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# Commonwealth of Kentucky

# Court of Appeals

NO. 2008-CA-001405-MR

JOHN FRANKLIN MAPLES, JR. APPELLANT

APPEAL FROM BELL CIRCUIT COURT
v. HONORABLE JAMES L. BOWLING, JR., JUDGE
ACTION NOS. 08-CR-00024

COMMONWEALTH OF KENTUCKY APPELLEE

AND NO. 2008-CA-001406-MR

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COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, TAYLOR, AND WINE, JUDGES.

WINE, JUDGE: John Maples, Jr. appeals from his conviction in the Bell Circuit Court for two counts of receiving stolen property, being a convicted felon in possession of a firearm and being a persistent felony offender in the second degree. On appeal he argues (1) that he was denied a fair trial when the firearm charge was joined with the receiving stolen property charges; (2) that the Commonwealth failed to prove he was in possession of a firearm; and (3) that penalty phase errors occurred when the trial court erroneously instructed the jury and improperly allowed enhancement of the sentence for the firearm charge. However, for the reasons stated herein, we affirm.

**History**

In October of 2006, two burglaries occurred in a neighborhood in Bell County. On October 19, 2006, Mona Milwee returned home to find her door had been pried open and that several pieces of her jewelry were missing. On October 22, 2006, another Bell County resident, Jody Cosby, discovered that his home had been burglarized and that, among other things, his .454 Ruger Casull was missing. Both burglaries were reported to the police.

Cosby, however, was not content to have local police handle the matter, and instead, launched an all-out campaign to recover his .454 Ruger Casull

on his own. Cosby began telling anyone he could about his missing Ruger. One such person was Charlie Smith, a friend with whom Cosby often hunted. On October 26, 2006, Smith reported to Cosby that his nephew, John Goode, had heard that "John Boy" Maples was looking to sell a Ruger handgun for $175.00.

The men decided to set up a sting to catch Maples. Cosby gave $180.00 to Smith and Goode to purchase the gun from Maples. Smith and Goode proceeded to Maples's home to purchase the gun. Cosby and his friend, Todd Bayliss, followed behind Smith and Goode to lay in wait while the pair purchased the gun.

Goode and Smith testified that they arrived at Maples' residence and parked outside. Cosby and Bayliss parked down the street, positioned so that they could still see Maples's home. Maples went back into his home and then returned to the car where Goode and Smith were waiting. Maples got into the car with Goode and Smith, retrieved the gun from a red duffle bag, and sold it to them for $175.00. According to Goode and Smith's testimony, Maples did not have $5.00 to make change for them, so he gave them a bag of jewelry instead. The jewelry was later recovered by police and determined to be that of Mona Milwee (and, ironically, to have an estimated value of $2,000.00).

Goode and Smith then drove down the street to show Cosby the gun. After determining that it was, in fact, his gun, Cosby called the police. Unfortunately for Maples, the police did not arrive promptly and Cosby was anxious to recover his $180.00. Cosby and Bayliss approached Maples outside his

home where they were joined by the other men. Maples fled into the woods to escape the men and hid on a creek bank.

Maples later telephoned his friends to come and pick him up. However, and again most unfortunate for Mr. Maples, the friends he called were working in cooperation with the Bell County Police. Officer Charles Bruce and Detective Mike Hensley of the Bell County Police Department were there to intercept Maples when his friends picked him up.

Maples was arrested and charged with receiving stolen property and being a persistent felony offender in the first degree for the theft of Milwee's jewelry. He was also charged with receiving stolen property, being a felon in possession of a firearm, and being a persistent felony offender in the second degree for the theft of Cosby's Ruger. At the suggestion of trial counsel, the trial court consolidated the indictments for trial.

Maples was convicted on both counts of receiving stolen property, receiving two years for each count. He was also convicted of being a felon in possession of a firearm, for which he received a five year sentence. The jury enhanced this five year sentence to twelve years after finding him a persistent felony offender in the second degree. However, the charge for persistent felony offender in the first degree was dismissed with prejudice. The sentences were set to run consecutively for a total of sixteen years.

