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Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-000931-MR

MARLOW JOHNSON — APPELLANT

v.

APPEAL FROM WARREN CIRCUIT COURT
HONORABLE THOMAS R. LEWIS, JUDGE
ACTION NO. 98-CR-00605

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING
** ** ** ** **

BEFORE: BARBER, EMBERTON, AND KNOPF, JUDGES.

KNOPF, JUDGE: Marlow Johnson appeals from an April 15, 1999, judgment of Warren Circuit Court convicting him, pursuant to a jury verdict, of assault under extreme emotional disturbance (KRS 508.040) and assault in the fourth degree (KRS 508.030). He was sentenced as a second-degree persistent felony offender (PFO) (KRS 532.080) to five years in prison. Johnson maintains that his trial was rendered unfair by reference during a police officer's testimony to a co-defendant's confession and by limitations placed on his, Johnson's, attempts to impeach one of the Commonwealth's witnesses. Johnson also maintains that he should not have been subjected to sentence enhancement as a PFO.

For the reasons that follow we are not persuaded that Johnson is entitled to relief and so affirm the trial court's judgment.

This prosecution stems from events in Bowling Green, Kentucky, on May 17, 1998. On that day two friends, John Wells and Fred Willhite, had come to Bowling Green to attend some graduation parties. In the late afternoon or early evening they encountered Johnson. Johnson agreed to procure marijuana for Wells, and the three young men set off together for that purpose. The details of what then transpired are disputed, but not in dispute is the fact that racial animosity developed between Willhite, who is white, and Johnson, who is black, which escalated from verbal abuse on both sides to a physical confrontation. Also not in dispute is the fact that, at some point in this increasingly bitter exchange, Willhite brandished a knife and Johnson struck him on the head with a stick of some sort about three or four feet in length. Willhite was apparently felled by the blow, at least momentarily, required nine 'staples' to close the resulting wound, and several weeks later suffered a seizure likely the consequence of lingering bruises. Johnson also struck Wells, either with his fists or with a different stick, and a cohort of Johnson kicked him.

A grand jury charged Johnson with first-degree assault for the alleged attack upon Willhite and with second-degree assault for the alleged attack upon Wells. The indictment also alleged that Johnson should be sentenced as a second-degree PFO. Johnson, claiming to have acted in self defense, pled not guilty. Prior to trial, apparently, Johnson's appointed counsel urged him

to plead guilty in exchange for a reduction of the assault charges and the dismissal of the PFO count. In anticipation of such a bargain, the Commonwealth prepared a motion to amend the charges accordingly, and at a pre-trial conference in February 1999 the written motion was tendered to the court.

At the outset of that conference, Johnson's attorney indicated that an agreement had not yet been entered but was pending. Johnson thereupon sought permission to speak. Recognized by the court, he made it clear that he did not desire to plead guilty and felt that he was being unfairly pressured to do so by both the Commonwealth's attorney and his own counsel. At that point, the Commonwealth announced that the plea offer was withdrawn, and Johnson's counsel moved to be replaced. The court granted the motion to substitute counsel, assured Johnson that he could have a trial and that witnesses would be subpoenaed on his behalf, and scheduled the trial for April 12, 1999. In this flurry of activity, the trial court seems inadvertently to have executed the order attached to and granting the Commonwealth's now defunct motion to dismiss the PFO count of the indictment. On February 22, 1999, that apparent order was entered in the record, with a notation that copies had been sent to the attorneys for both sides.

At trial Willhite and Wells testified that Johnson had failed to give Wells the marijuana he had promised and had also refused to return to Wells the $20.00 Wells had paid. They protested against this treatment, and Willhite in particular grew angry and began using racial epithets. At some point in the

ensuing shouting match, they claimed, Johnson armed himself with a three or four foot length of 2-by-4 lumber, confronted them, and struck Willhite on the side of the head. The blow knocked Willhite down and may have knocked him out momentarily, but in any event he soon arose and gave chase to Johnson, who fled. Wells claimed not to have joined the chase, but testified that several minutes later Johnson returned and assaulted him.

