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Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-002373-MR

KELVIN W. REED — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE BARRY WILLETT, JUDGE
INDICTMENT NOS. 99-CR-002901, 99-CR-002972 & 00-CR-001896

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING IN PART, REVERSING IN PART, AND REMANDING

** ** ** ** **

BEFORE: COMBS AND DYCHE, JUDGES; POTTER, SPECIAL JUDGE.[1]

DYCHE, JUDGE: Following a jury trial, Kelvin William Reed was convicted of receiving stolen property valued at over $300, unauthorized use of a motor vehicle, theft by unlawful taking of property valued at under $300, second-degree criminal trespass, giving a police officer a false name, and being a second-degree felony offender. This is a direct appeal from the final judgment sentencing Reed to concurrent sentences totaling four years, enhanced to eight years by the second-degree persistent felony offender conviction. In this appeal Reed claims that the trial

[1]Senior Status Judge John Potter sitting as Special Judge by Assignment of the Chief Justice pursuant to Section 110 (5) (b) of the Kentucky Constitution.

court erred by improperly consolidating two indictments, by refusing to grant a motion for a mistrial, by admitting hearsay evidence, by bifurcating the sentencing on misdemeanor offenses, by denying a request to poll the jury, and by improperly instructing the jury during the PFO-penalty phase. Reed further claims that the evidence was insufficient for the jury to find guilt on two of the charges. We affirm in part, reverse in part and remand.

On September 9, 1999, Reed was discovered in the rear stockroom of Shaheen's Department Store, St. Matthews, Kentucky, by the owner and his wife. He was ordered out and exited the store. When the police responded they located Reed in a Cadillac outside the store. The temporary tag in the back window appeared to be forged and the vehicle had been reported stolen. Reed had no identification and gave the officer the name Kelvin Williams. Reed was indicted on November 30, 1999 (No. 99-CR-2901), for receiving stolen property over $300, second-degree criminal trespass, giving a peace officer a false name, criminal possession of a forged instrument, and PFO II. This case was assigned to Division One of the Jefferson Circuit Court and scheduled for jury trial on July 11, 2000.

On September 30, 1999, an employee of Melton Food Mart Cheap Smokes (Food Mart) observed Reed parking a Red Honda Civic before entering the store and placing a number of cartons of cigarettes under his shirt and exiting the store. When confronted by the employee, he dropped the cigarettes and ran. Police responded to the shoplifting call and apprehended Reed. Police discovered the license plate had been removed from the

Honda Civic and it had been reported stolen. Reed gave the investigating officer the name Kelvin Williams. An indictment was returned on December 14, 1999 (No. 99-CR-2972), charging Reed with two counts of receiving stolen property over $300, theft by unlawful taking under $300, receiving stolen property under $300, possession of marijuana, first-degree fleeing or evading police, operating a vehicle on a suspended license, and giving a peace officer a false name or address. This indictment also included offenses which occurred on October 9, 1999. The case was assigned to Division Twelve of the Jefferson Circuit Court and was scheduled for jury trial on September 5, 2000.

On July 11, 2000, the morning of trial on Indictment No. 99-CR-2901, the Commonwealth moved to consolidate the indictment from Division Twelve with the indictment from Division One. The trial court denied this motion, and the parties proceeded to trial on Indictment No. 99-CR-2901. During voir dire, the trial court inadvertently read the PFO charge to the jury. The mistake was brought to the court's attention the second morning of trial. The court agreed to view the videotape during the lunch break but proceeded with the trial. The trial court viewed the tape, confirmed the error, and the defense moved for a mistrial. The Commonwealth stated that, if a mistrial was granted, it would renew its motion to consolidate the indictments. A mistrial was granted and a new trial scheduled for January 30, 2001.

On August 17, 2000, the Commonwealth filed a motion to consolidate, which was granted. On the morning of trial the Commonwealth indicated it would not be going forward on four

counts of Indictment No. 99-CR-2972, as they had not intended that indictment be joined. The trial court granted a defense motion to dismiss those charges with prejudice.