**Analysis**

On appeal, Maples argues (1) that the firearm charge was improperly joined with the receiving stolen property charges; (2) that there was insufficient evidence to prove that he was in possession of a firearm; and (3) that his sentence for possession of a firearm by a convicted felon was impermissibly enhanced to a Class C felony.

**A. Failure to Sever Charges**

We first address Maples's argument that the possession of a firearm charge and receiving stolen property charges were improperly joined. Maples contends that the trial court erred by joining these charges because the charge necessarily informed the jury that he had previously been convicted of a felony. Although this error is not preserved for review, Maples has briefed and requested palpable error review under Kentucky Rule of Criminal Procedure ("RCr") 10.26. RCr 10.26 provides that an alleged error which has been improperly preserved for appellate review may be revisited upon a demonstration that the error is palpable. *See Butcher v. Commonwealth*, 96 S.W.3d 3, 11 (Ky. 2002). A palpable error is one which affects the substantial rights of a party. *Id.* Relief will only be granted where there is a substantial possibility that the outcome would have been different but for the error. *Id.*

It should first be noted that Maples's counsel did not *merely* fail to preserve the issue for review. Rather, defense counsel was the one who *suggested* that the two cases (08-CR-0010 and 08-CR-0024) be consolidated. Indeed, when the trial court was setting trial dates during pre-trial, the defense attorney called to

the judge's attention that both of Maples's cases had receiving stolen property charges and had "the same fact pattern," suggesting that they be consolidated. The court responded, "You think there's a couple of these that are subject to consolidation?" Defense counsel responded, "Yes, sir." The court noted that both indictments contained receiving stolen property and persistent felony offender charges. The Commonwealth then moved to consolidate the indictments and the trial court granted the motion to consolidate. Defense counsel remained silent.

Although it is ordinarily improper for the jury to be informed of prior convictions during the guilt phase of trial (which is why many trials are bifurcated), we find that under the circumstances of this case Maples has waived joinder on appeal. *See, e.g., Hubbard v. Commonwealth*, 633 S.W.2d 67 (Ky. 1982) (*holding that possession of a handgun by a convicted felon should be tried separately due to prejudice*). Here, defense counsel not only raised the issue before the judge, he effectively told the judge that the cases should be joined rather than moving to sever the charges. Our courts have made clear that palpable error, and even constitutional error, may be affirmatively waived by counsel at trial. *See, e.g., Violett v. Commonwealth,* 907 S.W.2d 773, 777 (Ky. 1995), *citing West v. Commonwealth*, 780 S.W.2d 600, 602 (Ky. 1989). *See also, Allen v. Commonwealth*, 148 Ky. 327, 146 S.W. 762 (Ky. 1912); and *United States v. Olano*, 507 U.S.725, 733, 113 S.Ct. 1770, 1777, 123 L.Ed.2d 508 (1993). Unlike the case cited by Maples, *Phillips v. Commonwealth*, 2003 WL 1193071 (Ky. 2003), trial counsel did not merely fail to object to joinder, he actively requested it.

Further, we note that *Phillips* is merely persuasive, and as an unpublished opinion, is not binding precedent. Kentucky Rule of Civil Procedure ("CR") 76.12(4)(c).

Regardless, we find that any error would have been harmless as Maples took the stand at trial to testify on his own behalf and admitted that he was a convicted felon. RCr 9.24. Thus, his status as a convicted felon was introduced into evidence. Accordingly, there is no substantial possibility under RCr 10.26 that the outcome would have been any different.

Hence, we affirm on this ground.

**B. Sufficiency of the Evidence**

We now address Maples's next contention that the Commonwealth failed to prove by sufficient evidence that he was in possession of a firearm which was capable of firing a shot. Maples concedes that this claim was not preserved for review, but has briefed and requested palpable error review under RCr 10.26. Thus, we will apply the palpable error standard of review rather than the standard for sufficiency of the evidence set forth in *Commonwealth v. Benham*, 816 S.W.2d 186 (Ky. 1991). *See, e.g. Potts v. Commonwealth*, 172 S.W.3d 345, 348 (Ky. 2005).

