

Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-001170-MR

MICHAEL CHAD WEBB

APPELLANT

v. APPEAL FROM WARREN CIRCUIT COURT
HONORABLE JOHN R. GRISE, JUDGE
ACTION NO. 15-CR-00233

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON, STUMBO AND THOMPSON, JUDGES.

STUMBO, JUDGE: Michael Chad Webb appeals from a Judgment and Sentence of the Warren Circuit Court in which the court declined to probate Webb's term of imprisonment. We find no error and AFFIRM the Judgment and Sentence on appeal.

Michael Chad Webb entered an Alford plea in Warren Circuit Court to two counts of Sexual Abuse in the First Degree against a victim under twelve years old. The guilty plea executed by Webb included his acknowledgement that he was not eligible for probation. The Commonwealth recommended concurrent eight-year sentences.

At the sentencing, Webb's counsel argued that he was eligible for probation. In support of the argument, his counsel noted that a risk evaluator reported that Webb did not seem oriented toward children as sexual partners. The court considered Webb's argument and determined that *Stull v. Commonwealth*, 443 S.W.3d 10 (Ky. App. 2014), operated to bar the application of probation under the facts before it. The court did not rule on Webb's request for probation and sentenced him to concurrent eight-year terms in accordance with the Commonwealth's recommendation. This appeal followed.

Webb now argues that the Warren Circuit Court erred in failing to order probation. After acknowledging that the determination of whether to grant probation is left to the sound discretion of the trial court, Webb maintains that the denial of probation is nevertheless a permissible ground for appeal. The focus of Webb's argument is that the Warren Circuit Court erred in failing to exercise its discretion when it determined that it was statutorily barred from considering probation for the charged offenses. Webb asserts that there is a definitional distinction between the term "violent felon" in Kentucky Revised Statute (KRS)

533.010(2) and “violent offender” in KRS 439.3401, and that KRS 532.047 does not prohibit probation for persons convicted of first-degree sexual abuse. He also argues that the general statute addressing probation, KRS 533.010, overrides the specific prohibition set out in KRS 532.047. In sum, Webb maintains that the phrase “violent offender” as defined in KRS 439.3401 is not the same as a violent offender addressed in KRS 532.047, and that the Warren Circuit Court erred in failing to so rule.

In *Stull, supra*, a panel of this Court addressed the application of probation to a defendant convicted of Sexual Abuse in the First Degree. The *Stull* defendant - Steven Stull - was indicted on one count of Sexual Abuse in the First Degree, which carried a penalty range of one to five years in prison. The crime was committed against his seventeen-year-old stepdaughter, a person with whom Stull was in a position of special trust. Stull accepted a plea offer of one year in prison, with no recommendation as to probation. At sentencing, the trial court concluded that Stull was ineligible for probation pursuant to KRS 532.040 because he qualified as a “violent offender” under to the provisions of KRS 439.3401(1)(e).

On appeal, Stull argued that the trial court erred by concluding that he was ineligible for probation. In addressing this question, the Court stated that,

The provisions of KRS 532.047 prohibit probation for anyone designated as a violent offender under the provisions of KRS 439.3401. A *violent*

offender (emphasis original) is defined as “any person who has been convicted of or pled guilty” to “the commission or attempted commission of a felony sexual offense described in KRS Chapter 510.” The crime of first-degree sexual abuse is codified in Chapter 510 at KRS 510.110. Thus, ***one who is convicted of first-degree sexual abuse qualifies as a violent offender pursuant to the provisions of KRS 439.3401 and is, therefore, ineligible for probation.*** (Emphasis added).

Stull, 443 S.W.3d at 11.

In considering Webb’s argument below, the Warren Circuit Court acknowledged this holding, and it was the application of *Stull* that formed the basis for the court’s implicit denial of probation. Webb asserts that the Warren Circuit Court did not exercise its discretion, i.e., that it failed to consider his request for probation and in so doing committed reversible error. This contention is refuted by the record. The Warren Circuit Court expressly considered Webb’s request for probation. The court analyzed the Legislature’s reasoning behind the respective statutory provisions limiting probation as to violent offenders, and noted that the Legislature had, through statutory enactment, strictly limited trial courts’ discretion in this area. Further, the court relied upon and cited *Stull* for the proposition that a person who is convicted of Sexual Abuse in the First Degree is a violent offender pursuant to the provisions of KRS 439.3401 and is therefore ineligible for probation.

Stull resolved the issue which Webb now raises, and the Warren Circuit Court properly so concluded. *Stull* is clear that a person convicted of Sexual

Abuse in the First Degree is a violent offender pursuant to the provisions of KRS 439.3401 and is therefore ineligible for probation. The Warren Circuit Court correctly applied *Stull* to Webb's request for probation and we find no error. For the foregoing reasons, we AFFIRM the Judgment and Sentence of the Warren Circuit Court.

CLAYTON, JUDGE, CONCURS.

THOMPSON, JUDGE, CONCURS IN RESULT ONLY.

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