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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-000379-MR
AND
NO. 2002-CA-000381-MR

STEVE B. BELL — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE MARY C. NOBLE, JUDGE
ACTION NOS. 00-CR-00816 AND 01-CR-00821

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: JOHNSON, KNOPF AND McANULTY, JUDGES.

JOHNSON, JUDGE: Steve B. Bell has appealed from a final judgment of the Fayette Circuit Court entered on January 16, 2002, which sentenced him to prison for one year following his conditional guilty plea to assault in the third degree.[1] Having concluded that the Commonwealth was not barred on double

[1] Kentucky Revised Statutes (KRS) 508.025. Assault in the third degree is a Class D felony.

jeopardy grounds from seeking to try Bell a second time following a mistrial, we affirm.

On June 28, 2000, Officer David Hester and Officer Mark Long of the Lexington Police Department responded to a domestic disturbance in Fayette County, Kentucky, involving Bell and his sister. According to Officer Hester's police report, he was in the process of gathering information from those present at the scene when Bell approached Bradford McKenzie, the father of Bell's sister's children, in a threatening manner. Officer Hester stated in his police report that he attempted to arrest Bell, but he resisted. According to the written report, a struggle ensued between Bell and both officers, which resulted in Bell striking Officer Hester in the face.

On August 15, 2000, a Fayette County grand jury indicted Bell on one count of assault in the third degree, one count of assault in the fourth degree,[2] one count of resisting arrest,[3] and one count of criminal mischief in the third degree.[4] On August 29, 2000, Bell entered pleas of not guilty to all of the charges in the indictment, and the case proceeded to trial.

Bell's jury trial began on December 5, 2000. After returning from the lunch recess, the Commonwealth called

[2] KRS 508.030. Assault in the fourth degree is a Class A misdemeanor.

[3] KRS 520.090. Resisting arrest is a Class A misdemeanor.

[4] KRS 512.040. Criminal mischief in the third degree is a Class B misdemeanor.

Sergeant Mark Sennett of the Lexington Police Department to testify. A few moments before Sgt. Sennett took the witness stand, he informed the Assistant Commonwealth's Attorney that he had taken a statement from Bell in which Bell purportedly admitted to striking Officer Hester in the face. At that time, neither the Commonwealth nor counsel for Bell was aware that Bell had allegedly made such a statement to Sgt. Sennett.

During its direct examination of Sgt. Sennett, the Commonwealth introduced Bell's alleged admission without first informing defense counsel about this newly discovered piece of evidence. Bell's defense counsel did not make an immediate objection to Sgt. Sennett's testimony. During cross-examination, Sgt. Sennett also revealed for the first time that a "Use of Force Report" had been made following the incident in question. Bell's self-incriminating statement in which he purportedly admitted to striking Officer Hester in the face was contained in this report. Once again, neither the Commonwealth nor counsel for Bell was aware that such a report had been made. According to the record, immediately after Sgt. Sennett was dismissed from the witness stand, both the Assistant Commonwealth's Attorney and Bell's defense counsel objected to

Sgt. Sennett's testimony.[5] Following a conference in chambers,[6] the trial court granted Bell's motion for a mistrial.[7]

Approximately two weeks later, on December 18, 2000, Bell filed a motion to dismiss the indictment. Bell argued that allowing the Commonwealth to retry its case against him would violate the double jeopardy provisions of the United States Constitution[8] and the Kentucky Constitution.[9] On June 21, 2001, the trial court entered an order denying Bell's motion to have the indictment against him dismissed.

Following the denial of his motion to dismiss, Bell elected to enter a conditional plea of guilty to assault in the third degree,[10] while reserving his right to appeal the double jeopardy issue. The trial court accepted Bell's guilty plea on

[5] It is difficult to discern from the recording of the proceedings whether both parties indeed made an objection to Sgt. Sennett's testimony. However, in its order denying Bell's motion to dismiss, the trial court found that "[b]oth parties objected." On appeal, neither party has taken issue with this finding.

[6] Apparently, this conference was not recorded or transcribed and is consequently not a part of the record before us.

[7] Approximately one week after declaring a mistrial, the trial court entered an order setting the case for a status hearing. In this order, the trial court stated in part that "[Bell] made a motion for a mistrial and said [m]otion was granted." However, in Bell's motion to dismiss his indictment, he asserts that the mistrial was granted "on a joint motion by the parties."

