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Commonwealth Of Kentucky

Court Of Appeals

NO. 2002-CA-001542-MR

RICKEY LEAP

APPELLANT

v. APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE LEONARD L. KOPOWSKI, JUDGE
INDICTMENT NO. 00-CR-00241

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING IN PART,

VACATING IN PART, AND REMANDING

** ** * * *

BEFORE: BAKER¹ and SCHRODER, Judges; HUDDLESTON, Senior Judge.²

¹ This opinion was prepared and concurred in prior to Judge Baker's leaving the Court, effective December 17, 2003.

² Senior Judge Joseph R. Huddleston sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Ky. Rev. Stat. (KRS) 21.580. This opinion was prepared and concurred in prior to the expiration of the Special Judge assignment on November 25, 2003.

HUDDLESTON, Senior Judge: Ricky Leap appeals following his convictions of assault in the fourth degree and wanton endangerment in the first degree, enhanced by a finding that he is a persistent felony offender in the first degree, resulting in a sentence of ten years' incarceration. The charges arose from an incident on July 31, 2000, in which the victim, Jerri Lynn Payne, was severely beaten³ and then left by the side of a road without clothes or a clear recollection of what happened to her. Leap admitted spending time with the victim that evening during which the two traveled to various bars and consumed large quantities of alcohol and smoked marijuana, but he denied beating her.

In August of 2000, Leap was indicted by a Campbell County grand jury on the charges of second-degree assault of a non-family member; first-degree unlawful imprisonment; and first-degree persistent felony offender. A jury trial commenced on February 6, 2002, and concluded the following day. During trial, the Commonwealth did not proceed on the charge of unlawful imprisonment, resulting in its dismissal. Leap asserts in his brief that the trial resulted in a mistrial when the jury

³ Payne's injuries were extensive. She suffered several fractures on the left side of her face, one of which will never properly heal. She has a plastic insert behind her eyeball, and has permanently impaired vision.

could not reach a decision.⁴ However, while the record indicates that a jury trial was indeed held, it is unclear regarding its disposition.

Following the mistrial, the Commonwealth sought from a new grand jury an indictment on the charge of first-degree wanton endangerment. Leap sought dismissal of the additional charge citing Kentucky Rules of Criminal Procedure (RCr) 6.18. This motion was denied, allowing the case to proceed to trial.⁵

On appeal, Leap argues that the Commonwealth's motivation in bringing the additional indictment was one of vindictiveness, spawned by its inability to gain a conviction at the first trial. Accordingly, the Commonwealth is barred from proceeding on the additional charge because it failed to offer any objective reason why the wanton endangerment count could not have been brought as part of the original indictment.

The law regarding vindictiveness as a due process consideration begins with the United States Supreme Court's

⁴ Leap asserts that the jurors were split regarding whether to acquit or to convict him of the lesser-included misdemeanor offense of fourth-degree assault. However, there is no evidentiary basis to support this claim.

⁵ Leap has since abandoned his Ky. R. Crim. P. (RCr) 6.18 argument. In any event, this argument was without merit in that the joinder provisions of RCr 6.18 are couched in terms of the permissive "may," not the mandatory "shall."

decision in North Carolina v. Pearce.⁶ In Pearce, the Court was presented with two consolidated cases in which defendants who had successfully attacked their convictions were again convicted and sentenced to increased terms upon retrial. The Court held that:

Due process of law [] requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial. And since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction, due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge.

In order to assure the absence of such a motivation, we have concluded that whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear. Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after

⁶ 395 U.S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969).

the time of the original sentencing proceeding. And the factual data upon which the increased sentence is based must be made part of the record, so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal.⁷

While perhaps instructive on a thematic level, Pearce does not directly control situations such as this case in which a prosecutor's motivation may be problematic. It would take later decisions of the Court to apply its reasoning in Pearce to other scenarios.

Blackledge v. Perry⁸ involved a defendant (Perry) who was originally charged with a misdemeanor and convicted in North Carolina's lower trial court, called the district court.

Perry then filed a notice of appeal to the Northampton County Superior Court. Under North Carolina Law, a person convicted in the District Court has a right to trial de novo in the Superior Court. [] The right to trial de novo is absolute, there being no need for the appellant to allege error in the original proceeding.

When an appeal is taken, the statutory scheme provides that the slate is wiped clean; the prior conviction is

⁷ Pearce, supra, 395 U.S. at 725, 23 L. Ed. 2d at 656.

⁸ 417 U.S. 21, 94 S. Ct. 2098, 40 L. Ed. 2d 628 (1974).

annulled, and the prosecution and the defense begin anew in the Superior Court.

