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# Commonwealth of Kentucky

# Court of Appeals

NO. 2009-CA-000407-MR

JOHN FRANKLIN MAPLES, JR. APPELLANT

v. APPEAL FROM BELL CIRCUIT COURT
HONORABLE JAMES L. BOWLING, JR., JUDGE
ACTION NO. 07-CR-00285

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
AFFIRMING IN PART,
REVERSING IN PART AND REMANDING

** ** ** ** **

BEFORE: DIXON AND VANMETER, JUDGES; LAMBERT,[1] SENIOR JUDGE.

LAMBERT, SENIOR JUDGE: John Franklin Maples, Jr. appeals from the judgment of the Bell Circuit Court convicting him of third-degree possession of a controlled substance, second offense; possession of drug paraphernalia, second

[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.

offense; driving under the influence, first offense (with aggravating circumstances); and being a second-degree persistent felony offender. Appellant argues that his convictions for possession of a controlled substance and for possession of drug paraphernalia violate the constitutional prohibition against double jeopardy. He also raises a number of contentions regarding his sentencing. Upon review of the record, we affirm Appellant's convictions but reverse and remand for a new sentencing phase for reasons that follow.

**Facts and Procedural History**

On June 8, 2007, Middlesboro Police Officer Joey Brigmon was travelling west on Nolltown Road in Bell County when he observed an eastbound Toyota Supra being driven by Appellant cross the center line into the westbound lane of traffic. Officer Brigmon turned his cruiser around and began pursuing Appellant. As Appellant turned into a private driveway at an apartment building, Officer Brigmon activated his blue lights.

When Officer Brigmon stopped his car, he observed Appellant and his passenger, Roy Baker, Jr., climbing a flight of steps up to a porch. Officer Brigmon then asked them to come back down the steps. As Appellant turned to walk towards Officer Brigmon, the officer observed him toss something out of his pocket onto the porch. That item was later identified as a clear plastic bag containing a green leafy substance and a cellophane wrapper. Within the wrapper were nine blue oval pills and nine yellow round pills. Officer Brigmon observed that Appellant had glassy, bloodshot eyes and was unsteady on his feet. Appellant

then failed a series of field sobriety tests and admitted that he had smoked marijuana earlier in the day.[2] He was then arrested for driving under the influence. In addition to the drugs found on the steps, 225 pink oblong pills were found under the hood of the Supra during a search incident to arrest.[3] All of the pills taken into evidence were later identified by a Kentucky State Police forensics scientist as being Schedule IV controlled substances.

Appellant was subsequently tried and found guilty of operating a motor vehicle while under the influence, first offense (with aggravating circumstances); third-degree possession of a controlled substance, second offense; and possession of drug paraphernalia; second offense. The jury further found that Appellant was a second-degree persistent felony offender (PFO).[4] Per the jury's recommendations, the trial court sentenced Appellant to 48 hours' imprisonment and a $200.00 fine for the DUI conviction; a five-year sentence on the conviction for possession of a controlled substance, enhanced to ten years pursuant to the finding that Appellant was a second-degree PFO; and a five-year sentence on the conviction for possession of drug paraphernalia. The sentences for the latter two convictions were also ordered to run consecutively to one another. Thus, Appellant was sentenced to a total of fifteen years' imprisonment – the maximum

[2] Appellant did not consent to testing of his blood, breath, or urine.

[3] The Supra was registered in Roy Baker, Jr.'s name.

[4] In support of its claim that Appellant was a second-degree PFO, the Commonwealth presented evidence of three prior felony convictions against Appellant that had occurred between 1994 and 2002.

possible sentence. Appellant was further ordered to pay $351.00 in court costs and fees despite his status as an indigent defendant. This appeal followed.

**Issues**

**I.**

Appellant first argues that his convictions for possession of a controlled substance and for possession of drug paraphernalia violate the prohibitions against double jeopardy contained within the Fifth Amendment to the United States Constitution[5] and Section 13 of the Kentucky Constitution.[6] Appellant specifically challenges his conviction for possession of drug paraphernalia, arguing that he was subjected to double jeopardy when he was convicted for possessing pills and marijuana in addition to being convicted of possessing the baggie and cellophane wrapper within which those drugs were contained. Although this issue is unpreserved for appellate review, we are nonetheless authorized to address it. *See Beaty v. Commonwealth*, 125 S.W.3d 196, 210 (Ky. 2003); *Sherley v. Commonwealth*, 558 S.W.2d 615, 618 (Ky. 1977), *overruled on other grounds by Dixon v. Commonwealth*, 263 S.W.3d 583 (Ky. 2008).

