

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001348-MR

LESTER JOE BRADLEY WAGNER, JR.

APPELLANT

v. APPEAL FROM BELL CIRCUIT COURT
HONORABLE JAMES L. BOWLING, JR., JUDGE
ACTION NO. 08-CR-00294

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING IN PART AND
REVERSING IN PART

** ** * * * * *

BEFORE: TAYLOR, CHIEF JUDGE; CLAYTON, JUDGE; LAMBERT,¹
SENIOR JUDGE.

CLAYTON, JUDGE: Appellant, Lester Joe Bradley Wagner, Jr., appeals the
judgment of the Bell Circuit Court finding him guilty of second-degree possession

¹ Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

of a controlled substance, possession of drug paraphernalia and of being a persistent felony offender (“PFO”). For the reasons stated herein, we affirm in part and reverse in part, the conviction.

BACKGROUND AND PROCEDURAL HISTORY

On June 13, 2008, Wagner was arrested when police officers responded to a domestic dispute. He was charged with alcohol intoxication, disorderly conduct, possession of drug paraphernalia, two counts of possession of a controlled substance (“PCS”) (one charge for a ten-milligram tablet of hydrocodone and another for alprazolam), and possession of marijuana. Wagner was indicted on August 13, 2008, for possession of drug paraphernalia (second offense or greater), second-degree possession of a controlled substance, hydrocodone (second offense or greater), and PFO.

At a pre-trial hearing that was conducted on September 15, 2008, Wagner’s jury trial was set for February 17, 2009. On February 16, 2009, Wagner’s trial was reassigned to a later date. On March 2, 2009, Wagner’s trial was again reassigned, this time for June 9, 2009. On April 20, 2009, Wagner filed a pro se motion to dismiss his indictment for violation of the Speedy Trial Act. The trial court denied Wagner’s motion on the June 9th trial date and his case proceeded to trial. The jury found Wagner guilty of possession of drug paraphernalia, with a recommended sentence of five years; second-degree PCS, recommending a five-year sentence; and PFO. At sentencing, the trial court ran the five and ten-year sentences concurrently, for a total sentence of ten years. The

trial court additionally assessed court costs in the amount of \$151 to be paid by Wagner within 180 days of his release from prison. This appeal followed.

Wagner raises five issues on appeal:

1. Whether the trial court erred when it failed to instruct the jury on possession of a controlled substance in an unapproved container as a lesser included offense;
2. Whether the trial court erred when it did not allow a corrected prescription record to be admitted;
3. Whether Wagner was subject to double enhancement when convictions that ran consecutively in a prior judgment were split to enhance his sentences for subsequent offender and persistent felony offender;
4. Whether the trial court erred when it denied Wagner's motion to dismiss under the Speedy Trial Act; and
5. Whether the trial court erred when it imposed court costs on Wagner.

We examine each issue in turn.

DISCUSSION

Wagner's first contention is that the trial court erred when it refused to instruct the jury on the lesser included offense of PCS in an unapproved container. This issue is preserved by defense counsel's request for an instruction on PCS in an improper container. Whether to include a particular instruction is a matter of law and thus will be reviewed de novo. *Arterburn v. First Community Bank*, 299 S.W.3d. 595 (Ky. App. 2009).

While Wagner is correct that "[i]n some instances, the 'whole law' principle requires an instruction on a lesser included offense simply because the

provable elements of the primary and lesser included offenses are the same.” 1
William S. Cooper and Donald P. Cetrulo, *Kentucky Instructions to Juries*,
Criminal § 1.05 (5th ed. 2007), there was no error in this case since the elements
necessary for PCS II and PCS in an unlawful container are different.

A lesser included offense is one which “is established by proof of the
same or less than all the facts required to establish the commission of the offense
charged[.]” KRS 505.020(2)(a). “[I]f the lesser offense requires proof of a fact not
required to prove the greater offense, then the lesser offense is not included in the
greater offense, but is simply a separate, uncharged offense.” *Cecil v.*
Commonwealth, 297 S.W.3d 12, 19 (Ky. 2009), citing *Colwell v. Commonwealth*,
37 S.W.3d 721, 726 (Ky. 2000). KRS 218A.1416(1) provides that “[a] person is
guilty of possession of a controlled substance in the second degree when he or she
knowingly and unlawfully possesses: a controlled substance[.] KRS 218A.210(1),
on the other hand, provides that “[a] person to whom or for whose use any
controlled substance has been prescribed, sold, or dispensed, by a practitioner or
other person authorized under this chapter, may lawfully possess it only in the
container in which it was delivered to him by the person selling or dispensing the
same.”

KRS 218A.210 requires proof of elements which KRS 218A.1416
does not. Whether a controlled substance is in its original container is factually
irrelevant to a charge of PCS II, because the requirement for a conviction of PCS II
is that it be possessed knowingly and unlawfully while PCS in an unlawful

container is that you lawfully possess a controlled substance, but that it is not in its proper container. Thus, the trial court did not err in refusing to include an instruction for KRS 218A.210.

