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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-000166-MR

RICHARD E. GEORGE — APPELLANT

v.

APPEAL FROM NICHOLAS CIRCUIT COURT
HONORABLE ROBERT MCGINNIS, JUDGE
ACTION NO. 01-CR-00011

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: BAKER, BARBER AND JOHNSON, JUDGES.

JOHNSON, JUDGE: Richard E. George has appealed from the final judgment and sentence entered by the Nicholas Circuit Court on December 20, 2001, which convicted him of two counts of trafficking in a controlled substance in the first degree (cocaine)[1] and sentenced him to prison for a term of 10 years. Having concluded that the trial court's failure to sua sponte admonish the jury as to the limited admissibility of George's

[1] Kentucky Revised Statutes (KRS) 218A.1412.

prior DUI convictions did not constitute a palpable error warranting review under RCr[2] 10.26 and that the evidence presented at trial was sufficient to support the convictions, we affirm.

On July 18, 2001, a Nicholas County grand jury returned an indictment against George charging him with two counts of trafficking in a controlled substance in the first degree. The two charges stemmed from two alleged "controlled buys" that took place between George and a confidential informant, Perry Feeback, on March 22 and 23, 2000, in the parking lot of Barlow's Bar, which is located in Morefield, Kentucky. Feeback was working under the supervision of Kentucky State Police Trooper Joey Johnson on both occasions and after each buy, Feeback rendezvoused with Trooper Johnson and provided him with the cocaine he had purchased and a tape recording of the transaction.

At the trial on November 29, 2001, Trooper Johnson testified that while he was working as an undercover officer during March 2000, Feeback had volunteered to assist the police in an effort to minimize his punishment on some criminal charges pending against him related to domestic violence. Trooper Johnson stated that after he verified Feeback's knowledge of the

[2] Kentucky Rules of Criminal Procedure.

drug culture in Nicholas County, he asked Feeback to participate in a “controlled buy” in the Morefield area.

Trooper Johnson testified that he met with Feeback in Carlisle, Kentucky, on the evening of March 22, 2000. He testified that he searched Feeback, a woman who was driving for Feeback due to his loss of his driver’s license from a DUI conviction, and the car she was driving for contraband. Trooper Johnson then gave Feeback a tape recorder and a $100.00 to purchase cocaine and followed him back to Morefield. Trooper Johnson testified that he followed Feeback and watched the vehicle Feeback was riding in pull into the parking lot at Barlow’s. Trooper Johnson claimed that he then proceeded to a nearby church, where he parked his car and waited for Feeback. When Feeback subsequently met Trooper Johnson at the church parking lot, he gave him the tape recorder and a small bag of cocaine. Trooper Johnson stated that he then searched Feeback and told him to meet him in Carlisle. Trooper Johnson explained that after he met Feeback in Carlisle, they discussed the transaction in detail, after which Feeback agreed to participate in another “controlled buy” the following evening.

Trooper Johnson testified that the second “controlled buy” was very similar to the first buy except for the meeting places and the fact that he gave Feeback $200.00 for the second purchase. Trooper Johnson testified that on the evening of

March 23, 2000, he met with Feeback and his same driver and searched them and their vehicle. He followed the vehicle and watched it pull into Barlow's parking lot, just as he had done the previous night. Trooper Johnson then proceeded to a nearby funeral home, where he parked his car and waited for Feeback. Trooper Johnson testified that shortly thereafter Feeback met him and gave him the tape recorder and two small bags of cocaine. Trooper Johnson conceded that he did not witness either transaction.

Feeback's testimony was consistent with Trooper Johnson's account of the events that occurred on March 22 and 23, 2000. Feeback claimed to have purchased cocaine at Barlow's in the past and he explained that he expected to find someone at Barlow's that was willing to sell him cocaine. Feeback stated that although he had been friends with George and his family for a long time, he had never purchased cocaine from George in the past. Feeback explained that he was not actually looking for George, but rather, another individual that he thought might be at Barlow's that evening.

Feeback further testified that after he asked if anyone had something to sell that George motioned for him to come outside of Barlow's. Feeback claimed that George then informed him that "he had what [Feeback] needed," and that they proceeded to George's truck. Feeback explained that once they

got to the truck, George realized that he had locked his keys in the truck. Feeback claimed that he waited by the truck while George was taken by Feeback's driver to George's house to get a spare set of keys. Feeback stated that once George returned, he gave George the $100.00 and George reached underneath the seat of his truck and handed Feeback a gram of cocaine. The alleged tape recording of the first buy was not played for the jury because it was suppressed by the trial court due to the Commonwealth's failure to provide the tape in a timely manner.

