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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-002531-MR

STEVEN ATWELL — APPELLANT

v.

APPEAL FROM HART CIRCUIT COURT
HONORABLE LARRY D. RAIKES, JUDGE
ACTION NO. 01-CR-00007

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: EMBERTON, CHIEF JUDGE; BUCKINGHAM AND KNOPF, JUDGES.

BUCKINGHAM, JUDGE: Steven Atwell appeals from a judgment of the Hart Circuit Court wherein he was convicted of several criminal offenses and sentenced to eighteen years in prison. He alleges numerous errors, but we find no merit in his allegations. Thus, we affirm.

The events which led to Atwell's convictions occurred on January 4, 2001. Atwell, who was 22 years old at the time, had a history of mental problems. He had been diagnosed with paranoid schizophrenia, acute psychosis, impulse control

disorder, and polysubstance abuse. He had been prescribed anti-psychotic and anti-depressant medications. From time to time Atwell exhibited bizarre behavior, such as proclaiming that he had a computer chip in his head and that airplanes flying overhead were watching him through infrared cameras.

On the night of the incident, Atwell was with his girlfriend, Christy Jaggers. Jaggers lived with her grandparents, Charles and Shirley Stinson. At about 6:00 p.m. Atwell borrowed Mrs. Stinson's car to visit his parents' home. He returned to the Stinsons' residence at approximately 9:15 p.m. and later became very agitated and violent. His parents were called to come to the Stinson residence to reason with him, but they were not able to do so.

Atwell turned over a kerosene heater, and the floor and bedcover ignited. He had a lighter and a can of hairspray in his possession and was combining the two to make a torch. Atwell then ran downstairs to Mr. Stinson's gun cabinet and removed a shotgun. He struck Mr. Stinson in the head and face with the butt of the gun, causing injury. As Atwell was attempting to load the shotgun, the other individuals ran out of the house to hide from him. As they did so, he fired two shots in their direction.

Jaggers and the Stinsons got into the family truck and drove away. While in the house, Atwell fired a shot with a

pistol into the microwave oven and fired two shotgun blasts into the interior walls of the house. He then took Mrs. Stinson's Pontiac and left the residence.

Atwell was spotted driving on Highway 31W and then turning onto Interstate 65. Several police officers pursued him at speeds exceeding 100 miles per hour. Atwell successfully avoided a tire-flattening device but was ultimately stopped by having an accident on I-65 near Elizabethtown. He tried to escape by commandeering a tractor-trailer truck, but he was subdued before being able to do so.

Atwell was indicted by a Hart County grand jury on January 16, 2001, twelve days after the incident. He was transferred to the Kentucky Correctional Psychiatric Center (KCPC), and he spent an extended period of time at that facility prior to his arraignment in circuit court on May 15, 2001. At that time, his case was set for trial for September 24, 2001. Atwell remained in jail in lieu of bond.

On August 15, 2001, Atwell's attorney filed a notice of intent to rely on a defense of mental disease or defect. See RCr[1] 7.24(3)(B)(i). Counsel also moved for a competency evaluation or examination and moved the court to continue the trial. The September 24, 2001, trial date was cancelled, and the case was set to be reviewed on October 2, 2001.

[1] Kentucky Rules of Criminal Procedure.

Dr. Robert Sivley from the Pennyroyal Center examined Atwell on October 4, 2001, and filed his evaluation report on October 26, 2001. On December 4, 2001, the case was given a new trial date of May 8, 2002. A pretrial conference was scheduled for May 3, 2002.

On April 18, 2002, Atwell's attorney filed an amended notice of his intent to introduce expert testimony relating to mental disease or defect as a defense. This motion prompted the Commonwealth to file a motion for a KCPC evaluation. The court granted the Commonwealth's motion and continued the trial date from May 8, 2002, until July 22, 2002. The KCPC evaluation took place on June 24, 2002.

The case finally went to trial on July 22, 2002. Atwell was found guilty but mentally ill and convicted of one count of second-degree assault, eight counts of first-degree wanton endangerment, two counts of theft by unlawful taking over $300, one count of first-degree criminal mischief, and one count of second-degree evading the police. Pursuant to the jury's verdict, he was sentenced to seven years in prison on the assault charge, one year on each of the eight wanton endangerment charges, one year on each of the two theft charges, one year on the criminal mischief charge, and three months on the evading police charge. All sentences were ordered to run consecutively with each other, with the exception of the three-

month sentence which was ordered to run concurrently with the other sentences, for a total of eighteen years. Atwell was acquitted on a charge of first-degree arson. This appeal followed.

