

RENDERED: November 19, 2004; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2003-CA-000359-MR

BOBBY PHILLIPS

APPELLANT

v. APPEAL FROM CLINTON CIRCUIT COURT
HONORABLE EDDIE C. LOVELACE, JUDGE
ACTION NO. 02-CR-00070

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: JOHNSON, TAYLOR, AND VANMETER, JUDGES.

JOHNSON, JUDGE: Bobby Phillips has appealed from a judgment of conviction and sentence entered by the Clinton Circuit Court on January 21, 2003, finding him guilty of robbery in the first degree¹ and sentencing him to prison for 17 1/2 years. Having concluded that the error in the admission of evidence of Phillips's prior criminal record during the sentencing phase of the trial was not properly preserved for appellate review and

¹ Kentucky Revised Statutes (KRS) 515.020.

that the error did not rise to the level of palpable error, we affirm.

On September 16, 2002, Phillips was indicted by the Clinton County grand jury for robbery in the first degree and assault in the fourth degree.² Charles Jolly, a 78-year-old man who was acquainted with Phillips, had alleged that on September 2, 2002, when he gave Phillips a ride, Phillips held a knife to Jolly's throat causing him physical injury. Jolly accused Phillips of robbing him of his billfold and automobile.

At a jury trial held on December 11, 2002, the trial court granted Phillips a directed verdict of acquittal on the assault charge on the basis that the assault charge merged into the robbery charge. However, the jury found Phillips guilty of robbery in the first degree and recommended a prison sentence of 17 1/2 years. The trial court subsequently entered a final judgment and sentence consistent with the jury's verdict and recommendation. This appeal followed.

Phillips contends that during the penalty phase of the trial the trial court erroneously admitted into evidence a computer printout of his criminal record, which contained inadmissible evidence concerning his prior criminal record. Phillips also contends that the exhibit was inadmissible as hearsay evidence that was not subject to any exception to the

² KRS 508.030.

hearsay rule. Phillips concedes that the issues raised on appeal are not preserved for appellate review, but he requests that we review the issues pursuant to the palpable error standard contained in RCr³ 10.26.

During the penalty phase of the trial, the Commonwealth presented evidence from Diane Staton of the Clinton Circuit Court Clerk's office concerning Phillips's prior criminal record. The criminal record that Staton referenced was obtained from an Internet website of the Kentucky Court of Justice, Administrative Office of the Courts known as "CourtNet."⁴ At the Commonwealth's request, Staton read to the jury entries from a computer printout obtained from the website which indicated various criminal convictions for Phillips. There were approximately 22 misdemeanor convictions listed on the ten-page printout. The Commonwealth then requested that the printout of the CourtNet record be introduced as an exhibit and published to the jury. The trial court admitted the printout as evidence without any objection.

We first note that while KRS 532.055(2)(a)1.⁵ permits the introduction of prior convictions of the defendant, it does not allow for the introduction of prior charges subsequently

³ Kentucky Rules of Criminal Procedure.

⁴ <http://kycourtnet.courts.cog.ky.us/courtnet/aocdefault.asp>.

⁵ Commonly referred to as the "Truth in Sentencing Law."

dismissed.⁶ Thus, it is well-settled that the Commonwealth cannot introduce evidence of charges that have been dismissed or set aside.⁷ Further, since only final convictions are admissible, pending charges, convictions in which a final judgment has not been entered, or convictions pending on appeal, are not admissible.⁸

Unfortunately, the printout from CourtNet that was admitted into evidence listed approximately 30 criminal charges which had either been dismissed, were still pending, or whose final disposition was unclear. Among these charges were two entries related to the felony charge of theft by unlawful taking over \$300.00; three charges of assault in the fourth degree (including one with the additional notation "child abuse"); two harassment charges; two terroristic threatening charges; two criminal trespass charges; three alcohol intoxication charges; a wanton endangerment charge; an attempt to elude charge; an escape charge; and a criminal mischief charge. Minor charges for offenses such as speeding, failure to wear a seat belt, and inadequate muffler were also contained on the printout.

⁶ Robinson v. Commonwealth, Ky., 926 S.W.2d 853, 854 (1996).

⁷ Cook v. Commonwealth, Ky., 129 S.W.3d 351, 365 (2004); Robinson v. Commonwealth, Ky., 926 S.W.2d 853, 854 (1996); Scrivener v. Commonwealth, Ky., 539 S.W.2d 291, 293 (1976); Dial v. Commonwealth, 142 Ky. 32, 133 S.W. 976, 977 (1911).

⁸ KRS 532.055(2)(a)1; Melson v. Commonwealth, Ky., 772 S.W.2d 631, 633 (1989).

While we agree with Phillips that it was error to allow the introduction of the CourtNet printout as an exhibit, since there was no objection to this evidence, Phillips cannot obtain relief on appeal unless we determine that the error constituted palpable error. A palpable error is an error that "affects the substantial rights of a party" and one that will result in "manifest injustice." "What it really boils down to is that if upon a consideration of the whole case this court does not believe there is a substantial possibility that the result would have been any different, the irregularity will be held nonprejudicial.'"⁹

While it was certainly error for the jury to be presented a printout containing charges for which there had not been a conviction, we cannot conclude that this error rises to the level of palpable error, i.e., that but for the error there is a substantial possibility that the result of the jury's recommended sentence would have been different. We first note that this senseless and disgusting crime was perpetrated against a 78-year-old man, and the jury's recommended sentence of 17 1/2 years, which was 2 1/2 years less than the maximum, was certainly not unjust to Phillips. Second, it is unclear from the record why defense counsel failed to object to the admission

⁹ Schoenbachler v. Commonwealth, Ky., 95 S.W.3d 830, 836 (2003)(quoting Abernathy v. Commonwealth, Ky., 439 S.W.2d 949, 952 (1969) overruled in part on other grounds, Blake v. Commonwealth, Ky., 646 S.W.2d 718 (1983)).

of the evidence. As argued by the Commonwealth, there are conceivable reasons why trial counsel may have, as a matter of legitimate trial strategy, purposely decided not to object to the Commonwealth's use of the exhibit. For this reason, we conclude that the error is better examined under the procedures provided for under RCr 11.42. Under those procedures, the issue of whether trial strategy was involved in the admission of the printout may be examined after an evidentiary hearing has been held.¹⁰

If it is determined in a RCr 11.42 proceeding that the introduction of the printout was not based on legitimate trial strategy, it will be for the trial court to determine whether Phillips received ineffective assistance of counsel. Thus, even though we have concluded that the error did not constitute palpable error because there is not a substantial possibility that the outcome would have been different, this does not foreclose a finding by the trial court at a RCr 11.42 proceeding that Phillips was prejudiced by the error under the Strickland standard. Strickland requires a finding of a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.¹¹

¹⁰ Humphrey v. Commonwealth, Ky., 902 S.W.2d 820, 822-23 (1998).

¹¹ Strickland v. Washington, 466 U.S. 668, 694, 104 S.Ct. 2052, 2068, 80 L.Ed.2d 674, 695 (1984).

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

ALL CONCUR.

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