

RENDERED: December 23, 2004; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-000292-MR

KARLOS BROWN

APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE LISABETH HUGHES ABRAMSON, JUDGE
ACTION NO. 01-CR-000497

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** *

BEFORE: SCHRODER AND TACKETT, JUDGES; EMBERTON, SENIOR JUDGE.¹

SCHRODER, JUDGE: Karlos Brown (Brown) appeals his conviction for possession of a controlled substance (cocaine),² driving without a valid license,³ and persistent felony offender (PFO)

¹ Senior Judge Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

² KRS 218A.1412; KRS 218A.070(1)(d).

³ KRS 186.450(4).

first degree⁴ for which he was sentenced to eighteen years. Brown contends the court erred in allowing defense counsel to step outside the courtroom when the appellant testified and when he gave his closing argument. Because an attorney may not ethically assist in presenting false testimony, nor argue false facts in his closing, the court did not err. Also, the right to testify does not include the right to testify falsely; therefore appellant waives his right to counsel for that part of the trial where he proceeds against his counsel's advice.

Brown was arrested on August 29, 2000, by Detective Bouie and Officer King of the Louisville Police Department. At trial, the police and the defendant gave different versions of what occurred that evening. According to the police, that evening, Brown drove by the police going south on 19th Street in a Ford Fairmont. Officer King recognized Brown and knew he did not have a driver's license (at this time he did have a permit which required him to have another licensed driver in the vehicle). The police turned on 19th Street and got several cars behind Brown. Around the 1700 block, they turned on their blue lights and sirens. Appellant was alone and when the lights and siren were activated, Brown turned and looked at the police, then began reaching over to the passenger seat, and continued this gesture for several blocks. At 15th and Broadway, Brown

⁴ KRS 532.080.

turned right and turned into Findley's Barbeque. Brown immediately exited the vehicle and the police rushed to grab him because they thought he was going to run. Brown's fists were clenched and he put his right hand down the back of his pants. One officer grabbed his right hand and another grabbed his left. A couple of seconds later his hand opened up and two pieces of crack cocaine fell to the ground. The police picked up the cocaine and searched the vehicle. They recovered a loaded gun in a shoebox under the passenger seat.

After the Commonwealth rested, Brown insisted he be permitted to take the stand, against his attorney's advice. Brown's insistence that he testify required his attorney to request he be permitted to withdraw, stating (after approaching the bench) that he believed Brown planned on testifying differently from what the attorney had learned from his investigation. Defense counsel was permitted to leave during Brown's testimony. Brown made no opening statement and took the stand to give his version of the events of that night. He called no other witnesses and made his own closing statement. Defense counsel joined him in the sentencing phase of trial.

Brown testified that on the evening in question, he was driving his girlfriend's car and had a valid permit (which did require a licensed driver in the car). He said he was driving his girlfriend, Ms. McCauley, to the hair salon at 16th

and Broadway, and that he was unaware that the police were following him. He proceeded to drop her off and continued on his way, not aware of the police lights or sirens until he turned at 15th and Broadway when he immediately pulled over into Findley's Barbeque. He explained his reaching was an attempt to get his insurance and other papers from the glove compartment. Brown alleges he was pulled from the vehicle and his arms were pulled behind him and handcuffed. When the police said he was going to jail for the bag of crack he threw down, Brown did not see any bag. If there were drugs in a bag he believed the police planted them. He testified that the loaded gun was his girlfriend's and that he did not know she had it in the car.

The jury believed the police's version of the events of that evening and found Brown guilty of: driving without a valid license with a twenty-five dollar fine and possession of a controlled substance (cocaine) for which he received five years, enhanced to eighteen years by the PFO I charge.

