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Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001786-MR

WADE G. SHEELEY — APPELLANT

v.

APPEAL FROM MEADE CIRCUIT COURT
HONORABLE ROBERT A. MILLER, JUDGE
ACTION NO. 00-CR-00117

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING IN PART, REVERSING IN PART AND REMANDING

** ** ** ** **

BEFORE: BUCKINGHAM, DYCHE, AND GUIDUGLI, JUDGES.

GUIDUGLI, JUDGE: Wade G. Sheeley appeals from a judgment of the Meade Circuit Court following a jury verdict of guilty on one count of facilitating the manufacturing of methamphetamine. He contends that the trial court erred in denying his motion for a directed verdict, that certain testimony was improperly admitted, and that he was prejudiced when the jury was told that his co-indictee had entered a guilty plea. For the reasons stated below, we affirm in part, reverse in part and remand for further proceedings.

On September 7, 2000, the Meade County grand jury indicted Sheeley on charges of manufacturing methamphetamine, trafficking in a controlled substance, and possession of drug paraphernalia enhanced by possession of a firearm. The indictment arose from a Kentucky State Police investigation, which began when confidential informant, Darrell Hubbard, told the police that he observed Sheeley and Russell Tim Pridham manufacturing methamphetamine in Sheeley's garage on July 22, 2000. Based on this information, Detective Sergeant Gerald Wilson obtained a search warrant of Sheeley's property.

The search warrant was executed on July 24, 2000. The police found items including a jar allegedly containing red phosphorus, an empty toluene can, a Pyrex pan, along with guns and cash. The matter went before the Meade County grand jury, which returned an indictment on September 7, 2000, charging Sheeley and Pridham with several charges related to the manufacturing of methamphetamine. Pridham later pled guilty to manufacturing methamphetamine, first-degree trafficking in a controlled substance, possession of drug paraphernalia, and possession of marijuana.

The charges against Sheeley resulted in a jury trial conducted on July 16, 2003. Sheeley maintained that the chemicals found in his garage were left over from his previous employment as a pool installer. After hearing all of the proof,

jury instructions as to both the manufacturing of methamphetamine and facilitation to manufacture methamphetamine were given. On motion of the Commonwealth, the trafficking charge was dismissed. Sheeley was found guilty of facilitation and received a sentence of three and one-half years in prison. This appeal followed.

Sheeley first argues that the trial court erred in overruling his motion for a directed verdict of acquittal. He maintains that he could not be found guilty of facilitating when the Commonwealth failed to prove that Pridham committed the underlying offense of manufacturing. Without proving that Pridham manufactured methamphetamine, he contends that there was no legal basis for finding him guilty of facilitating, and that that the trial court erred in failing to so rule. He seeks an order reversing the judgment and remanding the matter to the circuit court.

We have closely examined this issue and find no error. KRS 506.080(1) states,

> A person is guilty of criminal facilitation when, acting with knowledge that another person is committing or intends to commit a crime, he engages in conduct which knowingly provides such person with means or opportunity for the commission of the crime and which in fact aids such person to commit the crime.

Criminal facilitation requires knowledge that another intends to commit the crime coupled with the means or opportunity for the commission of the crime.[1]

In the matter at bar, not only did the testimony of Hubbard and Detective Wilson support the Commonwealth's assertion that Sheeley intended to manufacture methamphetamine, Hubbard testified that he observed Sheeley and Pridham manufacturing the substance. This evidence, taken alone, forms a sufficient basis upon which the jury could reasonably conclude that Sheeley either intended to commit or did commit a crime.

As the parties are aware, Commonwealth v. Benham[2] sets forth the standard for reviewing motions for a directed verdict. It states that,

> On motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given. For the purpose of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but reserving to the jury questions as to the credibility and weight to be given to such testimony.
>
> 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

[1] Skinner v. Commonwealth, 864 S.W.2d 290 (Ky. 1993).

[2] 816 S.W.2d 186 (Ky. 1991).

> defendant is entitled to a directed verdict of acquittal.[3]

When examining the evidence as a whole pursuant to Benham, we cannot determine that it would be clearly unreasonable for the jury to determine that Sheeley either intended to commit a crime or did commit a crime. Accordingly, the evidence supported the jury's conclusion that Sheeley facilitated Pridham's intended or actual criminal behavior, and the trial court did not err in failing to so rule.

Sheeley next argues that the trial court erred when it failed to sustain an objection to Wilson's identification of a substance as red phosphorus. The substance, which was found in Sheeley's garage during the search, was intentionally destroyed by the police prior to trial as it was believed to be a hazardous material. Sheeley contended at trial that Wilson was not an expert witness, that he had no basis for stating to the jury that the substance was red phosphorus, and that the testimony should have been excluded. He now argues that the trial court erred in allowing Wilson's testimony on this issue.

Sheeley relies in part on Kentucky Rule of Evidence 702, which addresses the admissibility of expert testimony. This rule is not applicable to the instant issue, however, as Wilson was not offered by the Commonwealth as an expert.

