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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001275-MR

ANDRE FINNELL — APPELLANT

v.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE PATRICIA M. SUMME, JUDGE
ACTION NO. 07-CR-00130

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON, KELLER, AND LAMBERT, JUDGES.

CAPERTON, JUDGE: The Appellant, Andre Finnell, was convicted of reckless homicide, facilitation to commit robbery in the first degree, and of being a persistent felony offender in the second degree. Following a trial, he was sentenced to twenty years of imprisonment, although his case was subsequently

reversed for a new penalty phase.[1] Following the second penalty phase, Finnell received five years for reckless homicide, five years for facilitation to commit robbery in the first degree, enhanced to a total of seventeen years in light of his conviction as a persistent felony offender (PFO). Finnell now appeals the admission of certain testimony and the court's refusal to grant a mistrial at his request. Having reviewed the record, the arguments of the parties, and the applicable law, we affirm.

During the course of testimony at trial, it was established that an individual named Howard Edwards robbed, shot, and killed James Clowers on January 21, 2006. Edwards received an eighteen-year sentence in exchange for his testimony against Finnell. Finnell was tried for the charges against him in connection with these incidents on November 15, 2007. According to Edwards, Finnell planned the robbery of Clowers and provided a gun to Edwards. Edwards testified that the plan was for Finnell to sell Clowers cocaine, and that Edwards would interrupt the deal and rob Clowers. In the process of robbing Clowers, Edwards shot and killed him. According to the trial testimony of witness Murray Burnham, Finnell was "shocked and surprised" at the events that occurred.

During Edwards's testimony at trial, the prosecutor asked if he knew Finnell to carry a gun. Edwards responded with a "yes," at which point Finnell's counsel objected and requested a mistrial. That motion was overruled, and an

[1] Following Finnell's original appeal, in the case *Finnell v. Commonwealth*, 2008-SC-000085, the Kentucky Supreme Court reversed for a new penalty phase after the trial court permitted Courtnet to be used in lieu of certified court documents to prove Finnell's prior criminal history.

admonition was given to the jury instead. This claim of error was not raised on direct appeal of the initial judgment to the Kentucky Supreme Court, and the guilt phase proceedings were otherwise affirmed on that appeal.

After the taking of proof, the jury was instructed on complicity to robbery in the first degree, and facilitation to robbery as well as murder and other lesser charges. As noted, the jury ultimately returned a verdict of guilty on the facilitation instruction and the reckless homicide instruction.

Prior to proceeding in the penalty phase, the Commonwealth advised the court that it would have a certified copy of the conviction in support of the PFO charge, but that otherwise Finnell's probation and parole officer would utilize a Courtnet history to testify regarding Finnell's other convictions. Finnell objected, and was overruled. He eventually appealed this issue to the Kentucky Supreme Court. As noted, Finnell was convicted of all three charges against him and was sentenced to twenty years of imprisonment. Finnell then appealed to the Kentucky Supreme Court concerning the use of the Courtnet history, as well as the Commonwealth's alleged failure to provide timely discovery and the trial court's failure to instruct the jury on facilitation to commit murder. The Supreme Court affirmed on the latter issues but reversed for a new penalty phase for the use of the Courtnet records.

During the course of the new penalty phase following Finnell's first appeal, jurors viewed the original trial on DVD. Finnell now asserts that during the course of the new penalty phase all excludable evidence shown on the trial

DVD was to be omitted. However, the aforementioned testimony that Finnell had frequently been seen with a gun was not omitted and Finnell's counsel again objected and sought a mistrial. In response, the court again declared that an admonition would cure the error. In lieu of a mistrial, counsel agreed to an admonition. Finnell was ultimately sentenced to a total of seventeen years for the three aforementioned convictions. It is from the sentence imposed after the new penalty phase that Finnell now appeals to this Court.

In reviewing the arguments of the parties on this issue, we note that the trial court's decision to deny a motion for mistrial should not be disturbed absent an abuse of discretion. *Matthews v. Commonwealth*, 163 S.W.3d 11, 17 (Ky. 2005). We review this matter with this standard in mind.

On appeal, Finnell argues that Edwards's testimony concerning whether Finnell carried a gun on other occasions was impermissible evidence and inappropriate for a jury to hear. Finnell asserts that during the course of the initial trial, the court determined this evidence to be inadmissible and that an admonition did not cure that error. Finnell asserts that Edwards's testimony concerning the fact that Finnell frequently carried a gun was devastating to the defense since a key issue during trial was whether Finnell gave Edwards the gun that was ultimately used to kill Clowers. Finnell asserts that the Commonwealth had the responsibility to redact any potential errors in the form of objections but failed to do so, and that a second admonition during the course of the penalty phase did not cure the damage incurred as a result. Finnell thus argues that it is impossible to determine

whether the new jury sentenced him to seventeen years as a result of hearing this impermissible testimony. Finnell therefore requests another penalty phase.

