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# Commonwealth of Kentucky

# Court of Appeals

NO. 2006-CA-000240-MR

KENNETH ALLEN — APPELLANT

v.

APPEAL FROM SHELBY CIRCUIT COURT
HONORABLE REBECCA OVERSTREET, JUDGE
ACTION NO. 05-CR-00036

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KELLER AND NICKELL, JUDGES; KNOPF,[1] SENIOR JUDGE.

KNOPF, SENIOR JUDGE: Kenneth Allen appeals his conviction for one count of first-degree possession of a controlled substance for which he was sentenced to four years' imprisonment. He advances two arguments in support of his contention that the judgment based upon a jury verdict must be set aside: 1) that the trial court erred in failing to *sua sponte* order a competency evaluation; and 2) that the prosecutor's remarks in closing deprived him of a fair trial. Finding no reversible error in either argument, we affirm.

[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.

Allen's conviction stems from an incident that took place on March 4, 2005, when a vehicle in which he was a passenger was stopped by a police officer. The arresting officer, Deputy Mark Beckley, testified that while traveling to act as backup at a traffic stop, he passed a vehicle driven by David Sanders, a person whose operator's license had recently been suspended. He thereafter stopped Sanders' vehicle, confirmed that his license was in fact suspended, arrested him, and placed him in the back of his police cruiser.

Allen, who was a passenger in the vehicle driven by Sanders, insisted that he wanted to leave the scene. Deputy Beckley informed Allen that if the vehicle in which he had been riding had no contraband in it, he would be allowed to leave. Deputy Beckley testified that he then conducted a pat-down search for weapons and told Allen to remain by the front of the vehicle until a search of it had been completed. Shortly thereafter, other law enforcement officers arrived on the scene, including Deputy Daniel Wills. Deputy Wills noticed Allen walking away from the stopped vehicle and directed him to return to the scene, which he did. Deputy Wills testified that when he asked Allen if he had any illegal substances on him, he started pulling items out of his pockets and slamming them down on a nearby loading dock. One of those items was a cigarette pack which opened when he slammed it on the loading dock revealing marijuana seeds. Deputy Wills also testified that he found a hard white substance in the brim of Allen's hat, which he suspected to be cocaine. Wills stated that when he asked Allen if he could search him, he simply stretched out his arms in compliance without saying anything.

Deputy Wills also noted that throughout this interchange, Allen said little but appeared to be very upset and angry.

Allen did not put on any proof at trial. He now appeals his conviction citing the trial court's failure to *sua sponte* order a competency evaluation and alleging prosecutorial misconduct in the Commonwealth's opening statement and closing argument. We find no reversible error.

Conceding that his competency allegation was not preserved, Allen asks this Court to review the failure to question his competency under the doctrine of palpable error. Despite the lack of preservation, we will briefly address Allen's arguments concerning his competency and the lack of support for those arguments in the record.

RCr 8.06 prescribes the duties of the trial court concerning a defendant's competency to stand trial:

> If upon arraignment or during the proceedings there are reasonable grounds to believe that the defendant lacks the capacity to appreciate the nature and consequences of the proceedings against him or her, or to participate rationally in his or her defense, all proceedings shall be postponed until the issue of incapacity is determined as provided by KRS 504.100.

The Supreme Court of Kentucky recently clarified the responsibilities of the trial court and the standard of appellate review of its decision on the issue of competency:

> ... the standard of review when the trial court fails to hold a competency hearing is, "Whether a reasonable judge, situated as was the trial court judge whose failure to conduct an evidentiary hearing is being reviewed, should have experienced doubt with respect to competency to stand trial." *Williams v. Bordenkircher,* 696 F.2d 464, 467 (6th Cir. 1983)

> (quoted in *Mills,* 996 S.W.2d at 486). "[E]vidence of a defendant's irrational behavior, his demeanor at trial, *and any prior medical opinion on competence to stand trial* are all relevant" facts for a court to consider. *Drope v. Missouri,* 420 U.S. 162, 180, 95 S.Ct. 896, 908, 43 L.Ed.2d 103 (1975).

