

Commonwealth of Kentucky
Court of Appeals

NO. 2006-CA-001083-MR

KYLE RUARK

APPELLANT

v. APPEAL FROM GREENUP CIRCUIT COURT
HONORABLE LEWIS D. NICHOLLS, JUDGE
ACTION NO. 05-CR-00075

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: KELLER, LAMBERT AND STUMBO, JUDGES.

STUMBO, JUDGE: This appeal comes from a conviction of Kyle Ruark (Appellant) in Greenup Circuit Court on charges of second-degree manslaughter and tampering with physical evidence. He was sentenced to 15 years of incarceration. Appellant was a juvenile when the crime occurred, but was transferred to circuit court under KRS 635.020(4). Appellant puts forth three arguments to overturn his conviction. He argues that the Commonwealth failed to prove guilt beyond a reasonable doubt, that the Court's instruction on the definition of wanton was incorrect, and that the KRS 635.020 transfer

proceeding was unconstitutional. After reviewing the facts, the record, and the law, we find that Appellant's conviction was proper and affirm the trial court.

On December 20, 2004, Appellant and Alex Hale, ages 15 and 16 respectively, were on their way to Rick Rice's, age 19, apartment to go target shooting. On the way, Appellant gave Hale a bullet from his gun for Hale to look at and keep, seemingly as a souvenir. Appellant's gun was an AK-47 assault rifle and the three boys were going to take turns using it. After arriving at Rice's apartment, the boys went into the woods behind Rice's apartment and began shooting the gun.

Once they finished they returned to Rice's apartment. They had used all the ammunition for the gun except the one bullet Appellant gave to Hale earlier that day. The boys remained at the apartment for some time after, playing video games and using a work-out bench. During this time, Appellant asked Hale for the bullet he had given him earlier. Hale returned the bullet to Appellant. Hale did not see what happened to the bullet but testified at trial that he heard Appellant manipulate his gun after he gave him the bullet. According to Appellant, about thirty minutes later, he was playing with the gun and pointing it at Rice. Appellant then stated that Rice yelled "boom", which startled Appellant and caused him to pull the trigger. When the trigger was pulled, the gun went off, killing Rice.

Prior to the trial, the Commonwealth sought to transfer Appellant from juvenile court to circuit court under KRS 635.020(4). That statute states:

Any other provision of KRS Chapters 610 to 645 to the contrary notwithstanding, if a child charged with a felony in

which a firearm, whether functional or not, was used in the commission of the offense had attained the age of fourteen (14) years at the time of the commission of the alleged offense, he shall be transferred to the Circuit Court for trial as an adult if, following a preliminary hearing, the District Court finds probable cause to believe that the child committed a felony, that a firearm was used in the commission of that felony, and that the child was fourteen (14) years of age or older at the time of the commission of the alleged felony. If convicted in the Circuit Court, he shall be subject to the same penalties as an adult offender, except that until he reaches the age of eighteen (18) years, he shall be confined in a facility or program for juveniles or for youthful offenders, unless the provisions of KRS 635.025 apply or unless he is released pursuant to expiration of sentence or parole, and at age eighteen (18) he shall be returned to the sentencing Circuit Court for proceedings consistent with KRS 640.030(2).

At the transfer hearing, the court found probable cause to transfer Appellant's case to circuit court because Appellant was charged with a felony, had attained the age of 14, and a firearm was used. Appellant was convicted after a jury trial in the circuit court and now appeals.

Appellant argues that there was insufficient evidence to prove beyond a reasonable doubt that he committed second-degree manslaughter. Appellant argues that when viewed objectively, there was only evidence to support a conviction of reckless homicide. Because Appellant did not contest that he held the gun that killed the victim, the primary issue during the trial was whether the shooting was intentional or accidental. Instructions for intentional murder, manslaughter second-degree, and reckless homicide were given. Manslaughter in the second-degree is defined in KRS 507.040 as:

(1) A person is guilty of manslaughter in the second degree when he wantonly causes the death of another person,

including, but not limited to, situations where the death results from the person's:

- (a) Operation of a motor vehicle; or
 - (b) Leaving a child under the age of eight (8) years in a motor vehicle under circumstances which manifest an extreme indifference to human life and which create a grave risk of death to the child, thereby causing the death of the child.
- (2) Manslaughter in the second degree is a Class C felony.

Reckless homicide is defined in KRS 507.050 as:

- (1) A person is guilty of reckless homicide when, with recklessness he causes the death of another person.
- (2) Reckless homicide is a Class D felony.

Appellant argues that there was no evidence to prove he acted wantonly. Wantonly and recklessly are defined in KRS 501.020(3) and (4) respectively as:

- (3) "Wantonly" -- A person acts wantonly with respect to a result or to a circumstance described by a statute defining an offense when he is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation. A person who creates such a risk but is unaware thereof solely by reason of voluntary intoxication also acts wantonly with respect thereto.
- (4) "Recklessly" -- A person acts recklessly with respect to a result or to a circumstance described by a statute defining an offense when he fails to perceive a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree that failure to perceive it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation.

Appellant asserts that the Commonwealth did not prove he acted with a wanton mental state and, thus, his motions for directed verdict should have been granted.

He contends that he told police that he was not aware that a bullet was in the gun. If he was not aware of a bullet being in the gun then he could not have been aware of and consciously disregard a substantial and unjustifiable risk that he would kill Rice.