The trial was held on July 5 and 6, 2001. Reed was found guilty of receiving stolen property valued at over $300 for the Honda Civic, unauthorized use of a motor vehicle for the Cadillac, theft by unlawful taking of property valued at under $300 for the cigarettes, and second-degree criminal trespass and giving a false name to a peace officer for the incident at Shaheen's.

The combined PFO/penalty phase was held on July 9, 2001. Reed testified and admitted that he committed the shoplifting and that he gave the officer a false name. The jury fixed Reed's punishment as follows: Receiving stolen property valued at over $300 — 4 years; unauthorized use of a motor vehicle — 12 months and $500; theft by unlawful taking of property valued at under $300 — 6 months and $250; second-degree criminal trespass — 90 days; and giving a peace officer a false name — 90 days and $250. They also found him guilty of being a second-degree persistent felony offender and enhanced the 4-year sentence to 8 years. Reed was finally sentenced on August 30, 2001, to the enhanced sentence of 8 years.

Reed first argues that it was reversible error for the trial court to consolidate the two indictments. In the alternative, he argues that double jeopardy attached after the first trial.

Under RCr 6.18, two or more offenses may be charged in the same indictment "if the offenses are of the same or similar

character or are based on the same acts or transactions connected together or constituting parts of a common scheme or plan." Offenses closely related in character, circumstances, and time need not be severed. Cardine v. Commonwealth, Ky., 623 S.W.2d 895 (1981). The trial judge has broad discretion with respect to joinder of charges and will not be overturned in the absence of a showing of prejudice and a clear abuse of discretion. Rearick v. Commonwealth, Ky., 858 S.W.2d 185 (1993). Reed fails to show prejudice or abuse of discretion. The trial court summarily denied the Commonwealth's motion to consolidate the indictments on a motion brought on the morning of the first trial. On retrial the court granted the motion to consolidate and the defense filed a motion to sever. At the hearing on the motion to sever, the court indicated that the original motion was denied because of its untimeliness. The trial court then denied the motion to sever specifically finding that the offenses were similar, closely related in character, circumstances, and time. The acts were committed within weeks of each other, both involved reported stolen vehicles with the identity disguised, both involved Reed giving the officer the same false name. The trial court's denial of the motion to sever was therefore not an abuse of discretion.

Reed further argues that he was prejudiced by the court's denial of severance in that he was in essence being punished for demanding a mistrial. However, the Commonwealth was well within its rights to request consolidation. We fail to see how the fact that it informed the court that it intended to so proceed prejudiced Reed, especially given the fact that several

charges were dismissed with prejudice as a result of the joinder. Reed also claims he was prejudiced in that he would have testified concerning the September 30th incident had it been tried separately. Counsel stated that Reed "may have wanted to testify" to one of the incidents had they been tried separately. The trial court then offered that Reed could testify only as to the Food Mart charges and the Commonwealth agreed to limit cross-examination to those charges. Reed declined that offer. He cannot now be heard to say that he would have testified. Finding no prejudice or abuse of discretion we affirm on this issue.

Reed argues in the alternative that Indictment No. 99-CR-2901 should be dismissed on double jeopardy principles. Citing Oregon v. Kennedy, 456 U.S. 667, 679, (1982), and Tinsley v. Jackson, Ky., 771 S.W.2d 331 (1989), Reed argues that the mistrial was precipitated by the unfair action of the trial court. The record reflects that the reading of the PFO charge during voir dire in the first trial was inadvertent. When this mistake was brought to the trial court's attention, the court appropriately found that manifest necessity required a mistrial. Reed has failed to describe any conduct that rises to the level of that required by law to show that the trial court's actions were fundamentally unfair, in bad faith, or overreaching on the part of the court. We affirm on this issue.

