

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001048-MR

COMMONWEALTH OF KENTUCKY

APPELLANT

v. APPEAL FROM HOPKINS CIRCUIT COURT
HONORABLE CHARLES W. BOTELEER, JR., JUDGE
ACTION NO. 01-CR-00195

DAVID BEAN

APPELLEE

OPINION

AFFIRMING

** ** * * * * *

BEFORE: BAKER, GUIDUGLI AND SCHRODER, JUDGES.

GUIDUGLI, JUDGE. The Commonwealth of Kentucky has appealed from the Hopkins Circuit Court's April 19, 2002, order granting David Bean's (hereinafter "Bean") motion for a new trial pursuant to RCr 10.02. The sole issue on appeal is whether the trial court properly ruled that the Commonwealth's introduction of testimony regarding Bean's prior bad acts prejudiced the jury to the extent that a new trial was warranted. We affirm and remand for a new trial.

On July 24, 2001, the grand jury indicted Bean for possession of a controlled substance and for being a persistent felony offender, second degree, stemming from an April 26, 2001, arrest. A bench warrant was issued when Bean failed to appear at his arraignment, and he was eventually arrested on the bench warrant on October 3, 2001. He entered a plea of not guilty on October 5, 2001.

The matter proceeded to trial on April 2, 2002. The Commonwealth presented testimony to establish that on April 26, 2001, Bean entered a Madisonville, Kentucky, area Wal-Mart establishment, where he was noticed acting suspiciously by loss prevention officer Brad Ramsey (hereinafter "Ramsey") while buying a package of lithium batteries. Lithium batteries can be used in the production of methamphetamine, a controlled substance. Ramsey notified the police department and identified Bean to Officer William Poe (hereinafter "Officer Poe") upon his arrival. Officer Poe approached the vehicle Bean and his companion Joseph Franklin (hereinafter "Franklin") as they entered it, and asked Bean, who was entering the driver's side, for his name and identification. Officer Poe discovered that there was an outstanding warrant for Bean's arrest, had him exit the vehicle, and arrested him. Following the arrest, Officer Poe conducted a search of the vehicle and recovered a blue pill bottle under the driver's seat containing two corner baggies of

a brownish substance later determined to be methamphetamine. At no time did Officer Poe see Bean holding the Wal-Mart bag containing the package of lithium batteries, which was recovered from Franklin's possession.

Bean presented testimony to the effect that the Mercury Tracer he was driving on April 26, 2001, belonged to his wife, Tonie Bean. She had owned the car for less than a year, and frequently lent the car to relatives and friends to use in exchange for gasoline. Bean and Tonie had been experiencing marital difficulties, which had escalated to such an extent in February of 2001 that Tonie obtained an emergency protective order against her husband. It was for a violation of this order that Bean was arrested by Officer Poe on April 26, 2001. Upon cross-examination and without any objection, the Commonwealth elicited testimony from Tonie that she had recommended on the EPO that Bean enter a drug abuse program. Bean testified in his own defense, denying having entered the general merchandise portion of Wal-Mart that day, and admitted only to entering the garden area. He denied buying any lithium batteries or having any knowledge of the drugs recovered from the vehicle. On cross-examination, the Commonwealth followed up on its earlier line of questioning regarding the EPO by asking Bean why Tonie would have recommended drug treatment. The trial court overruled Bean's objection to this line of questioning,

reasoning that the same testimony had been admitted earlier during Tonie's testimony. Bean then admitted that he smoked marijuana.

At the close of the defense's case-in-chief, the trial court held an in-chambers hearing. At that time, Bean's counsel renewed his objection to the introduction of testimony regarding drug use. Counsel requested that the trial court admonish the jury to disregard the irrelevant testimony. The Commonwealth objected, noting that the testimony was elicited in follow-up to prior testimony from Tonie to which Bean did not object. However, the Commonwealth did not have a problem with an admonishment to the jury regarding the EPO and marijuana use. The trial court then reconsidered its prior ruling, sustained Bean's objection, and informed counsel that an admonishment would be given to the jury to disregard any testimony relating to drug problems that inspired the DVO and Bean's marijuana use. The court ruled that the testimony had no relevance to the charge for which Bean was being tried. The trial court noted that it would revisit the issue post-trial in the event of a conviction.

