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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-000062-MR

WESLEY A. ANSTEATT, JR. — APPELLANT

v.

APPEAL FROM GRANT CIRCUIT COURT
HONORABLE STEPHEN L. BATES, JUDGE
ACTION NO. 01-CR-00084

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION

AFFIRMING IN PART, REVERSING AND REMANDING IN PART

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; McANULTY AND VANMETER, JUDGES.

McANULTY, JUDGE. This is a direct appeal of a conviction of fraudulent use of a credit card, attempted fraudulent use of a credit card and receiving stolen credit cards. Appellant, Wesley A. Ansteatt, Jr. (Ansteatt), received a sentence of 3 ½ years. Ansteatt claims numerous errors at trial necessitating reversal. Because we conclude that information relating to charges for which Ansteatt was not convicted was inadmissible

during the sentencing phase, we reverse and remand for resentencing. We affirm as to all other errors asserted.

The facts of this case are straightforward. On the evening of June 26, 2001, Peggy Applegate called the Kentucky State Police to report that her purse had been stolen from her car. Among the contents in her purse were her Visa credit card, her MasterCard credit card and a telephone calling card in the name of Eric Applegate, Peggy's husband.

Not less than an hour after Peggy Applegate reported her cards stolen, Ansteatt attempted to purchase a Play Station Two at Wal-Mart in Dry Ridge, Kentucky, using Peggy Applegate's credit cards. After the cards were rejected, Ansteatt moved to the jewelry counter at Wal-Mart, where he was able to purchase a bracelet with one of Peggy Applegate's cards. When the time came for Ansteatt to sign the credit card receipt, Ansteatt signed Eric Applegate's name, however, he spelled Eric's name incorrectly as follows: " ERICK APLEGATE." The Wal-Mart associate at the jewelry counter notified store security. Wal-Mart security quickly called the local police, who ultimately apprehended Ansteatt while he was still at the jewelry counter. Video surveillance cameras captured much of the activity.

The Grant County Grand Jury charged Ansteatt with the following crimes: (1) fraudulent use of a credit card, a class "D" felony; (2) criminal attempt to commit fraudulent use of a

credit card, a class “A” misdemeanor; and (3) receipt of a stolen credit card, a class “A” misdemeanor. A jury convicted Ansteatt on all three counts of the indictment.

On appeal, Ansteatt claims that the following six errors at trial necessitate reversal: (1) the trial court erred in allowing voir dire to proceed in Ansteatt’s absence; (2) the trial court abused its discretion in failing to grant a continuance in order for Ansteatt to exercise his due process right to retained counsel of choice; (3) the trial court erred in admitting Ansteatt’s irrelevant, non-self-inculpatory statements; (4) the trial court erred in admitting Ansteatt’s inconsistent statements pertaining to his acquisition and use of Peggy Applegate’s credit cards; (5) the trial court erred in instructing the jury on the penalties for the two misdemeanor counts during the guilt phase of the trial; and (6) the trial court erred in allowing evidence of Ansteatt’s prior charges during the sentencing hearing.

We begin with Ansteatt’s argument that the trial court denied his right to confrontation, due process and a fair trial when Ansteatt was absent from voir dire and possibly other portions of the trial. Having reviewed the trial transcript, we conclude that this argument has no merit. The record reflects that, although Ansteatt was not present when role was called for

the jurors, he was present during voir dire. See Trial Transcript, November 15, 2001, pp. 15-16.

We move to Ansteatt's second argument that he had a due process right to retained counsel of choice. Ansteatt further argues that his right to counsel was impermissibly restricted by the denial of his counsel of choice.

The facts underlying these arguments are as follows: Ansteatt originally retained F. Dennis Aldering (Aldering) to represent him; however, Aldering was suspended from the practice of law for 90 days, which suspension ended on December 26, 2001. Dennis C. Aldering, an attorney and the son of F. Dennis Aldering, then took over Ansteatt's representation.

On October 10, 2001, Dennis C. Aldering made a motion to continue Ansteatt's trial date from its originally scheduled date of October 19, 2001, to a date sometime after Aldering was no longer suspended. The trial court granted a one-month continuance and set the trial for November 15, 2001.