After the filing of the notice of appeal, but prior to the respondent's appearance for trial de novo in the Superior Court, the prosecutor obtained an indictment from a grand jury, charging Perry with the felony of assault with a deadly weapon with intent to kill and inflict serious bodily injury. [] The indictment covered the same conduct for which Perry had been tried and convicted in the District Court.⁹

The Court began its substantive analysis by referencing its decision in Colten v. Kentucky¹⁰:

The appellant in Colten claimed that the Constitution prevented the court of general jurisdiction, after trial de novo, from imposing a sentence in excess of that imposed in the court of original trial. [The Supreme Court] rejected the Pearce analogy. Emphasizing that Pearce was directed at insuring the absence of "vindictiveness" against a criminal defendant who attacked his initial conviction on

⁹ Id., 417 U.S. at 22, 40 L. Ed. 2d at 628 (internal citations omitted).

¹⁰ 407 U.S. 104, 92 S. Ct. 1953, 32 L. Ed. 2d 584 (1972).

appeal, the Court found such dangers greatly minimized on the facts presented in Colten. In contrast to Pearce, the court that imposed the increased sentence after retrial in Colten was not the one whose original judgment had prompted an appellate reversal; thus, there was little possibility that an increased sentence on trial de novo could have been motivated by personal vindictiveness on the part of the sentencing judge. Hence, the Court thought the prophylactic rule of Pearce unnecessary in the de novo trial and sentencing context of Colten.¹¹

The Court, analyzing its prior decisions, said that "the Due Process Clause is not offended by all possibilities of increased punishment upon retrial after appeal, but only those that pose a realistic likelihood of 'vindictiveness.'"¹² Whether an actual retaliatory motivation existed on the part of the prosecutor or sentencing judge is irrelevant; rather, the Court emphasized, the determinative consideration is whether the convicted defendant's apprehension of retaliation would discourage him from attacking a conviction through means

¹¹ Blackledge, supra, n. 7, 417 U.S. at 26, 40 L. Ed. 2d at 633.

¹² Id., 417 U.S. at 27, 40 L. Ed. 2d at 634.

otherwise legally available. "A person convicted of an offense is entitled to pursue his statutory right to a trial de novo, without apprehension that the State will retaliate by substituting a more serious charge for the original one, thus subjecting him to a significantly increased potential period of incarceration."¹³ The Court held that such a potential for vindictiveness must not enter into North Carolina's two-tiered appellate process, and that therefore it was not constitutionally permissible for the state to respond to Perry's statutory right to appeal by bringing a more serious charge against him prior to the trial de novo. However, the Court acknowledged that its result would be different if the state had shown that it was impossible to proceed on the more serious charge at the outset.

In Bordenkircher v. Hayes,¹⁴ the Court applied its decisions in the pretrial context. In that case, the Court refused to prohibit a prosecutor from carrying out a threat made during plea negotiations to bring additional charges against an accused who refused to plead guilty to the offense with which he was originally charged. The Court held that there was no element of punishment in the "give and take" of plea

¹³ Id. (Citations omitted).

¹⁴ 434 U.S. 357, 98 S. Ct. 663, 54 L. Ed. 2d 604 (1978).

negotiation, so long as the accused is free to accept or reject the prosecution's offer. The Court held that "the course of conduct engaged in by the prosecutor in [that] case, which no more than openly presented the defendant with the unpleasant alternatives of foregoing trial or facing charges on which he was plainly subject to prosecution, did not violate the Due Process Clause of the Fourteenth Amendment."¹⁵

In United States v. Goodwin,¹⁶ the Court relied on Bordenkircher to hold that a prosecutor is not prohibited from bringing additional charges in response to a defendant's demand for a jury trial. Like Bordenkircher, the Court's decision in Goodwin was mandated by its acceptance of plea bargaining as a legitimate process.¹⁷

In declining to apply a presumption of vindictiveness, the Court recognized that "additional" charges obtained by a prosecutor could not necessarily be characterized as an impermissible "penalty." Since charges brought in an original indictment may be abandoned by the prosecutor in the context of plea

¹⁵ Id., 434 U.S. at 365, 54 L. Ed. 2d at 612.

¹⁶ 457 U.S. 368, 102 S. Ct. 2485, 73 L. Ed. 2d 74 (1982). Goodwin provides an excellent discussion of the development of the law on vindictiveness, and serves as a useful reference regarding the interplay of the cases cited above.

