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Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-001716-MR

RONALD LEE HIBBITT, II — APPELLANT

v.

APPEAL FROM WARREN CIRCUIT COURT
HONORABLE STEVE ALAN WILSON, JUDGE
ACTION NO. 04-CR-00405

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: THOMPSON AND WINE, JUDGES; KNOPF,[1] SENIOR JUDGE.

KNOPF, SENIOR JUDGE: Appellant, Ronald Lee Hibbitt, II, was convicted of second-degree assault and second-degree wanton endangerment following a jury trial in Warren Circuit Court. He entered a conditional guilty plea pursuant to *North Carolina v. Alford*, 400 U.S. 25 (1970), on the charge of first-degree persistent felony offender (PFO) and was sentenced to fifteen years' imprisonment. On appeal, Hibbitt argues that: (1) his

[1] 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.

actual PFO status should have been classified as second-degree; (2) the trial judge should have recused himself; (3) the trial court improperly admitted expert testimony; and (4) he was entitled to an instruction on self-defense. We affirm.

On the evening of April 15, 2004, Hibbitt and his girlfriend, Charlie Pratt, were drinking and smoking marijuana at the home they shared in Bowling Green, Kentucky. Pratt's two children were asleep in the back bedroom. At some point in the evening, Hibbitt and Pratt became embroiled in a heated argument that eventually escalated into a physical confrontation. Pratt apparently threw a dumbbell at Hibbitt after he received a telephone call from an ex-girlfriend. Later, Hibbitt squirted gasoline on Pratt while she was sitting on the floor folding clothes. Pratt went to the sink to wash herself off at which time the gasoline ignited and caused severe burns to Pratt's left side and buttocks. Hibbitt maintained that the ignition was accidentally caused by his lit cigarette. Other evidence tended to show that the ignition was deliberate. Hibbitt was found guilty of second-degree assault and second-degree wanton endangerment. He entered a conditional *Alford* plea to first-degree persistent felony offender. This appeal follows.

Hibbitt first argues that he should have been classified as second-degree PFO because he received concurrent sentences on his previous felony convictions. Hibbett pled guilty in 1997 to an amended charge of possession of a controlled substance and received a probated five year sentence. In 1998, Hibbitt pled guilty to two counts of trafficking in a controlled substance. Hibbitt received a sentence of five years' imprisonment to be served concurrently to the probated sentence in the previous case. He

cites KRS 532.080(4) and the 1974 commentary in support of his argument. We disagree.

KRS 532.080(4) provides:

> For the purpose of determining whether a person has two (2) or more previous felony convictions, two (2) or more convictions of crime for which that person has served concurrent or uninterrupted consecutive terms of imprisonment shall be deemed to be only one (1) conviction, unless one (1) of the convictions was for an offense committed while that person was imprisoned.

The 1974 Commentary to this section states:

> Subsection [2](c) requires that the defendant must have been imprisoned for the prior offense before it can be treated as a previous felony conviction under this section… When an individual has been convicted two times before serving any time in prison, his convictions shall be considered a single conviction for the purposes of this section.

In *Hinton v. Commonwealth*, 678 S.W.2d 388, 390 (Ky. 1984), our Supreme Court held that amendments to KRS 532.080 permitted the use of convictions resulting in probation or parole to determine PFO status. The Supreme Court further held that the 1974 Commentary relating to this section was inapplicable because amendments to the original statute abolished the requirement of actual imprisonment. *Id.* Hibbitt's convictions of trafficking in a controlled substance do not merge with his first conviction for possession of a controlled substance because he had already begun serving his sentence on the first conviction before being charged and sentenced on the second and third convictions. *Thacker v. Commonwealth*, 194 S.W.3d 287, 293 (Ky. 2006).

Hibbitt next argues that the trial court erred by failing to recuse itself when Hibbitt notified the court that the judge had prosecuted him for the convictions used to

support the PFO charge. Hibbitt moved to have the trial court recuse itself pursuant to KRS 26A.015

> KRS 26A.015(2)(b) provides:
>
> > Any justice or judge of the Court of Justice or master commissioner shall disqualify himself in any proceeding:
> > (b) Where in private practice or government service he served as a lawyer or rendered a legal opinion in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter in controversy, or the judge, master commissioner or such lawyer has been a material witness concerning the matter in controversy;

Commonwealth v. Carter, 701 S.W.2d 409 (Ky. 1985) is dispositive of this issue. In *Carter,* the defendant sought recusal of the trial judge because the judge had previously served as county attorney and had prosecuted the defendant on previous felony offenses that were being used as the basis for the current PFO charge. The Supreme Court reversed the Court of Appeals and stated:

> [T]he fact that Judge Soyars was County Attorney at the time of the prior convictions in 1973 and 1977 does not affect his qualification to preside at the pleas of guilty herein for the simple reason that those convictions were not "the matter in controversy" as set out in KRS 26A.015(2)(b).

