

RENDERED: SEPTEMBER 22, 2006; 2:00 P.M.  
NOT TO BE PUBLISHED

## Commonwealth Of Kentucky

### Court of Appeals

NO. 2005-CA-000818-MR

DALE WILLIS

APPELLANT

APPEAL FROM BELL CIRCUIT COURT  
v. HONORABLE JAMES L. BOWLING, JR., JUDGE  
ACTION NO. 04-CR-00079

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: HENRY AND VANMETER, JUDGES; KNOPF,<sup>1</sup> SENIOR JUDGE.

KNOPF, SENIOR JUDGE: Dale Willis was convicted of second-degree assault<sup>2</sup> and being a second-degree persistent felony offender<sup>3</sup> (PFO) in connection with a violent attack on his girlfriend, Belinda Hatfield. He argues in this appeal that the trial court erred in refusing his request for a missing evidence instruction

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<sup>1</sup> Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

<sup>2</sup> KRS 508.020.

<sup>3</sup> KRS 532.080(2).

and in allowing the Commonwealth to introduce an exhibit during the penalty phase of his trial which contained extraneous information about a prior conviction. Finding no reversible error in either contention, we affirm the judgment of the Bell Circuit Court.

The victim testified at trial that after she refused to take Willis to the local bootlegger, he hit her in the back of the head with a tire iron, forced her into their car and drove her to the top of a mountain where he beat and raped her. After attempting to choke her with an electrical cord, he threw her into the trunk of the vehicle from which she was able to escape after Willis walked away from the car. Although her eyes were swollen shut, she was able to crawl down the hill where she was found by a neighbor who called police.

When Sheriff Bruce Bennett went to the parties' trailer to investigate Belinda's allegations, he found appellant Willis hiding underneath a blanket in a brush pile in the woods behind the trailer. After Willis's subsequent arrest for the attack on Belinda, the Sheriff called Gary Wagner, a towing service operator, to remove the vehicle in which the assault allegedly occurred from the trailer premises. It appears that after storage fees for the car went unpaid, Wagner contacted the Sheriff's office to see if he could dispose of it. Although Wagner testified that former Deputy Sam Johnson told him he

could dispose of it, both Sheriff Bennett and Deputy Sheriff David Cornelius stated that they were unaware that the car had been destroyed until Cornelius contacted the garage to inform them that appellant's trial counsel would be coming to view it.

Willis's version of the events of that night is completely at odds with the testimony of other witnesses. He maintains that it was the victim who attacked him inside the trailer after she became enraged upon learning that he had not fixed their car which had broken down. He stated that after Belinda stabbed him in the hand with a knife, he responded by throwing her away from him. When she came at him again, he kicked her to get her away from him. Willis acknowledged knowing that he probably injured Belinda because he kicked her hard with steel-toed boots and admitted that he had in fact broken her nose and the bone surrounding her right eye, as well as causing a severe bump on the back of her head when she hit the television.

Willis stated that while he was in the bathroom tending to his bleeding hand, Belinda left the home. He then went to the broken-down car and attempted to get it started so he could look for her. When he could not start the car, Willis claimed that he returned to the trailer and again tended to his bleeding hand. He eventually went outside and sat down on a blanket where he fell asleep and was later awakened by the

sheriff. After his arrest and while Belinda was hospitalized from her injuries, the couple's trailer was destroyed by fire. It is Willis's contention the loss of the physical evidence in both the trailer and the vehicle proved prejudicial to his defense. Although Willis was acquitted of the rape charge, his conviction for second-degree assault and the PFO charge precipitated this appeal.