Reed's next allegation of error is that the trial court failed to grant a mistrial based on improper comments made by Sergeant Walker of the Jefferson County Police Department. The first comment of which Reed complains was in response to

prosecution questioning as to what Sergeant Walker did after arriving at the Food Mart.

> Prosecutor: When you arrived at that location was there a suspect in custody?
>
> Sgt. Walker: Yes.
>
> Prosecutor: What did you do when you got there?
>
> Sgt. Walker: I advised the suspect who I was, what my capacity was on the department as far as being a detective, asked him his name, admonished him if he had given me a false name, address or birthday, or any of that personal information, that he could be charged with that later. Mirandized him, he invoked, so there was no questioning.

The test concerning indirect comments is "whether the comment is reasonably certain to direct the jury's attention to the defendant's exercise of his right to remain silent." Sholler v. Commonwealth, Ky., 969 S.W.2d 706 (1998). In Gall v. Commonwealth, Ky., 607 S.W.2d 97 (1980), overruled on other grounds by Payne v. Commonwealth, Ky., 623 S.W.2d 867, 870 (1981), the prosecutor elicited testimony from a police officer that he had tried to talk to the defendant, but "he wouldn't talk." The court held that this comment was not likely to draw the jury's attention to the defendant's silence. While Sergeant Walker's comments were inappropriate, they cannot be said to be any more likely to direct the jury's attention to Reed's right to remain silent. Not every isolated instance of reference to post-arrest silence is reversible error. Unless post-arrest silence is deliberately used to impeach or there is reason to believe a defendant has been prejudiced by reference to his exercise of his constitutional right, it is not reversible error. Wallen v.

Commonwealth, Ky., 657 S.W.2d 232 (1983). The unelicited comments of this police officer, while inappropriate, were not used to deliberately impeach Reed. The prosecutor drew no further attention to them or made any other comment on Reed's invoking.

The second comment by Sergeant Walker occurred during cross-examination. While being questioned Sergeant Walker stated that defense counsel "was trying to confuse her and the jury." The court denied a defense motion for mistrial, reprimanded the witness at the bench and admonished the jury to disregard the comment. While this unelicited testimony was improper, Reed fails to show how he was prejudiced. It is ordinarily presumed that the jury is controlled by an admonition. Carpenter v. Commonwealth, Ky., 256 S.W.2d 509 (1953). Reed fails to overcome the presumption that the admonition cured any prejudicial effect of the statement. A mistrial is appropriate only where the record reveals a manifest necessity for such an action. Gosser v. Commonwealth, Ky., 31 S.W.3d 897 (2000). A trial court has discretion to determine when to grant a mistrial and that decision will not be disturbed absent a showing of abuse of discretion. Clay v. Commonwealth, Ky. App., 867 S.W.2d 200 (1993). Finding no prejudice to Reed in the statements made by Sergeant Walker, we affirm on this issue.

Reed next argues that the trial court committed reversible error by inferring that the defense would present evidence. When dismissing the jury for a recess at the close of the Commonwealth's case, the court admonished the jury not to discuss the case or form any opinion "because although you've

heard all the Commonwealth's proof, you haven't heard any evidence on the defendant's side." Reed argues that this improperly shifted the burden of proof and inferred that Reed should present evidence. When brought to the court's attention during the recess, the court denied the motion for mistrial but stated that when the jury returned he would ask defense counsel if they intended to put on any proof and stated that the written instructions to the jury would cure any prejudice. In Kirk v. Commonwealth, Ky., 6 S.W.3d 823 (1999), a comment by the court that once the Commonwealth produced proof the jury would "be looking for any evidence that's been put on by the other side to rebut that" was found to be cured by written instructions given to the jury at the conclusion of the case accurately stating the presumption of innocence and placing the burden on the Commonwealth. While the determination in Kirk was partly based on the fact that the defense failed to request a mistrial or admonition, we believe it applies in this case. Defense could have requested an admonition but instead agreed with the trial court as to how to proceed when the jury returned. Further, the statement by the court in the instant case did not rise to near the level of burden shifting as that in Kirk. Therefore, we believe the written instruction was sufficient to cure any prejudice that may have occurred. Under the previous analysis of when failure to grant a mistrial is reversible error, we do not believe that the court abused its discretion in denying the mistrial. Thus, we affirm on this issue.