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[3] Benham, 816 S.W.2d at 187.

Rather, he was a lay witness who gave his opinion as to the contents of the jar. Conversely, Sheeley testified that the jar contained red raspberries.

After considering Sheeley's objection to the introduction of Wilson's statement, the trial court ruled that it was a question of credibility for jury. We find no error in this conclusion. KRE 701 states that, "[i]f the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those inferences which are: (a) rationally based on the perception of the witness; and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." Wilson's opinion as to the jar's contents was, in the language of KRE 701, rationally based on his perception and helpful in the determination of a fact at issue. It is also worth noting that the jury members were given a "missing evidence" instruction. This instruction told the jury it could infer that the destroyed evidence would have been favorable to Sheeley's case.

Since the jury was apprised that Wilson's testimony was mere opinion, and as it was told that it could infer that the evidence would have been helpful to Sheeley had it not been destroyed, we find no basis for tampering with the trial court's ruling on this issue.

Sheeley's final argument is that he was prejudiced by the introduction of Pridham's guilty plea. He maintains that the Kentucky Supreme Court has consistently held that the admission of a co-indictee's entry of a guilty plea or determination of guilt is so improper and prejudicial as to require reversal. Since it is uncontroverted that Pridham's conviction was made known to the jury, and as it was not properly used for the purposes of impeachment, he argues that he is entitled to a reversal of his conviction and a new trial.

We agree with Sheeley that evidence of Pridham's conviction was improperly admitted. "It has long been the rule in this Commonwealth that it is improper to show that a co-indictee has already been convicted under the indictment."[4] This is true whether the co-indictee pled guilty or was convicted at trial.[5] The only exception to this rule is if the information is introduced to impeach the co-indictee.[6] In the matter at bar, Pridham's conviction was not introduced to impeach his testimony, and as such, was improperly admitted. .

In his appellate brief, Sheeley states that the issue was not preserved by a timely objection at trial. However, a review of the trial videos reveals that Sheeley did object to

[4] Parido v. Commonwealth, 547 S.W.2d 125 (Ky. 1977), quoting Martin v. Commonwealth, 477 S.W.2d 506 (Ky. 1972).

[5] Parido, supra.

[6] Id.

Pridham's plea being introduced. In fact, Sheeley objected and argued that Pridham's plea was immaterial and not relevant since it did not mention any involvement or participation by Sheeley.[7] The trial court overruled Sheeley's objections and immediately thereafter, admonished the jury as follows:

> Ladies and gentlemen, the court has taken judicial notice and you shall take notice of the following facts: The indictment of which Mr. Pridham plead guilty[], and he plead guilty to, manufacture of methamphetamine in violation of KRS 218A.1432, trafficking in a controlled substance, methamphetamine, first-degree . . . in violation of KRS 218A.1412; possession of drug paraphernalia, in violation of KRS 218A.500(2); possession of marijuana, in violation of KRS 218A.1422, alleged to have occurred on Counts One and Two on or about July 2000 in Meade county Kentucky and on the possession of drug paraphernalia and possession of marijuana July 24, 2000, in Meade County, Kentucky. (Tape 2, 7/16/03, 16:09:58).

We believe the issue was preserved by Sheeley's objection, though his objection may have been based on the wrong reasons. But assuming that the issue was not properly preserved as Sheeley contends, he now contends that it should be considered as palpable error pursuant to RCr 10.26. RCr 10.26 states:

> 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,

[7] Tape 2, 7/16/03, 16:08.

> 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 Sherley v. Commonwealth,[8] Justice Leibson, in a concurring opinion, addressed when palpable error occurs. He stated:

> Thus, the one point made in the Majority Opinion with which I agree is that since no contemporaneous objection was made, if we are to reverse this case it must be on grounds of palpable error under RCr 10.26. Contrary to the Majority Opinion, if there is palpable error, a circumscribed legal concept articulated in RCr 10.26, we are duty bound to reverse. But the palpable error concept requires more than just an error the appellate court can palpate and more than what is reversible error if preserved by contemporaneous objection. It requires an unpreserved error "[so] substantial . . . that manifest injustice has resulted from the error." RCr 10.26.
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> The key issue here is whether "manifest injustice has resulted from the error." The constitutional error standard, a "harmless beyond a reasonable doubt" review, applies if the error were preserved, but it does not control our hand when the problem is to decide whether the error is of such magnitude "manifest injustice has resulted." See Jackson v. Commonwealth, Ky.App., 717 S.W.2d 511 (1986). While the meaning of "manifest injustice" as used in RCr 10.26, has never been fully expounded in our previous opinion, there is one case, Stone v. Commonwealth, Ky., 456 S.W.2d 43 (1970)[,] explaining that it applies where the appellate court "believes there may have been a miscarriage of justice."[9]

[8] 889 S.W.2d 794 (Ky. 1994).

[9] Id. at 803.