Id. at 410. The Supreme Court concluded that the prior convictions were not "matters in controversy" within the meaning of KRS 26A.015(2)(b) and recusal of the trial judge was not required. The present case presents a similar situation and we conclude that the trial judge's past prosecutions of Hibbitt did not require his recusal under KRS 26A.015(2)(b). Hibbitt presents no evidence of record or otherwise demonstrating any bias or unfairness on the part of the trial judge in this case. There was no error in denying Hibbitt's motion to recuse.

Hibbitt next argues that the trial court erred by admitting expert testimony that did not satisfy the relevancy requirement of the *Daubert* analysis.

Detective David West of the Kentucky State Police was called to testify regarding the plausibility of an accidental ignition of the gasoline on Pratt's body. Detective West testified that it would have been impossible to ignite the gasoline by the ambers of a lit cigarette because of the low amount of gasoline on Pratt's clothing and because the ambient temperature of the room was too low. He further testified that such an ignition would have been caused by an open flame such as a lighter. West had been employed by the Kentucky State Police for three years and had previously been employed by the Kentucky State Fire Marshall. He is a certified fire and explosion investigator with continuing education as a fire investigator. West testified that his opinion was based on his use of National Fire Protection Association (NFPA) protocol 921, which was developed to provide the methodology for safe and systematic fire investigation. West applied NFPA 921 to his investigation of the crime scene. He also interviewed Pratt and examined her clothing.

In *Stringer v. Commonwealth*, 956 S.W.2d 883, 891 (Ky. 1997), the Kentucky Supreme Court set forth a four factor test to determine whether expert testimony is admissible: (1) the witness is qualified to render an opinion on the subject; (2) the subject matter satisfies the requirements of *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579; (3) the subject matter satisfies the test of relevancy in KRE 401, subject to the balancing requirement of KRE 403; and (4) the opinion will assist the trier of fact pursuant to KRE 702. On appeal, the standard of review is whether

the trial court abused its discretion in determining the admissibility of the expert testimony. *Smith v. Commonwealth*, 181 S.W.3d 53, 59 (Ky.App. 2005).

Hibbitt does not challenge Detective West's qualifications as an expert or the reliability of his methodology. Rather, he challenges the relevance of the opinion because West did not know the precise amount of gasoline on Pratt's clothes or the exact ambient temperature in the room. Hibbitt further argues that the testimony was irrelevant because Detective West did not apply his methodology to the facts of this case. We disagree.

It is clear from reviewing the *Daubert* hearing that the trial court completed the full inquiry required by *Stringer, supra.* The trial court found that Detective West was qualified and that his methodology satisfied the requirements of *Daubert*. The trial court also specifically found that the proposed testimony was relevant and would assist the jury in determining how the fire was set. We find no abuse of discretion in the admission of Detective West's testimony and agree with the trial court that Hibbitt's complaints go to the weight of West's testimony rather than its admissibility.

Hibbitt next argues that the trial court erred by denying him an instruction on self-defense because of his subjective belief that he was under attack from Pratt.

KRS 503.050(1) provides:

> The use of physical force by a defendant upon another person is justifiable when the defendant believes that such force is necessary to protect himself against the use or imminent use of unlawful physical force by the other person.

A criminal defendant is entitled to jury instructions on any defense supported by the evidence. *Thomas v. Commonwealth*, 170 S.W.3d 343, 348 (Ky. 2005). In reviewing a claim of error for the failure to give a jury instruction, the appellate court views the evidence in the light most favorable to the party who requested the instruction. *Id.* at 347.

Even viewing the evidence in the light most favorable to Hibbitt, we still conclude that he was not entitled to an instruction on self-defense. Although Hibbitt did not testify, he stated in a police interview played to the jury that he sprayed the gasoline on Pratt because "she kept coming at him." Be that as it may, the moment when the assault occurred was when Hibbitt *ignited* the gasoline. Hibbitt stated to police that he was assisting Pratt to wash off the gasoline rather than defending himself from her at that point in time. There was no testimony presented that indicated Pratt was a threat to Hibbitt at this time. Additionally, while Hibbitt admitted spraying Pratt with the gasoline, he maintained that the ignition was accidental, which is inconsistent with an intentional act of self-defense. *See Grimes v. McAnulty*, 957 S.W.2d 223, 227 (Ky. 1997). Hibbitt also raises imperfect self-defense for the first time in his reply brief. He neither requested nor tendered an instruction on a theory of imperfect self-defense. This issue is not properly preserved for review.

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

ALL CONCUR.

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