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Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000759-MR

PHILLIP PHILLIPS — APPELLANT

v.

APPEAL FROM WHITLEY CIRCUIT COURT
HONORABLE PAUL E. BRADEN, JUDGE
ACTION NO. 99-CR-00037

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: HENRY, TACKETT, AND VANMETER, JUDGES.

VANMETER, JUDGE: This is an appeal from a final judgment and sentence on plea of not guilty entered by the Whitley Circuit Court, ordering appellant, Phillip Phillips, to serve nine years in the penitentiary after being convicted of possession of a handgun by a convicted felon. Appellant argues on appeal that the trial court erred by informing the jury of the nature of his multiple prior offenses, by not requiring the jury to find that his prior offenses were felonies, by not declaring a mistrial after two jurors saw him shackled, and by allowing an audiotape

of his post-arrest statements to the police to be played. For the reasons stated hereafter, we affirm.

Appellant was convicted of murder and possession of a handgun by a convicted felon and was sentenced to confinement in prison for life and five years, respectively. The Kentucky Supreme Court reversed this conviction and remanded the matter for the handgun charge to be severed from the murder charge. On January 28, 2004, a second trial commenced regarding the charge of possession of a handgun by a convicted felon. The jury returned a guilty verdict the following day and recommended that appellant serve nine years in prison. On March 22 the circuit court entered a final judgment and sentenced appellant in accordance with the jury's recommendation. This appeal followed.

I. Evidence of Appellant's Prior Offenses

During voir dire, the trial judge read the indictment against appellant, including the section which stated that appellant had previously been convicted of the following felonies in Tennessee: receiving stolen property on November 17, 1987, burglary in the first and second degrees on June 8, 1988, robbery and forgery on March 9, 1990, and aggravated rape on January 9, 1995.[1] The prosecutor repeated this list of

[1] Although the January 1995 judgment shows that appellant was actually convicted of criminal attempt to commit rape, the indictment below apparently listed the conviction as having been for aggravated rape. However, the

felonies to the jury during his opening remarks and the case-in-chief. The list of felonies was also incorporated into the jury instructions. Appellant contends that the trial court erred by allowing the nature, date, and location of the felonies to be disclosed to the jury and by allowing evidence of multiple felonies to be presented to the jury. We disagree.

It is, of course, well-established that the Commonwealth must prove every element of its case beyond a reasonable doubt.[2] Moreover, a defendant's previous convictions are generally not "relevant or competent during the guilt phase of a bifurcated trial unless, of course, it should become relevant for impeachment purposes."[3] This is not the case, however, in a prosecution for possession of a firearm by a convicted felon pursuant to KRS 527.040, where the Commonwealth must prove (1) possession of a handgun (2) by a convicted felon.[4] Although appellant correctly asserts that KRS 527.040(1) does not expressly authorize either the admission of evidence of the nature, date, or location of a defendant's prior felonies, or the admission of evidence of multiple felonies, the statute does

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conviction was correctly identified as criminal attempt to commit rape at all other times during the trial. In any event, this matter was not raised as an issue on appeal.

[2] KRS § 500.070.

[3] *Hubbard v. Commonwealth*, 633 S.W.2d 67, 68 (Ky. 1982).

[4] *Duvall v. Commonwealth*, 593 S.W.2d 884, 886 (Ky.App. 1979).

not prohibit the admission of such evidence. Indeed, "the best evidence of the fact of conviction is the judgment setting out the conviction,"[5] which typically reveals information such as the nature, date, and location of the crime. The trial court therefore was not statutorily barred from admitting evidence of these Tennessee judgments or in allowing them to be referenced.

Further, we are not persuaded that KRE 404(b) prohibited the introduction of evidence of multiple prior convictions. It is true that KRE 404(b) does not permit evidence of other crimes to be admitted "to prove the character of a person in order to show action in conformity therewith." However, the evidence of former convictions was not used in such a manner in the matter now before us. Rather, it was used to prove an essential element of the charge of possession of a handgun by a convicted felon, namely whether appellant was a convicted felon. The fact that evidence of more than one felony conviction was introduced does not compel a different conclusion.

