

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2001-CA-002505-MR

SHANE PRIDHAM

APPELLANT

v. APPEAL FROM MEADE CIRCUIT COURT  
HONORABLE ROBERT A. MILLER, JUDGE  
ACTION NO. 00-CR-00119

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

REVERSING AND REMANDING

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BEFORE: BUCKINGHAM, GUIDUGLI AND McANULTY, JUDGES.

GUIDUGLI, JUDGE. Shane Pridham (hereinafter "Shane") has appealed from the Meade Circuit Court's October 26, 2001, Judgment and Sentence on a Jury Verdict of Guilty on charges of Trafficking in a Controlled Substance (methamphetamine), 1<sup>st</sup> degree<sup>1</sup>, Possession of Drug Paraphernalia<sup>2</sup>, and Possession of Marijuana<sup>3</sup>. Pridham received a sentence of ten years for the

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<sup>1</sup> KRS 218A.1412.

<sup>2</sup> KRS 218A.500(2).

<sup>3</sup> KRS 218A.1422.

trafficking charge and twelve-month sentences for each possession charge, to be served concurrently for a total of ten years. Having considered the record, the parties' briefs, and the applicable case law, we reverse and remand for a new trial.

On July 24, 2000, the Kentucky State Police drug enforcement division, led by Detective Gerald Wilson (hereinafter "Detective Wilson"), was investigating a report of methamphetamine manufacturing, and during the course of this investigation obtained and simultaneously served two search warrants. One warrant was served at the location of the suspected methamphetamine laboratory, and the other was served on the residence of Russell Tim Pridham (hereinafter "Tim"), who is Shane's father. Trooper (now Detective) Terry Young (hereinafter "Trooper Young"), along with two deputies, served the search warrant at Tim's residence. Upon entry, he saw Tim's girlfriend Pam Straney (hereinafter "Pam") on the couch, and discovered from her that other people were in the residence. After pounding on a locked bedroom door three times and identifying themselves as police officers, they forced their way into the bedroom. Inside, they found Shane, Tim, Shane's girlfriend Kim Campbell (hereinafter "Kim") and Jackie Allen. Trooper Young secured the room and removed the occupants of the residence to the front yard. Detective Wilson conducted a search of the residence and seized several items, including

substances later determined to be methamphetamine and marijuana, glass vials, a box of plastic bags, scales, a telephone, a scanner, and a knife.

On September 7, 2000, the grand jury indicted Shane on charges of Manufacture of Methamphetamine<sup>4</sup>, trafficking in methamphetamine, and possession of drug paraphernalia and marijuana. On the Commonwealth's motion, the trial court dismissed the manufacturing charge by order entered September 13, 2001. The matter proceeded to a trial by jury on October 9, 2001. The Commonwealth presented evidence from Trooper Young, Sergeant Jerry Hopson (hereinafter "Sergeant Hopson"), and Detective Wilson. Sergeant Hopson is the administrative sergeant in charge of the evidence room, and his testimony only concerned the preservation of the evidence collected. On advice of counsel, Shane waived any claim regarding custody of the evidence and agreed to stipulate the laboratory results. Both Trooper Young and Detective Wilson testified concerning their July 24, 2000, service of the search warrant and the search conducted that day at Tim's residence.

At the close of the Commonwealth's case, Shane moved the trial court to direct a verdict in his favor because the Commonwealth introduced no evidence to allow a reasonable jury to find him guilty of trafficking or possession. After the

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<sup>4</sup> KRS 218A.1432.

trial court denied the motion, Shane briefly recalled Trooper Young. Shane renewed his motion for a directed verdict at the close of his case, which was again denied. Following deliberation, the jury returned with guilty verdicts on each of the three remaining charges in the indictment. In the penalty phase, the jury recommended consecutive sentences of ten years, twelve months and twelve months for a total of twelve years. Following the sentencing hearing, the trial court entered its final judgment and sentence on October 26, 2001, adjudging Shane guilty of the three offenses and ordering concurrent sentences for a total of ten years. This appeal followed.

In his brief, Shane presents four arguments for this Court to review: 1) whether the trial court erred in denying the motion for a directed verdict; 2) whether the trial court properly allowed Trooper Young to testify as an expert on drug trafficking; 3) whether the Commonwealth committed reversible error in the closing argument; and 4) whether the trial court improperly curtailed defense counsel's cross-examination of Trooper Young regarding statements allegedly made by Tim. The Commonwealth has responded to each of Shane's argument in its brief.

Shane first argues that the trial court should have granted his motion for a directed verdict because the Commonwealth failed to offer any evidence linking Shane to the

drugs in Tim's bedroom. On the other hand, the Commonwealth argues that a reasonable juror could infer guilt based upon the circumstances and upon the amount of controlled substances and paraphernalia seized during the execution of the search warrant.

