

Commonwealth of Kentucky
Court of Appeals

NO. 2010-CA-000045-MR

LESLIE SMITH

APPELLANT

v. APPEAL FROM MUHLENBERG CIRCUIT COURT
HONORABLE BRIAN WIGGINS, JUDGE
ACTION NO. 09-CR-00216

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE, LAMBERT AND THOMPSON, JUDGES.

ACREE, JUDGE: The appellant, Leslie Smith, appeals the Muhlenberg Circuit Court's judgment and final sentence convicting Smith of first-degree promoting contraband and of being a first-degree persistent felony offender. For the following reasons, we affirm.

On September 25, 2009, the Muhlenberg grand jury returned an indictment charging Smith with one count of first-degree promoting contraband for allegedly possessing marijuana while confined in the Green River Correctional Complex, and one count of being a first-degree persistent felony offender. A bifurcated jury trial was conducted on November 17, 2009. During the entirety of the jury trial, Smith wore prison-issued khaki pants and a khaki shirt. The khaki shirt included a white label, sewn on the left side of the shirt, which contained Smith's name and inmate number. At the conclusion of the trial's first phase, the jury found Smith guilty of one count of first-degree promoting contraband.

During the sentencing phase, the Commonwealth sought to prove that Smith was a persistent felony offender. In doing so, the Commonwealth presented testimony from the Muhlenberg Circuit Court Clerk. The Clerk testified that Smith had four prior felony convictions: a 2007 conviction for failing to comply with the sex offender registration; a 1987 conviction for promoting contraband in the first-degree; a 1987 conviction for riot in the first-degree; and a 1981 conviction for rape in the first-degree, sodomy in the first-degree, robbery in the first-degree and kidnapping.¹ At the conclusion of the Clerk's testimony, the Commonwealth moved, and the circuit court admitted without objection, certified copies of the indictments and corresponding judgments relating to Smith's prior convictions. The indictment relating to the 1987 rioting charge (Riot Indictment) and the

¹ The Clerk also informed the jury that Smith had a 2006 misdemeanor conviction for driving under the influence and resisting arrest.

indictment relating to the 1981 felony charges (1981 Indictment) also contained charges against Smith which were eventually dismissed.

Ultimately, the jury found Smith guilty of being a first-degree persistent felony offender and recommended an enhanced sentence of 15 years. Thereafter, the circuit court entered a judgment and final sentence consistent with the jury's verdict and recommendation. Smith promptly appealed.

On appeal, Smith asserts he was denied his Fourteenth Amendment right to a fair trial and substantially prejudiced because: (1) he was tried and convicted by a jury while dressed in identifiable prison attire; and (2) during the sentencing phase, the jury was presented with evidence of charges against Smith which had been dismissed.

Smith admits he failed to properly preserve these issues for appellate review, but seeks palpable-error review pursuant to Kentucky Rules of Criminal Procedure (RCr) 10.26. That rule permits an appellate court to review unpreserved "palpable errors which affect the substantial rights of a party" and to grant appropriate relief if it determines that "manifest injustice has resulted from the error." RCr 10.26.

An error is palpable only when it is "easily perceptible, plain, obvious and readily noticeable." *Burns v. Level*, 957 S.W.2d 218, 222 (Ky. 1997). A palpable error must be so serious that it would seriously affect the fairness to a party if left uncorrected. *Brewer v. Commonwealth*, 206 S.W.3d 343, 349 (Ky. 2006). Fundamentally, a palpable error determination turns on whether the court believes there is a "*substantial possibility*" that the result would have been different without the error. *Id.*

Hibdon v. Hibdon, 247 S.W.3d 915, 918 (Ky. App. 2007) (emphasis supplied).

Simply, “[a] palpable error must involve prejudice more egregious than that occurring in reversible error.” *Brewer*, 206 S.W.3d at 351.

If this Court finds that palpable errors exist, we must then examine the errors for manifest injustice to determine if reversal is warranted. Manifest injustice exists only if the palpable error “so seriously affected the fairness, integrity, or public reputation of the proceeding as to be ‘shocking or jurisprudentially intolerable.’” *Commonwealth v. Jones*, 283 S.W.3d 665, 668 (Ky. 2009) (citing *Martin v. Commonwealth*, 207 S.W.3d 1, 4 (Ky. 2006)).

Smith first asserts that the circuit court denied him his fundamental right to a fair trial, thus committing palpable error, when it allowed him to be tried in front of a jury wearing identifiable prison attire.

In *Estelle v. Williams*, 425 U.S. 501, 512, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976), the United States Supreme Court recognized the inherent prejudice suffered by a defendant who is forced to appear before a jury in distinctive prison garments. The Court held that it is reversible error if, over a defense objection, the defendant is compelled to appear in jail clothing before a jury. *Estelle*, 425 U.S. at 512-13. Kentucky has likewise acknowledged that requiring a defendant to appear in front of a jury in identifiable jail attire constitutes reversible error provided the defendant properly objects. *Scrivener v. Commonwealth*, 539 S.W.2d 291, 292 (1976). *Estelle* and *Scrivener* clearly hold, however, that a defendant’s failure to object “to being tried in prison attire, for whatever reason, is sufficient to negate

the presence of compulsion necessary to establish a constitutional violation.”