*Bray v. Commonwealth,* 177 S.W.3d 741, 750 (Ky. 2005)(emphasis original). We find nothing in this record which would have caused a reasonable trial judge to doubt Allen's competence to understand the nature of the proceedings against him or to rationally participate in his defense. The indicators upon which Allen relies simply do not comport with the facts disclosed by review of the record.

In support of his contention that a sua sponte competency evaluation was required, Allen cites his stuttering and inability to express himself verbally, the fact that he noted in his affidavit of indigency that he was homeless and receiving a disability check, his "aberrant" behavior prior to his arrest, and his "utter confusion" at sentencing. None of these factors, either singly or cumulatively, were sufficiently indicative of incompetence so as to trigger the conclusion that Allen could not comprehend the proceedings or assist in his defense.

First, with respect to Allen's history of homelessness, the affidavit of indigency for his current offense dated March 4, 2005, gives a specific address and apartment number. The fact that Allen had been homeless in 2000, as indicated on an affidavit of indigency dated July 25, 2000, has little, if any, bearing on his current competence and certainly would not put a trial judge on notice that he might be incompetent to stand trial.

Next, Allen alleges that his clear confusion at arraignment is indicative of his incompetence. We have reviewed the video recording and find no indication of confusion or disruptive conduct. Allen conferred with his attorney and asked her a question to which she nodded in response. While he did stutter at one point, stuttering is not an indication of incompetence. We find nothing in Allen's demeanor at his arraignment which should have triggered a question as to his competence.

Allen also alleges that "muttering" which can be heard during the testimony of Detective Mark Moore is indicative that he might be incompetent. While at certain points on the video recording of the proceedings, someone can be heard speaking off-camera, it does not rise to the level of what might be construed as disruptive behavior or constitute a "pattern" of inappropriate conduct.

Nor does Allen offer any support for his contention that the listing of disability payments on his affidavit of indigency imposes some duty on the trial court to inquire into the nature of his disability. Concerning his behavior prior to arrest, rather than indicating incompetence, Allen's actions are consistent with a person who is angry or upset, but who is nevertheless capable of compliance with the police officers' requests. We find nothing "bizarre" about his behavior and nothing which suggests that Allen was incoherent or incompetent.

Finally, on the question of competence, Allen points to his behavior at sentencing as unresponsive and rambling. After having his appeal rights explained to him, the trial court asked Allen if he understood those rights. He responded, "Not really,

I got to be sent to the hospital. That's all I have to say." The trial judge then told Allen that he would be turned over to the Department of Corrections and that they would assess his needs. His understanding of the trial judge's statement is obvious from his response: "Could it be as soon as possible?" Allen's trial counsel then explained to him that he would remain in Shelby County because he had another case pending, to which he responded, "Yeah." Contrary to his claim of utter confusion, Allen's responses to the trial court and his counsel appear lucid and coherent. To reiterate, nothing in the alleged instances of "confusion" indicate incompetence, either singly or in combination. We are thus convinced that an examination of the record does not support Allen's argument that the trial judge was required to *sua sponte* conduct a competency hearing. *Henley v. Commonwealth,* 621 S.W.2d 906 (Ky. 1981).

Next, Allen argues that the prosecutor's misconduct in her opening statement and closing argument requires reversal of his conviction. We disagree. Allen's specific complaint concerning the prosecutor's remarks focuses upon her "war on drugs" theme and whether she put the jury in a position that if the jurors did not convict Allen, they were being unpatriotic. Again, Allen concedes that this issue is unpreserved.

In examining this question, we are guided by the recent decision of the Supreme Court of Kentucky in *Matheney v. Commonwealth,* 191 S.W.3d 599, 606 (Ky. 2006), in which that Court reiterated the view that a reversal for prosecutorial misconduct in closing argument is warranted only if the misconduct is "flagrant" *or* if each of the following three conditions is satisfied:

> (1) Proof of defendant's guilt is not overwhelming;
> (2) Defense counsel objected; and
> (3) The trial court failed to cure the error with a sufficient admonishment to the jury.

