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NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2003-CA-000173-MR

MICHAEL FERGUSON

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE THOMAS B. WINE, JUDGE  
ACTION NO. 01-CR-002377

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING IN-PART,  
REVERSING IN-PART, AND REMANDING  
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BEFORE: EMBERTON, CHIEF JUDGE; SCHRODER AND TACKETT, JUDGES.

TACKETT, JUDGE: Michael Ferguson appeals from the judgment of the Jefferson Circuit Court convicting him of two counts of first-degree bail jumping and sentencing him to two and one-half years' imprisonment on each count with the sentences to run consecutively. He claims that the trial court erred by allowing the Commonwealth to present testimony from a witness without reviewing his psychiatric records to determine whether they contained evidence that would be relevant for cross-examination

and by allowing disclosure of the specific felonies underlying the bail jumping charges. In addition, Ferguson argues that the trial court incorrectly determined that his sentences were required by law to run consecutively on the two counts of bail jumping. We affirm as to the convictions, reverse as to the sentences and remand for further proceedings consistent with this opinion.

Prior to his indictment on the charges in the case *sub judice*, Ferguson was released on bond while awaiting trial on multiple charges of second-degree burglary. After Ferguson failed to appear for two pretrial conferences, he was charged with two counts of first-degree bail jumping. In addition, the Commonwealth charged him with perjury because he testified at a bond hearing that he was living at the Salvation Army shelter in 2001. The Grand Jury returned an indictment on these charges on October 11, 2001, and the Commonwealth made a motion to consolidate these charges with the burglary charges that were still pending in another division of the Jefferson Circuit Court. The trial court denied this request finding that it would be prejudicial to Ferguson to defend against the burglary charges simultaneously with the bail jumping and perjury charges.

The perjury and bail jumping charges were tried by a jury on November 20-22, 2002. The Commonwealth presented

testimony from an employee in the Circuit Court Clerk's office, the operations manager of the Salvation Army Mission, and an officer with the Jefferson County Police Department. In addition, documents from Ferguson's court file were introduced showing scheduled pretrial conferences on November 24, 1999, and May 1, 2001, as well as bench warrants issued on those dates when Ferguson failed to appear. After Ferguson testified, the Commonwealth was also permitted to call Adam Wasankari as a rebuttal witness. At the conclusion of the trial, the jury acquitted Ferguson of perjury, convicted him of both counts of bail jumping, and recommended sentences of two and one-half years' imprisonment on each count. Pursuant to the trial court's erroneous instruction requiring consecutive sentences, the jury recommended that the sentences be served consecutively with each other. This appeal followed.

Ferguson's first argument concerns the trial court's decision to allow Wasankari to testify as a rebuttal witness. The day before the trial was scheduled, the Commonwealth filed a motion in limine informing the trial court that Wasankari was hospitalized at a mental facility and requesting that questions pertaining to his mental health be limited. Ferguson's counsel objected to the motion and requested a continuance to obtain information regarding Wasankari's psychiatric history, diagnosis, and the reason for his current hospitalization. The

trial court agreed that the medical records were relevant to the issue of Wasankari's credibility, but questioned whether the witness had material evidence to offer. According to the Commonwealth, Wasankari was prepared to testify that, while Ferguson was staying with him in May 2001, Ferguson said he was on the run from criminal charges. The trial court advised the prosecutor that Wasankari's testimony was not necessary since the court records contained all the evidence needed to prove the bail jumping charges. Moreover, the trial court would have to grant a continuance to allow review of Wasankari's psychiatric records, pursuant to Eldred V. Commonwealth, Ky., 906 S.W.2d 694 (1995), if he was to be called as a witness. Consequently, the Commonwealth stated that Wasankari would not be called in its case in chief, but reserved the right to call him as a rebuttal witness.