Feeback then proceeded to explain the events that took place on the evening of March 23, 2000. Feeback stated that he proceeded to Barlow's parking lot, just as he had done the previous night. Feeback maintained that when he pulled into the parking lot, he noticed George sitting in his truck. Feeback testified that he then approached George and asked him for a couple "G's." According to Feedback, he gave George the $200.00 and George gave him approximately two grams of cocaine. The Commonwealth then played a tape of the March 23, 2000, transaction. Feeback claimed that the tape was an accurate reflection of the events that took place on the evening of March 23, 2000, and he identified his and George's voices on the tape.

On cross-examination, Feeback admitted that he only volunteered his services as a confidential informant after he was arrested for violating the terms of an Emergency Protective

Order that had been issued against him in Nicholas County. Feeback also admitted that he was a recovering alcoholic and cocaine addict. After the Commonwealth rested its case, George moved for a directed verdict of acquittal, which was summarily denied by the trial court.

George testified in his own defense and denied selling any cocaine to Feeback on the dates in question. George stated that he was not sure where he was on the evenings of March 22, 2000, and March 23, 2000, but that he was sure that he did not sell Feeback any cocaine. During direct examination, George also stated that he did not have a criminal record. On cross-examination, the following colloquy took place between George and the prosecutor:

> Q. You just testified that you didn't have a criminal record, is that true?
>
> A. Right.
>
> Q. What happened to this assault fourth charge for spousal abuse in Nicholas County?
>
> A. It was dropped.
>
> Q. I have an operating under the influence of alcohol, driving, guilty plea in Nicholas County?
>
> A. I did have a DUI.
>
> Q. You got more than one, haven't you?
>
> A. I just got one.

Q. You got one. What about this one in 2001, you had one, right?

A. Yes, sir.

Q. You had one in 1992, right.

A. Well, yeah, I probably had one years ago. I mean I just got one on my record.

Q. You had one in 1995, right?

A. I have no idea for sure?

Q. It shows here you entered a guilty plea to a DUI charge in 1995 in Nicholas County?

A. That's a possibility, yeah.

George's attorney did not object to this line of questioning, nor did he ask the trial court for an admonition to the jury as to the limited admissibility of George's prior DUI convictions. After resting his case, defense counsel again moved for a directed verdict of acquittal, which was also summarily denied.

The jury returned a verdict of guilty on both counts of the indictment, recommending a sentence of five years on each conviction, to be served consecutively. On December 20, 2001, the trial court adopted the jury's recommendation and sentenced George to a prison term of 10 years. This appeal followed.

In his appeal, George first claims that he was denied a fair trial due to the trial court's failure to sua sponte admonish the jury as to the limited admissibility of his prior DUI convictions. While George concedes that he "arguably"

opened the door for the prosecutor's inquiry on cross-examination, he nonetheless claims that he was entitled to an admonition as to the limited admissibility of his prior DUI convictions pursuant to KRE[3] 105(a), which provides as follows:

> When evidence which is admissible as to one (1) party or for one (1) purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and admonish the jury accordingly. In the absence of such a request, the admission of the evidence by the trial judge without limitation shall not be a ground for complaint on appeal, except under the palpable error rule [emphasis added].

Since George did not request an admonition he is precluded from raising this issue on appeal,[4] unless it constituted palpable error pursuant to RCr 10.26, which provides as follows:

> A palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or

[3] Kentucky Rules of Evidence.

[4] See e.g., Barth v. Commonwealth, Ky., 80 S.W.3d 390, 396-97 (2001) ("The 'upon request' qualification of [KRE 105(a)] is but a codification of the principle that the admission of mixed admissibility evidence without an accompanying admonition cannot be questioned on appeal by a party who failed to request an admonition at trial.'"); and Hall v. Commonwealth, Ky., 817 S.W.2d 228, 229 (1991) overruled on other grounds, Commonwealth v. Ramsey, Ky., 920 S.W.2d 526 (1996). ("[A] defendant who wants the court to admonish the jury must ask for such relief; otherwise, his failure to request it will be treated as a waiver or as an element of trial strategy."), See also 29 Am.Jur.2d, Evidence, § 323 ("The failure of a party to request a limiting instruction pursuant to Federal Rules of Evidence 105, either during the trial or at the close of the case in the charge to the jury, precludes review on appeal of the alleged error in failing to give such an instruction" [footnote omitted]).

> preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error.