Atwell's first argument is that he was denied the right to a speedy trial. He maintains that the continuance granted to the Commonwealth of the May 8, 2002, trial date was unnecessary and that the Commonwealth had no need to move the court to have him evaluated by KCPC at that time because he had already been evaluated by KCPC on two prior occasions since his arrest. He asserts that the eighteen-month delay between his arrest and his trial was "presumptively prejudicial" considering the length of time and the uncomplicated nature of the case.

Persons charged with a crime have a constitutional right to a speedy trial. See United States Constitution, Amendment 6; Kentucky Constitution, § 11. Where the right to a speedy trial has been violated, the charges against the defendant must be dismissed. Strunk v. United States, 412 U.S. 434, 439, 93 S.Ct. 2260, 2263, 37 L.Ed.2d 56, 61 (1973).

In analyzing a defendant's right to a speedy trial, the four-factor test articulated by the United States Supreme Court in Barker v. Wingo, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972), must be applied. Dunaway v. Commonwealth, Ky., 60 S.W.3d 563, 569 (2001). These factors are: "(1) the

length of delay, (2) the reason for the delay, (3) the defendant's assertion of his right, and (4) the prejudice to the defendant caused by the delay." See Dunaway, 60 S.W.3d at 569. "No single one of these factors is ultimately determinative by itself." Gabow v. Commonwealth, Ky., 34 S.W.3d 63, 70 (2000).

The delay between Atwell's arrest and his jury trial was approximately eighteen months, not an insignificant period of time. However, the reasons for the delay are significant. First, there was a delay of approximately four months between the return of the grand jury indictment and Atwell's arraignment because he spent an extended period of time in KCPC before being transferred back to the jail. Second, the first continuance was granted at Atwell's request after he raised the defense of mental disease or defect. Thus, the case was rescheduled to be tried in May 2002. A continuance was then granted to a date of July 22, 2002. It was this last continuance of two and one-half months that causes Atwell to claim that his right to a speedy trial has been violated.

In the Barker case the U.S. Supreme Court identified three factors bearing on the prejudice to a defendant caused by a delay. These interests are: (1) to prevent oppressive pretrial incarceration; (2) to minimize anxiety and concern of the accused; and (3) to limit the possibility that the defense

will be impaired. Barker, 407 U.S. at 532, 92 S.Ct. at 2193, 33 L.Ed. 2d at 118. The last factor is the most serious. Id.

Atwell claims that the last continuance prejudiced him because the Commonwealth gathered additional evidence against him during the two and one-half month period before the final trial date. While it may be true that the Commonwealth learned of additional evidence during that time, that does not mean Atwell's defense was impaired because of the delay. In short, considering the reasons for the delay between the time of Atwell's arrest and his trial, the relatively short delay after the last continuance was granted, and the lack of prejudice to him, we conclude that Atwell's right to a speedy trial was not violated.

Atwell's second argument is that the trial court committed reversible error by failing to strike two jurors for cause. At the time of the trial, Atwell had a civil lawsuit pending in federal court against Hart County and Hart County officials, including the county judge-executive.[2] One of the prospective jurors in the case *sub judice* was a brother of the county judge-executive, and another juror was the county judge-executive's son. Atwell argues that the court erred by not granting his motion to strike these two jurors for cause.

[2] This lawsuit concerned an alleged beating that Atwell claims was administered to him at the Hart County jail.

The decision of whether, prospective jurors should be stricken for cause "rests within the sound discretion of the trial judge." Peters v. Commonwealth, Ky., 505 S.W.2d 764, 765 (1974). Unless the trial court's action was clearly erroneous, this court will not reverse the trial court in matters regarding the bias and impartiality of a juror. Scruggs v. Commonwealth, Ky., 566 S.W.2d 405, 410 (1978). "Bias and preconceived ideas must be adequately proven by the party alleging it and cannot be presumed." Hicks v. Commonwealth, Ky. App., 805 S.W.2d 144, 147 (1990). "Such biases and prejudices . . . must be determined by the trial court based on the particular facts of each case." Id.