Johnson, testifying on his own behalf, claimed to have given Wells the marijuana as agreed, but to have taken umbrage shortly thereafter at Willhite's racist remarks. His angry protests, he claimed, had prompted an attack by Willhite, armed with a knife, which had necessitated his defending himself with a length of wooden molding he found lying on the ground. He struck Willhite with the stick and managed to escape, but a few minutes later reencountered Wells, who immediately reached into his pocket as though, Johnson said, for a weapon. Preemptively, therefore, Johnson struck Wells with his fists. An acquaintance of Johnson, Mark Anderson, then kicked Wells before Johnson could prevent it.

The evidence thus presented a classic swearing match, which was resolved by the jury in the manner noted above. It is the judgment in accordance with the jury's verdict from which Johnson has appealed.

A witness for the Commonwealth, Bowling Green police investigator Clifford Meeks, was asked on cross-examination in what order he had conducted his interviews. Referring to his notes, officer Meeks read the dates of the various interviews and

remarked that, on the 26th [May 26, 1998], he had talked to Mark Anderson, "who gave a confession." As noted, Anderson had been referred to in the testimony as the person who had kicked Wells after Johnson had struck him. Johnson maintains that the reference to Anderson's confession so tainted the trial as to render it unfair. We disagree.

First, as Johnson acknowledges, no objection to officer Meeks's testimony was raised at trial and thus the purported error was not preserved for review. The general rule, of course, is that unpreserved errors do not provide a basis for relief on appeal. Stringer v. Commonwealth, Ky., 956 S.W.2d 883 (1997); Patrick v. Commonwealth, Ky., 436 S.W.2d 69 (1968). Nor are we persuaded, as Johnson urges, that officer Meeks's testimony merits review as a substantial error under RCr 10.26. Although, as Johnson notes, the prosecution is generally barred from introducing evidence of a co-defendant's confession, conviction, or guilty plea,[1] the reference to such information during cross-examination, as here, is far less clearly erroneous. *Cf.* Taylor v. Commonwealth, Ky., 652 S.W.2d 863 (1983) (mention of co-indictee's guilty plea during cross-examination not an error). Officer Meeks's testimony, furthermore, did not prejudice Johnson's case. Several witnesses, including Johnson himself, testified regarding Anderson's alleged assault. The result of this trial is not apt to have been different had officer Meeks not referred to Anderson's confession.

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[1] Rogers v. Commonwealth, Ky., 992 S.W.2d 183 (1999); Cosby v. Commonwealth, Ky., 776 S.W.2d 367 (1989); Tipton v. Commonwealth, Ky., 640 S.W.2d 818 (1982).

Another commonwealth witness, Barbara Gann, testified that, shortly before the assault upon Wells, she heard Johnson vowing angrily to "kill" someone, that she saw Johnson hit Wells with a stick, and that immediately afterwards she saw Johnson in possession of about $20.00 worth of crack cocaine. Johnson complains that he was denied a full and fair opportunity to impeach Gann's testimony by not being allowed to question her concerning the fact that at the time of trial she was on probation and thus had a strong motive for currying favor with the Commonwealth.

Relying, apparently, on Commonwealth v. Richardson, Ky., 674 S.W.2d 515 (1984), the trial court limited impeachment of Gann in this regard to the bare question of whether she had ever been convicted of a felony. Johnson correctly notes that Richardson was misapplied to this situation, where the attempted impeachment was based upon the witnesses's alleged bias rather than her alleged dishonesty. Commonwealth v. Cox, Ky., 837 S.W.2d 898 (1992). Johnson should have been allowed to probe Gann's possible bias. Again, however, the error was not preserved, and again we are not persuaded that it is sufficiently likely to have affected the trial's result to merit review under RCr 10.24. Rogers, *supra.* There was ample evidence other than Gann's testimony to support the jury's decision.

Finally, Johnson maintains that he should not have been sentenced as a PFO because, as noted above, the trial court entered an order, however inadvertently, dismissing the PFO count of the indictment, which could not then be reinstated without a

new indictment. Once again, this alleged error was not preserved for appellate review. Johnson insists, however, that it is an error bearing on the trial court's fundamental authority to act and thus may be reviewed despite the lack of preservation.[2] Trial courts, of course, speak through their records and generally are to be held thereto. Commonwealth v. Hicks, Ky., 869 S.W.2d 35 (1994). Given the possibility of an unlawful sentence, we agree with Johnson that this highly unusual circumstance requires review. Commonwealth, ex rel. Hancock v. Melton, Ky., 510 S.W.2d 250 (1974); Carrol v. Carrol, Ky., 338 S.W.2d 694 (1960). Upon examination, however, we are persuaded that the irregularity in this record does not entitle Johnson to relief.

