

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-002653-MR

LANDAN MABREY

APPELLANT

ON REMAND FROM KENTUCKY SUPREME COURT
2001-SC-0298-DG
v. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE GREGORY M. BARTLETT, JUDGE
ACTION NO. 99-CR-00039

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING AND REMANDING
** **

BEFORE: BUCKINGHAM, COMBS, and DYCHE, Judges.

COMBS, JUDGE: This case is before us on remand from the Kentucky Supreme Court with directions to reconsider our opinion in this matter rendered March 16, 2001, in light of Manns v. Commonwealth, Ky., 80 S.W.3d 439 (2002), which became final on August 22, 2002, and Canter v. Commonwealth, Ky., 843 S.W.2d 330 (1992). After reviewing Mabrey's appeal with these cases in mind, we reverse and remand.

On January 29, 1999, Mabrey was indicted for two counts of first-degree trafficking in a controlled substance. KRS¹ 218A.1412. The charges were based on the allegation that on December 3 and December 4, 1998, Mabrey sold a quantity of cocaine to Patricia Reilly, a witness for the prosecution.

Mabrey pleaded not guilty, and on August 31 and September 1, 1999, he was tried before a jury on both charges. He was convicted of one count of first-degree trafficking in cocaine and received a sentence of eight-years' imprisonment. Final Judgment was entered on October 21, 1999. Mabrey then appealed to this court, and we affirmed in a decision rendered March 16, 2001. The Supreme Court granted discretionary review, and on September 18, 2002, it rendered an opinion and order remanding the case to this Court for reconsideration in light of Manns, supra, and Canter, supra.

Commonwealth's Exhibit 40 discloses that in November 1996, Mabrey had been indicted for two counts of first-degree trafficking in a controlled substance (KRS 218A.1412) based upon the allegation that he had sold cocaine in August and September 1996.² The exhibit also contains the Kenton Circuit Court Final Judgment and Sentence of Imprisonment dated March 14, 1997, reflecting that Mabrey had pled guilty to one count of first-

¹Kentucky Revised Statutes.

²The indictment does not specify whether the charges are for first-offense trafficking, a Class C felony, or for second or subsequent offense trafficking, a Class B felony. The distinction is relevant under KRS 635.020 in determining whether a juvenile case may be transferred to circuit court or whether it must remain in district court.

degree trafficking in a controlled substance, first offense, a Class C felony, and to one count of possession of cocaine. The final judgment discloses that Mabrey was sentenced to a term of five years on the trafficking charge and to one year on the possession charge -- to run concurrently. Additionally, the judgment states: (1) "Because of the defendant's age, he is a youthful offender and is being sentenced pursuant to the provisions of KRS 640.030 and KRS 640 in general"; and (2) "If the Defendant attains the age of eighteen (18) years prior to the expiration of his sentence, and has not been probated or released on parole, he shall be returned to this sentencing Court for further proceedings all consistent with and pursuant to KRS 640.030."

On July 16, 1997, the Kenton Circuit Court entered an Agreed Order, which stated in relevant part as follows:

This court, having heard arguments of counsel on the above matter, hereby vacates its Final Judgment and Sentence of Imprisonment entered March 14, 1997, and disposes of this matter by committing Landon Mabrey to the department of Juvenile Justice, Commonwealth of Kentucky, as a public offender pursuant to KRS 635.060. This case properly falls under the authority of Canter v. Commonwealth, Ky., 843 S.W.2d 330 (1992).

As such, Landon Mabrey is hereby committed to the Department of Juvenile Justice as a public offender for an indeterminate period of time, up to the age of eighteen (18) years.

During his trial in 1999, which is the subject of this appeal, Mabrey testified on his own behalf. On cross-examination, the prosecutor asked him whether he had ever been convicted of a felony. Presumably after having discussed the matter with

defense counsel, Mabrey responded that he had. The trial court then admonished the jury that the prior felony conviction was to be considered only as it reflected upon Mabrey's credibility. Near the conclusion of the cross-examination of Mabrey, the prosecutor referred to him as a convicted felon – apparently as a trial tactic to bolster the image of Reilly, a self-admitted prostitute and crack addict, in contrast with and at the expense of Mabrey. In his closing argument, the prosecutor once again alluded to Mabrey's status as a "convicted felon."

Effective July 15, 1997, KRS 610.320(4), which addresses the admission of juvenile records as evidence in subsequent proceedings, was amended to permit juvenile court records to be offered in a criminal trial to include their use for impeachment purposes. That statute was amended to include their use as follows:

Subject to the Kentucky Rules of Evidence, juvenile court records of adjudications of guilt of a child for an offense which would be a felony if committed by an adult shall be admissible in court at any time the child is tried as an adult, or after the child becomes an adult, at any subsequent criminal trial relating to that same person. Juvenile court records made available pursuant to this section may be used for impeachment purposes during a criminal trial, and may be used during the sentencing phase of a criminal trial. However, the fact that a juvenile has been adjudicated delinquent of an offense which would be a felony if the child had been an adult shall not be used in finding the child to be a persistent felony offender based upon that adjudication.