The seminal double jeopardy case of *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932) provides that "where the same act

[5] The double jeopardy clause of the Fifth Amendment to the United States Constitution provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb."

[6] Section 13 of the Kentucky Constitution provides, in relevant part: "No person shall, for the same offense, be twice put in jeopardy of his life or limb[.]"

or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." *Id.*, 284 U.S. at 304, 52 S.Ct. at 182. This standard for evaluating double jeopardy claims has been adopted by Kentucky courts and by the Kentucky General Assembly. *See Dixon*, 263 S.W.3d at 588; *Commonwealth v. Burge*, 947 S.W.2d 805, 811 (Ky. 1996), *modified on denial of reh'g*, 947 S.W.2d 805 (Ky. 1997); KRS 505.020. Accordingly, our inquiry is focused on whether possession of a controlled substance and possession of drug paraphernalia each "requires proof of a fact which the other does not."

Appellant acknowledges that on the surface, the Kentucky Supreme Court's opinion in *Hampton v. Commonwealth*, 231 S.W.3d 740 (Ky. 2007) appears to resolve this issue in the Commonwealth's favor. In *Hampton*, the defendant was found in possession of a pipe containing cocaine residue and was ultimately convicted of both possession of a controlled substance and possession of drug paraphernalia. The cocaine residue was the basis for his conviction for possession of a controlled substance and was also used as evidence to categorize his pipe as drug paraphernalia. The defendant argued that his double jeopardy rights were violated because possessing the residue of cocaine on the pipes was necessarily an included offense of possession of drug paraphernalia because one of the factors in considering whether the pipes were drug paraphernalia was whether there was any residue of controlled substances on them. *Id.* at 751.

Rejecting Appellant's argument, the Supreme Court held that "the elements of possession of a controlled substance are not contained in possession of drug paraphernalia, and vice versa." *Id.* It justified this conclusion by nothing that "[t]he elements of possession of drug paraphernalia are possession of an object that is drug paraphernalia with the intent to use it to consume drugs. Possession of a controlled substance requires knowing and unlawful possession of a controlled substance." *Id.* The Supreme Court further explained:

> Appellant's theory only works if possession of a controlled substance (in the form of cocaine residue on the alleged paraphernalia) is an element of the offense of possession of drug paraphernalia. It is not. The presence of residue is merely one of a nonexclusive list of factors found in KRS 218A.510 to be considered in determining whether a given object is drug paraphernalia. While such residue on the pipes is particularly compelling evidence that they were drug paraphernalia, the Commonwealth was not required to prove this fact to secure a conviction for possession of paraphernalia. Other evidence, whether of one of the other factors listed in KRS 218A.510 or any "other logically relevant factors," could have been presented and would have been sufficient to prove the paraphernalia element of the crime.
>
> The fact that proof of the presence of cocaine residue was the basis of the possession of a controlled substance conviction, constituting one of the crucial elements of that offense, does not change this. A single item of evidence may be used to support proof of multiple crimes so long as each crime has an element that the other does not. Because the crimes in this case had separate elements, and in fact had no common elements, Appellant's convictions do not violate double jeopardy.

*Id.* at 751-52. Consequently, application of *Hampton* to this case would appear to compel a result in favor of the Commonwealth.

Appellant contends, though, that his case is distinguishable from *Hampton*. In so doing he relies largely upon the opinion of the Court of Appeals of New Mexico in *State v. Almeida*, 185 P.3d 1085 (N.M. Ct. App. 2008). In *Almeida*, the New Mexico court was confronted with a set of facts similar to those at play here, *i.e.*, a defendant was convicted of both possession of a controlled substance and possession of drug paraphernalia for possessing drugs in a plastic baggie. The New Mexico court acknowledged that the prosecutions for drug possession and possession of a controlled substance did not constitute double jeopardy under *Blockburger* because they each required an element of proof not required by the other. *Id.* at 1087. However, the New Mexico court nonetheless concluded that the convictions violated the defendant's double jeopardy rights because it did not believe that the New Mexico legislature intended pyramid penalties for possessing drugs and drug paraphernalia when the drug paraphernalia in question consisted only of a common, everyday item and was identifiable as such only because it was a container for a personal supply of a controlled substance. *Id.* at 1090. In other words, the New Mexico court concluded that the possession of a baggie to hold drugs merged with the offense of possessing drugs and that the legislature did not intend to punish them as distinct wrongs. The court distinguished this scenario from one in which a baggie of drugs was found next to a pipe or when the drugs were found inside the pipe or inside a syringe, noting that two punishments would appear to be permitted under those circumstances. *Id.*

