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Commonwealth Of Kentucky

Court Of Appeals

NOS. 1998-CA-002735-MR
1998-CA-002736-MR

CHARLES SKAGGS — APPELLANT

v.

APPEAL FROM KNOX CIRCUIT COURT
HONORABLE RODERICK MESSER, JUDGE
ACTION NO. 98-CR-00052

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
REVERSING AND REMANDING
** ** ** ** **

BEFORE: GUIDUGLI, JOHNSON, AND KNOPF, JUDGES.

JOHNSON, JUDGE: Charles Skaggs has appealed from the judgment of the Knox Circuit Court convicting him of the crimes of assault in the first degree (Kentucky Revised Statutes (KRS) 508.010), four counts of wanton endangerment in the first degree (KRS 508.060), and possession of a firearm by a convicted felon (KRS 527.040), and sentencing him to a serve ten years in prison. Believing the trial court committed error in instructing the jury, we reverse and remand for a new trial.

The events which led to Skaggs' arrest and conviction occurred on March 29, 1998. After a morning of drinking, Skaggs and a friend, John Vanover, drove to the home of Meredith Lawson.

Skaggs testified that Lawson asked him and Vanover to go up the road a ways to the home of Ray Roark to get a table she had stored there. Skaggs and Vanover complied with her request. Upon their arrival, they encountered several people sitting on Roark's front porch, including Ray Roark, his father and mother, Danny and Joann Roark, and Roark's girlfriend, Donna Smith. Skaggs testified that he initially explained why he and Vanover were there and then attempted to apologize for a misunderstanding that had occurred during a previous visit to Roark's residence. He told the jury that the Roarks were not interested in his apology and that they told him to leave. Skaggs further explained that he saw Danny Roark pull a gun out from behind his back and, at that point, he and Vanover decided that they should leave.

As they retreated to their car, Skaggs and Vanover were followed by Ray and Danny and Joann Roark. Vanover was kicked by Danny Roark as he entered the car, and Skaggs was hit by Ray Roark on his head and his face with a mine roofing bolt. Skaggs was not able to testify what happened next as he has no memory of the events. However, he testified to being afraid that he was going to be shot and killed. Other witnesses who testified, including Vanover, stated that Skaggs drove a short distance, slammed on his brakes, turned side-ways in the road and fired a gun out the window of the car towards the Roarks. Danny Roark returned fire with his own gun, striking the car at least twice.

There is no question that Joann Roark suffered a serious physical injury when she was shot in the leg during the

fracas, allegedly from a bullet from Skaggs' weapon. With respect to this charge, the trial court instructed the jury on assault in the first degree under both an intentional and a wanton theory, and assault in the second degree under a wanton theory. The jury was also instructed on five counts of wanton endangerment in the first degree with respect to the remaining Roarks and other bystanders in the vicinity, and it was instructed on the firearm possession offense. The trial court also gave a self-defense instruction; however, that instruction was applicable only to the intentional assault instruction.

The jury found Skaggs guilty of assault in the first degree under a wanton theory, and on four counts of wanton endangerment in the first degree. Skaggs was found not guilty on one count of wanton endangerment. The jury recommended the minimum prison sentence of ten years on the assault charge and one year on each of the four counts of wanton endangerment, and five years on the charge of possession of a firearm by a convicted felon, all to run concurrently.

Skaggs argues that the trial court erred in instructing the jury. Specifically, Skaggs alleged that the trial court erred by failing to qualify the wanton assault and wanton endangerment instructions with the element of self-protection as required by Elliott v. Commonwealth.[1] In the alternative, Skaggs argues that if, as the Commonwealth argues, Elliott was not the law at the time he was tried, the instructions were erroneous under the existing law which would have prohibited the giving of

[1]Ky., 976 S.W.2d 416 (1998).

an instruction of assault under a wanton theory (the instruction under which Skaggs was convicted). This allegation of error was, admittedly, not preserved for review. Skaggs, however, has invoked our review under the "palpable error" rule contained in RCr[2] 10.26, as follows:

> A palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error.

In order to reach an alleged error under this rule, it is required that the "error must seriously affect the fairness, integrity or public reputation of judicial proceedings,"[3] and that a "substantial possibility exists that the result would have been different."[4] Having reviewed the entire record, we are convinced that a palpable error did occur.

We agree with Skaggs' observation that this area of the law has been unsettled. There has been a great deal of confusion as to the proper form and content of jury instructions in cases involving homicide and assault, self defense, and wanton or reckless conduct. This confusion, commonly referred to as the

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[2]Kentucky Rules of Criminal Procedure.

[3]Brock v. Commonwealth, Ky., 947 S.W.2d 24, 28 (1997) (citing United States v. Filani, 74 F.3d 378 (2nd Cir.1996)).