On appeal, Brown contends the trial court erred in allowing defense counsel to withdraw during his defense without appointing substitute counsel. The problem arose at trial when the appellant insisted on testifying, which is his right. However, defense counsel became aware that Brown's testimony would not be consistent with what he knew about the case. Ethically, defense counsel cannot assist a defendant in offering

false testimony, (SCR 3.130(3.3)) and requested that he be permitted to withdraw. Because the trial was underway, the trial court denied a request to seek substitute counsel, but did permit defense counsel to step out during Brown's testimony and cross-examination. No other witnesses were called by the defense and Brown made his own closing, which was inconsistent with defense counsel's understanding of the facts. Defense counsel was on call through the rest of the trial and was back in the courtroom for sentencing.

It is uncontroverted that appellant is constitutionally entitled to effective representation at all stages of the proceedings, has the right to present evidence in his defense, and is entitled to his right to remain silent, regardless of guilt. However, there is no constitutional right to present false testimony, Nix v. Whiteside, 475 U.S. 157, 173, 106 S. Ct. 988, 89 L. Ed. 2d 123 (1986); Sanborn v. Commonwealth, Ky., 975 S.W.2d 905, 912 (1998), cert. denied, 526 U.S. 1025, 119 S. Ct. 1266, 143 L. Ed. 2d 361 (1999), and an attorney may not participate, even by silence, in presenting false testimony. In Re Carroll, Ky., 244 S.W.2d 474 (1951); Hogg v. Commonwealth, Ky. App., 848 S.W.2d 449 (1992); Tamme v. Commonwealth, Ky., 973 S.W.2d 13, 31 (1998), cert. denied, 525 U.S. 1153, 119 S. Ct. 1056, 143 L. Ed. 2d 61 (1999). Because Brown had no right to present false testimony, he had no right

to an attorney during that phase of his defense and the court did not err in permitting counsel to step out during Brown's narrative or his closing, which emphasized his narrative defense. Brown did not have an adequate reason for substitute counsel. Henderson v. Commonwealth, Ky., 636 S.W.2d 648 (1982).

Brown also alleges the trial court erred when it disallowed evidence intended to impeach the testimony of Officer King by showing bias and a motive to lie. Brown wanted to cross-examine Officer King to show King and Brown had a ten-year history of conflicts and past run-ins. The court would not allow Brown to bring up the specific incidents for impeachment purposes, but did allow Brown to indicate, during cross-examination, that there was friction and even a past history between Officer King and himself. Brown also was allowed to argue in his closing that Officer King wanted him so badly that he planted the drugs on Brown. Brown was attempting to impeach Officer King through collateral facts to reveal bias or hostility. The Kentucky Rules of Evidence, like the Federal Rules, do not address this issue.⁵ Professor Lawson⁶ opines the common law of evidence allows evidence of bias, but the admissibility of the specific acts is governed by the provisions on relevance in Rules 401 and 402 of the Kentucky Rules of

⁵ Robert Lawson, The Kentucky Evidence Law Handbook, § 4.10, p. 277 (4th ed. Lexis Nexis 2003).

⁶ Id. at p. 278.

Evidence. In Caudill v. Commonwealth, Ky., 120 S.W.3d 635, 661 (2003), cert. denied, _____ U.S. _____, 124 S. Ct. 2877, 159 L. Ed. 2d 781 (2004), our Supreme Court recognized that limitations on cross-examination to expose bias or prejudice should be cautiously applied, but that the judge has the power to set reasonable boundaries as long as a complete picture of the bias and motivation is developed.

Although the trial court allowed Brown to show bias or prejudice, we cannot say whether the trial court's limitations were reasonable or unreasonable because Brown did not preserve any of the questions or answers he wanted to ask. Brown's dialogue with the court inferred that he wanted to discuss specific run-ins with Officer King over the years. However, when the court would not allow it, he did not request that the evidence be preserved by avowal as required by RCr 9.52. Hart v. Commonwealth, Ky., 116 S.W.3d 481 (2003); Charash v. Johnson, Ky. App., 43 S.W.3d 274 (2000); Commonwealth v. Ferrell, Ky., 17 S.W.3d 520 (2000). Without the avowal testimony, we cannot say the court erred.

For the foregoing reasons, the judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Kathleen Kallaher Schmidt
Shepherdsville, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

Todd D. Ferguson
Assistant Attorney General
Frankfort, Kentucky