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Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-001951-MR

GIL FAVOR LUNDY

APPELLANT

v. APPEAL FROM WARREN CIRCUIT COURT
HONORABLE THOMAS R. LEWIS, JUDGE
ACTION NO. 00-CR-00191

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
VACATING and REMANDING
** ** * * * * *

BEFORE: BARBER, McANULTY, AND SCHRODER, JUDGES.

McANULTY, JUDGE: Appellant Gil Lundy appeals from a judgment of the Warren Circuit Court which convicted him of trafficking in marijuana, five pounds or more (KRS 218A.1421(4)), and being a persistent felony offender (PFO) in the first degree (KRS 532.080(3)), and sentenced him to 10 years imprisonment. We now vacate the decision of the trial court and remand for proceedings consistent with this opinion.

In January of 2000, police officers were looking for appellant in an attempt to execute a warrant for his arrest.

They found him at the apartment of his girlfriend, Shelley Tabor. When officers approached the residence, appellant attempted to slip out a back window. However, an officer apprehended appellant and brought him back into the apartment. Once there, appellant was placed under arrest and escorted to a police car waiting outside.

According to the officers, appellant was read his Miranda rights twice at this time. Meanwhile, other officers had obtained permission from Tabor to search her vehicles and apartment. An officer asked appellant if there was anything they should know before beginning the search and, according to the officers, appellant admitted that he had left marijuana in his girlfriend's car without her knowledge. A search of the car did indeed turn up a large quantity of marijuana, and a search of Tabor's residence revealed several marijuana cigarettes. Tabor was arrested for possession of marijuana.

Appellant was eventually indicted by a grand jury on the above-referenced charges. At trial, the Commonwealth called Tabor as a witness. After she answered some introductory questions, Tabor refused to answer any questions regarding the marijuana found in her car, or any phone conversations she had with police. Instead, she asserted her Fifth Amendment right against self-incrimination. The court threatened Tabor with contempt, but ultimately appointed an attorney to represent her, and excused her until the following day.

When Tabor returned the next day, her attorney informed the court that Tabor intended to continue asserting her privilege. The court directed the Commonwealth to call Tabor back to the stand. Both parties continued with their examinations. Finally, the court declared Tabor to be an unavailable witness, and her taped confession to police was played in open court. At the end of the proceedings, appellant was convicted and sentenced to 10 years imprisonment.

Appellant first alleges that the trial court dealt improperly with Tabor and her reluctance to testify. The Commonwealth disagrees, claiming that no matter how the trial court dealt with Tabor, the court's actions do not amount to reversible error. We find, however, that the trial court failed to make a proper inquiry into Tabor's assertion of constitutional immunity in this case, and erred in directing her to take the stand. Furthermore, we believe it was error to admit her statement after she refused to testify. Therefore, we vacate and remand for a new trial.

[I]t is uniformly recognized that it is for the court and not the witness to say whether refusal to answer is justified.@ Young v. Knight, Ky., 329 S.W.2d 195, 201 (1959). Indeed, it is incumbent upon the court to conduct a thorough examination of a witness claiming privilege from self-incrimination. As this court has explained:

If it appears to the court that a responsive answer to a question propounded would furnish a necessary link in the chain of evidence which might implicate or convict the witness, he may properly claim his constitutional privilege. . . . The particular question which a witness refuses to answer may not be considered in isolation. In adjudicating the right of immunity the court must be able to discern from the character of the questions and the other facts adduced in the case some tangible and substantial probability that the answer of the witness might help to convict him of a crime.

Young, supra, at 201 (citations omitted).

Further, this court has clearly set out what a court must examine in order to determine whether a witness can rightfully assert the Fifth Amendment privilege. In Commonwealth v. Getty, Ky. App., 610 S.W.2d 899 (1980), we wrote:

First, the trial court should endeavor to make a thorough examination of the questions to be asked to determine whether or not responsive answers would be incriminating. Second, the trial court must determine, taking into account any peculiar facts known to it, what crimes might reasonably be anticipated to be elicited by responsive answers on the part of the witness claiming the privilege.

Getty, supra, at 901.

In Owsley v. Commonwealth, Ky., 458 S.W.2d 457 (1970), our Supreme Court reiterated the procedure to be followed when a witness attempts to assert her or his Fifth Amendment privilege. In regards to a particular witness in that case, the court wrote,

The procedure that should have been followed when Mrs. Owsley declined to answer questions on the ground that it was her Fifth Amendment

privilege to remain silent was for the judge to withdraw to his chambers and there permit Mrs. Owsley to state the basis of her privilege. The judge should have then decided . . . whether Mrs. Owsley's refusal to answer the questions was justified.

Owsley, at 462.

There is no evidence in the record that the trial court conducted any examination into Tabor's ability to assert her Fifth Amendment privilege. The videotape record of the trial shows only that Tabor was called as a witness twice at the request of the court. Each time, attorneys told the court that Tabor planned on asserting her Fifth Amendment privilege; each time she recited that claim on the stand in front of the jury. The court did not seek to ascertain what types of questions Tabor would refuse to answer; instead, it directed Tabor to take the stand and required both the prosecuting and defense attorneys to examine her for almost ten minutes, eliciting only her assertion of her Fifth Amendment right. No in camera hearing was held to determine how answering those questions could potentially incriminate Tabor.

The trial court should have followed the steps outlined above in Owsley once Tabor elected to assert her Fifth Amendment privilege. In not doing so, we believe the court committed reversible error. Moreover, it was error for the exchange to take place before the jury. We do not find the errors to have

been harmless. Therefore, we vacate the court's holding and remand for a new trial.

In addition, we are compelled to point out that it was erroneous for the Commonwealth to introduce Tabor's statement after she asserted her right not to testify. To admit the witness' statement under such circumstances violates the accused's Fifth Amendment right to confront witnesses against him. Bush v. Commonwealth, Ky., 839 S.W.2d 550, 553 (1992).

Since we are remanding this case for a new trial, we feel it is necessary to comment on those claims of error in appellant's brief that we believe may recur on retrial. Appellant alleges that the trial court committed reversible error when it did not allow defense counsel to question potential jurors about penalty ranges during voir dire. A party may voir dire jurors on their ability to consider the full range of penalties for each indicted offense, in accordance with the directives of Lawson v. Commonwealth, Ky., 53 S.W.3d 534, 544 (2001).

Appellant also claims the court erred in overruling his motion to suppress without first holding an evidentiary hearing, as is mandatory pursuant to RCr 9.78 and Mills v. Commonwealth, Ky., 996 S.W.2d 473, 480-81 (1999), cert. denied, 528 U.S. 1164, 145 L.Ed.2d 1088, 120 S.Ct. 1182 (2000). The Commonwealth concedes that the trial court erred in denying appellant's motion

without a hearing. On remand, if the same motion is made, an evidentiary hearing is required under the Rule. Mills, at 481.

We do not reach the question of whether the trial court erred in failing to declare a mistrial after a witness testified to hearsay as to the content of information police received from a confidential informant. We believe this matter can be dealt with upon retrial by an appropriate motion in limine, and this precise issue is unlikely to recur.

Based on the foregoing, we hereby vacate the judgment of the trial court and remand for a new trial.

ALL CONCUR.

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