The 1997 amendments to the juvenile code added identical language to KRS 532.055(2) (a) (felony sentencing

hearings) and KRS 532.025(1) (capital offense sentencing hearings).

In our original decision in this case, we affirmed the Commonwealth's use of Mabrey's juvenile record for impeachment purposes. Since that decision was rendered, Manns v. Commonwealth, supra, declared the 1997 amendments to be unconstitutional to the extent that they permitted juvenile records to be used for impeachment purposes in a subsequent trial.³ The Supreme Court held that the impeachment aspect of the 1997 amendments violated the doctrine of separation of powers. It deferred to the rule set forth at KRE⁴ 609(a) with respect to impeachment by prior criminal adjudications, holding that it applies to the use of prior juvenile convictions for purposes of impeaching the credibility of witnesses. KRE 609(a) provides in pertinent part:

For the purpose of reflecting upon the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record if denied by the witness, but only if the crime was punishable by death or imprisonment for one (1) year or more under the law under which the witness was convicted. (Emphasis added.)

Citing Coleman v. Staples, Ky., 446 S.W.2d 557, 560 (1969); Cotton v. United States, 355 F.2d 480, 481 (10th Cir.1966)); and KRS 635.040, the Manns Court clarified that a juvenile adjudication does not equate to a criminal conviction

³Mabrey did not raise the constitutionality of the 1997 amendments in his original appeal to this Court.

⁴Kentucky Rules of Evidence.

but that it is a determination or an adjudication of a status. Manns at 445. Mabrey's earlier conviction had been adjudicated in circuit court. However, when harmonized with other provisions of the juvenile code and Canter v. Commonwealth, supra, his conviction of first-degree trafficking in a controlled substance, first offense, normally a Class C felony, falls within the special purview of KRS 635.040. KRS 635.040 provides as follows:

No adjudication by a juvenile session of District Court shall be deemed a conviction, nor shall such adjudication operate to impose any of the civil disabilities ordinarily resulting from a criminal conviction, nor shall any child be found guilty or be deemed a criminal by reason of such adjudication.

The record is unclear as to what circumstances caused the transfer of the 1996 charges to circuit court under KRS 635.020 and KRS 640.010. But the fact remains that Mabrey was ultimately convicted of a Class C felony. KRS 635.020(2) provides as follows:

If a child charged with a capital offense, Class A felony, or Class B felony, had attained age fourteen (14) at the time of the alleged commission of the offense, the court shall, upon motion of the county attorney made prior to adjudication, and after the county attorney has consulted with the Commonwealth's attorney, that the child be proceeded against as a youthful offender, proceed in accordance with the provisions of KRS 640.010.⁵

If Mabrey had originally been charged with the same offense of which he was ultimately convicted (a Class C felony),

⁵KRS 640.010 sets forth the hearing and proof requirements applicable to the determination of whether to transfer a juvenile case to circuit court and to try the juvenile as a youthful offender.

that lower level of felony would have rendered him exempt from the status of youthful offender. Disposition of his case would have occurred in juvenile court rather than in circuit court. See Canter v. Commonwealth, Ky., 843 S.W.2d 330, 331 (1992). Hence, the provisions of rule of KRS 635.040 are activated. Therefore, Mabrey's 1996 adjudication cannot be considered a criminal conviction. Id.

In summary, pursuant to Manns v. Commonwealth, Canter v. Commonwealth, and KRS 635.040, as Mabrey was not a convicted felon at the time of his trial in the present case, the court erred in permitting the impeachment of his credibility on that basis. As noted in our earlier decision, Mabrey did not properly preserve this issue for appeal. However, we are reviewing this matter pursuant to RCr⁶ 10.26.

Witness credibility was crucial in this case. The case was largely one of Mabrey's word against the word of the alleged drug-buyer. We are persuaded that a manifest injustice has resulted from the error and that a substantial possibility exists that the result of the trial would have been different but for the error. Jackson v. Commonwealth, Ky. App., 717 S.W.2d 511 (1986). We accordingly reverse and remand for a new trial excluding the impermissible impeachment evidence.

In his original appeal, Mabrey also contended that the application of the 1997 amendments to his trial was barred by *ex post facto* principles. Consistent with our decision in our

⁶Kentucky Rules of Criminal Procedure.

original opinion, the Supreme Court in Manns rejected this argument.

Finally, in his original appeal, Mabrey argued that it was improper to use his 1996 conviction in the sentencing phase of the case. Again, the Supreme Court considered this issue in Manns and held that it is permissible to use prior juvenile records in the sentencing phase of the case.

For the foregoing reasons, the judgment of conviction of the Kenton Circuit Court is reversed and remanded for a new trial.

BUCKINGHAM, JUDGE, CONCURS.

DYCHE, JUDGE, DISSENTS.

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