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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-000068-MR
and
NO. 2005-CA-000301-MR

COMMONWEALTH OF KENTUCKY APPELLANT/APPELLEE

v.

APPEALS FROM CHRISTIAN CIRCUIT COURT
HONORABLE JOHN L. ATKINS, JUDGE
ACTION NO. 02-CR-00366

JACQUES REDD APPELLEE/APPELLANT

OPINION
REVERSING AND REMANDING AS TO
2005-CA-000068-MR
AND AFFIRMING AS TO
2005-CA-000301-MR

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BEFORE: COMBS, CHIEF JUDGE; McANULTY,[1] JUDGE; POTTER, SENIOR JUDGE.[2]

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[1] Judge William E. McAnulty, Jr., concurred in this opinion prior to his resignation effective July 5, 2006, to accept appointment to the Kentucky Supreme Court. Release of the opinion was delayed by administrative handling.

[2] Senior Judge John W. Potter sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

POTTER, SENIOR JUDGE: Below Jaques Redd (Redd) was charged with two drug charges and being a second-degree persistent felony offender[3] (PFO II). He brings appeal 2005-CA-000301-MR from a judgment of the Christian Circuit Court upon a jury trial adjudging him guilty on two counts of first-degree trafficking in a controlled substance (cocaine)[4] and sentencing him to two respective ten-year concurrent terms of imprisonment. The Commonwealth of Kentucky (Commonwealth) brings appeal 2005-CA-000068-MR from an order of the Christian Circuit Court dismissing the PFO II charge against Redd after the same jury was unable to reach a verdict on the PFO II charge.

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Working with the Hopkinsville Police Department and the federal Drug Enforcement Administration, David Quarles testified that he purchased crack cocaine from Redd at Redd's residence on May 6, 2002, and on May 31, 2002. Further testimony indicated that on May 6, 2002, law enforcement searched Quarles and his car, gave him $200.00, and wired him with an audio recording device. Quarles drove to Redd's house; asked a guy named "Tip" for Redd; was asked by "Tip" for crack cocaine; told "Tip" that he would get back to him; was advised by "Tip" that Redd was next door; found Redd next door;

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[3] Kentucky Revised Statutes 532.080.

[4] Kentucky Revised Statutes 218A.1412.

purchased $200.00 worth of crack cocaine from Redd; and turned the drugs over to law enforcement. Law enforcement paid Quarles $100.00, which he admitted was to fund his own crack cocaine addiction. On May 31, 2002, law enforcement again searched Quarles and his car; gave him $100.00; and wired him with an audio recorder. Quarles went to Redd's residence and purchased crack cocaine from Redd. Law enforcement monitored both drug buys via the audio recorder and the audiotapes made on both occasions were played for the jury. The jury found Redd guilty on two counts of first-degree trafficking in a controlled substance (cocaine) and recommended sentences of ten years on each count.

Before us, Redd argues trial court error in the penalty phase, specifically pertaining to the introduction of evidence that he was a drug dealer and in allowing the Commonwealth to refer to facts not in evidence during its closing argument.

Redd first alleges trial court error in ruling that evidence of his reputation as a drug dealer would be admissible if he took the stand and denied selling drugs; and in allowing the Commonwealth to introduce this reputation testimony during the penalty phase of trial. Specifically, he cites to the court's ruling in response to the Commonwealth's notice pursuant

to Kentucky Rules of Evidence (KRE) 404(b) and (c)[5] that it intended to produce evidence at trial that Stephanie Hester (Redd's wife at the time of trial) was aware that Redd had sold cocaine for a year prior to August 16, 2002, and that she was aware that Redd sold drugs out of their residence. The trial court ruled that the testimony would be allowed in rebuttal if Redd testified and denied selling drugs, relying on KRE 404(a)(1).[6] As the defense presented no witnesses during the guilt phase, Stephanie did not testify in rebuttal.

The Commonwealth introduced testimony during the penalty phase from the clerk's office and probation and parole. The defense presented Redd's brother, who testified on direct that he did not feel that Redd had committed the offenses; that

[5] (b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible:
(1) If offered for some other purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident; or
(2) If so inextricably intertwined with other evidence essential to the case that separation of the two (2) could not be accomplished without serious adverse effect on the offering party.
(c) Notice requirement. In a criminal case, if the prosecution intends to introduce evidence pursuant to subdivision (b) of this rule as a part of its case in chief, it shall give reasonable pretrial notice to the defendant of its intention to offer such evidence. Upon failure of the prosecution to give such notice the court may exclude the evidence offered under subdivision (b) or for good cause shown may excuse the failure to give such notice and grant the defendant a continuance or such other remedy as is necessary to avoid unfair prejudice caused by such failure.

[6] (a) Character evidence generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:
(1) Character of accused. Evidence of a pertinent trait of character or of general moral character offered by an accused, or by the prosecution to rebut the same.

the verdict was not right; and that Redd had totally changed his life since his prior conviction. On cross-examination, Redd's brother denied that he had seen Redd selling dope out of the house for a year. The Commonwealth's further question as to Redd's brother's knowledge of Stephanie's statement to the police that Redd had been selling drugs at the house brought an objection, and although overruled, no further response was made. Thereafter, Redd testified on cross-examination, over objection, that he had not done anything illegal since his prior arrest and parole such as sell drugs, despite Stephanie's statement. When the Commonwealth called Stephanie as a rebuttal witness and she equivocated as to making the statement, the statement was played for the jury.