Appellant argues that because the presence of drugs was the *only* evidence that the plastic baggie and cellophane in his possession were drug paraphernalia, the reasoning of *Almeida* should be applied here. However, our reading of *Almeida* reflects that New Mexico courts rely upon a standard for analyzing double jeopardy claims strikingly different from the one used in Kentucky. The Kentucky Supreme Court has held that "our *Blockburger*-guided double jeopardy analysis should focus only on whether each statute, on its face, contains a different element." *Dixon*, 263 S.W.3d at 590-91. Consequently, in Kentucky the *Blockburger* test is definitive on the question of whether double jeopardy exists in a particular case.

In contrast, New Mexico courts utilize a two-part test when a defendant claims that he is being subjected to multiple punishments for the same offense. The first prong of that test examines "whether the conduct underlying the offenses is unitary," while the "second part focuses on ... whether the legislature intended to create separately punishable offenses." *Almeida*, 185 P.3d at 1087, *quoting Swafford v. State*, 810 P.2d 1223, 1233 (N.M. 1991). From our reading of *Almeida*, legislative intent appears to be a primary – if not *the* primary – concern of New Mexico courts in considering double jeopardy claims. Those courts utilize the *Blockburger* test only "[w]hen a clear expression of legislative intent is absent" as to the question of whether the legislature intended to create separately punishable offenses. *Id.* Moreover, even when *Blockburger* analysis establishes that each criminal statute at issue requires an element of proof not required by the

other, this creates only a *presumption* that the legislature intended to punish the offenses separately. *Id.* This "presumption is not conclusive; it may be overcome by 'other indicia of legislative intent, including the language, history, and subject of the statutes, the social evils sought to be addressed by each statute, and the quantum of punishment prescribed by each statute.' " *Id.*, *quoting State v. Armendariz*, 141 P.3d 526, 532 (N.M. 2006). "If those factors reinforce the presumption of distinct, punishable offenses, then there is no violation of double jeopardy." *Id.*, *quoting Armendariz*, 141 P.3d at 532-33.

Consequently, *Almeida* has no applicability to the case before us as we are limited to examining Appellant's double-jeopardy claim under the elements set forth in *Blockburger*. *See Dixon*, 263 S.W.3d at 590-91. As such, Appellant's constitutional arguments must fail, per *Hampton*, since he was convicted under two statutes that have no common elements, thereby satisfying the test set forth in *Blockburger* and *Burge*. We further note that under KRS 218A.510(4), the proximity of an item to a controlled substance is a relevant factor in classifying an item as drug paraphernalia. Thus, the fact that the plastic baggies and cellophane wrappers in this case contained drugs actually supports their classification as drug paraphernalia. Moreover, a single item of evidence may be used to support multiple convictions without running afoul of the double jeopardy prohibition. *Hampton*, 231 S.W.3d at 752. Accordingly, we hold that Appellant's convictions for possession of a controlled substance and for possession of drug paraphernalia do not run afoul of the constitutional protections against double jeopardy afforded

by the Fifth Amendment to the United States Constitution and Section 13 of the Kentucky Constitution.

## II.

Appellant next raises a number of arguments relating to information presented during the sentencing phase of his trial. Appellant concedes that none of the issues presented in this context are preserved for appeal and therefore must be analyzed under Kentucky Rules of Criminal Procedure (RCr) 10.26 for palpable error.[7] "Under this rule, an error is reversible only if a manifest injustice has resulted from the error. That means that if, upon consideration of the whole case, a substantial possibility does not exist that the result would have been different, the error will be deemed nonprejudicial." *Graves v. Commonwealth*, 17 S.W.3d 858, 864 (Ky. 2000), *quoting Jackson v. Commonwealth*, 717 S.W.2d 511, 513 (Ky. App. 1986). "[T]he required showing is probability of a different result or error so fundamental as to threaten a defendant's entitlement to due process of law." *Martin v. Commonwealth*, 207 S.W.3d 1, 3 (Ky. 2006).