Appellant's initial argument is that the trial court erred in denying his request for a missing evidence instruction. We disagree. As our Supreme Court made clear in Estep v. Commonwealth,<sup>4</sup> a criminal defendant is entitled to such an instruction only upon a showing that the Commonwealth acted in bad faith:

[T]he Due Process Clause is implicated only when the failure to preserve or collect the missing evidence was intentional and the potentially exculpatory nature of the evidence was apparent at the time it was lost or destroyed. None of the above precludes a defendant from exploring, commenting on, or arguing inferences from the Commonwealth's failure to collect or preserve any evidence. It just means that **absent some degree of "bad faith," the defendant is not entitled to an instruction that the jury may draw an adverse inference from that failure.** (Emphasis added.)

Here, the most Willis can point to is the failure to follow "proper police procedures" as evidence of negligence on the part

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<sup>4</sup> 64 S.W.3d 805, 810 (Ky. 2002).

of the Commonwealth in failing to preserve the evidence. We are convinced that such failure, even if true, falls woefully short of the bad faith standard set out in Estep and is thus plainly insufficient to warrant the requested instruction.

Willis also complains that his due process rights were violated during the penalty phase of the proceeding with the introduction of an exhibit containing a citation for driving under the influence (DUI) which included a narrative of the details of that crime. Willis admits that his trial counsel did not object to the introduction of this exhibit and thus the issue has not been properly preserved for our review. Although we find no manifest injustice resulted from the admission of this exhibit, in the interest of judicial economy we will briefly address Willis's contention that it deprived him of a fair trial.

Relying upon Pace v. Commonwealth,<sup>5</sup> Willis asserts that the only information concerning prior offenses which may be introduced during the PFO phase of a bifurcated trial is a simple check list of technical statutory requirements establishing his status of a persistent felony offender. He maintains that the clear import of that Court's opinion is that the introduction of other evidence "can only serve to lengthen what is intended to be a quick and simple procedure and to

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<sup>5</sup> 636 S.W.2d 887 (Ky. 1982), reversed on other grounds.

inflame the jury.”<sup>6</sup> Such a view, however, fails to take into account the explicit language of KRS 532.055(2)(a)(2) which permits the Commonwealth to offer evidence in the penalty phase of a bifurcated trial as to the “nature of prior offenses” of which a defendant has been convicted.

The effect of the 1986 enactment of KRS 532.055 with respect to the introduction of indictments was the subject of Supreme Court review in Maxie v. Commonwealth.<sup>7</sup> In that case, the Court reaffirmed the proposition that “such information was relevant and essential so that jurors are not required to ‘sentence in a vacuum without any knowledge of the defendant's past criminal record or other matters that might be pertinent to consider in the assessment of the appropriate penalty.’”<sup>8</sup> Citing the opinion of this Court in Lemon v. Commonwealth,<sup>9</sup> the Maxie Court also noted that because the same evidence that is pertinent in fixing the penalty is a pertinent consideration in enhancing the sentence, a combined hearing on those aspects of the case posed no procedural problems. Finally, of particular pertinence to the issue in this case, the Court concluded that there was nothing in the language of the indictment which

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<sup>6</sup> Id. at 890.

<sup>7</sup> 82 S.W.3d 860, 865 (Ky. 2002).

<sup>8</sup> Id. at 865-6, citing Commonwealth v. Reneer, 734 S.W.2d 794, 797 (Ky. 1987).

<sup>9</sup> 760 S.W.2d 94 (1988).

exceeded the scope of evidence held to be admissible in Robinson v. Commonwealth<sup>10</sup> because "the indictment provided nothing more than a 'general description' of the crime with which Appellant was charged."<sup>11</sup> So it is with the allegedly improper use of the citation. The information contained in the citation does nothing more than outline the factual predicate for the DUI charge which culminated in a conviction. It was not unduly prejudicial and certainly did not affect the fundamental fairness or basic integrity of the proceedings below.

Accordingly, the judgment of the Bell Circuit Court is affirmed.

BRIEF FOR APPELLANT:

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<sup>10</sup> 926 S.W.2d 853 (Ky. 1996).

<sup>11</sup> 82 S.W.3d at 866.