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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2001-CA-001652-MR

RENNIE D. WARFIELD

APPELLANT

v. APPEAL FROM SCOTT CIRCUIT COURT
HONORABLE PAUL F. ISAACS, JUDGE
ACTION NO. 00-CR-00112

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING AND REMANDING
** **

BEFORE: COMBS, CHIEF JUDGE; VANMETER AND TACKETT, JUDGES.

TACKETT, JUDGE: Rennie Warfield appeals from the judgment of the Scott Circuit Court finding him guilty of first-offense driving under the influence, no operator's license, terroristic threatening (two counts), first-degree wanton endangerment and being a second-degree persistent felony offender. Warfield raises numerous issues on appeal, the most persuasive being that the trial court improperly allowed the jury to consider penalty information on the misdemeanor offenses during the guilt phase

of the trial, contrary to the Kentucky Supreme Court's subsequent certification of the law in Commonwealth v. Philpott, Ky., 75 S.W.3d 209 (2002). We therefore reverse the judgment of the trial court and remand this case for further proceedings.

On the night of his arrest, Warfield was driving on highway 227 in Scott County. Sheriff's Deputy Wayne Humphrey was patrolling the area searching for an erratic driver who had been reported by the Sheriff's Department's dispatcher. Humphrey was also driving along highway 227 when he spotted a car driving towards him from the opposite direction. The driver had his hand on the steering wheel, but his head was bobbing up and down and he was leaning over in his seat. The oncoming vehicle began to veer into Humphrey's lane across the center line and the deputy was forced to swerve off the road into a ditch where he narrowly avoided a rock wall.

Humphrey pulled out of the ditch, turned around and followed the vehicle which was now driving north in the southbound lane of 227. The driver turned into a residential driveway and Humphrey followed him and approached the car. Warfield was sitting in the driver's seat trying to restart the stalled vehicle. Humphrey instructed him to stop trying to restart the car and, when Warfield ignored him, Humphrey removed the keys from the ignition and told Warfield to exit the vehicle. Warfield was unable to open the car door unassisted,

smelled strongly of alcohol, and stumbled while trying to get out of the car. In addition, Humphrey saw an empty fifth bottle of vodka in the car. Warfield was too inebriated to perform the field sobriety tests and stated that he had consumed six beers prior to driving. The portable breathalyzer test indicated the presence of alcohol in Warfield's system.

Humphrey placed Warfield under arrest and Warfield became very belligerent, cursing and threatening to beat up the deputy. He banged his head against the glass repeatedly after he was placed inside Humphrey's cruiser. A computer check revealed that Warfield did not have an operator's license. During this time, Deputy Karen Kendrick arrived to transport Warfield to the jail where she would administer the intoxilizer test to determine his blood alcohol level. Kendrick was certified to administer this test while Humphrey was not. She drove Humphrey's cruiser to the jail because hers did not have the protective glass partition between the front and back and back seats of the car. Meanwhile, Humphrey waited for a truck to tow Warfield's car from the spot where the arrest had occurred.

While driving Warfield to the jail, Kendrick was conducting the mandatory observation period prior to administering the intoxilizer test. During this time, he yelled, kicked at the protective glass, tried to get his cuffed hands in front of him and made sexually profane and threatening

remarks to Kendrick. When they arrived at the jail, it took several people to get Warfield out of the cruiser and into the observation area. Kendrick noted that his speech was slurred, he had very red eyes, a strong odor of alcohol, and difficulty sitting upright. Warfield again admitted that he had been drinking prior to driving his father's car and continued his threats and sexual comments toward Kendrick in the presence of employees at the jail. At the end of the observation period, he refused to sign the implied consent form or submit to the intoxilizer test.

Warfield was indicted and charged with first-degree wanton endangerment based on his driving under the influence and endangering the life of Deputy Humphrey by driving on the wrong side of the road. In addition, he was charged with being a second-degree persistent felony offender, and the misdemeanor offenses of DUI, no operator's license and terroristic threatening towards the two deputies, Humphrey and Kendrick. A jury found him guilty of all offenses and he received a sentence of ten years' imprisonment. This appeal followed.