During cross-examination, the Commonwealth asked Ferguson whether he was staying with Wasankari during May 2001. The trial court overruled the objection of Ferguson's trial counsel, but stated that a ruling on whether Wasankari's testimony was admissible would come at a later time. Ferguson denied staying at Wasankari's apartment, making a statement to Wasankari that he was on the run, or even knowing Wasankari. At the close of Ferguson's defense case, the trial court conducted a hearing, determined that Wasankari was competent to

testify, and allowed the Commonwealth to attempt to impeach Ferguson's denial that he had told Wasankari that he was on the run. Instead, Wasankari's testimony contained unresponsive answers about Ferguson drawing Social Security Insurance, confessing to burglaries and selling drugs. However, Wasankari steadfastly denied that Ferguson had told him he was on the run or had to go to court causing the trial court to terminate direct examination by the Commonwealth. Moreover, on cross-examination, Wasankari stated that he was diagnosed with schizoaffective disorder and was taking Risperidol.

The trial court erred in allowing the Commonwealth to call Wasankari as a witness without reviewing his psychiatric records. When the trial court has evidence before it that a witness suffers from a mental disability which might affect his credibility, Eldred requires the trial court to conduct an *in camera* review of the witness' psychiatric records to determine whether they contain evidence that would be material to the witness' credibility. Eldred at 702. Moreover, according to Eldred, the failure to do so results in a denial of effective cross-examination which cannot be cured through a showing of lack of prejudice. However, due to a factual quirk, the case *sub judice* is distinguishable from Eldred. Wasankari was called by the Commonwealth to impeach Ferguson's statements that he was not living with Wasankari and never told him he was supposed to

appear in court in May 2001. Nevertheless, Wasankari denied that Ferguson made any such statement to him. His testimony could have supported Ferguson's perjury charge which was based on his sworn testimony that he was living at a Salvation Army shelter in 2001; however, the jury acquitted Ferguson of perjury. Furthermore, Wasankari gave no relevant testimony in support of Ferguson's bail jumping convictions. Therefore, the trial court's failure to hold an Eldred hearing was harmless error.

Ferguson also complains that evidence of prior bad acts was improperly admitted. Wasankari spontaneously injected mentions of burglaries and allegations that Ferguson sold drugs into his testimony. Moreover, the Commonwealth informed the jury that Ferguson was charged with burglaries when he allegedly committed the bail jumping offenses. In order to prove a charge of first-degree bail jumping, The Commonwealth must show that a defendant was released on bail on a felony charge when he failed to appear for a scheduled court date. Kentucky Revised Statute (K.R.S.) 520.070. Since Ferguson's counsel did not object to the mention of the specific felony charges, we must determine whether such evidence was prejudicial. In support of the bail jumping charges, the Commonwealth introduced court records, including videotapes of Ferguson's earlier court appearances, to show that he was scheduled to appear in court on November 24,

1999, and May 1, 2001, and failed to do so on both occasions. In fact, Ferguson admitted in his testimony that he did not attend all scheduled court proceedings and was not in court on May 1, 2001. Due to the overwhelming evidence against Ferguson, the admission of prior bad acts evidence, even if erroneous, was harmless. Hill v. Commonwealth, Ky. App., 779 S.W.2d 230 (1989). Consequently, we affirm the portion of the trial court's judgment finding Ferguson guilty of two counts of bail jumping.

We turn, finally, to Ferguson's allegations of error during the sentencing phase of his trial. He first contends that the trial court erroneously allowed the Commonwealth to introduce evidence of prior failures to appear on misdemeanor charges. During the penalty phase of a felony trial, K.R.S. 532.055 allows the introduction of "evidence relevant to sentencing" including evidence regarding prior offenses of which a defendant has been convicted. Hudson v. Commonwealth, Ky., 979 S.W.2d 106 (1998) limits the evidence of the nature of a prior offense to a general description. Ferguson argues that prior bench warrants for failure to appear are not listed in K.R.S. 532.055 as evidence that may be admitted during the sentencing phase, nor are they a general description of the offense as mandated in Hudson. However, the more recent case of Cornelison v. Commonwealth, Ky., 990 S.W.2d 609 (1999), found

that the word "including" in K.R.S. 532.055 means that the list of admissible information contained therein is not exclusive. Moreover, the purpose of the statute "is to insure having a jury well informed about all pertinent information relating to the person on trial." Cornelison at 610. We disagree with Ferguson that his history of failing to appear in court on misdemeanor charges is irrelevant to the jury's decision fixing punishment on two counts of bail jumping.

