

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001057-MR

GREGORY BRENT

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE SHEILA R. ISAAC, JUDGE
ACTION NO. 02-CR-00068

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING IN PART, VACATING AND REMANDING IN PART

** ** * * *

BEFORE: JOHNSON, KNOPF, AND McANULTY, JUDGES.

McANULTY, JUDGE. Gregory Brent (Brent) appeals from the judgment of the Fayette Circuit Court convicting him of possession of a controlled substance, first degree and being a persistent felony offender, second degree. Brent argues that the trial court failed to comply with RCr 9.78 and further erred to his prejudice when it responded to a juror's question regarding the persistent felony offender instruction. We affirm in part and vacate and remand in part.

At about 6:45 a.m. on August 24, 2001, two Lexington Metro Police officers were on their way to respond to a call that a pit bull was loose and chasing kids (dog-at-large). While stopped at a stop light, one of the officers noticed a passenger in a parked car motion toward a pedestrian, who was later identified as Brent. After being motioned, Brent approached the driver's side of the parked car, which was parked in a residential driveway. The officers observed Brent display something in his hand to the driver of the car, although the officer could not see what was in Brent's hand. At this point, the officers pulled in the driveway behind the parked car.

Upon seeing the officers, Brent rolled his hands up in his shirt. One of the officers instructed Brent to show his hands. As Brent was taking his hands out of his shirt, the officer observed a baggie containing a white residue tucked in Brent's pants. The officers then arrested Brent. The substance in the baggie field-tested positive for cocaine.

The Fayette County Grand Jury returned an indictment charging Brent with trafficking in a controlled substance, first degree and with being a persistent felony offender, second degree. During the proceedings against Brent, the trial court learned that Brent's prior conviction, by which he was charged as a PFO, wrongly noted his conviction as first degree

trafficking in a controlled substance, when the true conviction was for possession of controlled substance. Upon learning of the error, the trial court granted Brent's motion to dismiss the indictment. Subsequently, the previous conviction was corrected, and the Fayette County Grand Jury reindicted Brent for trafficking in a controlled substance, first degree and with being a persistent felony offender, second degree (the PFO charge), based on the corrected conviction.

In this appeal, Brent makes three arguments for our review. First, Brent argues that RCr 9.78 required the trial court to make factual findings to support its decision denying Brent's motion to suppress. Second, Brent argues that he could not be charged as a PFO because no valid conviction existed prior to the commission of the current charges. Finally, Brent argues that the trial court erred to his prejudice when it answered a juror's question during the sentencing phase.

We first address the suppression issue. In the underlying proceedings, Brent made a motion to suppress evidence on the grounds that the police did not have a reasonable articulable suspicion to make the stop. The trial court conducted a hearing on the motion to suppress and denied the motion at the conclusion of the hearing. However, in so doing, the trial court did not make any findings to support the ruling. RCr 9.78 is as follows:

If at any time before trial a defendant moves to suppress, or during trial makes timely objection to the admission of evidence consisting of (a) a confession or other incriminating statements alleged to have been made by the defendant to police authorities or (b) the fruits of a search, the trial court shall conduct an evidentiary hearing outside the presence of the jury and at the conclusion thereof shall enter into the record findings resolving the essential issues of fact raised by the motion or objection and necessary to support the ruling. If supported by substantial evidence the factual findings of the trial court shall be conclusive.

The absence of the entry of any factual findings by the trial court, either orally at the conclusion of the evidentiary hearing or written, prevents us from conducting a meaningful review of the matter. As such, we remand this issue to the trial court for factual findings as mandated by RCr 9.78.

Brent's second argument is that he could not be charged as a PFO second because no valid conviction existed prior to the commission of the current charges. Brent argues that no valid conviction existed where the initial conviction wrongly noted his charge and was not corrected until after the commission of the new offense. We believe this argument is without merit. Regardless of the clerical mistake on the initial judgment of conviction, Brent stood convicted of a felony after having been convicted of one previous felony. See KRS 532.080.

We move to Brent's final argument that the trial judge committed a prejudicial error when it answered a juror's question during the sentencing phase of the trial. The facts pertaining to this claimed error are as follows: after the court gave the jury its instructions and the jury began its deliberations, one of the jurors sent a note to the court regarding the instructions on the PFO charge. The note stated:

To: Judge Issac [sic]

Question:

Instruction E

Count two:

Second Degree PFO

Item "D"

Is this item worded correctly?

Also[,] [d]oes the defendant have to be off probation to meet the criteria of PFO?

In response to the juror's note, the trial court heard argument from Brent's counsel that the trial court should not answer the question. Counsel further argued that the trial court should inform the jury to follow the instructions that they were provided with no additional instruction or clarification from the court. The trial court held that the juror's question was one of law, not fact, and answered only the second sub-part pertaining to whether Brent had to be off probation to meet the criteria of PFO by writing "No" on the juror's note. There is no dispute that this answer was in accordance with the law, however, Brent argues that the trial

court's response prejudiced his rights because it injected the trial court's opinion upon the province of the jury and further helped the jury resolve a disputed question of fact.

The approved practice in this case would have been for the trial court to re-read the instructions with no further comment. See Eaton v. Commonwealth, 230 Ky. 250, 19 S.W.2d 218, 226 (1929); Neace v. Commonwealth, Ky., 978 S.W.2d 319, 320-21 (1998). We conclude, however, that the trial court's response did not prejudice Brent's rights, therefore, Brent is not entitled to a reversal of the PFO conviction. See Eaton, 19 S.W.2d at 226 ("He [the trial court] should have done nothing further than read the instructions, but the defendant is not entitled to a reversal of this judgment unless he shows that in what the judge said there was something prejudicial to the defendant . . .").

Contrary to Brent's assertion, the juror's question did not constitute a question of fact. As is apparent from the nature of the question, there was no dispute that Brent was conditionally discharged from drug court in February 2001 and committed this felony on August 24, 2001. Instead, the clarification pertained to a question of law -- the implication of a person's commission of a felony after being conditionally discharged from drug court.

For the foregoing reasons, the trial court's denial of Brent's motion to suppress is vacated and remanded for factual findings in support of the ruling. Further, at this point, the judgment is affirmed as to the claimed errors pertaining to the PFO charge.

ALL CONCUR.

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