Appellant first argues that the Commonwealth violated KRS 532.055 by introducing evidence of four convictions that were a little more than two weeks

[7] RCr 10.26 provides: "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, 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."

old during the sentencing portion of trial. The convictions were for being a felon in possession of a handgun, receiving a stolen firearm, receiving stolen property over $300.00, and being a second-degree PFO. They were entered on July 7, 2008[8] by the Bell Circuit Court and were introduced for truth-in-sentencing purposes pursuant to KRS 532.055. That statute provides, in relevant part, that after a guilty verdict is returned, "[e]vidence may be offered by the Commonwealth relevant to sentencing including ... [t]he nature of prior offenses for which he was convicted[.]" KRS 532.055(2)(a)(2). However, "a prior conviction may not be utilized under KRS 532.055 ... unless: (1) The time for appealing the conviction has expired without appeal having been taken, or (2) Matter of right appeal has been taken pursuant to § 115 of the Constitution of Kentucky and the judgment of conviction has been affirmed." *Cook v. Commonwealth*, 129 S.W.3d 351, 365 (Ky. 2004), *quoting Melson v. Commonwealth*, 772 S.W.2d 631, 633 (Ky. 1989).

Pursuant to RCr 12.02(3) an appeal must be taken within thirty days of the date of the judgment. Accordingly, Appellant's time to appeal the convictions in question had not run as of the time at which they were introduced in the subject trial, and they were, therefore, improperly admitted. Appellant contends that the introduction of these convictions was prejudicial because he received the maximum possible sentence of imprisonment and that a new sentencing phase is merited.

[8] The sentencing phase of Appellant's trial took place on July 24, 2008.

The Commonwealth concedes that these convictions were erroneously admitted but argues that the error does not rise to the level of palpable error because the jury also heard properly-admitted evidence of three previous felony convictions and two previous misdemeanor convictions against Appellant. The admissible evidence supported the jury's determination that Appellant was a PFO, and we agree with the Commonwealth that it also could have been enough to lead the jury to impose the maximum possible sentence – the introduction of the July 2008 convictions notwithstanding. Thus, this error, standing alone, is not enough to merit a new sentencing phase.

Appellant next claims that his sentencing was tainted by false information presented by the Commonwealth regarding parole eligibility. At sentencing, the Commonwealth explained to the jury during its closing argument that it was required to set a sentence of one to five years for the possession of a controlled substance conviction and that it could enhance this sentence to between five and ten years if it found Appellant to be a PFO. The Commonwealth further explained that the sentence for possession of drug paraphernalia was also one to five years but that this offense could not be enhanced by the PFO charge. The Commonwealth also advised the jury that the maximum sentence that could be imposed was fifteen years' imprisonment. The Commonwealth then made the following comments regarding newly-enacted parole guidelines and their effect on Appellant's parole eligibility:

> One final note – parole eligibility. No one can tell you when Mr. Maples will make parole. That is up to the parole board. And the new, just-enacted parole eligibility chart, which I have in my hand, a certified copy, marked exhibit – Commonwealth's exhibit 25 – has new guidelines. The low used to be twenty percent, [but] as of July 15th, I guess, or mid-July – whatever – it's now fifteen percent. Now what that means is, if you fix a sentence of one year, he is eligible for parole in two months. If you fix a sentence of five years, he is eligible for parole in nine months. Doesn't say he'll get it, doesn't say he won't. And the legislature says you're entitled to know that when you fix a sentence. So even if you fixed a maximum sentence, you are entitled to consider parole eligibility.

These comments were intended to reflect recent changes to parole eligibility guidelines made by the General Assembly via 2008 Ky. Acts Chap. 127 (H.B. 406) Part I § I (1)(6), which provided:

> Review of Cases: Notwithstanding 501 KAR 1:30 Section 3(1)(a), a nonviolent offender convicted of a Class D felony with an aggregate sentence of one to five years confined to a state penal institution or county jail shall have his or her case reviewed by the Parole Board after serving 15 percent or two months of the original sentence, whichever is longer.[9]

However, the Commonwealth failed to explain to the jury that the referenced changes applied only to those nonviolent offenders who had received sentences of between one and five years. The Commonwealth did not address how Appellant's parole eligibility would be affected if the jury found him to be a PFO and enhanced his sentence. The Commonwealth now acknowledges that because Appellant was determined to be a second-degree PFO and was given a sentence of ten years'

[9] These changes were codified in KRS 439.340(3)(a).

imprisonment for possession of a controlled substance, he is eligible for parole only after serving twenty percent of his sentence – not fifteen percent.

