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Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-000674-MR

DEMETRIUS STEPHENSON — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE ELLEN B. EWING, JUDGE
ACTION NO. 97-CR-0140

COMMONWEALTH OF KENTUCKY — APPELLEE

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

BEFORE: JOHNSON, MCANULTY AND MILLER, JUDGES.

JOHNSON, JUDGE: Demetrius Stephenson appeals from a judgment of the Jefferson Circuit Court entered on January 14, 1998, following his conditional guilty plea.[1] Stephenson attempted to preserve two issues for appellate review: (1) whether the trial court erred in refusing to grant Stephenson a separate trial from his co-defendants; and (2) whether the trial court erred in refusing to suppress evidence obtained from the vehicle

[1]Kentucky Rules of Criminal Procedure (RCr) 8.09.

Stephenson was a passenger in at the time of his arrest on a bench warrant. Having concluded that Stephenson has failed to show that he would have been unduly prejudiced by a joint trial and that the search of the vehicle was proper, we affirm.

Stephenson was indicted along with co-defendants Demetrious Mack and Sherwin Harrison for robbery in the first degree[2] and complicity to the attempted murder[3] of Jermaine Williams.[4] Williams claimed that late in the evening of October 9, 1996, Mack and Harrison robbed him and shot him eight times. He claimed that Stephenson was driving the car that the co-defendants alighted from just prior to robbing him.

A joint trial of the three defendants began on January 6, 1998. On the second day of trial, all three defendants accepted the Commonwealth's offer and entered conditional guilty pleas. Stephenson entered a conditionally guilty plea to one count of facilitation to robbery in the first degree and one count of facilitation to attempted murder.[5] He was sentenced to prison for a term of three years on each conviction, with the

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[2]In violation of Kentucky Revised Statutes (KRS) 515.020.

[3]In violation of KRS 506.010 and 507.020 (complicity).

[4]Mack and Harrison were indicted on additional unrelated offenses. These charges were severed for separate trial. Each co-defendant also has an appeal pending in this Court: Mack, 98-CA-0224-MR, and Harrison, 98-CA-0368-MR.

[5]The trial court also dismissed a charge of being a persistent felony offender in the second degree.

sentences to run concurrently with each other, but consecutively with a sentence he was then serving. This appeal followed.

Stephenson argues that the trial court erred by not severing his case for a separate trial from his co-defendants. He claims this issue was preserved for appellate review by the written motions for separate trials by each defendant and by the entry of a conditional guilty plea. The Commonwealth has conceded that at trial it intended to call as a witness Stephenson's former girlfriend, Alicia Lynette Sanders. The Commonwealth intended to elicit from Sanders testimony that she had seen the three co-defendants together in a car the night of the robbery. Co-defendants, Mack and Harrison, each stated that it was his intention to impeach Sanders by asking her about her alleged bias against Stephenson.

It was Sanders who had filed a petition for an Emergency Protective Order (EPO) against Stephenson that had led to his arrest in the case sub judice. In the petition seeking the EPO, Sanders accused Stephenson of violent behavior toward her and serious violations of the law. She claimed that Stephenson also went to a her house with a gun and forced her to go to his mobile home where he beat her with the gun, disrobed her, locked her in a closet and had his friends come over to look at her. The EPO petition further alleged that on that same day Stephenson also beat a 14-year-old girl and threw her out of his home. The EPO petition also claimed that Stephenson had been

violent with Sanders in the past, including one instance where he broke her arm, and that she was afraid of him.[6]

Stephenson argued that at a joint trial the co-defendants would have an absolute right to bring out Sanders' alleged bias and that their impeachment of her would inevitably prejudice him.[7] He claimed that this prejudice could only be eliminated by a separate trial. Kentucky RCr 9.16 provides in pertinent part:

> If it appears that a defendant or the Commonwealth is or will be prejudiced by a joinder of offenses or of defendants in an indictment, information, complaint or uniform citation or by joinder for trial, the court shall order separate trials of counts, grant separate trials of defendants or provide whatever other relief justice requires.