One of the two jurors stated that he had "just heard" about the civil action filed by Atwell in circuit court. After denying Atwell's motion to strike the county judge-executive's brother for cause, the judge advised Atwell's counsel not to further pursue a line of questioning relating to the lawsuit in federal court. The other juror was not questioned about the matter. Atwell argues that the circuit court erred by not excusing the two jurors because of their implied bias against him, especially considering that the court limited his questioning of the jurors.

We perceive no abuse of discretion by the circuit court's refusal to strike the two jurors for cause. First, one

of the jurors indicated that he had only heard about the lawsuit. Second, we found nothing in the record to indicate that Atwell's counsel moved to strike the second juror (the county judge-executive's son) until after he had already accepted the juror. Thus, he failed to preserve any alleged error regarding this juror.[3] Third, Atwell's counsel, although he was prohibited from further questioning the jurors with regard to the federal lawsuit, apparently did not further question the jurors concerning any bias they might have had against Atwell. We note that the court did not prohibit Atwell's counsel from questioning any of the potential jurors concerning possible bias. Rather, it only prohibited him from injecting the federal court lawsuit into the case.[4] Under these circumstances, we find no abuse of discretion.

Atwell's third argument is that the circuit court erred by not granting him a directed verdict of not guilty by reason of insanity or intoxication. He asserts that he was either insane and/or was so intoxicated that he was unable to form the necessary criminal intent to commit the crimes for

[3] In Atwell's brief he did not state where he preserved any alleged error regarding his motion to strike the second juror for cause, except he noted that he moved in chambers after the completion of voir dire to strike the juror. RCr 9.36 states in part that "[n]o prospective juror may be challenged after being accepted unless the court for good cause permits it." See also Rowe v. Commonwealth, Ky., 394 S.W.2d 751, 753 (1965). As voir dire had been completed prior to any effort by Atwell to strike the second juror for cause, he was deemed to have accepted him.

[4] Atwell's counsel sought to have the right to inject the facts surrounding the federal court lawsuit into the trial of the case.

which he was charged. Further, Atwell notes that the testimony of the three doctors who evaluated him established this fact and was uncontradicted by other expert testimony.

"On 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." Commonwealth v. Benham, Ky., 816 S.W.2d 186, 187 (1991). While it is true that there was some evidence from which the jury could conclude that Atwell was not guilty by reason of insanity, there was also evidence sufficient to support the guilty verdicts. Several actions by Atwell clearly indicated that he was aware of what he was doing, was able to control his actions, and was able to form the requisite intent. For example, Atwell was able to elude the police and was able to maneuver around the tire-flattening device. Also, he attempted to commandeer a tractor-trailer truck. Additionally, there was evidence that Atwell was on drugs at the time and may have been acting while voluntarily intoxicated rather than under a mental disease or defect. Further, the evidence indicated that Atwell was not so intoxicated as to be unable to control his actions. In short, the trial court properly denied his motion for a directed verdict.

Atwell's fourth argument is that the trial court erred by admitting a piece of aluminum foil which had a brown residue of methamphetamine and a small amount of cocaine which was found on his person after his arrest. He argues that the admission of these items into evidence was error because the Commonwealth failed to provide him with notice of its intent to introduce the evidence pursuant to KRE[5] 404(c) and because the Commonwealth failed to establish a chain of custody of the items.

KRE 404(c) requires the Commonwealth to give reasonable pretrial notice to the defendant of its intention to offer evidence of other crimes, wrongs, or acts. While there may be a question as to whether the piece of aluminum foil and the quantity of cocaine was KRE 404(b) evidence, Atwell had notice of such evidence because there was a copy of the lab report in the court record which is dated and stamped April 25, 2001.

We likewise reject the chain of custody argument. In this regard one of the troopers testified that another trooper retrieved the piece of foil and the cocaine from Atwell but that the trooper could not remember the name of the officer who did so. Further, the trooper testified that he placed the items in the trunk of his car rather than in a secured evidence bin at the state police post.

[5] Kentucky Rules of Evidence.

With respect to substances such as drugs which are not clearly identifiable or distinguishable, "it is unnecessary to establish a perfect chain of custody or to eliminate all possibility of tampering or misidentification, so long as there is persuasive evidence that 'the reasonable probability is that the evidence has not been altered in any material respect.'" Rabovsky v. Commonwealth, Ky., 973 S.W.2d 6, 8 (1998). In the case *sub judice* the fact that the evidence was placed in the trunk of a trooper's car is insufficient by itself to undermine the otherwise reasonable probability that the evidence was the same evidence taken from Atwell and that it had not been altered.