The Commonwealth denies that any false information on the issue of parole eligibility was given to the jury, but it admits that the statements in question were ambiguous and that the jury may have taken them to mean "that the new parole eligibility guidelines would be in effect no matter what sentence the jury imposed." There is no indication that the prosecution acted in bad faith in this case, but its comments to the jury clearly suggested that Appellant would be eligible for parole after serving fifteen percent of his sentence. Moreover, the Commonwealth emphasized that the jury was entitled to consider parole eligibility even if a maximum sentence were imposed. Thus, the Commonwealth obviously wished to impart to the jury the import of this information. Consequently, we are compelled to conclude that the statements regarding parole eligibility were incorrect in this context.

With this said, the question is whether such error rises to the level of palpable error. As a general rule, "[t]he use of incorrect, or false, testimony by the prosecution is a violation of due process when the testimony is material.... This is true with regard to the good faith or bad faith of the prosecutor." *Robinson v. Commonwealth*, 181 S.W.3d 30, 38 (Ky. 2005). The test for materiality when the prosecution knew or should have known that the testimony was false is whether "there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *Id.*, *quoting United States v. Agurs*, 427 U.S. 97, 103, 96

S.Ct. 2392, 2397, 49 L.Ed.2d 342 (1976). While the statements made here came from the prosecutor during closing and not from actual testimony, we believe they are still subject to the aforementioned analysis.

*Robinson* establishes that a sentence may be reversed and a new sentencing phase ordered where false statements offered during a sentencing phase are found to be material – even where there is a lack of preservation. *See id.* The Commonwealth argues that in light of Appellant's prior criminal history and the speed with which the jury agreed to impose the maximum possible sentence, there is no reasonable likelihood that the statements in question could have affected the jury's decision. Thus, the Commonwealth contends, palpable error did not occur.

While it is true that the Commonwealth presented several other factors that might have persuaded the jury to impose the maximum sentence, we cannot ignore the fact that the jury was presented with incorrect or misleading parole eligibility information *and* improperly-introduced evidence of four other convictions that had occurred only two weeks earlier. Even assuming that each one of these things, standing alone, would not merit a new sentencing phase, an accumulation of such errors may certainly do so. *See, e.g.*, *Funk v. Commonwealth*, 842 S.W.2d 476, 483 (Ky. 1992); *Peters v. Commonwealth*, 477 S.W.2d 154, 158 (Ky. 1972). The Commonwealth presumably called the jury's attention to these items because of the possibility that they could affect the jury's sentencing decision. As was the case in *Robinson*, *supra*, the question is whether the subject information "influenced the jury to render a sentence greater than what

it might otherwise have given[.]" *Robinson*, 181 S.W.3d at 38. As the Kentucky Supreme Court concluded therein, "[w]e believe it did and, for sure, can't say it didn't." *Id.* Consequently, we believe that a reasonable likelihood exists that the jury was improperly influenced by these items.

The Supreme Court's decision in *Robinson v. Commonwealth* leaves no doubt that neither failure of preservation nor good-faith error will excuse materially-false information where "there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *Id.*, *quoting Agurs*, 427 U.S. at 103, 96 S.Ct. at 2397. Henceforth, prosecutors should be forewarned that if they intend to use parole-eligibility information, its accuracy will be subjected to an exacting standard. This is true even if their statements to the jury are ambiguous but subject to misconstruction. As such, we reverse the portion of the Bell Circuit Court's order relating to sentencing and remand this matter to the trial court for a new sentencing phase and for sentencing on all convictions.

Appellant finally contends that the trial court erred by ordering him to pay a $200.00 fine for his misdemeanor conviction and $151.00 in court costs because of his status as an indigent defendant. The trial court found Appellant to be indigent and appointed a public defender to represent him at trial. Moreover, the trial court granted Appellant the right to proceed *in forma pauperis* on appeal. The Commonwealth concedes that Appellant's contention is correct because neither fines nor court costs may be levied upon defendants who are found to be indigent. *See* KRS 534.040(4); KRS 31.110(1)(b); KRS 23A.205(2).

Consequently, the trial court clearly erred in imposing a fine and court costs upon Appellant. Thus, we reverse the portion of Appellant's sentence whereby he was ordered to pay a fine and court costs.

**Conclusion**

For the foregoing reasons, Appellant's convictions are affirmed; however, the sentence imposed for those convictions is reversed and this case is remanded to the Bell Circuit Court for a new sentencing phase of trial in accordance with the contents of this opinion.

DIXON, JUDGE, CONCURS.

VANMETER, JUDGE, CONCURS IN RESULT ONLY.

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