In Commonwealth v. Pace,[5] the defendant was arrested for DUI while operating his ATV. Pace was subsequently indicted for DUI, fourth offense in five years; driving while his license was suspended for DUI, second offense; and for operating an ATV on a highway. At trial, Pace testified in his own defense and denied that he was under the influence at the time of his arrest. During cross-examination, the prosecutor questioned Pace concerning his prior DUI convictions, without objection. Pace was found guilty of all the charges.

In his appeal to this Court, Pace argued that his prior DUI convictions were inadmissible as "prior bad acts" under KRE 404(b).[6] This Court agreed and reversed Pace's DUI conviction, holding that the introduction of his prior DUI convictions amounted to palpable error resulting in a manifest injustice under RCr 10.26. The Supreme Court, however, reversed, reasoning that "[t]he palpable error rule set forth in RCr 10.26 is not a substitute for the requirement that a litigant must contemporaneously object to preserve an error for

[5] Ky., 82 S.W.3d 894 (2002).

[6] See Commonwealth v. Ramsey, Ky., 920 S.W.2d 526, 529 (1996).

review."[7] The Court noted that "[i]n determining whether an error is palpable, 'an appellate court must consider whether on the whole case there is a substantial possibility that the result would have been any different.'"[8] Applying this criterion, the Supreme Court was unable to "conclude that the outcome would have been any different had the evidence in question not been excluded."[9] Thus, while the Court agreed that Pace's prior DUI convictions were inadmissible during the guilt phase of his trial, it concluded that the error did not "constitute palpable error warranting review under RCr 10.26."[10]

The following observation provided by Professor Robert Lawson is on point:

> [While] [l]itigants have tended recently to argue for findings of plain error in the failure of trial judges to give unrequested limiting instructions . . . courts have generally been unresponsive to such arguments: "Ordinarily, a trial court's omission of a limiting instruction is not plain error unless the error may have caused a verdict not warranted under the law or 'where it is apparent on the face of the record that a miscarriage of justice may occur.'"[11]

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[7] Pace, 82 S.W.3d at 895.

[8] Id.

[9] Id. at 896.

[10] Id.

[11] Robert G. Lawson, The Kentucky Evidence Law Handbook § 1.10 at 4 (3d ed. Supp. 1993).

In the case sub judice, we hold that since the result would not have been any different had the trial court decided to sua sponte admonish the jury as to the limited admissibility of George's prior DUI convictions, no palpable error occurred. George was on trial for trafficking in a controlled substance, not DUI. Moreover, the evidence against George, while not overwhelming, was significant, including the audiotape of the March 23, 2000, transaction. Thus, a "manifest injustice" did not result from the trial court's failure to sua sponte give an admonition.

George next contends that the evidence presented against him was insufficient to support his trafficking convictions. The standard of review for a trial court's denial of a motion for a directed verdict of acquittal is well established. In Commonwealth v. Benham,[12] our Supreme Court stated:

> On motion for a directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given. For the purpose of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but reserving to the jury questions as to the credibility and weight to be given to such testimony.

[12] Ky., 816 S.W.2d 186, 187 (1991).

> On appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal [citation omitted].

Based upon the evidence presented at trial, we cannot say that it was clearly unreasonable for the jury to find George guilty.[13] The crux of George's argument appears to center around the lack of direct evidence linking him to the "controlled buys." George claims that his convictions were based upon a "swearing match" between himself and Feeback. George focuses on Feeback's credibility as a witness and the fact that Feeback was the only eyewitness who testified against him. Once again, the evidence against George, while not overwhelming, was significant, including the audiotape of the March 23, 2000, transaction. While we agree with George that Feeback's credibility as a witness is subject to question, it is a well-settled principle that the credibility and weight to be given to testimony is within the exclusive province of the jury.[14] This province will not be invaded absent an indication that the verdict was clearly unreasonable.[15] The evidence presented at trial was sufficient to convince a reasonable jury that George

[13] The Commonwealth claims that George failed to properly preserve this issue for appeal. Given our disposition of the issue, we do not see the need to address the Commonwealth's argument.

[14] Commonwealth v. Smith, Ky., 5 S.W.3d 126, 129 (1999) (citing Estep v. Commonwealth, Ky., 957 S.W.2d 191, 193 (1997)).

[15] Smith, supra at 129.

was guilty. Thus, the trial court did not err by denying George's motion for a directed verdict of acquittal.

For the forgoing reasons, the final judgment and sentence of the Nicholas Circuit Court is affirmed.

ALL CONCUR.

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