

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-002234-MR

SIGMUND SCOTT SIMMONS

APPELLANT

v. APPEAL FROM GRAVES CIRCUIT COURT
HONORABLE JOHN T. DAUGHADAY, JUDGE
ACTION NO. 01-CR-00354

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

** ** * * *

BEFORE: BARBER, GUIDUGLI, and VANMETER, JUDGES.

VANMETER, JUDGE. This is an appeal from a judgment entered by the Graves Circuit Court after a jury returned a verdict finding appellant guilty of the charge of possession of a handgun by a convicted felon. Appellant contends that the trial court erred (1) by failing to instruct the jury on the defense of "choice of evils," (2) by failing to permit appellant to impeach a police officer through the introduction of a uniform citation report, and (3) by failing to find that appellant was unduly prejudiced

by the Commonwealth's remarks during the trial. For the reasons stated hereafter, we affirm.

The underlying facts are undisputed. On November 7, 2001, Mayfield police officers responded to a report that a black male had fired shots in a certain location in downtown Mayfield. Although no one was found in that location, appellant was found nearby and was approached by two officers who noted that he had a bulge in his front pocket. Upon questioning, appellant denied having a gun but he then began to reach into his pocket. He was handcuffed and a Raven .25 handgun was found in his pocket. Appellant subsequently was indicted on charges of carrying a concealed weapon, being a convicted felon in possession of a handgun, and being a second degree persistent felony offender (PFO). Later, the PFO and concealed weapon charges were dismissed.

At trial, appellant indicated that he was unaware that, as a convicted felon, he was prohibited from carrying a handgun. He testified that on the day before his arrest, he took the gun away from Tracy Cope after she threatened him with it, and he threw the gun into a graveyard near his grandmother's house. He later became concerned about the possibility of the gun being found by a child, and he also began to wonder whether the gun might have been used in the recent murder of Cope's neighbor. He claimed that because of these concerns, he

retrieved the gun from the graveyard on the day of his arrest with the intention of turning the gun over to the police. Appellant indicated that while he was walking toward the police station before his arrest, he shot the gun once into the air to let people who had threatened him know that he was armed and should be left alone. However, the police officers testified that appellant in fact was walking in a direction away from the police station when he was arrested. The jury convicted appellant of being a felon in possession of a handgun and recommended that he be sentenced to ten years' imprisonment. He was sentenced in accordance with the jury's recommendation. This appeal followed.

First, appellant contends that the trial court erred by failing to instruct the jury on "choice of evils." We disagree.

For purposes of this appeal, "choice of evils" is described in KRS 503.030(1) as justifying conduct which otherwise would be criminal "when the defendant believes it to be necessary to avoid an imminent public or private injury greater than the injury which is sought to be prevented by the statute defining the offense charged." As stated in *Beasley v. Commonwealth*, Ky. App., 618 S.W.2d 179, 180 (1981), an offender's justifiable choice of one offense over another is conditioned upon at least four different contingencies:

(1) that the person believes the necessity of his action is mandated by his subjective value judgment (this must be weighed by the reasonableness standard);

(2) that such action must be contemporaneous with the danger of injury sought to be avoided. See *Duvall v. Commonwealth*, Ky. App., 593 S.W.2d 884 (1980);

(3) that the injury is imminent, requiring an immediate choice if to be avoided; and

(4) that the danger or injury sought to be avoided must be *greater* than the penalty or offending charge occasioned by the action chosen by the party.

Moreover, a choice of evils instruction is warranted only if the defendant satisfies his or her burden of showing that the danger presented is

compelling and imminent, constituting a set of circumstances which affords him little or no alternative other than the commission of the act which otherwise would be unlawful. . . .

Where a defendant fails to produce evidence which would support him in choosing the commission of an otherwise unlawful act over other lawful means of protecting himself, the trial court is not required to instruct the jury on the choice of evils defense.

Senay v. Commonwealth, Ky., 650 S.W.2d 259, 260-61 (1983).

