

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001624-MR

DAVID LESLIE CASH

APPELLANT

v. APPEAL FROM BRACKEN CIRCUIT COURT
HONORABLE ROBERT I. GALLENSTEIN, JUDGE
ACTION NO. 02-CR-00007

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: JOHNSON, TAYLOR AND VANMETER, JUDGES.

TAYLOR, JUDGE: David Leslie Cash appeals from a July 1, 2002, judgment of the Bracken Circuit Court. We affirm.

On March 22, 2002, the Bracken County Grand Jury indicted appellant on six counts of first degree wanton endangerment, possession of a handgun by a convicted felon and for being a persistent felony offender in the second degree. Appellant subsequently filed a motion to enter guilty plea. The circuit court accepted the plea and set a date for sentencing.

Appellant appeared for sentencing on June 28, 2002, and requested a continuance. Appellant asserted he was eligible for probation with an alternative sentence and requested the continuance to prepare such a plan. The court granted the continuance and postponed sentencing.

Appellant then submitted a memorandum on the issue; wherein, he argued that probation with an alternative sentence was available to him. He further argued the court was compelled to consider probation with an alternative sentence before it could impose a sentence of imprisonment.

By judgment entered July 1, 2002, the circuit court accepted appellant's guilty plea on six counts of first degree wanton endangerment and one count of possession of a handgun by a convicted felon. The persistent felony offender charge was dismissed. Appellant was then sentenced to five years on each count and the sentences were ordered to run concurrently for a total of five years' imprisonment. This appeal follows.

Appellant contends the circuit court erred by failing to recognize probation with an alternative sentence as a distinct sentencing option. Specifically, he asserts the circuit court erred in its interpretation of Kentucky Revised Statutes (KRS) 533.060(2). Appellant also contends the circuit court abused its discretion by failing to rule on his eligibility for probation with an alternative sentence. He

asserts the circuit court "compressed and truncated the sentencing hearing, omitting the critical step of considering the full range of [sentencing] options prior to its ruling."

KRS 533.060(2) explicitly prohibits a convicted felon who commits a felony while on probation from being eligible for "probation, shock probation or conditional discharge." Appellant, however, argues the statute does not prohibit such a person from being eligible for probation with an alternative sentence. To support his contention, appellant argues that KRS 533.010(1) and (2) both identify "probation with an alternative sentencing plan" as separate and distinct from "probation." He contends that although KRS 533.060(2) precludes the possibility of probation, shock probation and conditional discharge, it does not specifically preclude probation with an alternative sentence. He further argues that "[h]ad the legislature intended the term 'probation' to encompass every possible type of probation; there would be no need to set out 'shock probation' as a separate entity under KRS 533.060." Appellant also asserts that pursuant to KRS 533.010, he was entitled to consideration of probation with an alternative sentence before imposition of a sentence of imprisonment.

A review of the record indicates the circuit court did consider probation with an alternative sentence as a distinct sentencing option and did so before imposition of the sentence.

In fact, the circuit court granted appellant's request for a continuance and postponed sentencing to allow counsel to prepare a proposed alternative sentencing plan. Pursuant to the circuit court's order, a hearing was to be "held for the purpose of determining whether the [appellant] should receive a sentence of probation with an alternative sentence."

The circuit judge began the sentencing hearing on July 1, 2002, by stating he had reviewed appellant's memorandum of law in support of probation with an alternative sentence. Furthermore, the circuit court explicitly found in its "Judgment and Sentence on Plea of Guilty," that a term of imprisonment was necessary to protect the public because "[p]robation, *probation with an alternative sentencing plan*, or conditional discharge would unduly depreciate the seriousness of the [appellant's] crime." (emphasis added).

Additionally, the Supreme Court of Kentucky has addressed this very issue in Hughes v. Commonwealth, Ky., 875 S.W.2d 99, 101 (1994). The Court held that when a circuit court has stated in its judgment that "probation with an alternative sentencing plan would unduly depreciate the seriousness of the crime," alternative sentencing is not available to a defendant. Thus, when a circuit court states in a judgment that it has considered probation with an alternative sentence, and has decided against it, the language of the judgment is controlling.

In the case *sub judice*, the circuit court did consider the distinct option of probation with an alternative sentence. The court found, however, that due to the seriousness of appellant's crime the option would not be exercised. The circuit court included this finding in its judgment and, thus, we are of the opinion that the court adequately considered the option. Id.

The circuit court did not, as appellant contends, abuse its discretion by failing to rule on his eligibility for probation with an alternative sentencing plan. As the judgment reflects, the circuit court clearly ruled on the issue and found probation with an alternative sentence was not available to appellant due to the seriousness of the crime.

For the foregoing reasons, the July 1, 2002, judgment of the Bracken Circuit Court is affirmed.

ALL CONCUR.

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