We agree with the Commonwealth that Redd's brother was properly cross-examined under KRE 405(b), which provides that:

> On cross-examination of a character witness, it is proper to inquire if the witness has heard of or knows about relevant specific instances of conduct. However, no specific instance of conduct may be the subject of inquiry under this provision unless the cross-examiner has a factual basis for the subject matter of the inquiry.

Pursuant to Johnson v. Commonwealth, 105 S.W.3d 430, 441-442 (Ky. 2003), Stephanie's statement was also admissible. In Johnson, the Kentucky Supreme Court concluded that testimony from a daughter that she had never seen her dad have any illegal drugs in the house opened the door, under KRE 405(b), to cross-

examination as to specific instances of conduct and to the admission of evidence of her father's previous guilty plea to drug trafficking. Following from the proper cross-examination of Redd's brother, the admission of Stephanie's statement was proper.

Redd next contends that the trial court erred in overruling his objections to comments made during the Commonwealth's closing argument in the penalty phase which he characterizes as facts not in evidence. More specifically he complains of argument blaming Redd for the city's drug problems, where there was no evidence but that he sold drugs to Quarles on two occasions, and implying that Redd was a "big-time drug dealer" due to the federal government's DEA looking at Redd, where the evidence indicated that the DEA was involved only due to the local law enforcement's targeting of Redd and its request for help from the DEA in cleaning up the drug problems in the county. We find no error.

Our standard of review of alleged prosecutorial misconduct during a closing argument pertains to "the overall fairness of the trial, and not the culpability of the prosecutor," and relates to "whether the conduct was so egregious that [Redd] was denied a fair trial." *See generally* Commonwealth v. Petrey, 945 S.W.2d 417, 419 (Ky. 1997) and Slaughter v. Commonwealth, 744 S.W.2d 407, 411 (Ky. 1987)

(citing Donnelly v. DeChristoforo, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974)).

Herein, the Commonwealth argued that Redd, who was convicted of trafficking by selling $300.00 worth of $20.00 rocks of crack cocaine, was affecting not only his family (due to his absence upon going to prison) but multiple families whose members were smoking the rocks sold by Redd. Redd's contemporaneous objection to this line of argument on the basis that it amounted to facts not in evidence and that the Commonwealth was "trying to blame Mr. Redd for the entire drug problem in Hopkinsville," was overruled. Later, the Commonwealth argued that the amount sold was "a significant amount enough to warrant the attention of the DEA. The DEA came in here to help stop the drug problem and [Redd] was identified as a big enough source to use them to go toward." Although Redd made no contemporaneous objection, his objection following the jury's retiring to deliberate was overruled on the basis that the comments were proper inferences from the evidence.

Looking at whether the Commonwealth's conduct was so egregious as to deny Redd a fair trial, we find no error in the trial court's rulings. Overall, Redd was convicted upon the testimony of the person who bought $300.00 worth of crack cocaine from him on two occasions, and those purchases were overheard by law enforcement. The comments made by the

Commonwealth in closing were logical inferences from the evidence. There was no error.

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As noted above, Redd was found guilty on the underlying offenses upon a jury trial. In the penalty phase, the jury affixed punishment at ten years on each of the underlying charges to be served concurrently. The jury was dismissed upon its inability to reach a verdict as to the PFO II charge. At sentencing, the Commonwealth argued for the impaneling of a new jury to hear the PFO II charge. Redd argued that a hung jury amounted to an acquittal. The trial court dismissed the PFO II charge concluding that it pertained to a status and not a "stand alone charge," and that the jury's inability to conclude Redd's status as a PFO resulted in an acquittal of that charge.

Before us, the Commonwealth argues that the trial court erred in dismissing the PFO II charge. Neither side disputes the appropriateness of the action of the trial court in dismissing the jury for failure to reach a verdict on the PFO charge. The question is the appropriateness of impaneling a new jury.

According to Kentucky Revised Statutes (KRS) 532.080(1):

> [A PFO] proceeding shall be conducted before the court sitting with the jury that found the defendant guilty of his most recent offense unless the court for good cause discharges that jury and impanels a new jury for that purpose.

In Commonwealth v. Crooks, 655 S.W.2d 475, 477 (Ky. 1983), where the jury found guilt as to PFO but was discharged upon failure to agree upon a sentence, the Kentucky Supreme Court concluded that "[i]n conformity with [KRS 532.080(1)] a new jury should now be impaneled to consider the persistent felony offender charge." Furthermore, in a discussion of KRS 532.055, the court in Williamson v. Commonwealth, 767 S.W.2d 323, 326 (Ky. 1989), cited Crooks as holding "when the original jury is discharged for good cause in a PFO proceeding, it is proper to impanel a new jury to consider only the issue of punishment." The trial court dismissed the PFO charge on the longstanding recognition that PFO is a status offense and not a criminal offense. *See generally* Hardin v. Commonwealth, 573 S.W.2d 657, 661 (Ky. 1978). We fail to see, however, in light of KRS 532.080(1) and Crooks how this argument assists Redd. Pursuant to KRS 532.080(1) and Crooks, the trial court incorrectly applied the law, and this case must be reversed and remanded to give the Commonwealth the opportunity to retry the PFO II charge.

For the foregoing reasons, the judgment of the Christian Circuit Court in appeal 2005-CA-000301-MR is affirmed; the order of the Christian Circuit Court in appeal 2005-CA-

000068-MR is reversed, and the action is remanded to give the Commonwealth the opportunity to impanel a new jury for PFO II proceedings.

ALL CONCUR.

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