Maples argues that, because the Commonwealth failed to prove that the Ruger was a fully-functioning firearm capable of expelling a projectile under Kentucky Revised Statutes ("KRS") 527.010 and 527.040, there was insufficient evidence to convict him of possession of a firearm by a convicted felon. However, Maples misunderstands the Commonwealth's burden. The Commonwealth does

not have the burden of proving that a firearm is operable, rather, a defendant may show that a weapon is *inoperable* as an affirmative defense. *Commonwealth v. Jones*, 283 S.W.3d 665 (Ky. 2009). *See also, Mosely v. Commonwealth*, 374 S.W.2d 492, 493 (Ky. 1964); *and Arnold v. Commonwealth*, 109 S.W.3d 161, 163 (Ky. App. 2003) (*holding that inoperability of a gun is an affirmative defense*). Indeed, there is a presumption that a weapon is operable unless evidence is introduced at trial to call operability into question. *Commonwealth v. Jones*, 283 S.W.3d at 671. Accordingly, we affirm on this ground.

**C. Felony Class Enhancement**

We now reach Maples's penalty phase argument, namely that the trial court erroneously instructed the jury on possession of a firearm by a convicted felon as a "Class C" rather than a "Class D" felony, allowing for enhancement of his sentence. Specifically, Maples contends that no testimony was offered by the Commonwealth that the gun in question was a handgun. Again, this error is not preserved for review, however, we will undertake palpable error review at Maples's request.

KRS 527.040(2) states that "[p]ossession of a firearm by a convicted felon is a Class D felony unless the firearm possessed is a *handgun* in which case it is a *Class C felony*." (*Emphasis added*). A "handgun" is defined by KRS 527.010(5) as "any *pistol* or revolver originally designed to be fired by the use of a single hand, or any other firearm originally designed to be fired by the use of a single hand." (Emphasis added.)

Maples argues that, under *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), the jury should have been left to determine whether he was in possession of a handgun or another type of firearm, as the fact of whether the firearm was a handgun was a fact that increased the penalty for the offense.

In *Apprendi, supra*, the United States Supreme Court established the following rule:

> Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.

*Id.* at 490. In *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), the United States Supreme Court reaffirmed its holding in *Apprendi*, and further explained that the "statutory maximum" for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict without making any additional findings. *Id.* at 304-305.

In the present case, the classification of the possession of a firearm charge as a "Class C" felony for the use of a handgun increased the penalty range from a period of one to five years to a period of five to ten years. Thus, under *Apprendi, supra*, a jury was required to determine whether the firearm in question was a handgun. *Washington v. Recuenco*, 548 U.S. 212, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006).

However, it is not clear that there is a *Blakely* violation as the jury instruction required the jury to find that Maples was in possession of a ".454 Ruger Cassull *pistol*." (Emphasis added.) "Handgun is defined by KRS 527.010(5) as "any pistol or revolver..." Further, "pistol" is defined by Webster's Dictionary as "a small firearm made to be held and fired with one hand." *Webster's New World Dictionary of the American Language, Second College Edition*. As the trial court could impose the sentence on the basis of the facts reflected in the jury verdict without making any additional findings, it does not appear *Blakely* has been violated.

Nonetheless, even if a *Blakely* violation had occurred, any such violation would be harmless. Indeed, the Supreme Court has held that *Blakely* errors are not structural errors and, thus, are subject to harmless error analysis. *Washington v. Recuenco*, 548 U.S. at 222. The United States Supreme Court set forth the standard for determining whether a constitutional error is harmless in *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). The test enunciated in *Chapman* is whether it appears "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Id.* at 24.

Here, we cannot say that, if the jury had been required to find that the firearm in question was a handgun, the result would have been any different. Handguns are ubiquitous in our society and are easily recognized by jurors and lay people as such. As the jury saw pictures of the weapon, which appears quite

obviously to be a handgun, and as the jury found in its verdict that Maples wielded a "pistol", which is the definitional equivalent of a handgun, any error is harmless.

Accordingly, the judgment and sentence of the Bell Circuit Court is hereby affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Erin Hoffman Yang
Assistant Public Advocate
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

David B. Abner
Assistant Attorney General
Frankfort, Kentucky