The determination of whether a separate trial should be granted to jointly indicted persons is a matter within the sound discretion of the trial court, and a conviction will be reversed only if the refusal of the trial court to grant the relief is a clear abuse of discretion and undue prejudice to the defendant is positively shown prior to trial.[8] A defendant must show that antagonism between his and his co-defendant's case would prevent

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[6]Separate criminal charges were filed against Stephenson in regard to the allegations made in the EPO petition.

[7]Kentucky Rules of Evidence (KRE) 607: "The credibility of a witness may be attacked by any party, including the party calling the witness." Byrd v. Commonwealth, Ky., 825 S.W.2d 272, 275 (1992).

[8]Rachel v. Commonwealth, Ky., 523 S.W.2d 395 (1975); Humphrey v. Commonwealth, Ky., 836 S.W.2d 865 (1992).

a jury from being able to separate and treat distinctively evidence that is relevant to each defendant and that such antagonism could mislead or confuse the jury.[9] However, the fact that the defenses of the co-defendants are antagonistic is only a factor for the trial court to consider in determining whether a defendant will be prejudiced by a joint trial.[10]

There are only a few cases in Kentucky where sufficient prejudice to the defendant was found so as to require the reversal of a conviction. Compton v. Commonwealth[11] embraces the proposition that severance is proper when evidence presented against one defendant would not have been admissible in a second trial of that single defendant.[12] Kentucky courts have also recognized that severance is proper when one defendant is on trial with co-defendants who are also charged with additional, separate crimes.[13]

The problem that we encounter in the case sub judice is that we must decide whether the trial court erred in making its determination that Stephenson was not unduly prejudiced by the joint trial when no trial actually took place. Stephenson is

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[9]Wilson v. Commonwealth, Ky., 836 S.W.2d 872 (1992) cert. denied 507 U.S. 1034, 113 S.Ct. 1857, 123 L.Ed.2d 479 (1993).

[10]Id.; Rachel, supra at 400.

[11]Ky., 602 S.W.2d 150, 153 (1980).

[12]See also Commonwealth v. Rogers, Ky., 698 S.W.2d 839 (1985).

[13]See Harris v. Commonwealth, Ky., 869 S.W.2d 32 (1993); Jackson v. Commonwealth, Ky., 670 S.W.2d 828 (1984).

asking this Court to predict what would have happened had the case gone to trial. The Commonwealth argues that "[w]hether appellant would or would not have been prejudiced by the cross-examination is a matter which cannot be determined from this record. . . . Appellant therefore is merely speculating about prejudice from that cross-examination and did not positively show undue prejudice herein." In his reply brief, Stephenson replies to the Commonwealth's argument by stating: "But the Commonwealth then indulges in speculation of its own when it says that at trial the judge would have admonished the jury and limited the cross-examination of Ms. Sanders to protect the appellant's right to a fair trial. . . . This case presents a serious problem of speculating about prejudice or lack of prejudice or ways to cure prejudice." We agree.

Since Stephenson has failed in his burden to demonstrate that the trial court's denial of a severance was a clear abuse of discretion due to a positive showing of prejudice, we affirm. The relief sought by Stephenson would require us to speculate as to what other evidence would have been presented at trial and as to the significance of the prejudice caused by the co-defendants' impeachment of Sanders. This need for speculation highlights one of the policy reasons for the adoption of a rule of law that requires that any issue reserved for appeal through a

conditional guilty plea be "case dispositive and [] capable of being reviewed by an appellate court without a full trial."[14]

> It has been held that, before accepting a conditional plea, the trial court and the prosecutor[15] must determine that the pretrial issues reserved for appeal are case dispositive and are capable of being reviewed by an appellate court without a full trial, which requires the trial court to make specific findings on the record of the issues to be resolved upon appeal,[16] and a further specific finding that those issues would effectively dispose of the indictment or suppress essential evidence which would substantially affect the prosecution's ability to prosecute the defendant as charged in the indictment . . . . However, it has also been held that the dispositiveness of the issue preserved for appeal is not a prerequisite to the acceptance of a conditional plea of no contest to a criminal charge [citations omitted].[17]

Two foreign cases that illustrate this dichotomy are cited in the above discussion. The first, State v. Hosea[18], is a West Virginia case involving West Virginia Rule of Criminal

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[14]21 Am.Jur.2d Criminal Law §712 (1998).

