

**IMPORTANT NOTICE**  
**NOT TO BE PUBLISHED OPINION**

***THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.***

**Supreme Court of Kentucky**

2003-SC-0230-MR

**FINAL**

DATE                      *E. J. A. Gregory, H.D.C.*  
APPELLANT

ARTHUR GREGORY

V. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE GEOFFREY P. MORRIS, JUDGE  
INDICTMENT NO. 02-CR-001675

COMMONWEALTH OF KENTUCKY

APPELLEE

**MEMORANDUM OPINION OF THE COURT**

AFFIRMING

This matter arises from three criminal acts involving Appellant, Arthur Gregory, all of which occurred in Louisville. The first occurred on May 17, 2002, when Appellant allegedly robbed the Video Castle on LaGrange Road, while armed with a handgun. The next incident occurred on May 26, 2002, when Appellant allegedly entered and robbed the Bigfoot Food Store on Whipps Mill Road; Appellant was armed with a handgun once again. The final incident occurred on June 30, 2002, when Appellant, along with an accomplice, allegedly broke into and removed cash from the Sonic restaurant on Shelbyville Road.

Appellant was subsequently arrested for his participation and entered into a plea agreement with the Commonwealth, where he agreed to participate in continuing criminal investigations of other individuals in exchange for favorable sentencing considerations.

On August 12, 2002, Appellant pled guilty to two counts of first-degree robbery and to one count of third-degree burglary in the Jefferson Circuit Court. Appellant received a twenty-year prison sentence as to each count of first-degree robbery to run concurrently. Appellant was sentenced to five years on the remaining charge to run consecutively to the robbery counts for a prison term totaling twenty-five years.

On January 16, 2003, Appellant filed a pro se motion for shock probation, which the circuit court denied. Appellant filed a motion for leave to file a belated appeal on April 28, 2003. We granted his motion and this appeal followed.

Appellant's principal contention is that his guilty plea was not knowing and intelligent. Appellant states that he entered a guilty plea without realizing he would not be eligible for any type of probated sentence. In addition, while Appellant concedes that the circuit court informed him that he was not eligible for probation, he now claims that it is obvious that he did not have a complete understanding of the situation because he subsequently filed a motion for shock probation. Thus, he contends that he pled guilty to the charges against him without the requisite understanding necessary to enter a plea. We disagree.

A review of the video record in this case demonstrates that Appellant knowingly and intelligently entered a plea. The court first questioned Appellant's defense counsel regarding Appellant's plea. Defense counsel stated that he explained to Appellant his rights numerous times. Defense counsel further stated that it was his belief that Appellant understood his constitutional rights and the current legal proceedings. Additionally, defense counsel informed the court that he recommended to Appellant that he accept the Commonwealth's offer. Also, defense counsel told the court that he had

discussed the offer with Appellant in great detail and that he believed Appellant understood such.

The circuit court then proceeded to address Appellant directly regarding his decision to enter a plea of guilty. In response to questioning from the judge, Appellant stated that he was aware that he was giving up his right to a trial by jury. Appellant waived his right to confront and cross-examine any witnesses the Commonwealth might summon to testify against him. Appellant further made it known that he understood that the court was not bound by the Commonwealth's sentencing recommendation. Appellant also told the court he was aware that he was forfeiting all of his rights by entering into a plea agreement with the Commonwealth.

The record further shows that the circuit court discussed probation and parole eligibility with Appellant. The judge asked Appellant if the pre-sentence investigation (PSI) report, and the fact that a judge cannot probate a defendant when a handgun is used during the commission of first-degree robbery, had been explained to him. Appellant acknowledged that this had been explained to him and that he wished to waive the PSI report and be sentenced that very day. The video record in this case clearly reveals that Appellant's plea was entered knowingly, intelligently, and voluntarily.

Additionally, Appellant's assertion that his pro se motion for shock probation is evidence that he lacked the understanding required to enter a plea is not persuasive. We note that shock probation is a type of probation. Wilson v. Commonwealth, Ky. App., 839 S.W.2d 17, 19 (1992). Further, a prohibition against probation encompasses a prohibition against shock probation. Porter v. Commonwealth, Ky. App., 869 S.W.2d 48, 49 (1993). Here, the circuit court lacked the authority to probate Appellant under

KRS 533.060(1)<sup>1</sup>, as Appellant pled guilty to two counts of first-degree robbery, a Class B felony, where he was armed with a handgun. As noted above, Appellant, in open court, acknowledged that he understood that the judge could not grant him probation. As such, we deem this assertion to be devoid of merit.

Appellant's principal argument regarding his plea was not preserved for appellate review. However, Appellant requests this Court to review this case pursuant to the palpable error rule, RCr 10.26.

An allegation of error that is not properly preserved for review before this Court "may be revisited upon a demonstration that it resulted in manifest injustice." Butcher v. Commonwealth, Ky., 96 S.W.3d 3, 11 (2002); RCr 10.26. "Manifest injustice" means that the alleged error must have prejudiced the substantial rights of the accused. Castle v. Commonwealth, Ky. App., 44 S.W.3d 790, 793 (2000) (quoting Brock v. Commonwealth, Ky., 947 S.W.2d 24, 28 (1997)). Here, we find nothing to indicate that a "manifest injustice" occurred, i.e., the circuit court's acceptance of Appellant's guilty plea in no way prejudiced Appellant's substantial rights. As previously stated, the video record in this case clearly reveals that Appellant's plea was entered knowingly, intelligently, and voluntarily. We can find no error in this matter, palpable or otherwise.

Accordingly, we affirm the judgment of the Jefferson Circuit Court.

All concur.

---

<sup>1</sup> KRS 533.060(1) provides: "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 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. . . ."

COUNSEL FOR APPELLANT:

John Palombi  
Assistant Public Advocate  
Department of Public Advocacy  
100 Fair Oaks Lane, Ste. 302  
Frankfort, KY 40601

COUNSEL FOR APPELLEE:

Gregory D. Stumbo  
Attorney General  
Capitol Building  
Frankfort, KY 40601

Michael Harned  
Assistant Attorney General  
Office of Attorney General  
Criminal Appellate Division  
1024 Capital Center Drive  
Frankfort, KY 40601-8204

John R. Tarter  
Office of the Attorney General  
Criminal Appellate Division  
1024 Capital Center Drive  
Frankfort, KY 40601