

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001204-MR

DAMON SELDON

APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE PATRICIA M. SUMME, JUDGE
ACTION NO. 08-CR-00632

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING IN PART,
REVERSING IN PART, AND REMANDING

** ** * * * * *

BEFORE: CLAYTON, COMBS, AND WINE, JUDGES.

WINE, JUDGE: On August 14, 2008, a Kenton County grand jury indicted Damon Seldon for two counts of trafficking in a controlled substance. Six months later, on February 12, 2009, Seldon was indicted as a first-degree Persistent Felony Offender (“PFO I”). Following a jury trial in April 2009, Seldon was convicted on

all three counts. The jury fixed his sentence at a total of ten years' imprisonment, which the trial court imposed.

Seldon raises two issues on appeal. First, he argues that his conviction for PFO I should be set aside because one of the convictions used to support the charge did not qualify as a previous felony. The previous conviction at issue is a September 13, 2005, conviction for trafficking in marijuana from the Court of Common Pleas of Hamilton County, Ohio. R.C. § 2925.03(C)(3)(a). Although Ohio designates this offense as a felony, that state punishes the offense with imprisonment for a period of six to twelve months. R.C. § 2929.14(A)(5). The Ohio court placed Seldon on "Community Control" for a period of two years, subject to a sentence of eleven months if he violated the terms of his release. Since the maximum sentence for this offense was twelve months or less, Seldon contends that it must be treated as a misdemeanor for purposes of Kentucky's PFO statute.

We agree. For purposes of Kentucky's PFO statute, an out-of-state conviction can be treated as a felony if it carries a penalty of one year or more. Kentucky Revised Statute ("KRS") 532.080(3)(a). *See also Ware v. Commonwealth*, 47 S.W.3d 333, 334 (Ky. 2001). In this case, the offense for which Seldon was convicted carried a sentence of up to twelve months, which is within the misdemeanor range in Kentucky. *See Clark v. Commonwealth*, 324 S.W.3d 747, 751 (Ky. App. 2010). The Commonwealth admits that the sentencing range for the Ohio offense falls within the misdemeanor range for Kentucky sentences.

However, the Commonwealth points out that the Ohio court sentenced Seldon to two years of “community control” following his conviction. The Commonwealth contends that a prior felony includes a sentence of probation or any other legal release. KRS 532.080(3)(c)(2). However, that section merely allows PFO enhancement where the defendant “[w]as on probation, parole, conditional discharge, conditional release, furlough, appeal bond, or any other form of legal release from any of the previous felony convictions at the time of commission of the felony for which he now stands convicted” This section is subject to the requirement of KRS 532.080(3)(a), which defines a felony as a conviction involving a sentence of one year or more. Unless the prior conviction meets this definition, it is not a felony for purposes of PFO enhancement.

The Commonwealth also relies on *Commonwealth v. Davis*, 728 S.W.2d 532 (Ky. 1987), in which the Kentucky Supreme Court allowed a PFO enhancement based on a prior conviction for which the minimum sentence was less than one year. But the underlying Ohio conviction in *Davis* involved an indeterminate sentence of six months to five years, probated for three years. Our Supreme Court held that the possibility of an indeterminate minimum of less than one year is not controlling to determine whether the conviction qualified as a felony for purposes of PFO enhancement. Rather, the Court held that “[t]he key is that the maximum sentence imposed which can be served in a foreign jurisdiction controls and permits the crime to be considered as a felony for PFO purposes in Kentucky.” *Id.* at 533.

In this case, the maximum sentence Seldon could have served for the Ohio conviction was twelve months or less. Consequently, the prior conviction does not qualify as a felony for purposes of PFO enhancement. Therefore, Seldon's conviction for PFO I must be set aside.

Seldon next argues that the trial court improperly limited his questioning of a witness concerning the credibility of the Commonwealth's confidential informant. The trafficking charges arose from two controlled buys conducted by the police in June and July of 2008 using Erica Abner as a confidential informant. During trial, Seldon's counsel called Betty Doyle as a witness. After establishing that Doyle knew Abner, counsel asked Doyle whether she knew that Abner had had sex with Seldon. The Commonwealth objected to the question and the trial court sustained the objection. Shortly thereafter, Seldon's counsel asked Doyle if Abner had ever spoken disparagingly of Seldon or stated her intention that she planned to "get" him. The trial court sustained the Commonwealth's objections to these questions as well.¹

The Commonwealth maintains that Seldon's counsel failed to lay a sufficient foundation for these questions by cross-examining Abner about these matters. However, Seldon's counsel specifically raised these issues during Abner's cross-examination.² Furthermore, witness credibility is always at issue,

¹ The record does not show the basis for the Commonwealth's objections or the trial court's rulings. The parties discussed these objections with the court at the bench, but unfortunately, there is no audio recording of the bench conference.