In Commonwealth v. Benham, Ky., 816 S.W.2d 186 (1991), our Supreme Court addressed the directed verdict rule in this Commonwealth:

On motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given. For the purpose of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but reserving to the jury questions as to the credibility and weight to be given to such testimony.

Id. at 187. Furthermore, the Supreme Court stated that, "[o]n appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal." Id.

In reviewing the evidence presented at trial, we agree with the Commonwealth that there was sufficient evidence introduced, which, in the light most favorable to the Commonwealth, would allow a reasonable jury to find Shane guilty of the charges. Although we agree with Shane's contention that

"one's mere presence at the scene of a crime is not evidence that such one committed it or aided in its commission," Rose v. Commonwealth, Ky., 385 S.W.2d 202, 206 (1964), we believe that the evidence introduced in the instance case was sufficient to overcome a motion for directed verdict. Police officers found Shane inside of a locked bedroom with three other individuals after having to break down the door despite repeated requests for them to open it; a large quantity of methamphetamine was seized from various locations in the room, some of which was already packaged for sale; several items used either to prepare methamphetamine for sale or to use methamphetamine were recovered from the room; and marijuana was seized from several locations in the room. Although much of the contraband was found in the safe in Tim's closet, in Tim's room, in Tim's house, the evidence was sufficient to allow the case to go to the jury as it was not clearly unreasonable for a jury to find guilt. Therefore, the trial court properly denied Shane's motion and renewed motion for a directed verdict.

Shane next argues that Trooper Young was not qualified to testify as an expert on drug trafficking, and that the trial court erred in allowing him to testify in that regard. The Commonwealth elicited the testimony in question during its direct examination of Trooper Young, when the prosecutor asked him, "Detective, to your eye, was there any readily apparent

reason why four adult persons would be congregated in a locked bedroom at that time of the day?" In response, Trooper Young answered, "It appeared to be some type of drug transaction." Defense counsel immediately objected following Trooper Young's response, arguing that the answer was conclusory. The trial court overruled the objection, noting that the witness had already answered the question.

The Commonwealth argues that the trial court properly overruled the objection because it was untimely made. Furthermore, defense counsel did not request an admonition from the trial court. Regardless, the Commonwealth argues that Trooper Young's testimony did not harm Shane because he did not implicate Shane in the statement and therefore any possible error was harmless.

Our review of the evidence indicates that the Commonwealth was not attempting to elicit expert testimony from Trooper Young. The Commonwealth was merely having Trooper Young testify concerning his experience as a police officer. KRE 701 provides:

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are:

- (a) Rationally based on the perception of the witness; and

- (b) Helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

Here, Trooper Young's testimony was based upon his perception when he entered Tim's bedroom.

Although we disagree with Shane's contention that the trial court improperly allowed Trooper Young to testify as an expert, we nevertheless hold that the trial court erred in admitting this testimony. Trooper Young's response that the four individuals appeared to be involved in a drug transaction was conclusory, and went to the ultimate issue of fact reserved for the jury. Shane was on trial on several drug related charges, including a charge of trafficking in methamphetamine. We do not agree with the Commonwealth's argument that the testimony did not harm Shane in that Trooper Young did not specifically identify him as a participant. The prosecutor specifically asked him about the four adults in the locked room, of which Shane was one. The Commonwealth further argues that Shane is precluded from raising this issue because he did not request an admonition from the trial court.

We believe that the trial court should have sustained the objection and admonished the jury to disregard Trooper Young's response rather than overruling it because he had

already answered.<sup>5</sup> We hold that the inclusion of opinion testimony from Trooper Young to the effect that the individuals, including Shane, were involved in a drug transaction affected Shane's substantial rights because it went to the ultimate issue of fact reserved to the jury. Shane was indicted for trafficking and possession of methamphetamine and marijuana, so that Trooper Young's testimony that he was involved in a drug transaction had to be prejudicial to him. Likewise, we cannot hold that this error was harmless because it affected his substantial rights. CR 9.24. For this reason, Shane's conviction must be reversed and remanded for a new trial.

Although we are reversing and remanding for a new trial, we shall also consider the remaining arguments in Shane's brief. He next argues that the Commonwealth committed reversible error when the prosecutor commented during closing argument that Shane had not sworn an oath. Because this issue was not preserved for appellate review by a contemporaneous objection, Shane requests that we review this issue for palpable error under RCr 10.26, which provides that:

A palpable error which affects the  
substantial rights of a party may be

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<sup>5</sup> In fact, the trial court did just this later in the trial during the cross-examination of Trooper Young by defense counsel when the Commonwealth objected to a question after an answer had been made. Defense counsel elicited testimony from Trooper Young in which he agreed that Tim was a "bad guy," to which the Commonwealth objected. Even though Trooper Young had already answered the question, the trial court sustained the Commonwealth's objection and admonished the jury to disregard the responsive testimony. As in the previous situation, no request for an admonition was made.

considered by the court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error.