[15]Fed.R.Crim.P. 11(a)(2) makes specific reference to "the consent of the government" to the entry of a conditional plea of guilty, while RCr 8.09 makes no reference to the prosecutor.

[16]The judgment in the case sub judice merely stated: "This is a conditional plea pursuant to RCr 8.09 reserving the right to appeal all pre-trial motions and hearings[.]" Stephenson's motion to enter guilty plea merely included the notation: "Conditional plea pursuant to RCr 8.09." The Commonwealth's offer on a plea of guilty merely noted: "Pursuant RCr 8.09-condt'l plea, PT motions and hearings."

[17]21 Am.Jur.2d Criminal Law §712 (1998).

[18]199 W.Va. 62, 483 S.E.2d 62 (1996).

Procedure 11(a)(2)[19]. There, the defendant, a juvenile charged with first-degree murder, entered a Rule 11(a)(2) conditional guilty plea; but the State argued that the issues were not properly preserved for appellate review because they were not dispositive of the case. The Supreme Court of Appeals of West Virginia noted that several federal courts have consistently held that guilty pleas entered pursuant to Rule 11(a)(2) are proper only when the appellate court's decision will completely dispose of the case,[20] and ruled that the issue presented on appeal must be case dispositive.

Conversely, in State v. Montoya,[21] the Supreme Court of Utah reversed the intermediate appellate court's ruling that the issue on appeal from a conditional guilty plea must be case dispositive.[22] The defendant entered a conditional guilty plea

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[19]Both foreign rules discussed infra are practically identical to Kentucky RCr 8.09 which reads: "With the approval of the court a defendant may enter a conditional plea of guilty, reserving in writing the right, on appeal from the judgment, to review of the adverse determinations of any specified trial or pretrial motion. A defendant shall be allowed to withdraw such plea upon prevailing on appeal."

[20]See United States v. Doherty, 17 F.3d 1056, 1058 (7th Cir.1994); United States v. Bell, 966 F.2d 914, 915-16 (5th Cir.1992); United States v. Yasak, 884 F.2d 996, 999 (7th Cir.1989); United States v. Markling, 7 F.3d 1309, 1313 (7th Cir.1993)(holding that when a guilty plea is appealed, the issues to be resolved must "dispose of the case")(quoting United States v. Wong Ching Hing, 867 F.2d 754, 758 (2nd Cir.1989))(quoting Advisory Committee Note to 1983 Amendment to Fed.R.Crim.P 11)).

[21]887 P.2d 857 (Utah 1994).

[22]The Utah Rule of Criminal Procedure 11(i)mirrors the language of West Virginia Rule 11(a)(2) and Kentucky RCr 8.09.

to incest, and attempted to reserve for appellate review the narrow legal issue of whether the State had correctly charged him. The Supreme Court disagreed with the State's argument that since the issue on appeal was not case dispositive, it was not subject to a conditional guilty plea. The Court noted that in State v. Sery,[23] the Court had not found a case dispositive requirement; that the conditional guilty plea rule itself was clear and unambiguous; and that the conditional plea itself reserved the right to appeal "the adverse determination of any specified pre-trial motion," not just dispositive ones.[24]

Thus, this Court could follow the reasoning of the West Virginia Court and hold that in order for an issue preserved by a conditional guilty plea to be subject to review that it must be dispositive. Using this approach, Stephenson's argument for severance would fail, since if this Court found prejudice from the denial of the severance, it would necessitate a full trial. However, since the Commonwealth has not argued for the "case-dispositive" approach and since there is no Kentucky precedent for us to follow, we will refrain from going beyond the arguments in the briefs. Instead, we affirm because Stephenson has failed to show prejudice.