² On cross-examination, defense counsel asked Abner if she had ever had sex with Seldon. She replied that she had not (VR Tape 2, 04/15/2009, 16:40:15). She was also asked on cross-

and relevant evidence which affects credibility should not be excluded.

Commonwealth v. Maddox, 955 S.W.2d 718, 721 (Ky. 1997).

A trial court has discretion to permit or deny impeachment by extrinsic evidence on a collateral issue raised by a party on direct examination. *Commonwealth v. Prater*, 324 S.W.3d 393, 399-400 (Ky. 2010). In this case, Seldon's counsel did not establish that Doyle had any personal knowledge concerning Abner's sexual relationship with Seldon. Thus, Doyle's testimony concerning Abner's possible bias would be merely speculation based upon hearsay.

On the other hand, the Commonwealth gives no reason for the exclusion of Doyle's testimony concerning disparaging statements which Abner allegedly made about Seldon. Seldon's counsel clearly laid a foundation for these matters by questioning Abner about the statements during cross-examination. Furthermore, the alleged statements were clearly relevant to show Abner's bias and to impeach her testimony. *Delaware v. Van Arsdall*, 475 U.S. 673, 678-79, 106 S.Ct. 1431, 1435, 89 L. Ed. 2d 674 (1986). Finally, the questions concerned matters within Doyle's personal knowledge –whether Abner had made the statements to her. Consequently, the questions were proper for impeachment purposes. *See Jett v. Commonwealth*, 436 S.W.2d 788, 792 (Ky. 1969). *See also* Kentucky Rule of Evidence (“KRE”) 613.

examination whether she knew Doyle and whether she had ever told Doyle that she planned to “get” Seldon. She admitted knowing Doyle but denied ever making any such statement (VR Tape 2, 04/15/2009, 16:41:25).

Nevertheless, the Commonwealth contends that any error in excluding the question was harmless given the overwhelming evidence of guilt. While Abner was the only direct witness to the drug transactions, the police recorded the transaction and identified Seldon's voice as that of the seller. In addition, the same vehicle, while not registered to Seldon, was used at all three transactions, and the police observed and identified Seldon's voice while he was driving the vehicle shortly after the first two transactions and in person after the third transaction. The same vehicle was present at the second transaction. Given this evidence, the Commonwealth maintains that any error in excluding the evidence was harmless beyond a reasonable doubt.

Kentucky Rules of Criminal Procedure ("RCr") 9.24 provides that errors in the admission of evidence do not warrant reversal if they are harmless; that is, if the substantial rights of the parties have not been affected. "The test for harmless error is whether there is any reasonable possibility that, absent the error, the verdict would have been different." *Taylor v. Commonwealth*, 995 S.W.2d 355, 361 (Ky. 1999); *see also McBeath v. Commonwealth*, 244 S.W.3d 22, 35 (Ky. 2007). "[I]f upon a consideration of the whole case this court does not believe there is a substantial possibility that the result would have been any different, the irregularity will be held nonprejudicial." *Abernathy v. Commonwealth*, 439 S.W.2d 949, 952 (Ky. 1969), *overruled on other grounds by Blake v. Commonwealth*, 646 S.W.2d 718 (Ky. 1983); *see also Brewer v. Commonwealth*, 206 S.W.3d 313, 324-25 (Ky. 2006).

In this case, Abner was the only direct witness to the drug transactions. Thus, evidence regarding her possible bias against Seldon was clearly relevant to impeach her testimony. However, the Commonwealth also produced significant other testimonial and circumstantial evidence to corroborate her account. Although the trial court should have allowed defense counsel to question Doyle about Abner's statements concerning Seldon, we find no reasonable possibility that the result would have been different had the questions been allowed. Consequently, we must conclude that the error was harmless.

Accordingly, the judgment of conviction by the Kenton Circuit Court is affirmed in part, reversed in part, and remanded for a new penalty phase only on the two counts of Trafficking in a Controlled Substance as the parties conceded during trial that the other felony conviction was outside the time guidelines set forth in KRS 532.080(3)(c).

ALL CONCUR.

BRIEFS FOR APPELLANT:

Samuel N. Potter
Assistant Public Advocate
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Perry T. Ryan
Assistant Attorney General
Frankfort, Kentucky