II. Jury Findings and Appellant's Previous Offenses

Appellant's next contention on appeal is that the trial court erred by failing to instruct the jury to determine whether his prior offenses were felonies. We disagree.

[5] *Commonwealth v. Willis*, 719 S.W.2d 440, 441 (Ky. 1986).

Appellant concedes that this issue is unpreserved for appeal but argues that he is entitled to relief because of palpable error pursuant to RCr 10.26. As stated by the Kentucky Supreme Court:

> A palpable error is one which affects the substantial rights of a party and relief may be granted for palpable errors only upon a determination that a manifest injustice has resulted from the error. This means, upon consideration of the whole case, the reviewing court must conclude that a substantial possibility exists that the result would have been different in order to grant relief.[6]

Appellant correctly maintains that a criminal defendant is entitled "to a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt."[7] Therefore, he was entitled to a jury determination that he was in possession of a handgun and that he was a convicted felon.[8] Accordingly, the jury was given the following instruction regarding possession of a handgun by a convicted felon:

> You will find the Defendant guilty of Possession of a Handgun by a Convicted Felon under this Instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:

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[6] *Partin v. Commonwealth*, 918 S.W.2d 219, 224 (Ky. 1996).

[7] *Apprendi v. New Jersey*, 530 U.S. 466, 477, 120 S.Ct. 2348, 2356, 147 L.Ed.2d 435 (2000) (internal citations omitted).

[8] *Duvall*, 593 S.W.2d at 886.

> A. That in this county on or about the 22nd day of April, 1999 and before the finding of the Indictment herein, the Defendant knowingly had in his possession a 38 Smith & Wesson revolver handgun;
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> AND
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> B. That he had been previously convicted of Receiving Stolen Property on November 17, 1987, Burglary First Degree and Burglary Second Degree on June 8, 1988, Robbery and Forgery on March 9, 1990 and Criminal Attempt Rape on January 9, 1995 by Judgment of the Shelby County Criminal Court.

This instruction is generally consistent with the model instruction set forth in Justice Cooper's treatise on jury instructions.[9] While the instruction given below did not expressly require a finding that the listed offenses are felonies, it did require the jury to find whether appellant had been convicted of the listed offenses. Moreover, the jury was provided with the Commonwealth's Exhibit 7, which consisted of certified copies of the judgments entered against appellant on offenses described in those judgments as felonies. We therefore conclude that any error did not result in manifest injustice[10] because even if the instructions had expressly required the jury to find whether appellant's past offenses were felonies, there would have been no difference in the end result.

III. Jurors' Observation of Appellant in Shackles

[9] 1 William Cooper, *Kentucky Instruction to Juries* § 8.60 (Revised Fourth Edition 1999).

[10] RCr 10.26.

Appellant contends that at the beginning of the second day of trial, two jurors observed him as he walked to the courtroom in shackles. Appellant asserts that he is entitled to relief because the circuit court denied his motion for a mistrial as follows:

> Well, there are several options the Court has. One is to make inquiry of the jurors and make inquiry as to whether or not that would cause them any concern. However, if I do that I think that would emphasize it . . . . So, I think the thing I'm going to do is just assume that, and it's my observation that no harm would have been done under these circumstances. We've been as careful as we can with your client and everything for him as far as I know . . . . I'll overrule the motion.

We disagree with appellant's contention.

RCr 8.28(5) mandates that "[e]xcept for good cause shown the judge shall not permit the defendant to be seen by the jury in shackles or other devices for physical restraint." A criminal defendant also has constitutional protections against being seen in shackles by the jury. As the Kentucky Supreme Court has explained, "[t]he inference of guilt created by restraining a defendant during trial relates closely to an accused's constitutional right to be presumed innocent until proven guilty. Accordingly, this Court has consistently

condemned the practice of shackling a defendant during trial, absent the presence of extraordinary circumstances."[11]

