald Lipton, was found guilty of wanton endangerment in the first degree, possession of a

controlled substance, subsequent offender, resisting arrest, and persistent felony offender in the second degree ("PFO II") and was sentenced to fifteen (15) years' imprisonment. In 1986, Lipton pled guilty to possession of a controlled substance in the first degree and was sentenced to three (3) years' imprisonment to be served concurrently with his prior sentence. On February 26, 1999, Lipton filed a motion for prerelease probation pursuant to KRS 439.575. The court thereafter ordered the Department of Corrections to conduct a probation risk assessment report. The report stated that Lipton was not eligible for probation because one of his convictions included a PFO II conviction. The conclusion of the report was that Lipton was not recommended for probation because one of his convictions was a PFO II and because of two parole violations. On April 12, 1999, the trial court denied Lipton's motion for prerelease probation without giving a reason therefor. On July 30, 1999, Lipton, assuming that the court had relied on KRS 532.080(5) in refusing to grant him prerelease probation, moved the court to declare KRS 532.080(5) unconstitutional. On that same date, Lipton filed another motion for prerelease probation, citing his argument that KRS 532.080(5) was unconstitutional. The motion was again denied by the court on August 4, 1999 without any reason being given. From this order, Lipton now appeals.

From the outset, we note that this Court has recently ruled on the issue of the constitutionality of KRS 532.080(5) in Commonwealth v. Meyers, Ky. App., 8 S.W.3d 58 (1999), which was rendered after the briefs were filed in this case. In addressing

KRS 532.080 as it existed prior to its amendment in 1998, we held that it was unconstitutional for KRS 532.080(7) to allow PFO I Class D felons probation, while denying probation to PFO II Class D felons in KRS 532.080(5). KRS 532.080 was amended in 1998 to allow PFO II Class D felons to be probated, and on its face seemingly treated PFO I and PFO II Class D felons the same as to eligibility for probation. However, KRS 532.080(9) states that "The provisions of this section amended by 1994 Ky. Acts ch. 396, sec. 11, shall be retroactive." Lipton argues that the trial court relied on this section in denying him prerelease probation on the basis that he was a PFO II Class D felon, since probation for PFO II Class D felons was not allowed until the 1998 Amendment to the statute (and, thus, could not be applied retroactively to a defendant sentenced before July 15, 1998), while KRS 532.080(7) could be applied retroactively to a PFO I Class D felon sentenced prior to July 15, 1998 since that section was enacted in 1994. We agree that such an application of KRS 532.080 would be unconstitutional under Commonwealth v. Meyers, Ky., 8 S.W.3d 58. However, as stated earlier, the court gave no reason why it denied Lipton's motion for prerelease probation. We have no idea whether the court: applied KRS 532.080 as it existed at the time of Lipton's sentencing and denied him probation because he was a PFO II offender; applied KRS 532.080 as it existed at the time of the motion (after the 1998 Amendment), but refused to grant him probation on the basis that KRS 532.080(5) could not be applied retroactively under KRS 532.080(9), as Lipton contends; or denied him probation because

of his two prior parole violations, which has nothing to do with him being a PFO II offender. We note that the decision to grant or deny probation is within the trial court's discretion. Turner v. Commonwealth, Ky., 914 S.W.2d 343 (1996); Brewer v. Commonwealth, Ky., 550 S.W.2d 474 (1977). However, since it is possible that the court denied Lipton probation because he was a PFO II offender (in reliance on the Department of Corrections's recommendation), we vacate the court's order and remand for the court to reconsider Lipton's motion for prerelease probation in light of our decision in Commonwealth v. Meyers, 8 S.W.3d 58.

For the reasons stated above, we vacate the order of the Jefferson Circuit Court and remand for proceedings consistent with this opinion.

ALL CONCUR.

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