

Commonwealth Of Kentucky

Court Of Appeals

NOS. 2000-CA-000601-MR
and 2000-CA-001583-MR

BILLY RAY CLEAVER, JR.

APPELLANT

v. APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE T. STEVEN BLAND, JUDGE
ACTION NO. 97-CR-00016

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: JOHNSON, KNOPF, AND MILLER, JUDGES.

KNOPF, JUDGE: These are consolidated appeals from a judgment of conviction by the Hardin Circuit Court following a jury trial.¹ The appellant, Billy Ray Cleaver, Jr., argues that the trial court made improper comments during *voir dire* which prejudiced his right to a fair trial, and that the court abused its discretion when it denied his request for probation. We find no merit to either of these contentions. Hence, we affirm.

¹ Cleaver filed his first notice of appeal on March 7, 2000, shortly after the trial court entered a judgment confirming the trial verdict. On June 30, 2000, following sentencing, Cleaver filed another notice of appeal. This Court ordered the appeals consolidated on September 14, 2000.

On January 30, 1997, a Hardin Circuit Court grand jury indicted Cleaver on one count each of first degree trafficking in a controlled substance,² and possession of drug paraphernalia.³ Following a jury trial, Cleaver was found guilty on both counts. The jury fixed his sentence at five years on the trafficking count. Upon agreement of the parties, the court reserved sentencing on the misdemeanor count of possession of drug paraphernalia. In its final judgment and order, the trial court imposed the five year sentence fixed by the jury, to run concurrently with a twelve month sentence on the paraphernalia charge. The trial court also denied Cleaver's motion for probation. Cleaver now appeals to this Court.

Cleaver raises two issues on appeal. First, he argues that the trial court made an improper comment to the jury panel. During *voir dire*, a prospective juror, Mr. Upton, expressed some reluctance about answering the court's questions. He asked the court what his rights were if he did not want to answer the questions. The trial court explained that the questions served to determine whether a person could serve as a fair and impartial juror in any given case.

Judge: Well, Mr. Upton, let me explain to the members of the jury the purpose of voir dire is to determine opinions that you as individuals may have that may affect either the Commonwealth or the defendant getting a fair trial. You asked what's the relevance of anyone getting a speeding ticket. Someone may have a burning grudge that they've carried ever since they got it against the

² KRS 218A.1412.

³ KRS 218A.500(2).

police and refuse to believe or accept anything the police offer. You would be an unfair juror to the police if you didn't reveal that fact under voir dire. You have a legal obligation to reveal those facts and the main reason is that all of us as we sit here might someday may be seated as a defendant or as a participant in a trial. We would certainly want those who have been called to serve as our jurors to judge us, to honestly and openly respond to those questions so that we might get a fair trial. Now if you don't want to participate in the jury system you are basically saying you don't think people are entitled to a fair trial. And if there's any juror here who feels our system of justice is not right, or that people aren't entitled to fair trials let me know now. Because that's what this is all about. You may not like being here, but, one, you have a legal duty to be here, and secondly, what goes around comes around. And none of us should ever assume that we'll never be in a situation seated at one of these tables, because it could happen to any of us. So that's the reason these questions are asked. This defendant has a right to know if any of you all are just chomping at the bit to send another drug trafficker to prison. The Commonwealth has a right to know if any of you are chomping at the bit to acquit someone who has been accused by a police officer because you don't like the police. That's the reason we do these questions. That's the reason the law permits them to be done. And that's the reason we're having this voir dire this morning. All of you are legally qualified as jurors once you answer those eight questions that I asked of you back at the beginning. And as Mr. Ferguson (prosecutor) has said, it's basically you unqualify yourselves if you make responses to questions that are asked of you. And the questions may vary from case to case depending upon what it is that is being tried. That's the reason we do this. That's the reason it's been done that way since we wrote the Constitution.

As a result of this comment, Cleaver contends that the court fatally prejudiced his right to a fair trial.

Trial courts have considerable discretion in conducting voir dire.⁴ We can find no abuse of that discretion in this case. The trial court did not “brand” Cleaver as a drug trafficker before trial. Rather, the court explained to the jury panel why the parties needed to ask them specific questions about their biases. When the court’s statement is considered in its entirety, we find no basis for Cleaver’s charge that the trial court prejudiced his right to a fair trial.⁵

Cleaver next argues that the trial court erred in denying his motion for probation. We find no basis for this contention either. It is mandatory that the trial court consider probation.⁶ KRS 533.010 sets out guidelines for the trial court to use in determining whether probation or conditional discharge is appropriate. Nevertheless, the determination of whether or not to grant probation is left to the discretion of the trial court.⁷ When granted, probation is a matter of grace and not of right.⁸

After the trial, the court conducted a full sentencing hearing in this case. As Cleaver correctly notes, he brought to the trial court’s attention a number of factors which could have justified granting probation. However, the trial court also

⁴ Jarvis v. Commonwealth, Ky., 960 S.W.2d 466, 472 (1998).

⁵ Garrett v. Commonwealth, Ky., 560 S.W.2d 805, 806-07 (1977).

⁶ Brewer v. Commonwealth, Ky., 550 S.W.2d 474 (1977).

⁷ Turner v. Commonwealth, Ky., 914 S.W.2d 343, 347-48 (1996).

⁸ King v. Commonwealth, Ky., 471 S.W.2d 297, 298 (1971).

reviewed the pre-sentence investigation report prepared by the Division of Probation and Parole. Cleaver's counsel was provided with a copy of the report, and he stated that he agreed with its factual contents. After reviewing the report and considering the nature and circumstances of the crime, and Cleaver's history and current condition, the trial court concluded that "Probation, probation with an alternate sentencing plan, or conditional discharge would unduly depreciate the seriousness of the Defendant's crime." To demonstrate compliance with KRS 533.010, the court need only place in the record a statement sufficient to show that it has duly considered probation.⁹ The language in the court's judgment in this case was sufficient to demonstrate compliance with KRS 533.010. Furthermore, we find no indication in the record that the trial court denied Cleaver's request for probation because he chose to exercise his right to a jury trial. Consequently, the trial court did not abuse its discretion when it denied his request for probation.

Accordingly, the judgment of the Hardin Circuit Court is affirmed.

All CONCUR.

BRIEF FOR APPELLANT:

Kenneth E. Daniels
Daniels Law Office, PSC
Elizabethtown, Kentucky

BRIEF FOR APPELLEE:

Albert B. Chandler, III
Attorney General of Kentucky

Dennis W. Shepherd
Assistant Attorney General
Frankfort, Kentucky

⁹ Bell v. Commonwealth, Ky. App., 566 S.W.2d 785 (1978).