

Commonwealth of Kentucky
Court of Appeals

NO. 2001-CA-002163-MR

RICHARD E. STINNETT

APPELLANT

v. APPEAL FROM WARREN CIRCUIT COURT
HONORABLE JOHN D. MINTON, JR., JUDGE
ACTION NO. 01-CR-00017

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING and REMANDING

** ** * * * * *

BEFORE: EMBERTON, CHIEF JUDGE; BAKER and HUDDLESTON, JUDGES.

EMBERTON, CHIEF JUDGE. Richard Stinnett was indicted and charged with burglary in the second degree, criminal mischief first degree, theft by unlawful taking under \$300, and being a persistent felony offender, second degree. A jury found Stinnett guilty of three lesser-included misdemeanors and was instructed on the sentencing ranges but was not instructed as to whether the sentences should run concurrently or consecutively. The jury returned a recommended sentence of ninety days and a \$250 fine on the trespass and theft charges and sixty days and a \$125 fine on the criminal mischief charge. The court imposed

the terms of imprisonment as recommended by the jury and ran the sentences consecutively for a total of 240 days. Stinnett was released from payment of the fines.

Stinnett maintains that the jury should have been instructed on whether to run the sentences concurrently or consecutively. He did not object when the instructions were given, thus review is proper only under RCr¹ 10.26, the palpable error rule.

KRS² 532.055 states:

- (1) In all felony cases, the jury in its initial verdict will make a determination of not guilty, guilty, guilty but mentally ill, or not guilty by virtue of insanity, and no more.
- (2) Upon return of a verdict of guilty or guilty but mentally ill against a defendant, the court shall conduct a sentencing hearing before the jury, if such case was tried before a jury. In the hearing the jury will determine the punishment to be imposed within the range provided elsewhere by law. The jury shall recommend whether the sentences shall be served concurrently or consecutively. (Emphasis added).

. . . .

¹ Kentucky Rules of Criminal Procedure.

² Kentucky Revised Statutes.

In Lawson v. Commonwealth,³ the court emphasized the importance of the jury's recommendation as to whether felony sentences are to run concurrently or consecutively:

Although we recognize that trial courts have the authority to make a final decision whether a defendant's sentences are to run concurrently or consecutively, and that juries' determinations as to that issue are merely recommendations, we decline the Commonwealth's invitation to find that the error in this case is harmless. While this Court has held that a defendant in an RCr 11.42 context could not satisfy his burden of proving prejudice as to a comparable error because of the trial court's ultimate authority to decide whether multiple felony sentences run concurrently or consecutively, in Stoker v. Commonwealth, [Ky., 828 S.W.2d 619 (1992)], a majority of this Court rejected the contention errors in concurrent/consecutive jury instructions will be harmless because the trial court makes the ultimate decision. This Court has recognized that a jury's recommendation as to concurrent or consecutive sentencing is far from meaningless or pro forma, and that the jury's recommendation in this regard has "significance, meaning, and importance."⁴ (Footnotes omitted).

As the Commonwealth points out, Lawson, supra, involved felony sentences and therefore it argues neither that decision nor the sentencing provisions of KRS 532.055(2), are applicable where the jury has found the accused guilty of only

³ Ky., 85 S.W.3d 571 (2002).

⁴ Id. at 581.

misdemeanor offenses. In view of the Supreme Court's decision in Commonwealth v. Philpott,⁵ we disagree. In Philpott, the court directly addressed the applicability of the "truth-in-sentencing" statute where the defendant is indicted for a felony offense but convicted of a lesser-included misdemeanor offense. The court concluded that KRS 532.055(1) applied, requiring that the jury consider first the guilt of the accused, and it was erroneous for the trial court to include the penalty ranges of any offense, including a misdemeanor, in the guilt phase instructions. The court summarized the procedure after the guilty phase 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

⁵ Ky., 75 S.W.3d 209 (2002).

evidence pursuant to KRS 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.⁶ (Citations omitted).

The "issue of punishment" necessarily includes a recommendation on whether two or more sentences are to run concurrently or consecutively and the defendant is entitled to a recommendation from the jury.

Although it is ultimately the trial court's decision, KRS 532.055(2) mandates that the jury make its recommendation.⁷ We find that the trial court's failure to so instruct the jury is palpable error. The jury found Stinnett guilty only of misdemeanors and did not impose the maximum sentence on all charges. Under the circumstances, it is possible that the jury would have recommended concurrent sentences.

The judgment is reversed to the extent that it orders the sentences to be run consecutively and remanded to the trial court for a new sentencing hearing. The arguments concerning the issue of punishment may be presented after which the jury shall be instructed regarding its recommendation of whether the

⁶ Id. 213-14.

⁷ Lawson, supra.

sentences are, in whole or in part, to run concurrently or consecutively.

ALL CONCUR.

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