

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-003134-MR

BILLY J. WILLIAMS

APPELLANT

v.

APPEAL FROM HOPKINS CIRCUIT COURT
HONORABLE CHARLES BOTELE, JUDGE
ACTION NO. 97-CR-00259

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
VACATING AND REMANDING
** **

BEFORE: COMBS, KNOFF, and TACKETT, Judges.

COMBS, JUDGE: The appellant, Billy Joe Williams (Williams), appeals from the judgment of the Hopkins Circuit Court convicting him of burglary in the third degree and of being a persistent felony offender in the first degree (PFO I) and sentencing him to fifteen-years' imprisonment. Having reviewed the record on appeal, we vacate and remand the judgment of the circuit court.

On November 25, 1997, Williams was indicted by the Hopkins County Grand Jury on the charges of burglary in the second degree and PFO I. The case proceeded to trial on May 13,

1998, and a jury found Williams guilty of burglary in the second degree. During the penalty phase of the trial, the jury fixed his sentence for burglary in the second degree at ten-years' imprisonment. However, the jury also found Williams guilty of PFO I and enhanced his sentence to a total of fifteen-years' imprisonment. Following the trial, Williams filed a motion for a judgment notwithstanding the verdict (JNOV), arguing that the elements of burglary in the second-degree as set forth in KRS 511.030 had not been met. KRS 511.030(1) provides that a person is guilty of second-degree burglary "when, with the intent to commit a crime, he knowingly enters or remains unlawfully in a dwelling." (Emphasis added). A dwelling is defined as a "building which is usually occupied by a person lodging therein." KRS 511.010(2).

On November 13, 1998, the circuit court sustained Williams's motion, agreeing that the building which Williams had burglarized did not constitute a dwelling. The court cited to the testimony of several witnesses at Williams's trial that the house was vacant and that no one had lived there for years. However, the court found that the elements for burglary in the third degree had been met. "A person is guilty of burglary in the third degree when, with the intent to commit a crime, he knowingly enters or remains unlawfully in a building." KRS 511.040(1). The court vacated Williams's conviction for burglary in the second degree and entered judgment against him for burglary in the third degree; the court did not disturb Williams's sentence. On December 9, 1998, the court entered

final judgment, convicting Williams of burglary in the third degree and sentencing him to fifteen-years' imprisonment. This appeal followed.

Williams argues on appeal that the court erred in not vacating his sentence and allowing a jury to determine his punishment for burglary in the third degree. He contends that he was entitled to be sentenced by a jury and not by the court. When the court vacated his conviction for second-degree burglary, Williams asserts that it should have vacated his sentence as well and held a sentencing hearing to allow a jury to fix his sentence. We agree.

In Wilson v. Commonwealth, Ky., 765 S.W.2d 22 (1989), the Kentucky Supreme held that "under Kentucky law a criminal defendant has a statutory right to have his sentence set by a jury." In reaching this conclusion, the Court cited to RCr 9.84(1) and KRS 532.055(2). RCr 9.84 provides that when a jury returns a guilty verdict, it shall fix the penalty except where the penalty is fixed by law. After a jury has returned a guilty verdict, KRS 532.055(2) directs the court to conduct a hearing before the jury so that the jury may determine the punishment to be imposed. The trial judge is to impose punishment only in the event the jury is unable to agree on a sentence. KRS 532.055(4). "The trial judge is not vested with the authority to abrogate a criminal defendant's right to jury sentencing by speculating on what sentence the jury would have imposed if properly instructed." Wilson, supra at 22. Additionally, in cases where a re-trial of the penalty phase is necessary, there is no

requirement that the issue of punishment be submitted to the same jury panel which determined guilt. Williamson v. Commonwealth, Ky., 767 S.W.2d 323 (1989). It is permissible for the court to impanel a new jury to consider only the issue of punishment. Id. Thus, Williams was entitled to have his sentence for burglary in the third degree to be fixed by a jury.

Additionally, although Williams failed to preserve this issue before the trial court, we may consider it on appeal pursuant to RCr 10.26, which allows an appellate court to review "a palpable error which affects the substantial rights of a party" even though it may not have been properly preserved. The rule also provides that "appropriate relief may be granted upon a determination that manifest injustice has resulted from the error." In this case, we find that the failure of the court to allow a jury to determine Williams's punishment constituted a palpable error. Burglary in the second degree carries a maximum sentence of ten years while the maximum sentence for burglary in third degree is only five years. This difference in the penalties is substantial, and it is impossible to determine and impermissible to speculate as to the sentence that the jury would have given Williams for burglary in the third degree.

In summary, we hold that the court was correct in setting aside the conviction for burglary in the second degree and in entering judgment for burglary in the third degree. But we conclude that the court erred in not vacating Williams's sentence and in not holding a new hearing to allow the jury to

fix his sentence. Accordingly, we vacate Williams's sentence and remand this case to the Hopkins Circuit Court for re-sentencing.

ALL CONCUR.

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