Atwell's fifth argument is that the court committed reversible error by allowing inadmissible hearsay evidence from his father and by allowing as evidence a statement made by Atwell himself after he was in custody. Mrs. Stinson testified that Atwell's father said that Atwell "must have got a hold of some bad shit."[6] This statement was made by Atwell's father after he had confronted Atwell at the Stinson residence. Atwell's attorney did not initially object to the question. However, when the prosecutor asked Mrs. Stinson to interpret what Atwell's father meant by the statement, an objection was made and sustained. Therefore, because no objection was made to

[6] By "bad shit" Atwell's father apparently meant bad drugs.

the initial testimony, any error was not preserved for our review. See KRE 103(a)(1).

The second part of this fifth argument relates to a statement Atwell made while he was handcuffed or strapped to a stretcher in the hospital after his arrest. One of the troopers testified that Atwell stated, "I smoked $100 worth of crank and smoked some crack – I feel no pain." This statement was admissible pursuant to KRE 801A(b)(1) as an admission of a party. Atwell's statement was an admission that he had been using drugs. Such evidence tended to refute his claims that his actions were caused by insanity or other mental illness.

Atwell's sixth argument is that the court allowed inadmissible testimony of the troopers as to their opinion that Atwell was under the influence of crank or cocaine. In this regard, three troopers testified concerning their experience with persons under the influence of methamphetamine and cocaine and its effects. KRE 701 allows a witness who is not testifying as an expert to give opinions or inferences which are "[r]ationally based on the perception of the witness." KRE 701(a). Because of the troopers training and experience, we conclude that the court did not err in allowing them to testify in that manner because such testimony was relevant to the issue of whether Atwell was under the influence of intoxicants at the time of his arrest.

Atwell's seventh argument is that the trial court erred by not allowing him to introduce the evaluation reports of two of the doctors who testified as to his mental condition. He argues that such reports were admissible pursuant to KRE 901, 902, 702, and 703 as business records or medical reports. The trial court correctly prohibited Atwell from introducing the reports into evidence because the reports were inadmissible hearsay statements of the witnesses. The statements were not admissible because they could not have been admitted pursuant to any of the purposes set forth in KRE 801A(a). See Berrier v. Bizer, Ky., 57 S.W.3d 271, 276 (2001); Wright v. Premier Elkhorn Coal Co., Ky. App., 16 S.W.3d 570, 572 (1999).

Atwell's eighth argument is that his eighteen-year sentence is grossly disproportionate to the nature of the offenses he committed. If the sentences are found to be greatly disproportionate to the crimes committed, "then the punishment becomes cruel and unusual." Workman v. Commonwealth, Ky., 429 S.W.2d 374, 378 (1968). "Generally, if the punishment given is within the maximum prescribed by statute, a reviewing court will not disturb the sentence." Marshall v. Commonwealth, Ky., 60 S.W.3d 513, 524 (2001). Given the violent and dangerous circumstances of this case and the fact that Atwell could have been sentenced to twenty years in prison, we conclude that his

sentence was not greatly disproportionate to the nature of the crimes he committed.

Atwell's ninth argument is that the prosecutor engaged in an improper closing argument. The prosecutor argued to the jury that if Atwell was found not guilty by reason of insanity, then there was nothing the court system could do to monitor him and that only his parents could monitor his behavior. The prosecutor further argued that if that happened, then "God help us." An objection was raised only to the portion of the statement by the prosecutor wherein he stated that Atwell would go free if he was found not guilty by reason of insanity. The court properly ruled that the prosecutor had a right to comment upon the evidence, and any error regarding the remainder of the argument was not preserved for our review due to the lack of an objection.

Finally, Atwell's tenth argument is that two palpable errors occurred which warrant reversal of his convictions. First, he argues that the Commonwealth used unauthentic medical record entries to cross-examine his witnesses relevant to notes and tests of drug use. Second, he argues that the guilty but mentally ill instruction to the jury was unconstitutionally vague and/or misleading. He offers no support for his arguments, either by way of elaboration or by citation to authority. Further, he does not assert how these alleged errors

may have affected his substantial rights or resulted in a manifest injustice. See RCr 10.26. Under the circumstances we decline to find palpable error in either regard.

The judgment of the Hart Circuit Court is affirmed.

ALL CONCUR.

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