This Court considered a somewhat similar issue in

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[23]758 P.2d 935 (Utah Ct.App. 1988).

[24]Montoya, supra at 860.

Rushin v. Commonwealth.[25] There the defendant, in accordance with KRS 440.450 and 500.110, requested a speedy trial in writing. Six days before the 180-day time limit was up, the court set the trial for November 28, 1994. On November 22, after the defendant's newly-appointed counsel's motion to dismiss was denied, counsel claimed that he did not have adequate time to prepare for trial because the Commonwealth was "trying to race to trial" to avoid violation of KRS 440.450.[26] The Commonwealth responded, claiming that if defense counsel could not be ready by the trial date, then Rushin should be required to move for a continuance, thereby waiving the prescribed time restraints. Rushin then entered a RCr 8.09 conditional guilty plea, reserving the issue for appeal.

Rushin argued that the Commonwealth's insistence on the November 28 trial date forced him to choose between his right to a speedy trial and his right to effective assistance of counsel. This Court noted that to prove ineffective assistance of counsel prejudice must be shown:

> [I]t is well-established that a finding of ineffective assistance of counsel must be based upon a showing of prejudice. . . Since Rushin entered a conditional guilty plea without proceeding to trial, we are unable to determine whether he would have been prejudiced by the allegedly short amount

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[25]Ky.App., 931 S.W.2d 456 (1996).

[26]Id. at 458.

of preparation time [citations omitted].[27]

Since no trial was held, Rushin's conditional guilty plea precluded a determination of whether prejudice had occurred.

Likewise, prejudice must be shown in a claim of improper denial of severance.[28] Since a trial was never held, prejudice cannot be shown. Stephenson based his conditional guilty plea on the mere possibility of prejudice. Since he cannot show that the trial court clearly abused its discretion in refusing to sever the cases for trial, we affirm.

Stephenson also claims that the trial court erred in not suppressing from evidence a gun that was seized from the vehicle that he was a passenger in at the time of his arrest. He also attempted to preserve this issue for our review by a written motion to suppress and by the entry of a conditional plea of guilty.

On the day Williams was robbed, Sheriff Deputies Tony Ford and Greg Haynes were sent to arrest Stephenson on a bench warrant and to serve him with the Emergency Protective Order. The EPO contained a description of Stephenson as 5'3" tall and 220 pounds; two addresses, one of which was River Oak Mobile Park, #30, in Louisville; and a description of Stephenson's car, a gold Chevrolet Impala. The EPO also stated that Stephenson was considered armed and dangerous.

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[27]Id at 460 (citations omitted).

[28]See RCr 9.16, supra.

When Deputy Ford and Deputy Haynes went to the mobile home park to serve Stephenson with this order and to arrest him on the bench warrant, they found the gold Impala, along with a white Plymouth or Chrysler, parked in front of the mobile home. After the officers knocked on both doors to the mobile home and received no answer, they left the premises to attend to other business.

Approximately one and a half hours later, when the officers returned to Stephenson's mobile home, they noticed the white car exiting the lot. There were three occupants in the vehicle, and the person in the backseat was "hefty", which, according to Deputy Ford's testimony, met the EPO's general description of Stephenson. The officers stopped the car. As Deputy Haynes approached the vehicle, Deputy Ford noticed the backseat passenger look to both sides, then bend forward. Deputy Ford, who was aware of the EPO's reference to weapons, came forward to assist his partner. Deputy Haynes asked the occupants if any of them were Demetrious Stephenson. Stephenson admitted his identity and was arrested and served with the EPO. A search of the vehicle by Deputy Haynes revealed a 9 mm handgun in the rear floorboard of the car where Stephenson's feet had been when he was seated in the car. Pre-trial discovery indicated that test results on the 9 mm handgun supported the Commonwealth's claim that the weapon was used to shoot Williams.