Estelle, 425 U.S. at 512-13; *Scrivener*, 539 S.W.2d at 292.

In the case *sub judice*, the record is clear that Smith did not object to wearing prison-issued clothing either before or during the trial. Thus, Smith’s claim of error does not even rise to the level of reversible error, much less palpable error. Additionally, Smith committed the offense for which he was being tried while he was incarcerated. During the first five minutes of *voir dire*, the Commonwealth advised the jury that this case was about Smith possessing marijuana while confined in prison. Consequently, the jury knew from the trial’s commencement that Smith was currently, or at least had recently been, incarcerated. Further, while testifying in his defense, Smith admitted he was a convicted felon currently confined in the Green River Correctional Complex. “No prejudice can result from seeing that which is already known.” *Estelle*, 425 U.S. at 507 (quoting *United States ex rel. Stahl v. Henderson*, 472 F.2d 556, 557 (5th Cir. 1973)). Therefore, we are unable to conclude that there is a substantial probability that the result would have been different if Smith did not appear before the jury in prison attire. *Hibdon v. Hibdon*, 247 S.W.3d 915, 918 (Ky. App. 2007). Nor can we conclude that Smith’s appearance before the jury in prison-issued clothing so seriously affected the fairness or integrity of Smith’s trial as to be “shocking or jurisprudentially intolerable” thereby warranting reversal. Accordingly, we reject Smith’s first argument.

Smith next contends he was denied a fair trial, resulting in palpable error, when, during the trial's sentencing phase, the circuit court submitted to the jury certified copies of prior indictments containing charges against Smith which had been dismissed. Specifically, Smith takes issue with the Riot Indictment, and the 1981 Indictment. While we agree that the circuit court erred in admitting documents referencing the dismissed charges, manifest injustice did not result therefrom so as to render Smith's trial unfair.

Kentucky's truth-in-sentencing statute, Kentucky Revised Statute (KRS) 532.055(2), is crafted so as to provide the jury with relevant information in order for it to arrive at the appropriate sentence for the specific offense. *Williams v. Commonwealth*, 810 S.W.2d 511, 513 (Ky. 1991). "The type of evidence which may be admitted during the persistent felony stage of a bifurcated trial should serve to establish the elements necessary for demonstrating the statutory requirements of being a persistent felony offender." *Cuzick v. Com.*, 276 S.W.3d 260, 263 (Ky. 2009). As a result, pursuant to KRS 532.055(2)(a)(1), the Commonwealth may introduce the defendant's prior felony and misdemeanor convictions.

However, in *Robinson v. Commonwealth*, 926 S.W.2d 853, 854 (Ky. 1996), our Supreme Court recognized that while KRS 532.055(2)(a) authorizes the Commonwealth to introduce the defendant's prior convictions, it may not introduce prior charges that were ultimately dismissed. "Thus, it is well settled that the Commonwealth cannot introduce evidence of charges that have been dismissed or set aside." *Cook v. Commonwealth*, 129 S.W.3d 351, 364 (Ky. 2004);

see also Cuzick, 276 S.W.3d at 264 (recognizing that a charging document may not be admissible during the penalty phase because it may contain “information inconsistent with the final judgment”).

In this case, the Riot Indictment contained four charges against Smith, three of which the Commonwealth dismissed in exchange for Smith’s guilty plea to the remaining first-degree riot charge. Additionally, the 1981 Indictment included seven charges against Smith, three of which were eventually dismissed. Consequently, the circuit court erred when it published the Riot Indictment and 1981 Indictment to the jury. *See Cook*, 129 S.W.3d at 364. Nonetheless, we do not think the circuit court’s mistake rises to the level of a palpable error resulting in manifest injustice.

As noted, the Commonwealth submitted evidence that Smith had been previously convicted of felony offenses through the Muhlenberg Circuit Court Clerk. During the Clerk’s testimony, the Commonwealth methodically questioned the Clerk regarding each previous felony conviction by asking the Clerk the case number, the date of the offense(s), the name of the offense(s), a brief description of the offense(s), the date of conviction, the sentence(s) received, and Smith’s age at the time of conviction. At no time during the Clerk’s testimony was she questioned, nor did she testify about, the additional counts that were dismissed, but which were nevertheless referenced in the Riot Indictment and the 1981 Indictment.

In due course, the Commonwealth submitted nine prior criminal convictions to the jury, seven of which constituted felony convictions. Based on the evidence presented, the jury had the authority pursuant to KRS 532.080(6)(b) to recommend a possible maximum sentence of twenty years for the first-degree persistent felony offender charge. Instead, the jury chose to recommend a fifteen-year sentence. Given Smith's extensive record supporting the jury's fifteen-year sentence recommendation, and the jury's less-than-maximum recommended sentence, we cannot say that there is a substantial probability that, without the error, the jury would have recommended a different sentence. Accordingly, Smith's claim of error does not rise to the level of palpable error resulting in manifest injustice warranting reversal.

The Muhlenberg Circuit Court's judgment and final sentence is affirmed.

ALL CONCUR.

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