

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001911-MR

JASON HALVORSON

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE F. KENNETH CONLIFFE, JUDGE
ACTION NO. 03-CR-001932

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * * *

BEFORE: BARBER, MINTON, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Jason Halvorson brings this appeal from an August 12, 2004, judgment upon a jury verdict convicting him of first-degree manslaughter and sentencing him to eleven years' imprisonment. We reverse and remand.

On July 20, 2003, the Jefferson County Grand Jury indicted appellant upon the offenses of murder and tampering with physical evidence. The events leading to the indictment are largely disputed. It is, however, undisputed that appellant and Charles Curran were involved in an altercation in the

parking lot of a Louisville bar known as Mary's Last Call. Curran received numerous stab wounds and ultimately died at another location as a result of his injuries.

At trial, appellant testified that he acted in self-protection and believed his life to be in danger during the fight with Curran. Appellant's trial strategy centered around the defense of self-protection. The jury acquitted appellant of murder and tampering with physical evidence but found him guilty of first-degree manslaughter. On August 12, 2004, the circuit court entered a judgment of conviction and sentenced appellant to a total term of eleven years' imprisonment. This appeal follows.

Appellant contends the circuit court's jury instruction upon the defense of self-protection erroneously shifted the burden of proof to appellant and resulted in reversible error. We are compelled to agree.

The law in this Commonwealth is clear:

Once a defendant produces evidence that he acted in self-protection, the burden of proof as to that issue shifts to the Commonwealth

Estep v. Commonwealth, 64 S.W.3d 805, 811 (Ky. 2002). Stated differently, if a defendant presents *prima facie* evidence proving that he acted in self-protection, the Commonwealth then bears the burden of disproving the defense beyond a reasonable

doubt. 1 William Cooper, Kentucky Instructions to Juries (Criminal) §11.07 (1999).

The circuit court submitted the following jury instruction upon the defense of self-protection:

Even though the Defendant might otherwise be guilty of an offense described in Instructions 3, 4, 5, or 6. If you believe from the evidence and beyond a reasonable doubt that Defendant killed Charles Curran, and at the time he killed Charles Curran, that Charles Curran was about to use physical force upon the Defendant, then the Defendant was privileged to use such physical force against Charles Curran, as he believed to be necessary in order to protect himself against it. He had the right to use deadly physical force only if he believed it to be necessary in order to protect himself from death or serious injury at the hands of Charles Curran.

Appellant objects to the above instruction because it required the jury to "believe from the evidence and beyond a reasonable doubt" that Curran was about to use physical force and that appellant was privileged to use physical force as necessary to protect himself. Appellant alleges that this instruction improperly shifted the burden of proof from the Commonwealth to him. The Commonwealth counters that any error was merely harmless. The Commonwealth specifically argues that as appellant was convicted of manslaughter, the jury must have determined that he did not act in self-protection. This argument ignores that the manslaughter instruction refers the

jury to the self-protection instruction in order to determine whether appellant acted in self-protection.

Although not directly on point, the following language in Estep offers guidance:

Although Instruction No. 2 accurately described the nature of the defense of self-protection, it did not inform the jurors that the burden of proof as to that issue was on the Commonwealth, *i.e.*, that they could find Appellant guilty only if they believed from the evidence beyond a reasonable doubt that, when he shot Jackson, Appellant was *not* privileged to act in self-protection. The failure of the instructions to properly allocate the burden of proof on this issue constituted prejudicial error.

Estep, 64 S.W.3d at 811. We think it evident that the circuit court's jury instruction for self-protection improperly shifted the burden of proof from the Commonwealth to appellant. Such an improper allocation of the burden of proof in the self-protection instruction constitutes reversible error. For this reason, we believe appellant is entitled to a new trial. Upon retrial, we cite the trial court to the following jury instruction upon self-protection found in 1 William Cooper, Kentucky Instructions to Juries (Criminal) §11.07 (1999):

Even though the Defendant might otherwise be guilty of Murder under Instruction No. ____, or First-Degree Manslaughter under Instruction No. ____, if at the time the Defendant killed _____(victim)(if he did so), he believed that _____(victim) was then and there about to use [,or believed there was an

impending danger that _____(victim) would use,] physical force upon him, he was privileged to use such physical force against _____(victim) as he believed to be necessary in order to protect himself against it, but including the right to use deadly physical force in so doing only if he believed it to be necessary in order to protect himself from death or serious physical injury [or kidnapping][or sexual intercourse compelled by force or threat] at the hands of _____(victim).

Appellant also argued that he was entitled to a directed verdict of acquittal upon manslaughter. We reject this argument. From the evidence, it was not clearly unreasonable for the jury to have found appellant guilty of manslaughter. See Commonwealth v. Benham, 816 S.W.2d 186 (Ky. 1991).

Appellant also alleges that the trial court erred by failing to instruct the jury that he had no duty to retreat. We refer appellant to the recent Kentucky Supreme Court case of Hilbert v. Commonwealth, 162 S.W.3d 921 (Ky. 2005); wherein, the Court held that if the jury is adequately instructed upon self-protection, there is no duty to also give a retreat instruction.

For the foregoing reasons, the judgment of the Jefferson Circuit Court is reversed and this cause is remanded for proceedings not inconsistent with this opinion.

ALL CONCUR.

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