

Commonwealth Of Kentucky

Court Of Appeals

NO. 2002-CA-000568-MR

NATHAN REGINALD CLARK

APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE MARY C. NOBLE, JUDGE
ACTION NO. 01-CR-01064

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: BUCKINGHAM, McANULTY, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: Nathan Reginald Clark appeals from a judgment of the Fayette Circuit Court sentencing him to ten years' imprisonment pursuant to a guilty plea, and denying him probation pursuant to KRS 533.060. We affirm.

On October 22, 2001, appellant was indicted for first-degree robbery, as a result of a robbery in which he was one of the participants. On February 8, 2002, appellant pled guilty to the amended charge of second-degree robbery, for which the Commonwealth recommended a sentence of ten years. At the plea hearing, appellant answered affirmatively when asked if he had committed the offense of second-degree robbery. In response to

the court's inquiry, appellant's counsel explained that appellant's version of events was that he knocked on the door to allow two other men, one of whom was armed with a gun, to gain entry to the home.¹ With regard to sentencing, the Commonwealth stated that its position would be that appellant was not eligible for probation pursuant to KRS 533.060.

Appellant moved the court to grant probation, contending that he did not fall within the purview of KRS 533.060, in that he did not personally possess or use the gun, and that he did not plead guilty to an offense statutorily defined as an offense involving a firearm. At the March 1, 2002, sentencing hearing, the court indicated that it believed that KRS 533.060 covered any use of a gun in the events, and therefore that the court did not have any choice but to find appellant not probatable. The court imposed a sentence of ten years' imprisonment, noting appellant's right to appeal the court's denial of the motion to grant probation. This appeal followed.

On appeal, appellant contends that the court erred in finding appellant ineligible for probation under KRS 533.060. KRS 533.060 provides, in pertinent part:

(1) When a person has been convicted of an offense or has entered a plea of guilty to an offense classified as a Class A, B, or C felony and the commission of the offense involved the use of a weapon from which a

¹ At the sentencing hearing, the Commonwealth stated for the record that its set of facts differed from appellant's, in that it was the Commonwealth's position that appellant entered the home with the person who had the gun, and participated in the robbery. (Appellant maintained that he did not enter the home.) The Commonwealth agreed, however, that appellant did not possess the gun.

shot or projectile may be discharged that is readily capable of producing death or other serious physical injury, the person shall not be eligible for probation, shock probation, or conditional discharge . . .

In Pruitt v. Commonwealth, Ky., 700 S.W.2d 68, 69 (1985), our Supreme Court held that KRS 533.060 does not distinguish based upon which participant actually used the weapon.

Appellant was convicted of second-degree robbery, KRS 515.030, which provides:

(1) A person is guilty of robbery in the second degree when, in the course of committing theft, he uses or threatens the immediate use of physical force upon another person with intent to accomplish the theft.

(2) Robbery in the second degree is a Class C felony.

Appellant contends on appeal that second-degree robbery is not a "firearm included offense," and that KRS 533.060 and Pruitt should not extend to offenses that by definition do not involve use of a firearm. We disagree. KRS 533.060, per its plain language, precludes probation where a firearm was used in the commission of an offense, and does not require that the offense be one which by definition involves the use of a firearm. We note that in Pruitt, the appellant, denied probation per KRS 533.060, was convicted of complicity to commit murder, the definition of which does not require that a firearm be used to cause the death. See KRS 507.020. Further, in Fultz v. Commonwealth, Ky. App., 596 S.W.2d 28 (1979), as in the present

case, this Court affirmed the application of KRS 533.060 to an appellant convicted of second-degree robbery.²

In the present case, appellant was convicted of a Class C felony, the commission of which involved the use of a firearm by one of the participants. Accordingly, per KRS 533.060 and Pruitt, we conclude the trial court properly denied appellant's motion to grant probation.

The judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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² The issue raised in the present case was not raised as an issue in Fultz or Pruitt.