¹⁷ Id., 475 U.S. at 378, 73 L. Ed. 2d at 84.

negotiation - in often what is clearly a "benefit" to the defendant - changes in the charging decision that occur in the context of plea negotiation are an inaccurate measure of improper prosecutorial "vindictiveness." An initial indictment - from which the prosecutor embarks on a course of plea negotiation - does not necessarily define the extent of the legitimate interest in prosecution. For just as a prosecutor may forgo legitimate charges already brought in an effort to save the time and expense of trial, a prosecutor may file additional charges if an initial expectation that a defendant would plead guilty to lesser charges proves unfounded.¹⁸

The Supreme Court has not been presented with a case, such as Leap's, where a prosecutor adds charges following a mistrial resulting from a deadlocked jury.¹⁹ However, other courts have dealt with the issue and have reached differing results.

¹⁸ Id. (citations omitted).

¹⁹ Obviously, the reason for the mistrial will have different effects on the ability of the defendant to be retried. In a case where a deadlocked jury has been unable to reach a verdict, double jeopardy does not bar retrial on the same charges. Commonwealth v. Ray, Ky. App., 982 S.W.2d 671 (1998). We therefore limit our analysis to that scenario.

The Supreme Court of Florida declined to apply a presumption of vindictiveness in State v. Wilkins.²⁰ The Court described the rationale of the Blackledge and Pearce holdings as being that the fear of vindictiveness may unconstitutionally deter a defendant's exercise of a fundamental right.²¹ It went on to say that "[b]ecause a mistrial follows as a matter of course from a jury deadlock, the state's enhancement of the charges did not preclude the assertion of any fundamental right in spite of its motivation. This case is, therefore, no different from pretrial amendment where the state can alter the charges at will."²²

As noted by the United States Court of Appeals for the Sixth Circuit, cases such as this require courts to reconcile to conflicting rules of law:

(1) [P]rosecutors have and need broad discretion to file charges where there is probable cause that someone has broken the law; [and] (2) vindictive conduct by persons with the awesome power of

²⁰ 534 So.2d 705 (Fla. 1988).

²¹ Id. at 706.

²² Id.

prosecutors (and judges) is unacceptable and requires control.²³

"Each situation will necessarily turn on its own facts."²⁴

In Wilkins, the Florida Court placed too much emphasis on the importance of prosecutorial discretion, to the exclusion of the need to control vindictive conduct. A reviewing court must analyze the circumstances of the individual case to determine whether there exists a realistic likelihood of vindictiveness. "The standard itself, however, is an objective one - whether a reasonable person would think there existed a realistic likelihood of vindictiveness."²⁵ The Florida Court was mistaken in disregarding the motivation behind the enhancement of the charges against the defendant. Rather, the determination must be whether there exists a reasonable likelihood of vindictive motivation, and if so, "the ordinary remedy is to bar the augmented charge."²⁶

We emphasize that once a court has found the existence of a realistic likelihood of vindictiveness the burden of disproving it is on the government.

²³ United States v. Andrews, 633 F.2d 449, 453 (6th Cir. 1980).

²⁴ Id. at 454.

²⁵ Id.

²⁶ Id. at 455.

[W]e do not think that judges should pass on subjective good faith assertions by prosecutors. Both Pearce and Blackledge went out of their way to avoid such difficult and unpleasant decision-making. At the same time, in Blackledge the Court noted in a footnote that "(t)his would clearly be a different case if the state had shown that it was impossible to proceed on the more serious charge at the outset." [] From this, we think that only objective, on-the-record explanations can suffice to rebut a finding of realistic likelihood of vindictiveness.²⁷

In this case, the Commonwealth has offered no explanation for why the charge of wanton endangerment was not added until after Leap's first trial. Given the close temporal proximity between the conclusion of the first trial and the addition of the new charge, there certainly exists a reasonable likelihood that the Commonwealth's motivation was one of retaliation provoked by Leap's ability to avoid conviction at the first trial. An alternative explanation is that the Commonwealth desired to see Leap punished as a persistent felony offender, which was only possible under the first indictment

²⁷ Id. at 456. See also United States v. Jamison, 505 F.2d 407 (D.C. Cir. 1974).

following a conviction for second-degree assault. By adding another felony, the Commonwealth increased the likelihood of a PFO finding. Whether or not this second possible motivation meets the legal standard of being "vindictive" is a difficult question; however, we need not answer it because at a minimum, there exists a sufficient likelihood of a purely vindictive motive that the Blackledge presumption applies.

