

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000257-MR

NATHAN ALAN ABNER

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE MARY C. NOBLE, JUDGE
ACTION NO. 03-CR-00306

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * * *

BEFORE: DYCHE, GUIDUGLI, AND MCANULTY, JUDGES.

GUIDUGLI, JUDGE: Nathan Alan Abner appeals the Fayette Circuit Court's order which denied his motion for shock probation following his plea to trafficking in marijuana over five pounds with a firearm (KRS 218A.1421(4a) enhanced under KRS 218A.992). The circuit court denied his motion based upon KRS 533.060 which prohibits shock probation to anyone found guilty of a class A, B, or C felony offense and the commission of the offense involved the use of a weapon from which a shot or projectile may be discharged. The Commonwealth argues that since Abner pled guilty to the enhanced charge, he is ineligible for shock

probation pursuant to KRS 533.060. We disagree, thus we reverse and remand.

Abner was indicted on March 18, 2003. The indictment charged the following three offenses:

THE GRAND JURY CHARGES:

COUNT 1:

On or about the 23rd of January 2003, in Fayette County, Kentucky, the above named Defendant trafficked in over five pounds of marijuana, while in possession of a firearm;

COUNT 2:

On or about the 23rd day of January 2003, in Fayette County, Kentucky, the above named Defendant knowingly and unlawfully planted, cultivated or harvested marijuana, with the intent to sell or transfer it, while in possession of a firearm;

COUNT 3:

On or about the 23rd day of January 2003, in Fayette County, Kentucky, the above named Defendant possessed objects used to introduce marijuana into the body and possessed items used in cultivating, growing and planting marijuana;

Following arraignment, pre-trial and several status hearings, Abner appeared in court with his attorney on June 17, 2003, and entered a guilty plea to Count 1 of the indictment (trafficking in marijuana over 5 lbs. with a firearm), Count 3 of the indictment (possession of drug paraphernalia), and an amended charge to Count 2 of the indictment (cultivation of marijuana less than 5 plants - a misdemeanor offense). The plea

agreement included a recommendation by the Commonwealth of ten years on Count 1 and twelve months on Counts 2 and 3. Final judgment and sentence of imprisonment was entered on July 22, 2003. Abner requested probation but the court denied probation due to the seriousness of the offense and the amount of marijuana involved. However, during the sentencing hearing, the trial judge did state that she would consider shock probation at a later date. The court even suggested that a motion for shock probation should be filed in approximately 120 days. No appeal of the July 22, 2003, judgment was filed.

Abner filed a motion for shock probation on November 24, 2003. The Commonwealth filed a response in which it argued, for the first time, that pursuant to KRS 533.060 Abner was not eligible for shock probation. The Fayette Circuit Court denied Abner's shock probation motion on December 16, 2003, based upon KRS 533.060. Abner filed a motion to reconsider that order and argued that KRS 533.060 was not applicable because he had not used a weapon to commit the felony charged. The court denied his motion to reconsider and this appeal followed.

On appeal Abner contends that he did not use any weapons and as such, KRS 533.060 is not applicable in this case. He also argues that KRS 533.060 was not mentioned during plea negotiations nor at either the plea hearing or at the sentencing hearing. The Commonwealth argues that since Abner pled guilty

to the trafficking charge and accepted the enhancement penalty under KRS 218A.992 that he admitted the required nexus between the possession of the firearm and the use of it. See Commonwealth v. Montague, Ky., 23 S.W.3d 629 (2000). In Montague, the Supreme Court of Kentucky held that "when it cannot be established that the defendant was in actual possession of a firearm or that a firearm was within his or her immediate control upon arrest, the Commonwealth must prove more than mere possession. It must prove some connection between the firearm possession and the crime." Id. at 633. Thus, the Commonwealth contends that since Abner pled guilty to possession of the firearm while trafficking he admitted the nexus required to assume that he also used the firearm during the commission of the crime. We do not accept this leap in statutory construction.

First, it should be pointed out that when arrested Abner was not in actual possession of either the marijuana or the firearms seized with the marijuana. The police had responded to Abner's apartment due to an attempted break-in. Once there, the police found the contraband that led to the offenses charged. Under these circumstances, an argument could have been made that the enhancement penalties were not applicable. See Montague, supra; Houston v. Commonwealth, Ky.,

975 S.W.2d 925 (1998). However, that issue is not before this Court.

As to the motion for shock probation, we believe Haymon v. Commonwealth, Ky., 657 S.W.2d 239 (1983), and Darden v. Commonwealth, Ky., 52 S.W.2d 574 (2001), are controlling. In Haymon, the Supreme Court of Kentucky distinguished the terms "possession" and "use" as follows:

The Commonwealth contends that possession of a weapon involves its use; that the intent of the General Assembly was to deter the involvement or presence of weapons in the commission of crimes. Admittedly, the word "use" is subject to such a construction.

On the other hand, the General Assembly took pains to distinguish between being "armed" with a weapon and the "use of a weapon" in the burglary statute. The offense can be committed by one who is only "armed" with a deadly weapon but when dangerous instruments are involved there must be a showing of their use or threatened use. The movant contends, therefore, that mere possession of a weapon constitutes being "armed" with a weapon but "use" of a weapon contemplates that it be employed in some manner in the commission of an offense. This too is a plausible explanation of the meaning of the word "use."

We conclude that the phrase "use of a weapon" as it is used in K.R.S. 533.060(1) is ambiguous in that it is subject to two entirely different but nevertheless logical interpretations. It is not possible to determine which meaning the General Assembly intended to be given to the phrase "use of a weapon" and for that reason the movant is entitled to the benefit of the ambiguity.

Because there was not showing that a weapon was used in any manner to further the commission of the offense, the trial court was in error in his belief that probation was precluded by the statute. This does not mean, of course, that probation should have been granted but only that it should have been granted or denied upon the basis of consideration of the merits of all other relevant factors.

The decision of the Court of Appeals is reversed, and the case is remanded for further consideration of the motion for probation.

Haymon, 657 S.W.2d at 240.

In Darden, our Supreme Court quoted extensively from the Haymon opinion and then added:

We believe the terms "possession of a weapon" and "use of a weapon" are two entirely different concepts. Further, doubts in the construction of a penal statute are to be resolved not only in favor of lenity, but also against a construction that would produce extremely harsh or incongruous results. Commonwealth v. Colonial Stores, Inc., Ky., 350 S.W.2d 465, 467 (1961). Interpreting these terms as one in the same would yield extremely harsh and disproportionate results for the trying of juvenile cases and is clearly not what the legislature intended. This rule of construction, in itself, mandates the reversal of Darden's conviction[.]

Darden, 52 S.W.3d at 577.

While the circuit court refused to grant probation in this case based upon the seriousness of the allegations and the amount of marijuana involved, it was not precluded from

considering probation, shock probation or conditional discharge solely on the basis of KRS 533.060. As such, the order of the Fayette Circuit Court denying Abner's motion for shock probation is reversed and the case remanded for further consideration of the motion for shock probation.

ALL CONCUR.

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