On appeal, Warfield raises several issues including jury selection, evidentiary issues, the trial court's failure to declare a mistrial, the denial of Warfield's request for a directed verdict, and sentencing information which was given to the jury during the guilt phase of the trial. It is the latter

issue which requires reversal in this case; however, we will briefly address the remaining issues to the extent that they may be relevant to a retrial of this matter. Warfield claims that the trial court improperly allowed jurors with personal ties to witnesses for the Commonwealth to be seated; however, the issue is now moot as we are reversing his conviction for an unrelated reason. In addition, he contends that the trial court erred in denying his motion for a mistrial due to the admission of hearsay testimony regarding prior bad acts which was the subject of a pretrial order excluding the testimony. Again, since this case is reversed on other grounds, the issue is now moot.

The following issues, while not relating our decision reversing Warfield's conviction, may also be present on retrial of the case: the trial court's decisions denying Warfield's motion for a directed verdict, excluding evidence of a romantic relationship between the two deputies involved in his arrest, and admitting a photograph taken of Warfield after he was arrested. The trial court correctly denied Warfield's motion for a directed verdict because the evidence that his conduct in driving under the influence of alcohol and forcing Humphrey's cruiser off the road created a substantial risk of death or serious physical injury was sufficient to allow the jury to determine his guilt on the charge of first-degree wanton endangerment. Further, the trial court correctly determined

that a romantic relationship between Humphrey and Kendrick, which began between the time of Warfield's arrest and his jury trial, was not sufficiently probative of their bias against him in charging him with multiple counts of criminal conduct to allow Warfield to use it to impeach their testimony against him on cross-examination. Finally, on retrial the trial court should not admit the mug shot of Warfield taken after his arrest. The Commonwealth argued at trial that the photograph was evidence which tended to prove that he was intoxicated. It is difficult to perceive how a black and white photograph can be evidence of intoxication. Moreover, there was ample evidence supporting the conclusion that Warfield was intoxicated, including the empty alcohol bottle in his car, Warfield's admission that he had drunk alcohol prior to driving, his inability to complete the field sobriety tests, the odor of alcohol on his person, and his reddened eyes. Given the wealth of admissible evidence available to the Commonwealth, we are unable to agree that the photograph of Warfield is more probative than prejudicial and, therefore, it should be excluded.

The issue upon which our decision to reverse this case rests involves the admission of sentencing evidence during the guilt phase of Warfield's trial. At the close of the guilt phase, the trial court instructed the jury on the elements of

both the felony and misdemeanor charges. In addition, the trial court's instructions included the penalties for each misdemeanor charge and instructed the jury that they were to sentence him for those charges accordingly if he were found guilty of any misdemeanors. The Kentucky Supreme Court has previously set forth the procedure for instructing a jury in cases where a defendant is tried on both felony and misdemeanor charges as follows:

We hold now that in the trial of a "felony case," *i.e.*, any trial in which a jury could return a verdict of guilty of a felony offense, the jury shall not be instructed on the penalty ranges of any offense, whether the primary or a lesser included offense. If, upon the conclusion of such a trial, the jury returns a verdict of guilty of a lesser included misdemeanor offense, no additional evidence shall be admitted, the jury shall immediately be instructed on the penalty range for that offense, and the attorneys shall be allowed additional argument only on the issue of punishment, following which the jury shall retire to deliberate its verdict on that issue. If, upon the conclusion of the trial of a multicount indictment, the jury returns verdicts finding the defendant guilty of both felony and misdemeanor offenses, and if either of the parties intends to offer evidence pursuant to [Kentucky Revised Statute] 532.055(2), the procedure described in the preceding sentence shall first be followed with respect to the misdemeanor convictions, after which the procedure described in KRS 532.055(2) and (3) shall be followed with respect to the felony convictions.

Philpott at 213. (Citations omitted.) The Philpott case was decided subsequent to Warfield's trial; consequently, the trial court, through no fault of its own, improperly instructed the jury on the penalties for the misdemeanor offenses before Warfield had been found guilty of either felony or misdemeanor offenses. Therefore, pursuant to the Supreme Court's certification of the law in Philpott, we are required to reverse Warfield's case and remand it to the trial court with instructions to follow the jury instruction procedure outlined in above.

For the foregoing reason, the judgment of the Scott Circuit Court is reversed and this case is remanded for further proceedings consistent with this opinion.

COMBS, CHIEF JUDGE, CONCURS.

VANMETER, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

VANMETER, JUDGE, DISSENTING: Respectfully, I dissent. Under the standard for palpable error established in Commonwealth v. Pace, Ky., 82 S.W.3d 894 (2002), and upon consideration of the whole case, I do not believe there is a substantial possibility that the result would have been any different if the jury had been instructed correctly. In fact, the evidence of appellant's guilt is much more compelling in this case than it was in Pace.

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