Johnson correctly notes that the prosecutor may dismiss an indictment or a part thereof, which dismissal ends that particular matter until it is raised again by reindictment. RCr 9.64; Pierce v. Commonwealth, Ky. App., 902 S.W.2d 837 (1995); Skaggs v. Commonwealth, Ky. App., 865 S.W.2d 318 (1994); C.R.M. v. State, 646 So.2d 1390 (Ala.App. 1994). In Kentucky, indeed, the right to reindict must often be expressly preserved,[3] and in any event a dismissal that is part of a valid guilty-plea agreement is deemed *res judicata*. Commonwealth v. Reyes, Ky.,

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[2]Appellate courts have authority, indeed the duty, to address even unraised questions pertaining to the lack of jurisdiction. Priestly v. Priestly, Ky., 949 S.W.2d 594 (1997); Commonwealth Health Corp. v. Croslin, Ky., 920 S.W.2d 46 (1996); White v. Commonwealth, Ky., 481 S.W.2d 656 (1972); Duncan v. O'Nan, Ky., 451 S.W.2d 626 (1970).

[3]Commonwealth v. Hicks, Ky., 869 S.W.2d 35 (1994).

764 S.W.2d 62 (1989). *Cf.* Boston v. Florida, 645 So.2d 553 (Fla.App. 1994) (discussing Florida's similar rule in circumstances like those of this case). If the order entered by the trial court was valid, therefore, despite its inadvertence, then Johnson should not have been sentenced as a PFO. We believe, however, that, despite formal entry by the clerk, the purported order was a nullity and thus had no bearing on Johnson's trial.

This was plainly the parties' understanding. The order was tendered in anticipation of and was conditioned upon Johnson's guilty plea. When that plea did not take place, everyone involved, Johnson included, understood that the condition precedent had failed and that the dismissal was no longer intended. *Cf.* Cope v. Commonwealth, Ky., 645 S.W.2d 703 (1983) (holding that, in general, an unconsummated plea bargain agreement is not enforceable). The "order" then is perhaps best understood merely as the record of a potential order which never came into being. This is particularly so given the utter lack of prejudice to Johnson, who not only did not rely on the purported order, but repudiated it.

More fundamentally, it is to be noted that the trial court does not have authority to dismiss counts of an indictment without the commonwealth's concurrence, except in unusual circumstances not applicable here. Commonwealth v. Huddleston, 283 Ky. 465, 141 S.W.2d 867 (1940); Commonwealth v. Cundiff, 149 Ky. 37, 147 S.W. 767 (1912); People v. Morrow, 542 N.W.2d 324 (Mich.App. 1995); *and cf.* Commonwealth v. Corey, Ky., 826 S.W.2d

319 (1992) (discussing the Commonwealth's right to reject all but unconditional guilty pleas). When the plea bargain came to naught and the Commonwealth withdrew its offer to dismiss the PFO count, the trial court's authority to issue the order of dismissal lapsed. Even if the "order" be deemed an actual ruling by the trial court, therefore, because entered on the record, that ruling is void as beyond the court's authority and so may not be given effect. Harden v. Commonwealth, Ky. App., 885 S.W.2d 323 (1994); State v. Sheahan, 456 S.E.2d 615 (Geo.App. 1995).

For these reasons, we affirm the April 15, 1999, judgment of the Warren Circuit Court.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT FOR APPELLANT:

Franklin P. Jewell
Appellate Public Advocate
Louisville, Kentucky

BRIEF FOR APPELLEE:

A. B. Chandler III
Attorney General of Kentucky

Paul D. Gilbert
Assistant Attorney General
Frankfort, Kentucky

ORAL ARGUMENT FOR APPELLEE:

David A. Smith
Frankfort, Kentucky