

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-002052-MR
&
NO. 2002-CA-002075-MR

ROY SCOTT MORROW

APPELLANT

v. APPEALS FROM FULTON CIRCUIT COURT
HONORABLE WILLIAM LEWIS SHADOAN, JUDGE
ACTION NO. 02-CR-00091

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: COMBS, DYCHE, and JOHNSON, Judges.

COMBS, JUDGE. Roy Scott Morrow appeals from a Fulton Circuit Court judgment convicting him of the crimes of escape in the second degree and of being a persistent felony offender in the second degree (PFO). He argues that the trial court erred during the guilt phase of his trial in allowing the Commonwealth to introduce evidence of other bad acts. He also contends that he is entitled to a new trial because the prosecutor improperly

questioned him about the number of his prior felony convictions in violation of the rule articulated in Commonwealth v. Richardson, Ky., 674 S.W.2d 515, 518 (1984). After reviewing the record, we agree with the contentions of the Commonwealth that the alleged evidentiary error was not preserved for our consideration and that the Richardson violation constituted harmless error. Thus, we affirm.

The facts underlying Morrow's conviction are not in dispute. Following his 2001 conviction for the offenses of theft by unlawful taking and criminal possession of a forged instrument, Morrow was incarcerated in the Fulton County Detention Center. After serving only a few months of his sentence, he was allowed to participate in a work release program. Under the terms of the program, Morrow was allowed to work for Jeff Swearingen, a roofer doing business in South Fulton, Tennessee. In allowing Morrow to leave the center in order to work, the court order required that he return to the detention center no later than 6:00 p.m. each work day; that he not drink alcoholic beverages or attend to personal business while on release; and that he immediately notify the jail and the clerk of the court of any changes in his employment.

On February 22, 2002, Morrow signed out to work for Swearingen. However, he did not work for Swearingen that day, nor did he return to the detention center. Instead, he was

arrested in Tennessee at 9:00 p.m. that evening and was charged with speeding and driving on a revoked driver's license. He was released by Tennessee authorities to the Fulton County Detention Center several days later. He was subsequently indicted for the offenses of escape and of being a PFO.

Prior to his trial on these charges, Morrow filed a motion *in limine* to prevent the Commonwealth from introducing evidence of any bad acts he may have committed prior to his arrest. In a brief hearing on the motion, the Commonwealth attempted to discover just exactly what evidence Morrow sought to have excluded. The Commonwealth agreed not to introduce evidence of prior criminal acts. However, Morrow agreed that the Commonwealth could introduce evidence of his arrest in Tennessee on the evening that he failed to report to the detention center.

During its case in chief, the Commonwealth called Swearingen as a witness. He testified that he had not had much work for Morrow and that Morrow had only worked for him sporadically since the previous June. He told the jury that Morrow had last worked for him on two days in January 2002 and that he believed that Morrow was working for a painting contractor in Clinton. The Commonwealth then offered testimony of jail officials that established that Morrow had not reported any change in his employment status with Swearingen. It then

presented documents which revealed that Morrow signed out to work for Swearingen on the day of his alleged escape -- all the while knowing that he would not be working for the only employer to whom he had been legitimately released.

In his defense, Morrow testified that the jail officials knew that he had obtained other employment. He also told the jury that on the day in question, he was putting on a roof for a different employer; that he got off work at 4:00 in the afternoon; that he was emotionally upset about the recent death of his grandmother; that he stopped by a liquor store and bought a six-pack of beer; and that he got lost while driving on the back roads of Tennessee as he was trying to get the odor of beer off his breath.

The jury disbelieved Morrow's defense that he did not intend to escape and that he was headed back to the detention center at the time of his arrest. It found him guilty of escape in the second degree and sentenced him to serve three years. At the conclusion of the PFO portion of the trial, the jury again found Morrow guilty and imposed the minimum sentence of five-years' imprisonment.

On appeal, Morrow argues that the evidence relating to his failure to comply with the requirements of the work release program constitutes evidence of "other bad acts" that the Commonwealth was prohibited from introducing. We disagree.

Morrow's disregard of the conditions and terms of the work-release program (*i.e.*, failing to report a change of employer) was directly relevant to the offense of escape with which he was charged. Moreover, he did not specifically seek exclusion of this evidence in his motion *in limine*; nor did he object to its introduction during trial. Thus, the Commonwealth is correct that any error in the admission of this evidence has not been preserved for our review. West v. Commonwealth, Ky., 789 S.W.2d 600 (1989).

Morrow next contends that he was deprived of a fair trial when he responded in the affirmative to the prosecutor's question as to whether he had ever been convicted of a felony. Rather than allowing the matter to drop as required by Richardson v. Commonwealth, *supra*, the prosecutor persisted and asked Morrow if he had in fact been convicted of two felonies. Morrow again answered "yes," explaining that because he had been convicted of both at the same time, he believed that they constituted only one felony. On re-direct, Morrow testified that both of his prior felony convictions were for non-violent crimes.

Morrow is correct in arguing that the prosecutor violated the procedure for impeaching a witness with a prior felony conviction as established in Richardson, 674 S.W.2d at 517-518, as follows:

[A] witness may be asked if he has been previously convicted of a felony. If his answer is "Yes," that is the end of it and the court shall thereupon admonish the jury that the admission by the witness of his prior conviction of a felony may be considered only as it affects his credibility as a witness, if it does so. If the witness answers "No" to this question, he may then be impeached by the Commonwealth by the use of all prior convictions. . . .

The trial court compounded the error by failing to give the required admonition.

After reviewing the evidence, we agree with the Commonwealth that the error was harmless. Morrow freely made numerous admissions concerning his conduct on the night in question -- including drinking and driving long past the time that he was supposed to have returned to the jail. The very nature of the charged offense of escape put the jury on notice from the outset that Morrow must have had some history of previous problems with the law. Therefore, we conclude that "there is no reasonable possibility that, absent the error, the verdict would have been any different." Hodge v. Commonwealth, Ky., 17 S.W.3d 824, 848 (2002).

The judgment of the Fulton Circuit Court is affirmed.

ALL CONCUR.

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