Here, appellant asserted that a choice of evils instruction was justified because he was forced to choose between being a felon in possession of a handgun, or leaving the gun in the graveyard where it either might be found by children

or might be unavailable as evidence in a murder case. This assertion simply is not tenable, however, for several reasons. First, no evidence showed a necessity that appellant retrieve the gun rather than having the police or some nonfelon third party retrieve it. Moreover, no evidence showed that, one or more days after appellant threw the gun into the graveyard, an imminent danger of immediate injury existed that compelled appellant to make an immediate choice so as to avoid danger to children or the destruction of evidence. Further, despite the choice of evils claim below, the evidence in fact did not support a finding that appellant's retrieval of the gun was as publicly motivated as he claimed at trial, since he in fact admitted shooting the gun into the air for his own purposes, and he testified below regarding his hope that he might receive a reward for turning a murder weapon over to the police. The court did not err by failing to give the choice of evils instruction.

Next, appellant contends that the trial court erred by failing to permit him to introduce a uniform citation report in order to impeach one of the police officers who arrested him. We disagree.

During trial, appellant unsuccessfully attempted to introduce the uniform citation report of his arrest in order to impeach the police officer's testimony with a prior inconsistent

statement. More specifically, appellant intended to diminish the credibility of the arresting officers by showing that although the citation suggested that the officers merely conducted a patdown search of appellant, their testimony at trial indicated that one of the officers first grabbed appellant's bulging pocket when appellant reached for that pocket after denying that he had a gun.

Regardless of whether the report was admissible for this purpose, the record clearly shows that any error in the trial court's failure to admit the report was harmless. Although the citation was less detailed than the testimony at trial, and it did not include the undisputed fact that appellant tried to reach into his pocket, the report did not directly conflict with the officers' testimony regarding appellant's actions. Moreover, since both appellant and the officers testified that appellant reached for his pocket, the alleged inconsistency between the report and actual events was presented to the jurors even though the report itself was not admitted into evidence. Indeed, throughout the trial appellant conceded that he had the gun in his pocket, and the only real issue was whether he was justified in possessing the gun. Hence, any error in the trial court's failure to admit the police report was harmless.

Finally, appellant contends that the trial court erred by failing to find that he was unduly prejudiced by the Commonwealth's remarks during the trial. We disagree.

After appellant responded to the Commonwealth's question during cross-examination regarding his previous drug convictions, appellant's counsel objected. The Commonwealth immediately stated that it had no further questions, and both parties rested their cases. The court did not rule and appellant did not request a ruling on the objection, and there was no request for an admonition or mistrial. Thus, appellant waived any further action by the trial court. *Commonwealth v. Pace*, Ky., 82 S.W.3d 894 (2002); *Bell v. Commonwealth*, Ky., 473 S.W.2d 820 (1971); *Taylor v. Commonwealth*, Ky., 449 S.W.2d 208 (1969). Additionally, given the many other references which were made during the trial to appellant's felony record, including appellant's own spontaneous statements, we cannot say that appellant was unduly prejudiced by the Commonwealth's inquiry into his record of past drug convictions.

Appellant also asserts that he was prejudiced by the Commonwealth's closing argument references to "the kind of life" which appellant and others had chosen. The court sustained appellant's objections and, *sua sponte*, admonished the jury that the comments did not constitute evidence. No further action was requested by appellant.

The court's admonition is presumed to control the jury and remove any prejudice. See *Tamme v. Commonwealth, Ky.*, 973 S.W.2d 13, 26 (1998); *Alexander v. Commonwealth, Ky.*, 862 S.W.2d 856 (1993), overruled on other grounds by *Stringer v. Commonwealth, Ky.*, 956 S.W.2d 883, 891 (1997); *Clay v. Commonwealth, Ky. App.*, 867 S.W.2d 200 (1993). Appellant's failure to seek a mistrial or other remedy amounted to a waiver of any further action by the trial court. Having reviewed the record as a whole, we cannot say that the trial court erred below or that appellant is entitled to relief in order to prevent the occurrence of manifest injustice. RCr 10.26.

The court's judgment is affirmed.

ALL CONCUR.

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