Reed's next assignment of error is that the trial court admitted hearsay evidence that the Honda Civic was stolen. The

car belonged to Clinical Pathology Associates. The operations manager for the corporation was called to testify that the Honda had been stolen while being driven by one of their couriers. Reed contends that the courier was the only person who could testify to those facts and that the manager's testimony was hearsay. The trial court allowed the testimony under the business records exception to the hearsay rule. KRE 803 (6). The manager testified that her duties included supervision of drivers and maintenance of the company vehicles. She testified that the vehicle was reported stolen, that she was the person called when the vehicle was recovered, and that she went to identify the vehicle. Reed claims she also testified as to how the car was stolen. However, a review of her testimony reveals that the only detail about how the car was stolen was that it was stolen while being driven by the courier and this testimony was elicited by defense counsel, not by the prosecution. The operations manager testified that she was in charge of maintenance for the vehicles and supervisor of the drivers. Under these facts we believe the trial court correctly allowed the manager to testify under the business records exception to the hearsay rule. Therefore, we affirm on this issue.

Reed's next assignment of error is that the Commonwealth failed to offer proof regarding the value of the Honda Civic. Reed states that this issue was preserved for appeal based on his motion for a directed verdict on the charge of receiving stolen property valued at over $300. The question then is one of whether Reed was entitled to a directed verdict on the charge.

The test of a directed verdict is when, viewing the evidence in the light most favorable to the Commonwealth, it would be unreasonable for a jury to find guilt. If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that a defendant is guilty, a directed verdict should not be given. Commonwealth v. Benham, Ky., 816 S.W.2d 186 (1991).

While the Commonwealth failed to present evidence directly addressing the value of the 1999 Honda Civic, pictures of the vehicle were introduced into evidence and the operations manager testified that it was a 1999 model. Although damaged, the car was obviously in working condition, as the store employee testified that Reed drove the car to the store. Based on this evidence, it would not be unreasonable for a juror to conclude that a working 1999 Honda Civic had a value of at least $300.00. Therefore, we affirm on this issue.

Reed next contends that the Commonwealth failed to offer sufficient proof on the charge of giving a peace officer a false name or address because Officer Ford failed to first warn Reed that this was a criminal offense. This issue was properly preserved for appellate review through Reed's motion for directed verdict.

KRS 523.110(1) provides that:

> A person is guilty of giving a peace officer a false name or address when he gives a false name or address to a peace officer who has asked for the same in the lawful discharge of his official duties with the intent to mislead the officer as to his identity. The provisions of this section shall not apply unless the peace officer has first warned the person whose identification he is seeking

> that giving a false name or address is a criminal offense.

When asked whether he had given Reed the warning Officer Ford replied,

> "At that point in time I don't think I did. I may have at sometime during the course, when we thought he was giving us a false name, said that, you know, if you give us a false name, its against the law . . . ."

At the hearing on the motion for directed verdict the Commonwealth stated that it believed Officer Ford testified he gave the warning. The court agreed and denied the motion based on a belief that Officer Ford testified that he gave the warning. It is clear from the record that Officer Ford testified that he did not give the warning at first and only that he "may have" given the warning later. Even viewing this evidence in a light most favorable to the Commonwealth, the equivocal statement, "I may have warned him later" was not sufficient to establish the warning was given. We find that the Commonwealth failed to meet its burden of proving that the mandatory warning was given. Thus, the trial court erred in denying Reed's motion for directed verdict. As such, we reverse Reed's conviction for giving a peace officer a false name with directions that it be dismissed on remand.