[4]Partin v. Commonwealth, Ky., 918 S.W.2d 219, 224 (1996) (citing Jackson v. Commonwealth, Ky.App., 717 S.W.2d 511 (1986)).

"Shannon problem,"[5] stems from Shannon v. Commonwealth,[6] which observed that a killing, undertaken in self-defense, is an inescapably intentional act rather than a wanton or reckless act, and that trial court's should not instruct on wanton murder where self-defense is claimed.

> There is no place in the structure of the Penal Code for an instruction to find the defendant guilty of wanton murder if the accused acted from an erroneous belief in the need for self-defense. The fact situation calls for an instruction on intentional murder qualified by self-defense. If the belief in the need for self-defense was justified, it is a complete defense. If it is not justified, then the accused can properly be convicted of a lesser included offense, either Manslaughter II or Reckless Homicide, depending on the jury's conclusion regarding the accused's state of mind [emphasis original].[7]

In McGinnis, supra, the Supreme Court reiterated that

> [t]he bench and bar have engaged in extensive debate regarding whether it is appropriate to include self-defense as an element of the instructions when the defendant is charged with a wanton or reckless homicide. [Citations omitted.] But the Shannon opinion plainly states that self-defense is no defense where the culpable mental state is either wanton or reckless (citing KRS 503.120). By the same token, wanton murder is no option is the self-defense scenario.[8]

Despite the confusion, on September 16, 1998, when Skaggs was tried, Shannon and McGinnis had been the controlling law for

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[5]McGinnis v. Commonwealth, Ky., 875 S.W.2d 518, 520 (1994).

[6]Ky., 767 S.W.2d 548, 549 (1988).

[7]Id. at 552.

[8]McGinnis, 875 S.W.2d at 526.

several years. Clearly, under those cases, the trial court, which prepared its own instructions, should not have instructed the jury under both an intentional assault with a self-defense justification and wanton assault. The unfairness inherent in instructing on two equally punishable theories, one qualified by self-defense and one not so qualified, was recognized in McGinnis as follows:

> . . . the prosecutor argued in effect, repeatedly, that self-defense was not available on the charge of wanton murder, so forget his self-defense claim--the accused had convicted himself of wanton murder out of his own mouth. A wanton murder conviction followed as a matter of course, as we have seen in a number of appeals based on this scenario.[9]

Predictably, as in McGinnis, the prosecutor in the case sub judice emphasized to the members of the jury that they did not have to be concerned with Skaggs' claim that he acted in self-defense since the trial court's instruction for wanton assault contained "no defense, no self-defense." Thus, considering the error in instructing under a wanton theory, an error compounded by the prosecutor's argument, we believe there to be a substantial possibility that the result would have been different.

McGinnis and Shannon, "Part II", were eventually overruled in Elliott v. Commonwealth, supra, as containing "statutory analysis" that was "fundamentally flawed,"[10] to the extent that they precluded a claim of "self-protection and the

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[9] Id. at 526.

[10] Elliott, 976 S.W.2d at 422.

other KRS Chapter 503 justifications as defenses to charges of wanton murder, second-degree manslaughter, or reckless homicide (as well as to charges of wanton or reckless assault)[.]"[11] Elliott was rendered on September 3, 1998, a few days before Skaggs was tried, but was not final until after his trial.

The Commonwealth asserts that Skaggs is not entitled to the benefit of Elliott because it was not yet final when he was tried. We agree that Elliott was not final and was not the law on the day Skaggs was tried. We do not fault the trial court for failing to apply an opinion that is not yet final and this Court's reversal of Skaggs' conviction is not based on the failure to instruct under Elliott. However, Skaggs is entitled to a new trial because the instructions were so plainly wrong under the state of the law on the date that he was tried, not because the trial court failed to apply Elliott. But, on remand Elliott must be followed as the current law of this Commonwealth.

Instead of addressing the propriety of the trial court's instructions, the Commonwealth argues that Skaggs has conceded that the jury was properly instructed under the existing case law (McGinnis). Skaggs quite clearly has not made any such concession. Further, the only substantive argument the Commonwealth has advanced for the proposition that no palpable error has occurred, is its contention that Skaggs was not entitled to an instruction on self-protection in the first instance. It suggests that the trial court gave the self-defense instruction "out of an abundance of caution," and that the

[11] Id.

instruction "must be viewed as a windfall, which was rejected by the jury . . . as unbelievable." We have reviewed the trial testimony and disagree that the instruction can be characterized as a "windfall." We also note that the prosecutor who represented the Commonwealth at trial made no objection to the self-defense instruction. Given Skaggs' testimony that he feared for his life and was afraid he was going to be shot, the trial court was required to give the self-defense instruction.[12]

Accordingly, the judgment of the Knox Circuit Court is reversed and the matter is remanded for a new trial consistent with this Opinion.

ALL CONCUR.

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[12]Mishler v. Commonwealth, Ky., 556 S.W.2d 676, 680 (1977).