The same considerations that led the high court to condemn such prosecutorial conduct in the context of a postconviction appeal are applicable when a defendant asserts his right to a retrial after a mistrial. As a prosecutor would have a considerable stake in discouraging appeals requiring trials de novo, so too would the prosecution in a case such as this have a great interest in discouraging a defendant's assertion of a retrial, particularly since the prosecution was unable to obtain a conviction at the first trial. Here, the defendant has endured a trial and a mistrial due to a hung jury, and when he asserts his right to a jury retrial rather than plead guilty and accept a prison term, he is faced with the possibility of greater punishment than he could have received if the prosecution had secured a conviction, apparently as a result of pursuing his right to be

tried by a jury on retrial. Such a situation calls for the prophylactic rule enunciated in Perry to protect against both the possibility that defendant will be deterred from exercising a legal right, as well as the danger that the state might be retaliating against the defendant for maintaining his innocence and facing a retrial.²⁸

Given that the Commonwealth has offered no non-retaliatory explanation regarding why the additional charge was not added until after the first trial, the ordinary remedy would be to reverse Leap's wanton endangerment conviction and remand for dismissal of the indictment on that count, which would also thereby negate his status as a PFO. However, there is a problem of preservation with respect to this argument.

Following the return of the second indictment, Leap moved that the additional charge be dismissed. However, the only ground for dismissal specifically cited in his motion was an alleged violation of the joinder provisions of RCr 6.18. While his brief states that counsel orally suggested prosecutorial misconduct at the hearing on that motion, we have been presented with no video tape, written transcript or

²⁸ Twiggs v. Superior Court, 34 Cal.3d 360, 369, 667 P.2d 1165, 1170 (1983).

narrative statement of the hearing on the motion to dismiss.²⁹ It is Leap's duty as appellant to demonstrate that this issue was properly preserved for review and, if so, in what manner.³⁰ Unless an argument is presented in such a way as to allow the circuit court to rule on it, we may not ordinarily consider it on appeal.³¹

However, we may consider Leap's argument under the "palpable error" provisions of RCr 10.26. Under this criminal rule, we may consider a palpable error which affects the substantial rights of a party if that error results in manifest injustice, even though insufficiently raised or preserved for review.

As explained above, a presumption of vindictive motivation arises in this case from the circumstances surrounding the addition of the wanton endangerment charge. While a manifest injustice may result from the affirmance of the conviction in violation of Leap's constitutional rights,³² it

²⁹ See Ky. R. Civ. P. (CR) 75.01 - 75.15.

³⁰ CR 76.12(4)(c)(v).

³¹ See, e.g., Kennedy v. Commonwealth, Ky., 544 S.W.2d 219 (1976).

³² This analysis is furthered by the consideration that due to the unique procedural development of this case, relief from sentence predicated on the ineffective assistance of counsel per RCr 11.42 may not be available to Leap in that the problem of preservation could be viewed as an error on appeal rather than during trial. While we do not comment on the ultimate

would be similarly unjust to deny the Commonwealth an opportunity to respond to an allegation which was not raised below. Therefore, this case must be remanded to the circuit court for an evidentiary hearing, the purpose of which is to reach a retrospective determination of the factual circumstances surrounding the late addition of the wanton endangerment charge. Because we have found a presumption of vindictiveness, the burden at the retrospective hearing will be on the Commonwealth to demonstrate a neutral, objective reason why it could not have brought the wanton endangerment charge concurrently with the charge for second-degree assault. If the Commonwealth fails in its burden, then Leap's conviction for wanton endangerment (and subsequent PFO enhancement) must be vacated and the charges dismissed. If, however, there exists some non-vindictive reason for the late addition which the Commonwealth can prove through objective evidence, then Leap's conviction and enhancement must be reinstated.

Leap's second argument is that the jury was incorrectly instructed to fix his misdemeanor sentence during the penalty phase of the trial. Under Commonwealth v. Philpott,³³ the circuit court erred by including penalty language

resolution of this question, its mere existence lends to the possibility of manifest injustice.

³³ Ky., 75 S.W.3d 209 (2002).

as part of the instruction for the lesser-included misdemeanor offense of fourth-degree assault. The remedy for such a violation is to reverse the conviction on that count and remand for a new trial.

In this instance, however, the error was harmless.³⁴ The jury's verdict that Leap is guilty of fourth-degree assault operated as an acquittal on the charge of second-degree assault.³⁵ Therefore, Leap may only be retried on fourth-degree assault. In that instance, Leap would be facing misdemeanor charges only, and the bifurcation requirements of Philpott would be inapplicable. Instead, the jury would be presented with penalty instructions included with the instructions regarding guilt, which would be essentially identical to the instruction under which he was convicted. Therefore, in this unique instance, Leap suffered no prejudice from the erroneous instructions.

Accordingly, the judgment is affirmed in part, vacated in part and this case is remanded to Campbell Circuit Court for further proceedings consistent with this opinion.

ALL CONCUR.

³⁴ See RCr 9.24.

³⁵ See Commonwealth v. Ray, supra, n. 18.

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