

RENDERED: JANUARY 9, 2009; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-002084-MR

ANTHONY HOPE

APPELLANT

v. APPEAL FROM BRECKINRIDGE CIRCUIT COURT
HONORABLE ROBERT A. MILLER, JUDGE
ACTION NO. 04-CR-00079

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: CAPERTON, DIXON, AND VANMETER, JUDGES.

CAPERTON, JUDGE: The Appellant, Anthony Hope (Hope), appeals the September 6, 2007, order of the Breckenridge Circuit Court, denying his post-judgment motion to modify the sentence imposed upon a guilty plea. After thorough review of the record and applicable law, we affirm.

Hope was indicted in Breckenridge Circuit Court for five counts of sodomy in the first degree (in 2003 and 2004), seven counts of use of a minor in a sexual performance (in 1991, 2002, 2003 and 2004), and four counts of sexual abuse in the first degree (in 1991, 2003, and 2004), as well as persistent felony offender. Hope entered a guilty plea to five counts of sodomy in the first degree pursuant to Kentucky Revised Statutes (KRS) 510.070, seven counts of use of a minor in a sexual performance as set forth in KRS 531.310, and four counts of sexual abuse in the first degree as set forth in KRS 510.110. Hope's guilty plea was accepted, and he was convicted of the aforementioned offenses. The charge of persistent felony offender second degree was dismissed in exchange for Hope's guilty plea to the other offenses. He was sentenced to twenty years imprisonment in accordance with a plea agreement on November 7, 2005. No appeal was taken.

Subsequently, Hope filed a motion for shock probation, and the Commonwealth responded, arguing that he was ineligible for same pursuant to KRS 439.3401. The court summarily denied Hope's motion on April 21, 2006, finding that he was ineligible for probation.

Thereafter, on August 22, 2007, Hope filed a motion to modify his twenty-year sentence of imprisonment to chemical castration as an alternative to incarceration. The Commonwealth objected, and the circuit court denied the motion as frivolous. Hope now appeals that denial to this Court.

Having reviewed the record in this matter, the law in this Commonwealth is clear as it applies to the matter before us. Hope argues that he is

entitled to post-judgment modification of his sentence to probation with an alternative sentencing plan pursuant to KRS 533.010. That provision provides, in pertinent part, as follows:

(1) Any person who has been convicted of a crime and who has not been sentenced to death may be sentenced to probation, probation with an alternative sentencing plan, or conditional discharge as provided in this chapter.

(2) Before imposition of a sentence of imprisonment, the court shall consider probation, probation with an alternative sentencing plan, or conditional discharge. Unless the defendant is a violent felon as defined in KRS 439.3401 or a statute prohibits probation, shock probation, or conditional discharge, after due consideration of the nature and circumstances of the crime and the history, character, and condition of the defendant, probation or conditional discharge shall be granted, unless the court is of the opinion that imprisonment is necessary for protection of the public because:

(a) There is substantial risk that during a period of probation or conditional discharge the defendant will commit another crime;

(b) The defendant is in need of correctional treatment that can be provided most effectively by his commitment to a correctional institution; or

(c) A disposition under this chapter will unduly depreciate the seriousness of the defendant's crime.

It is critical to note that Hope pled guilty to sodomy in the first degree, which classifies him as a violent offender pursuant to KRS 439.3401. That provision, in pertinent part, provides as follows:

(1) As used in this section, “violent offender” means any person who has been convicted of or pled guilty to the commission of:

- (a) A capital offense;
- (b) A Class A felony;
- (c) A Class B felony involving the death of the victim or serious physical injury to a victim;
- (d) The commission or attempted commission of a felony sexual offense described in KRS Chapter 510;
- (e) Use of a minor in a sexual performance as described in KRS 531.310;
- (f) Promoting a sexual performance by a minor as described in KRS 531.320;
- (g) Unlawful transaction with a minor in the first degree as described in KRS 530.064(1)(a);
- (h) Human trafficking under KRS 529.100 involving commercial sexual activity where the victim is a minor;
- (i) Criminal abuse in the first degree as described in KRS 508.100;
- (j) Burglary in the first degree accompanied by the commission or attempted commission of an assault described in KRS 508.010, 508.020, 508.032, or 508.060;
- (k) Burglary in the first degree accompanied by commission or attempted commission of kidnapping as prohibited by KRS 509.040; or
- (l) Robbery in the first degree.

The court shall designate in its judgment if the victim suffered death or serious physical injury.

....

(6) This section shall apply only to those persons who commit offenses after July 15, 1998.

(7) For offenses committed prior to July 15, 1998, the version of this statute in effect immediately prior to that date shall continue to apply.

Accordingly, on the basis of his sodomy conviction alone, it is clear that Hope is a violent offender pursuant to KRS 533.010(2), and accordingly, is ineligible for an alternative sentencing plan.

Finally, we note that even if Hope had been eligible for an alternative sentencing plan, the circuit court was without jurisdiction to modify a sentence more than ten days following the entry of judgment. *See Commonwealth v. Gross*, 936 S.W.2d 85 (Ky. 1996).

Accordingly, for the foregoing reasons, we find that the order of the circuit court denying Hope's post-judgment motion to modify sentence was proper and warranted in light of the law of this Commonwealth. We therefore affirm the decision of the Breckenridge Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Anthony Hope, *Pro Se*
LaGrange, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Gregory C. Fuchs
Assistant Attorney General
Frankfort, Kentucky