During the sentencing phase, the trial court incorrectly instructed the jury that Ferguson's sentences had to run consecutively with one another by law. Although, Ferguson failed to object contemporaneously, we will review this matter under the palpable error rule, Kentucky Rule of Criminal Procedure 10.26. K.R.S. 533.060, which deals with offenses committed while a defendant is awaiting trial on another offense states as follows:

When a person commits an offense while awaiting trial on another offense, and is subsequently convicted or enters a plea of guilty to the offense committed while awaiting trial, the sentence imposed for the offense committed while awaiting trial shall not run concurrently with confinement for the offense for which the person is awaiting trial.

Ferguson correctly argues that, while this statute required the sentences on the bail jumping offenses to run consecutively with any sentence he might later receive for the pending burglary

charges, it did not require the sentences on the two bail jumping charges to run consecutively with one another. The Commonwealth concedes that the trial court's interpretation of the statute and instructions to the jury were erroneous; however, the Commonwealth also argues that such error was harmless because Ferguson only received a sentence totaling five years on both charges when each charge carried a penalty of one to five years. We disagree.

The Kentucky Supreme Court recently addressed a similar situation in Lawson v. Commonwealth, Ky., 85 S.W.3d 571 (2002) wherein the Commonwealth introduced testimony during the sentencing phase of a trial that incorrectly informed the jury that the defendant was facing up to forty years' imprisonment. In closing arguments, the Commonwealth asked the jury to recommend a sentence in the middle of the penalty range, and the jury responded by recommending a sentence of twenty-five years. The trial court reduced the sentence to twenty years which was the maximum sentence permissible under the law. On appeal, the Court accepted the trial court's decision to reduce the sentence on the individual counts of the indictment to ten years each; however, the case was remanded for a jury to determine whether those sentences ought to run consecutively or concurrently. The Court reasoned as follows:

Although we recognize that trial courts have the authority to make a final decision whether a defendant's sentences are to run concurrently or consecutively, and that juries' determinations as to that issue are merely recommendations, we decline the Commonwealth's invitation to find that the error in this case was harmless. . . .[I]n Stoker v. Commonwealth [Ky., 828 S.W.2d 619 (1992)], a majority of this Court rejected the contention errors in concurrent/consecutive jury instructions will be harmless because the trial court makes the ultimate decision. This Court has recognized that a jury's recommendation as to concurrent or consecutive sentencing is far from meaningless or pro forma, and that the jury's recommendation in this regard has "significance, meaning and importance." [Dotson v. Commonwealth, Ky., 740 S.W.2s 930, 931 (1987).] We believe that to declare the error in this case harmless would effectively delete K.R.S. 532.055(2)'s requirement that "[t]he jury *shall* recommend whether the sentences shall be served concurrently or consecutively" and would ignore the jury's important role in the sentencing process.

Lawson at 581. (Italics in original.) We agree with Ferguson that the trial court erred to his prejudice by informing the jury that his sentences had to run consecutively to each other by law. Consequently, the portion of the trial court's judgment sentencing him to two and one-half years on each count of bail jumping with those sentences to run consecutively is reversed and remanded for a new sentencing phase pursuant to the procedure outlined in Boone v. Commonwealth, Ky., 821 S.W.2d 813 (1992).

The judgment of the Jefferson Circuit Court is affirmed in part, reversed in part and remanded for further proceedings consistent with this opinion.

ALL CONCUR.

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