However, as in the matter now before us, "the inadvertent viewing of the defendant in either handcuffs or another restraint for the sole purpose of being taken to or from the courtroom is not automatically reversible error."[12] Rather, "there is a position where the prejudicial effect is either de minimis or could become that through slight rehabilitation of the jury."[13] Indeed, multiple appellate decisions of Kentucky's highest court have found that harmless error occurred when jurors observed defendants in shackles.[14]

Here, the record shows that any viewing of appellant in shackles was brief, unintentional, without authorization by the court, and outside of the courtroom. While it may have been the better practice below to question the jurors as to whether they saw appellant in shackles and as to any prejudice resulting

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[11] *Peterson v. Commonwealth*, 160 S.W.3d 730, 733 (Ky. 2005) (internal citations omitted).

[12] *Moss v. Commonwealth*, 949 S.W.2d 579, 582-83 (Ky. 1997).

[13] *Davis v. Commonwealth*, 899 S.W.2d 487, 490 (Ky. 1995), *overruled on other grounds by Merriweather v. Commonwealth*, 99 S.W.3d 448, 453 (Ky. 2003).

[14] *See, e.g., Moss v. Commonwealth*, 949 S.W.2d at 582-83 (no error when juror saw appellant in parking lot while bound but stated that she did not notice anything particular about him); *Davis v. Commonwealth*, 899 S.W.2d at 490-91 (harmless error when jury panel saw defendant briefly handcuffed in courtroom and counsel was given ability to minimize any damage through voir dire); *Murray v. Commonwealth*, 474 S.W.2d 359, 361 (Ky. 1971) (defendant was not denied a fair trial when jury panel saw him being brought into courtroom in handcuffs and shackles but members denied during voir dire that their decisions would be affected).

therefrom, we believe that any prejudicial effect was de minimis given the specific circumstances of this case and the overwhelming evidence against appellant. We conclude, therefore, that the trial court did not abuse its discretion[15] in overruling appellant's motion for a mistrial.

IV. Tape of Appellant's Post-Arrest Statement

Finally, appellant argues that he is entitled to relief because the trial court failed to grant his motion for a mistrial after the Commonwealth played for the jury appellant's tape recorded statement to a police officer. We disagree.

During its case-in-chief the Commonwealth offered its Exhibit 10, which is a tape recording of appellant's post-arrest statement to a police officer. Apparently this tape was introduced to show that appellant possessed a handgun because he admitted to shooting a man. The Commonwealth began to play the tape after appellant's counsel did not object. At a certain point on the tape, the police officer stated that he was going to charge appellant with murder, robbery, and stealing an automobile. Appellant's counsel then objected to the word "murder" being mentioned "time and time again" on the tape. The trial court overruled the objection, resumed playing the tape, denied appellant's subsequent motion for a mistrial, and then allowed the remainder of the tape to be played.

[15] *Maxie v. Commonwealth*, 82 S.W.3d 860, 863 (Ky. 2002) (citing *Gould v. Charlton Co.*, 929 S.W.2d 734 (Ky. 1996)).

KRE 103(a) provides as follows with regard to rulings on evidence:

> Effect of erroneous ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected; and
> (1) Objection. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, and upon request of the court stating the specific ground of objection, if the specific ground was not apparent from the context[.]

Here, it is clear from the record that appellant's counsel was familiar with the contents of the tape but waived any right to object by failing to make an objection to the Commonwealth's introduction of the tape as Exhibit 10. "When trial counsel is aware of an issue and fails to request appropriate relief on a timely basis, the matter will not be considered plain error for reversal on appeal."[16] The trial court did not abuse its discretion[17] in overruling appellant's motion for a mistrial.

The judgment of the Whitley Circuit Court is affirmed.

ALL CONCUR.

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[16] *Crane v. Commonwealth*, 833 S.W.2d 813, 819 (Ky. 1992) (citing *West v. Commonwealth*, 780 S.W.2d 600 (Ky. 1989) and *Smith v. Murray*, 477 U.S. 527, 106 S.Ct. 2661, 91 L.Ed.2d 434 (1986)).

[17] *Maxie*, 82 S.W.3d at 863.

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