As was the case in *Matheney,* we need only evaluate whether the prosecutor's alleged misconduct was "flagrant" because Allen did not object at trial.

In *Barnes v. Commonwealth,* 91 S.W.3d 564 (Ky. 2002), the Supreme Court cited with approval the approach for resolving issues of prosecutorial misconduct utilized by the Sixth Circuit in *United States v. Carroll,* 26 F.3d 1380, 1390 (6th Cir. 1994). The *Carroll* Court set out the following criteria for assessing whether the improper remarks rise to the level of reversible error:

> *Bess* [*United States v. Bess,* 593 F.2d 749 (6th Cir.1979) ] and *Leon* [*United States v. Leon,* 534 F.2d 667 (6th Cir.1976)] can and should be construed in a way that makes them mutually consistent. Both require a two step approach; first we determine whether a prosecutor's remarks were improper, and then we determine whether the impropriety amounts to reversible error. Regarding the second step, the *Leon* test involves four factors:
>
> (1) whether the remarks tended to mislead the jury or to prejudice the accused;
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> (2) whether they were isolated or extensive;
>
> (3) whether they were deliberately or accidentally placed before the jury; and
>
> (4) the strength of the evidence against the accused.

Furthermore, the Court in *Matheney* observed that even if an appellant is able to demonstrate flagrant misconduct, where there was no objection at trial, a reviewing court

would also have to find that the appellant suffered "manifest injustice" before relief could be granted. 191 S.W.3d at 607, footnote 4, citing CR 10.26.

Applying these factors to the prosecutor's "war on drugs" theme utilized in her opening and closing statements, we find no reversible error. The prosecutor's remarks did not "mislead the jury" or "prejudice the accused." In fact, defense counsel picked up on the prosecutor's theme stating:

> Ms. Zeller began this morning by saying that there is a war on drugs, there is a war on drugs in this community. I don't dispute that, however, I don't think the war on drugs begins with cases like Kenneth Allen's. It will be for you to see in the jury room just exactly what we're talking about. It hasn't been passed around yet, but the substance of this entire case is again, I submit to you, not much bigger than the tip of my pen here.

And later, he again stated, "I keep going back to Ms. Zeller's war on drugs . . . I find it hard to believe that the war on drugs begins with an individual like Kenneth Allen."

As to whether her remarks were deliberate, Allen states that despite being admonished by the trial judge, the prosecutor turned to the jury and said virtually the same thing. There is no citation to the record to support this contention. To the contrary, Allen concedes that there was no objection to any of the prosecutor's remarks and, in his brief, states, "The prosecutor was neither challenged for the inappropriate comments to the jury nor reprimanded by the judge." We thus decline to consider Allen's allegation that the prosecutor's remarks were a deliberate attempt to mislead the jury or prejudice Allen.

Finally, as previously noted, the evidence against Allen was overwhelming and he offered nothing to contradict the testimony of the police officers or to rebut the case assembled by the Commonwealth. Evaluating the prosecutor's comments in the light of all these factors, we cannot conceive that the result of Allen's trial would have been different absent the prosecutor's statements. Thus, Allen cannot demonstrate prejudice and is not entitled to reversal of his conviction based solely upon the prosecutor's arguments to the jury. In *Graves v. Commonwealth,* 17 S.W.3d 858, 864 (Ky. 2003), our Supreme Court stated that under RCr 10.26:

> an error is reversible only if a manifest injustice has resulted from the error. That means that if, upon consideration of the whole case, a substantial possibility does not exist that the result would have been different, the error will be deemed nonprejudicial. *Jackson v. Commonwealth,* 717 S.W.2d 511 (Ky.App. 1986).

We thus find no manifest injustice resulted from the prosecutor's comments to the jury.

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

ALL CONCUR.

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