Stephenson bases his argument on appeal largely on Deputy Ford's testimony that the driver had committed no traffic

violations and that the vehicle was stopped solely to determine whether one of the passengers was indeed Stephenson. Under RCr 9.78, the trial court's factual findings in an evidentiary hearing will be upheld if the findings are supported by substantial evidence.[29] In addition, "[w]hen considering questions of law, or mixed questions of law and fact, the reviewing court has greater latitude to determine whether the findings below were sustained by evidence of probative value."[30]

In Delaware v. Prouse,[31] the defendant moved to suppress evidence seized from his vehicle after a police officer pulled him over to check his driver's license and registration. The officer testified that he had observed neither any traffic violations nor any suspicious activity by the defendant. The trial court found the stop and detention capricious and violative of the Fourth Amendment, as did the Delaware Supreme Court. The United States Supreme Court affirmed, noting:

> The essential purpose of the proscriptions in the Fourth Amendment is to impose a standard of "reasonableness" upon the exercise of discretion by . . . law enforcement agents, in order "to safeguard the privacy and security of individuals against arbitrary invasions"...the reasonableness standard usually requires, at a minimum, that the facts upon which an intrusion is based be capable of measurement against "an objective standard," whether this

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[29]See RCr 9.78.

[30]Uninsured Employers' Fund v. Garland, Ky., 805 S.W.2d 116, 117 (1991).

[31]Prouse 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979).

> be probable cause or a less stringent test [footnotes omitted] [citations omitted].[32]

The Court held:

> [E]xcept in those situations in which there is at least articulable and reasonable suspicion that a motorist is unlicensed or that an automobile is not registered, or that either the vehicle or an occupant is otherwise subject to seizure for a violation of law, stopping an automobile and detaining the driver in order to check his driver's license and the registration of the automobile are unreasonable under the Fourth Amendment [emphasis added].[33]

In Graham v. Commonwealth,[34] the defendant contended that no probable cause existed for an investigatory stop of his vehicle, after which a warrantless search yielded drugs. In affirming, this Court followed Prouse and stated:

> [T]he Commonwealth properly points out that probable cause is not the standard by which the stopping of a vehicle by the police is measured. Delaware v. Prouse,[citation omitted] speaks to the conduct of investigative stops. Weighing government intrusion against the privacy interest involved with automobiles, the Supreme Court acknowledged that individual rights outweigh an officer's unbridled discretion. Howsoever, it concluded that stops are proper "in those situations in which there is at least articulable and reasonable suspicion that a motorist is unlicensed or that an automobile is not registered, or that either the vehicle or an occupant is otherwise subject to seizure

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[32]Id at 667 (footnotes and citations omitted).

[33]Id. at 673.

[34]Ky.App., 667 S.W.2d 697 (1983)(discretionary review denied and opinion order published by Supreme Court 1984)

for violation of law [emphasis added].[35]

The officers in the case sub judice had articulable and reasonable suspicion that an occupant of the stopped vehicle was subject to seizure for violation of law. The EPO to be served contained an address and a description of Stephenson's car. When the officers reached that address, they observed that car, along with a white Malibu, parked in front of Stephenson's mobile home. When no one answered at the mobile home, the officers left. Upon their return one and a half hours later, they observed the white Malibu exiting the lot. The passenger was described as "hefty", a general, but reasonable, match of the EPO's description of Stephenson as 5'3", 220 pounds.

The car that they stopped had been parked very close to Stephenson's home; and a passenger in the vehicle matched a general description of Stephenson. As the Commonwealth aptly stated, the officers were not stopping every vehicle with a stocky person inside; they instead stopped the one car that had been parked in front of Stephenson's residence and contained a stocky person. They had a reasonable and articulable suspicion that the passenger in that car was subject to seizure for a violation of law. Since the stop was proper, a fortiori, the evidence was legally seized from the vehicle. The probative value of these facts support the trial judge's conclusion to deny suppression of the evidence, and we affirm.

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[35]Id. at 698.

For all the foregoing reasons, the judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Bruce P. Hackett
Daniel T. Goyette
Louisville, KY

BRIEF FOR APPELLEE:

A.B. Chandler, III
Attorney General

Gregory C. Fuchs
Asst. Attorney General
Frankfort, KY