At the beginning of her closing argument, the prosecutor stated that, "Every person in this room, Doug Vowels, Detective Wilson, Detective Young, Detective Fleisher, myself, the judge, every person including you, each of you, involved in this case with the exception of Shane Pridham, has sworn an oath to do a job." (emphasis added.) Shane did not testify at trial.

KRS 421.225 provides that "[i]n any criminal or penal prosecution the defendant on his own request, shall be allowed to testify in his own behalf, but his failure to do so shall not be commented upon or create any presumption against him." In Bradley v. Commonwealth, Ky., 261 S.W.2d 642 (1953), the former Court of Appeals held that the violation of this statutory prohibition could constitute grounds for reversal of a conviction, and stated:

The privilege of immunity of an accused person from having his silence questioned is fundamental and should be held inviolate. This constitutional right against self-incrimination is so jealously guarded that even a statute expressly declaring the accused's failure to testify 'to be a proper subject of comment by the prosecuting attorney' has been held unconstitutional. .

. . . In this jurisdiction, as stated, we have not only the Bill of Rights, Sec. 11, Constitution, but a direct and positive statutory prohibition.

Id. at 643. The following year, in Adams v. Commonwealth, Ky., 264 S.W.2d 283 (1954), the Court revisited this issue, again holding that:

[T]he failure of a defendant to testify in a criminal prosecution cannot be commented upon or referred to before the jury. . . . In Miller v. Commonwealth, 182 Ky. 438, 206 S.W. 630, it was said that the proper test in such cases is whether the statement was reasonably certain to direct the jury's attention to the defendant's failure to testify.

Adams, 264 S.W.2d at 286. The Sixth Circuit Court of Appeals also addressed this issue in Bagby v. Sowders, 894 F2d 792 (6<sup>th</sup> Cir. 1990), cert. denied, 496 U.S. 928, 110 S.Ct. 2626, 110 L.Ed.2d 646 (1990), stating:

Prosecutorial comment on a defendant's failure to testify can form the basis for habeas corpus relief. The protections accorded a defendant extend to indirect as well as direct comments. Where, as here, the comments are of an indirect nature, automatic reversal is not warranted; instead, we must determine whether the comments were manifestly intended by the prosecutor as a comment on the defendant's failure to testify or were of such a character that the jury would naturally and reasonably take them to be comments on the failure of the accused to testify. Only then will the indirect comment amount to constitutional error. (citations omitted.)

Id. at 797-98.

We are mindful, however, that not all such statements mandate reversal of a conviction. In Caldwell v. Commonwealth, Ky., 503 S.W.2d 485, 494 (1971), the former Court of Appeals held that the Commonwealth's attorney came close to violating the rule when he mentioned in his closing argument that the defendant did not testify, but "considering the overwhelming evidence we are convinced beyond any reasonable doubt that this particular argument was of negligible and nonprejudicial import." See also Dillard v. Commonwealth, Ky., 995 S.W.2d 366 (1999).

In reviewing the present matter, we hold that the prosecutor's statement that everyone, except Shane, had "sworn an oath" amounts to a violation of the statutory rule barring comment on his decision not to testify at trial. Further, we believe that even in light of the evidence introduced against him, this violation affected Shane's substantial rights to a degree that palpable error exists. CR 10.26. On retrial, the prosecutor is cautioned against using the same or similar language in the closing argument.

Lastly, Shane argues that the trial court improperly curtailed his counsel's cross-examination of Trooper Young when it halted his attempt to elicit testimony about statements attributed to Tim regarding the ownership of the drugs. Shane argues that the testimony should have been admitted as an

exception to the hearsay rule as Tim was not available to testify due to his own pending charges. The Commonwealth counters that the issue is not subject to review because Shane did not preserve Trooper Young's testimony by an avowal. However, this issue is moot because following the trial in this matter, Tim entered a guilty plea in his case and received a fifteen-year sentence.<sup>6</sup> Tim is no longer unavailable because his case is now resolved.

For the foregoing reasons, the Judgment and Sentence of the Meade Circuit Court is reversed and remanded for a new trial.

ALL CONCUR.

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<sup>6</sup> Pam and Kim also entered guilty pleas and were each sentenced to five years following Shane's trial. Two other co-defendants are scheduled to go to trial in June 2003.