“On appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal.” *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991). We find that it was not unreasonable for a jury to find Appellant guilty of manslaughter in the second-degree. Hale, the only other witness present during the shooting, testified that Appellant gave him a bullet earlier in the day, asked for the bullet later, and then heard Appellant manipulate his gun before it discharged. Hale also testified that after he heard the shot he saw Appellant holding the gun at a level position. Hale also testified that he did not recall anyone shouting “boom.” There was also evidence that Appellant was familiar with guns and their handling. This evidence is such that it would not be clearly unreasonable for the jury to believe that Appellant loaded the gun with the single remaining bullet as opposed to the theory that he did not know the gun was loaded. There is sufficient evidence to support a finding that Appellant acted wantonly. The denial of the directed verdict was proper.

Appellant next argues that his conviction must be reversed because the court’s instruction to the jury on the definition of wanton was incorrect. The defense’s preferred definition of wanton was, “A person acts wantonly with respect to another’s death when he is aware of and consciously disregards a substantial and unjustifiable risk

that the death will occur. The risk must be of such a degree and nature that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation.” The definition that was a part of the jury instructions was:

A person acts wantonly with respect to a result or to a circumstance when he is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation.

Appellant states that because homicide is a result offense, the definition for Appellant’s mental state should have made it perfectly clear that in order to find he acted wantonly, he had to disregard the risk that death would occur. Appellant states that the court’s definition could have confused the jury and made them think that Appellant acted wantonly if the unjustifiable risk pertained to the mishandling of the gun or the gun accidentally going off.

We find that the trial court’s definition of wanton is the correct one. The court’s definition is drawn from the language of KRS 501.020(3) quoted above and is also the instruction set forth in *Cooper, Kentucky Instructions to Juries*, 3.03.

Additionally, the instruction on murder in the second-degree read:

If you do not find the Defendant guilty under Instruction No. 1, you will find the Defendant guilty of Second-Degree Manslaughter under this Instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:

A. That in this county on or about December 20, 2004, and before the finding of the Indictment herein, he killed Rick Rice by shooting him in the head with a rifle;

AND

B. That in doing so, he was acting wantonly as that term is defined under Instruction No. 7.

This instruction advises the jury that if they find that Appellant killed Rice by shooting him in the head and did so wantonly, then he is guilty of second-degree murder. The jury was properly charged with determining whether Appellant was aware of, and then disregarded, the risk of serious injury or death. We hold that the instructions were proper.

Appellant's final argument is that the transfer in accordance to KRS 635.020(4) is unconstitutional as it violates his 6th and 14th Amendment rights to due process. Appellant concedes that this issue has been previously ruled upon in the case of *Caldwell v. Commonwealth*, 133 S.W.3d 445 (Ky. 2004). In that case, the Kentucky Supreme Court ruled that the KRS 635.020(4) transfer proceeding did not violate a defendant's 6th and 14th Amendment rights because the proceeding did not "involve sentencing or a determination of guilt or innocence. The decision to transfer a juvenile to circuit court involves the determination of which system is appropriate for a juvenile defendant." *Caldwell* at 453. The Commonwealth cites *Commonwealth v. Halsell*, 934 S.W.2d 552 (Ky. 1996), which also deems KRS 635.020(4) constitutional. Both *Caldwell* and *Halsell* hold that the statute does not act to further punish a juvenile offender, but is simply a way for the Legislature to limit the district court's jurisdiction and have a certain category of juvenile offenders tried in circuit court as adults. The

power of Kentucky's legislature to determine a court's jurisdiction is set forth in sections 113(6) and 112(5) of the Kentucky Constitution. Section 113(6) gives the General Assembly the ability to limit the jurisdiction of district courts and once this is done, section 112(5) takes over. Section 112(5) states that the circuit court has jurisdiction over causes not vested in some other court. KRS 635.020(4) is an exercise of the legislature's power which limits the district court's jurisdiction and places this type of juvenile offender in the hands of the circuit court.

Appellant argues that KRS 635.020(4) allows a juvenile offender to be more harshly punished by being punished as an adult and urges us to re-examine this issue based on the holdings of two recent U.S. Supreme Court cases which interpret the scope of the 6th and 14th Amendments, *Blakely v. Washington*, 542 U.S. 296 (2004), and *United States v. Booker*, 543 U.S. 220 (2005). These cases hold that it is unconstitutional for a judge to extend the punishment of a defendant based on facts not given to the jury or admitted by the defendant. In other words, any fact that increases the penalty for a crime beyond the statutory maximum must be submitted to a jury and proven beyond a reasonable doubt. Appellant argues that because the transfer to circuit court will undoubtedly increase any imposed punishment and that the use of a firearm is a common sentencing factor, which in the case of the transfer proceeding only need be found using a probable cause standard, KRS 635.020(4) is unconstitutional. Stated more simply, Appellant contends that the statute is unconstitutional because a transfer hearing can

increase the defendant's penalty and based on factors not determined by a jury to be beyond a reasonable doubt.

We find that Appellant's reliance on *Blakely* and *Booker* is misplaced. These two cases do not deal with juvenile cases and only serve to tell us that all factors which can increase a punishment must be determined to a jury. KRS 635.020(4) does not increase a punishment, it merely sets the standard to use in determining which court a juvenile will be tried in. This statute determines which court has jurisdiction over a particular group of juvenile offenders and does not impose any kind of punishment. Issues of guilt and punishment were decided by a jury as required by the United States Supreme Court. Because no issues of guilt, innocence, or punishment are decided during the transfer proceeding, it cannot be said to violate the due process requirements of the 6th and 14th Amendments to the United States Constitution. We therefore hold that the trial court's judgment is affirmed and that KRS 635.020(4) passes constitutional muster.

For the reasons set forth herein, the judgment is affirmed.

ALL CONCUR.

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