In response, the Commonwealth argues that the circuit court did not err in denying Finnell's request for a mistrial during the course of the second penalty phase. The Commonwealth notes that the error that Finnell alleges concerning Edwards's testimony occurred during the guilt phase portion of the initial trial, and that when Finnell appealed from that decision he claimed no error concerning that testimony. Further, the Commonwealth notes that the Supreme Court affirmed Finnell's conviction, aside from the issue concerning the use of the Courtnet records. Thus, the Commonwealth argues that while it is unfortunate that the objectionable testimony was replayed for the jury, it is not reversible error or error by the trial court in overruling the motion for a mistrial and giving an admonition. The adequacy of the admonition *sub judice* is now the law of the case. Consequently, the Commonwealth asserts that whether or not there was error or prejudice as a result of the testimony at issue is a matter which must be resolved against Finnell.

Alternatively, the Commonwealth asserts that there was no error *sub judice* that would warrant a mistrial in any event since a jury is presumed to follow an admonition and that the admonition cures any error that occurred. While acknowledging that there are two circumstances in which the presumptive adequacy of an admonition falters, the Commonwealth states that neither circumstance is present herein. First, it asserts that there is no evidence that the

question was asked without a factual basis since Edwards answered the question in the affirmative. Moreover, the Commonwealth argues that there is no evidence that this testimony was devastating to Finnell for sentencing purposes. The Commonwealth notes that the issue relative to the testimony during the guilt phase may have been whether Finnell gave Edwards the gun on the night of the murder, an issue which had been resolved by the first jury who found Finnell guilty. Thus, while the Commonwealth argues that this testimony may not have been particularly relevant in the second penalty phase, it was likewise not overly prejudicial because this issue had already been resolved through the conviction from the first jury.

Having reviewed the arguments of the parties and the applicable law, we cannot agree with the Commonwealth that the sufficiency of the admonition given in this instance was the "law of the case" in this matter since this matter was never specifically addressed or ruled upon in Finnell's prior appeals, and since the law-of-the-case doctrine generally applies only to matters which an appellate court has addressed on the merits. *See Brown v. Commonwealth*, 313 S.W.3d 577 (Ky. 2010)(*abrogating Commonwealth v. Schaefer*, 639 S.W.2d 776 (Ky. 1982)).[2]

[2] In arguing that Finnell's failure to address this issue on appeal resulted in the ruling of the Supreme Court being the "law of the case," the Commonwealth relied upon the holding of the Supreme Court in *Schaefer*, wherein the Court stated that:

> The "law of the case" doctrine is firmly established in this Commonwealth. As early as 1870, we held that the Court of Appeals has no power on a second appeal to correct an error in the original judgment which either was, or might have been relied upon in the first appeal. *McAllister's Adm'r v. Commonwealth*, 4 Ky. Opin. 178 (1870). This doctrine has carried through case law, and in *Sowders v. Coleman*, 223 Ky. 731 (1928), we firmly solidified the policy of this doctrine as such:

Nevertheless, in accordance with our Kentucky Supreme Court's recent holding in *Brown v. Commonwealth*, 313 S.W.3d 577, we are of the opinion that by not previously raising this issue on appeal, despite the trial court's express ruling on the sufficiency of the admonition in question, Finnell has waived his right to address it now in his second appeal to this Court.

In the matter *sub judice*, Finnell and his counsel certainly could have chosen to appeal the trial court's denial of his request for a mistrial following the

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> The doctrine of "the law of the case" is founded upon the policy that there should be an end to litigation, and cases may not be presented by piecemeal. It is a sound policy, and well-developed and understood in this jurisdiction. The doctrine as defined by the decisions, is that one adjudication settles all errors relied upon for a reversal, whether mentioned in the opinion of the court or not, and all errors lurking in the record on the first appeal which might have been, but were not expressly, relied upon as error.

We further held, in *Aetna Oil Co. v. Metcalf*, 300 Ky. 817, 190 S.W.2d 562, 563 (1945) that:

> "No rule is more firmly established in this jurisdiction than the one that the opinion on the first appeal becomes the law of the case not only as to the errors there relied upon for reversal but also as to errors appearing in the first record
>
> that might have been but were not there relied upon for a reversal."

Schaefer at 777-78.

The Supreme Court, in issuing its opinion in *Brown*, abrogated the holding in *Schaefer*, finding that the holding in *Schaefer* amounted to an extension of the core law-of-the-case doctrine which precluded an appellate court from reviewing not just prior appellate rulings, but also decisions of the trial court which could have been but were not challenged in a prior appeal. The *Brown* court found that the *Schaefer* decision mischaracterized this extension of the doctrine as part of the law-of-the-case doctrine. In *Brown*, the Court held that, "Unlike the core law-of-the-case doctrine, however, this extension barring issues not raised in a prior appeal is more accurately understood as a type of waiver. This is so because the extension hinges not on a previous appellate decision on the barred issue establishing the law of the case, but instead on the party's inaction in failing to raise the issue in a manner consistent with the court's general policy against piecemeal appeals." *See Brown* at 610-611.

conclusion of the first trial, along with the several other issues isolated for appeal. Finnell chose not to do so. As a result, Finnell's right to appeal that error, even if it did occur, was waived at the time the opinion was issued by our Supreme Court on the first appeal. Accordingly, we now decline to address this alleged error in the instant appeal. Therefore, we affirm. Having so found, we need not address the Commonwealth's second argument as to whether the alleged error would warrant a mistrial in this instance.

Wherefore, for the foregoing reasons, we hereby affirm the June 24, 2010, Judgment and Sentence of the Kenton Circuit Court.

ALL CONCUR.

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