The jury found Bean guilty as charged after deliberating for less than thirty minutes, and returned a six-year sentence based upon the PFO II conviction. Bean timely filed a motion for new trial pursuant to RCr 10.02, arguing that

the Commonwealth did not provide prior notice of the introduction of prior bad acts pursuant to KRE 404(c). The Commonwealth argued that the admonition cured any error there might have been, and that in any event Bean was not substantially prejudiced. Following a brief hearing, the trial court granted the motion for a new trial on April 19, 2002, as follows:

This matter is before the court on defendant's Motion for New Trial pursuant to RCr 10.02. Pursuant to said rule, the court may grant a new trial for any cause which prevented the defendant from having a fair trial, or if required in the interest of justice.

In this case there were several statements made by the defendant in response to questions by the Commonwealth that were very prejudicial. The Commonwealth argues that the defendant opened the door for such discussion and the particular questions that were asked by bringing up the subject of his EPO on direct. However, based on the facts of this case, it was necessary for the defendant to at least bring up the subject in order to explain why he was originally arrested in the first place (there was an outstanding warrant pursuant to the EPO). This evidence does not open the door as to any questions regarding the specifics of the same. In fact, such questions are not relevant to this action involving the possession of methamphetamine.

Evidence of the terms of the EPO, however, was highly prejudicial. In response to questions about the same, the Commonwealth elicited information to the effect that drug treatment was ordered for the defendant because of marijuana use. The

Commonwealth compounded the prejudicial affect of this evidence by specifically asking about the drug rehabilitation program, with follow up questions about marijuana use and what the defendant may or may not have done with his own drugs. There was an objection to this line of questioning which the court overruled. After reviewing the evidence which resulted from said questions, the court sustained the objection and gave an admonition to the jury. However, the court does not believe that the admonition corrected the problem because the defendant was charged with a drug offense and such testimony would have been prejudicial to the jury. As such, the substantial rights of the defendant were impaired in that he did not receive a fair trial pursuant to Castle v. Commonwealth, 44 S.W.3d 790 (Ky.Ct.App. 2000) and Schaefer v. Commonwealth, [Ky., 622 S.W.2d 218] (1996).

For the reasons stated above, the defendant's Motion for New Trial is hereby GRANTED.

This appeal by the Commonwealth followed.

On appeal, the Commonwealth argues that Bean was not entitled to relief under RCr 10.26 because 1) the alleged error did not generate a substantial possibility that the result would have been any different; 2) the trial court's admonition sufficiently addressed the situation; and 3) the basis of the motion for new trial did not support his request for relief. On the other hand, Bean argues that the trial court did not abuse its discretion under RCr 10.02 in ordering a new trial.

It is well settled in Kentucky that the decision to grant or deny a new trial rests in the sound discretion of the

trial court. Combs v. Commonwealth, Ky., 356 S.W.2d 761 (1962). Therefore, in the absence of an abuse of discretion, we must affirm.

RCr 10.02(1) provides that "[u]pon motion of a defendant, the court may grant a new trial for any cause which prevented the defendant from having a fair trial, or if required in the interest of justice." Additionally, RCr 10.02(2) provides that "the court on its own initiative may order a new trial for any reason for which it might have granted a new trial on a motion of a defendant, and in the order shall specify the grounds therefor."

We cannot hold that the trial court abused its sound discretion in granting Bean a new trial. We agree with the trial court that Bean sufficiently preserved this issue for review by objecting to the line of questioning regarding the EPO and his use of marijuana during his own testimony. In our review of the facts of this case, we note that Bean was being tried for possession of methamphetamine; Bean testified during cross-examination by the Commonwealth that he smoked marijuana, which is wholly different from the manufactured drug, methamphetamine. Any admission elicited by the Commonwealth as to prior or current drug use very possibly could have prejudiced the jury to a substantial degree. Additionally, we agree with the trial court's observation that the Commonwealth compounded

the problem by asking Bean more follow up questions regarding what he does with his own drugs. Based upon the facts of this case, we hold that the trial court did not abuse its discretion in granting Bean a new trial pursuant to RCr 10.02.

For the foregoing reasons, the trial court's order granting Bean's motion for a new trial is affirmed and the matter is remanded for a new trial.

ALL CONCUR.

BRIEF FOR APPELLANT:

A. B. Chandler
Attorney General

George G. Seelig
Assistant Attorney General
Frankfort, KY

BRIEF FOR APPELLEE:

Emily Holt
Assistant Public Advocate
Frankfort, KY