Reed next contends that the trial court erred by bifurcating the trial of the misdemeanor offense. However, in his reply brief he correctly notes that this is no longer an issue based on the recent Supreme Court decision in Commonwealth v. Philpott, Ky., 75 S.W.3d 209 (2002).

Reed next contends that the trial court erred in denying his request to poll the jury. The jury returned its verdict finding Reed guilty on Friday, July 6, 2001. The penalty phase was continued to Monday, July 9, 2001. On Monday morning Reed requested that the jurors be polled. The trial court denied the request, holding that the guilt-innocence phase was concluded, and therefore the request was made too late.

RCr 9.88 provides for the following procedure:

> When the verdict is announced, either party may require the jury to be polled, which is done by the clerk's or court's asking each juror if it is his or her verdict. If upon the poll, there is no unanimous concurrence, the verdict cannot be received.

The right of a defendant to have a poll of the jury is unquestionable. See Powell v. Commonwealth, Ky., 346 S.W.2d 731 (1961), and Temple v. Commonwealth, 77 Ky. (14 Bush) 769 (1879). However, this is a right which may be waived by failure to ask for it. Powell, supra; and Asher v. Commonwealth, 221 Ky. 700, 299 S.W. 568 (1927). Although Reed and his counsel were present when the jury announced its verdict, they did not request that the jury be polled, thereby waiving the right. There was no error in the court denying the belated request, and so we affirm on this issue.

Reed's final allegation of error is that the trial court improperly instructed the jury. He first contends that the court improperly took judicial notice that three of Reed's prior convictions were felonies. The Commonwealth produced proper evidence of Reed's prior convictions for two counts of receiving stolen property over $300 and one count of theft by unlawful

taking over $300. The trial court on request of the Commonwealth took judicial notice that these counts were felonies and so instructed the jury. The courts of Kentucky are charged with judicial notice of the laws of the Commonwealth. Allen v. Commonwealth, 272 Ky. 533, 114 S.W.2d 757 (1938). Therefore, we find no error and affirm on this issue.

The second instruction Reed assigns as error is that the judge improperly admonished the jury that it would only be recommending a sentence. We decline to review this unpreserved error, and do not believe that the instruction amounted to "manifest injustice" to warrant palpable error review. RCr 9.22; RCr 10.26.

The final instruction Reed assigns as error is that the trial court informed the jurors that the sentences would run concurrently. Reed alleges that this amounted to telling the jury that it could impose any penalty it wanted without consequence. Reed received multiple sentences for both definite and an indeterminate term. KRS 532.110(a) mandates that they be served concurrently. While it is true that the jury imposed the maximum jail sentence for three of the misdemeanors and the maximum fine for two, it did not impose the maximum sentence on one charge and did not impose the maximum fine on two. Contrary to Reed's argument, we believe this indicates that the jury did not see its job as meaningless or fail to take its role seriously. Finding no error, we affirm on this issue.

Because Reed's conviction for giving a peace officer a false name was based on insufficient evidence, we must reverse in that respect. The conviction of the Jefferson Circuit Court is

affirmed in all other respects, but the case is remanded for further proceedings consistent with this opinion.

POTTER, SPECIAL JUDGE, CONCURS.

COMBS, JUDGE, DISSENTS.

COMBS, JUDGE, DISSENTING. Sergent Walker gave Reed a warning that giving a false name or falsifying other personal information could result in later charges against him. He was properly on notice in satisfaction of KRS 523.110(1) - despite the omission of Officer Ford. I would affirm on this point.

BRIEF FOR APPELLANT:

Daniel T. Goyette
Jefferson District Public Defender

Elizabeth B. McMahon
Assistant District Defender
Louisville, Kentucky

BRIEF FOR APPELLEE:

Albert B. Chandler III
Attorney General

Louis F. Mathias, Jr.
Assistant Attorney General
Frankfort, Kentucky