In the case before us, not only was the admission of evidence of the co-indictee's plea error but we believe, under the standard set forth above, it was palpable error. The Commonwealth had little evidence of Sheeley's involvement in manufacturing methamphetamine. The search warrant revealed sparse physical evidence – a jar allegedly containing red phosphorus, an empty toluene can, and a Pyrex pan – which had been destroyed prior to trial. It had the testimony of a confidential informant who had been charged by Sheeley with theft and sued civilly for monetary damages and thus, had a motive for implicating Sheeley. The Commonwealth examined Pridham not on Sheeley's involvement in the manufacturing of the illegal drug but merely on the fact that he pled guilty to identical charges. Without the admission of Pridham's guilty plea, the Commonwealth's case against Sheeley relied primarily on the credibility of Hubbard, a convicted felon and confidential informant. Added to the impact of admitting Pridham's plea is the fact that the trial court admonished the jurors that it had taken judicial notice of Pridham's plea. Also, during closing argument, the Commonwealth emphasized Pridham had pled guilty and that he had been indicted along with Mr. Sheeley. Another factor to consider herein is that the jury instructions, as to facilitation, specifically referenced

Pridham's activities of manufacturing methamphetamine. Lastly, it must be noted that the jury deliberated for over 1½ hours during which they sent two notes to the judge. The first question concerned the photographs admitted into evidence, but the second inquiry was whether they could see the indictment against Pridham. Following that question, the jury returned a verdict against Sheeley on the charge of facilitation.

Upon a review of the entire case, we believe it to be clear that the court erred in admitting the plea of a co-indictee and that manifest injustice resulted. In Tipton v. Commonwealth,[10] the Court addressed a similar argument that such evidence was inadmissible by stating:

> It should be noted that Parido, supra, left open the possibility that evidence of the plea could be introduced to impeach the co-indictee. However, the Commonwealth in this case has made no such argument. Indeed, the Commonwealth did not appear concerned with Hodge's credibility because in large part he said exactly what the Commonwealth wanted to hear. It was the meaning of his testimony, the inference that both he and Tipton were guilty, that the Commonwealth attempted to bolster by reference to the guilty plea. Therefore, the admission of evidence concerning the co-indictee's guilty plea and the potential penalty was reversible error.

We believe the same situation occurred in this case and that the admission of evidence concerning the co-indictee's guilty plea resulted in reversible error.

[10] 640 S.W.2d 818, 820 (Ky. 1982).

For the foregoing reasons, we affirm in part and reverse in part the judgment of the Meade Circuit Court, and remand this matter for further proceedings consistent with this opinion.

DYCHE, JUDGE, CONCURS.

BUCKINGHAM, JUDGE, CONCURS AND FILES SEPARATE OPINION.

BUCKINGHAM, JUDGE, CONCURRING: I concur with the majority opinion, but I wish to write separately concerning the reason that we have reversed the conviction and remanded the case for further proceedings. At the trial the Commonwealth attempted to prove that Sheeley committed the offenses by introducing testimony from his co-defendant, Russell Tim Pridham, who had earlier pled guilty to the offenses. However, when the Commonwealth began to question Pridham concerning whether he had been at Sheeley's residence on the date in question, Pridham stated, "Not that I know of." Thereafter, the Commonwealth was permitted to introduce evidence that Pridham had pled guilty to manufacturing methamphetamine, trafficking in a controlled substance, possession of drug paraphernalia, and possession of marijuana.

There is no question that the Commonwealth had the right to impeach Pridham by any prior inconsistent statements. Likewise, the Commonwealth could use his guilty pleas to the offenses to impeach his testimony if such pleas did, in fact, do

so. Unfortunately for the Commonwealth, it does not appear that Pridham's guilty pleas impeached his testimony that he was not at the Sheeley residence on the date in question.

The situation in this case presents the continuing and difficult problem that prosecutors face when one co-defendant pleads guilty, is used as a witness at the trial of the other co-defendant, and then testifies that the co-defendant on trial was not involved in the crime. Only when the prior guilty plea of the testifying co-defendant implicates the co-defendant on trial may the plea be used for impeachment purposes under circumstances such as these.

Sheeley and Pridham were indicted under separate indictments, although the Commonwealth's case indicated that they were jointly involved in the crimes. The Sheeley indictment made no mention of Pridham, and the Pridham indictment made no mention of Sheeley. Furthermore, from what we know of the record of Pridham's guilty pleas, no mention was made of any involvement by Sheeley and no mention was made of the crime having occurred in Sheeley's garage.[11] Very simply, Pridham pled guilty to various offenses while "acting alone or in complicity with others." From what we know of the record in Pridham's guilty plea proceedings, Sheeley was not implicated in any manner. Had Pridham testified at his guilty plea

[11] Neither Pridham's written plea agreement nor the plea colloquy was made a part of the record in this case.

proceedings, or had the plea agreement stated, that the crimes were committed in Sheeley's garage, then Pridham's pleas could have been used to impeach his testimony in this case. However, I agree with the majority that the lack of specificity prohibited the Commonwealth from using Pridham's pleas in the manner that it did and that such amounted to palpable error if it was unpreserved.

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