Wagner next contends that the trial court erred when it did not allow the defense to enter the corrected prescription record from Stanifer Drugs to be admitted. This issue is preserved by Wagner's request at trial to admit the corrected prescription copy into evidence. We review rulings of the trial court on evidentiary issues on an abuse of discretion standard. *Olden v. Commonwealth*, 203 S.W.3d 672, 677-78 (Ky. 2006).

The prescription record which Wagner moved to introduce was unsigned and he did not move to introduce it until after the close of the evidence. Even if that had not been the case procedurally, the prescription record indicated that Wagner had previously had a prescription for five-milligram hydrocodone tablets rather than the ten-milligram one that was found in his possession. Thus, we find that the trial court did not err in denying entry into evidence of the prescription record.

Wagner next contends that there was a double enhancement of his sentence. This issue is unpreserved and will be reviewed pursuant to Kentucky Rules of Criminal Procedure (RCr) 10.26. *Sanders v. Commonwealth*, 301 S.W.3d 497, 500 (Ky. 2010). Wagner argues that a prior judgment was used to punish him multiple times. He contends that under *Gray v. Commonwealth*, 979 S.W.2d 454

(Ky. 1998), one prior conviction may not be the basis for enhancement under both the drug subsequent offender and PFO statutes.

Wagner was convicted of being a subsequent offender in possessing drug paraphernalia and a controlled substance. Wagner's sentence was also enhanced by a finding that he was a PFO. The prior charges used for the drug offenses were prior drug offenses. The PFO status arose from prior rape and sodomy charges which were felonies.

In *Morrow v. Com.*, 77 S.W.3d 558 (Ky. 2002), the Kentucky Supreme Court held that in a case where there were two crimes within one indictment, one felony could be used for enhancement purposes of a subsequent offense and the other for PFO status. In this case, Wagner had prior drug offenses in possessing paraphernalia and controlled substances. As to the PFO status, Wagner had felony convictions for rape and sodomy. We find that the court properly allowed enhancement instructions on both and that it was not double enhancement nor double jeopardy to have his sentence enhanced under both statutes.

Next, Wagner argues that his right to a speedy trial under the Sixth Amendment to the U.S. Constitution was violated. In determining whether a defendant's right to a speedy trial has been violated, a court must look to the following four factors:

1. Length of delay;

2. Reasons for delay;
3. Defendant's assertion of his right to speedy trial; and
4. Prejudice to the defendant due to delay.

Barker v. Wingo, 407 U.S. 514, 530, 92 S.Ct. 2182, 2192, 23 L.Ed.2d 101 (1972).

One factor alone is not determinative of whether the defendant's rights have been violated. *Gabow v. Commonwealth*, 34 S.W.3d 63, 70 (Ky. 2000).

In reviewing Wagner's case, a timeline is helpful:

Arrest	June 13, 2008
Arraigned	August 18, 2008
Pretrial Conference	September 15, 2008
Pro Se Pretrial Motions	February 3, 2009
Trial Cancelled due to Court Conflict	February 16, 2009
Trial Date Rescheduled	March 2, 2009
Trial Date Rescheduled Pro se Motion for <i>Faretta</i> hearing	March 25, 2009
Pro se Motion to Dismiss For violation of Speedy Trial	April 9, 2009
<i>Faretta</i> Hearing	April 20, 2009
Trial	June 9, 2009

In denying Wagner's speedy trial motion, the trial court found that Wagner's delay was not long for disposition of a felony case and that it was the result of older cases taking priority or general docket congestion. The timeline above shows that Wagner's trial was a year after his arrest. Wagner moved the court to have three different jury panels for the three pending indictments, so the trial court scheduled the third for February 17th noting that a new jury would be impaneled at that time. After the initial scheduling of the trial in February, it was rescheduled due to an older case (from 2007) taking priority. This was not undue delay. Wagner did assert his right; however, he did not show how he was prejudiced by

the rescheduling. Thus, pursuant to *Barker*, we find there was no violation of Wagner's right to a speedy trial.

Wagner last contends that the court improperly imposed court costs upon him because the court found Wagner a poor person as defined in KRS 453.190(2). We agree. Although this issue was not preserved for appellate review, we find the error substantial and will permit palpable error review. Because the trial court found Wagner to be indigent, it was improper to impose court costs upon him. *Travis v. Commonwealth*, 327 S.W.3d 456 (Ky. 2010). The Commonwealth agrees with Wagner's assessment of the issue. Thus, we will reverse the decision in regards to this issue only.

For the above reasons, we affirm Wagner's conviction except for the imposition of court costs and we reverse the trial court's decision on that issue.

ALL CONCUR.

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