[8] The Fifth Amendment to the United States Constitution states in part that "[n]o person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb."

[9] Section 13 of the Kentucky Constitution states in part that "[n]o person shall, for the same offense, be twice put in jeopardy of his life or limb . . . ."

[10] The other three counts in Bell's indictment, assault in the fourth degree, resisting arrest, and criminal mischief in the third degree, were dismissed.

December 11, 2001. On January 16, 2002, after a pre-sentence investigation had been completed, the trial court sentenced Bell to one year in prison.[11] This appeal followed.

Bell's sole claim of error is that the trial court erred by denying his motion to dismiss. Specifically, Bell argues that the Commonwealth acted in "bad faith" when it introduced Bell's purported admission without first disclosing the newly discovered piece of evidence to Bell's defense counsel. Bell argues that because of this "bad faith" conduct, the Commonwealth was barred from attempting to try him a second time on double jeopardy grounds. We disagree.

In Oregon v. Kennedy,[12] the United States Supreme Court stated:

> We do not by this opinion lay down a flat rule that where a defendant in a criminal trial successfully moves for a mistrial, he may not thereafter invoke the bar of double jeopardy against a second trial. But we do hold that the circumstances under which such a defendant may invoke the bar of double jeopardy in a second effort to try him are limited to those cases in which the conduct giving rise to the successful motion for a mistrial was intended to provoke the defendant into moving for a mistrial.

[11] On August 7, 2001, Bell was indicted for bail jumping in the first degree pursuant to KRS 520.070, for his failure to appear at a status conference. Bell eventually pled guilty to an amended charge of bail jumping in the second degree pursuant to KRS 520.080. On January 16, 2002, the trial court sentenced Bell to 12 months in jail for this conviction. This sentence was set to run concurrently with the one-year sentence he received on his conditional plea of guilty to assault in the third degree.

[12] 456 U.S. 667, 679, 102 S.Ct. 2083, 2091, 72 L.Ed.2d 416 (1982).

In Stamps v. Commonwealth,[13] our Supreme Court expressly stated that the aforementioned standard also applied to the Double Jeopardy Clause of the Kentucky Constitution.[14] Hence, absent proof that the Commonwealth intended to provoke Bell into moving for a mistrial, he was not entitled to invoke the bar of double jeopardy to prevent the Commonwealth from trying him a second time.

Under the facts of the case sub judice, we hold that the Commonwealth was not barred on double jeopardy grounds from attempting to try Bell a second time following the mistrial. In its order denying Bell's motion to dismiss, the trial court specifically found that it was not "the prosecutor's intention to provoke a mistrial," and that the "bad faith exception" did not apply.[15] Since the evidence upon which the trial court based its findings is not in the record before us, we must assume that the evidence supported the trial court's factual findings.[16]

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[13] Ky., 648 S.W.2d 868 (1983).

[14] Id. at 869 (holding that "[i]t is our opinion that this should also apply to the double jeopardy clause in the Constitution of Kentucky").

[15] The trial court found that the Assistant Commonwealth's Attorney knew she had a duty to disclose this newly discovered evidence to the defense. However, the trial court also found that she erroneously believed in good faith that since Sgt. Sennett's testimony "mirrored evidence already in the record," disclosure to the defense was not necessary.

[16] McDaniel v. Garrett, Ky.App., 661 S.W.2d 789, 791 (1983)(holding that "[w]hen the evidence is not presented for review, this court is confined to a determination as to whether the pleadings support the judgment and on all issues of fact in dispute we are required to assume that the evidence supports the findings of the lower court"). It appears as though the trial court based its findings on evidence presented during the in camera

Therefore, since the Commonwealth did not intend to provoke Bell into moving for a mistrial, double jeopardy did not preclude the Commonwealth from seeking to try Bell a second time. Accordingly, the trial court did not err by denying Bell's motion to dismiss.

Based on the foregoing, the order of the Fayette Circuit Court is affirmed.

ALL CONCUR.

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conference following Sgt. Sennett's testimony. Bell states in his brief that this conference was "not preserved on tape." Nonetheless, if Bell had wished to challenge the factual findings, he could have availed himself of Kentucky Rules of Civil Procedure (CR) 75.13, which allows an appellant to prepare a "narrative statement" of the proceedings below if no recording was made.