We review the trial court's failure to grant the requested continuance for an abuse of discretion. See RCr 9.04; Snodgrass v. Commonwealth, Ky., 814 S.W.2d 579, 581 (1991). Whether a three-month continuance was appropriate in this case depends upon the facts and circumstances, particularly in the reasons presented to the trial judge at the time the request is

made. See Ungar v. Sarafite, 376 U.S. 575, 589, 84 S. Ct. 841, 11 L. Ed. 2d 921 (1964).

We turn to the reasons presented to the trial judge at the time the motion was heard on October 10, 2001. Dennis C. Aldering did not appear on Ansteatt's behalf; however, it seems that he sent another attorney in his place to argue the motion. The attorney made no argument other than that which was stated in the motion -- Aldering was unavailable to try the case until sometime after January 1, 2002. The trial court granted a continuance of one month to allow Dennis C. Aldering adequate time to prepare for trial.

Considering the information that was available to the trial court at the time it heard the motion, we conclude the trial court did not abuse its discretion in declining to grant a three-month continuance. "[W]hile a criminal defendant has a constitutional right to effective assistance of counsel, there is no unqualified right to his choice of counsel." Commonwealth v. Maricle, Ky., 10 S.W.3d 117, 121 (1999). The facts of this case are simple, and Ansteatt does not assert that one month did not allow adequate time to prepare. Moreover, Ansteatt makes no allegation that Aldering's son, his trial counsel, was not prepared for trial, only that he was less prepared and less experienced. Aldering's son, however, was not suspended from

the practice of law. Under these facts and circumstances, there was no denial of due process.

Ansteatt's third argument is that the trial court erred in admitting Ansteatt's irrelevant, non-self-inculpatory statements. Specifically, over the objection of Ansteatt's counsel, the trial court allowed a police officer to testify as to statements that Ansteatt made to the police officer that (1) the people in the area were a bunch of hillbillies, and (2) he would beat the charges. In response, the Commonwealth argues that the statements were admissible as they were of probative value in demonstrating Ansteatt's criminal intent. Further, admission of the statements did not unduly prejudice Ansteatt, and the statements were part of Ansteatt's full confession, given voluntarily by Ansteatt after the officer had given him his Miranda warning. See Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

Upon review, we believe that Ansteatt's statement that he would beat the charges was admissible under KRE 801A(b)(1) as an admission of a party. In stating that he would beat the charges, one can infer that Ansteatt is acknowledging his own wrongdoing in using Peggy Applegate's credit card without her permission.

As to Ansteatt's statement that the people in the area were a bunch of hillbillies, we conclude that this statement was

not admissible. The statement was simply irrelevant. Evidence as to Ansteatt's perception of the people in the Dry Ridge Community had no tendency to make the existence of any fact of consequence more probable or less probable than it would be without the evidence. See KRE 401. However, we cannot agree that its admission was prejudicial given the sufficiency and weight of properly admitted evidence against Ansteatt. Accordingly, we hold that any error was harmless error. See RCr 9.24.

We move to Ansteatt's fourth argument that the trial court erred in admitting Ansteatt's inconsistent statements pertaining to his acquisition and use of Peggy Applegate's credit cards. In support, Ansteatt argues that his alleged statements were irrelevant. Moreover, Ansteatt argues that it is obvious that the Commonwealth sought to introduce the inconsistent statements for the purpose of showing that Ansteatt lied to the police. Ansteatt contends that this is improper under KRE 404(b).

The inconsistent statements came in through the testimony of the arresting officer, Troy Hagedorn, who was at that time, a sergeant with the Grant County Sheriff's Department. Sergeant Hagedorn testified that Ansteatt initially claimed to be Eric Applegate, and he was using credit cards in Peggy's name because he and Peggy had been having marital

problems and were trying to reconcile. She let him use the credit cards "to go shopping to better things." Direct Testimony of Troy Hagedorn, November 15, 2001, p. 83.

After further questioning by Sergeant Hagedorn, Ansteatt admitted that he was Wesley Ansteatt, Jr. See id. at 87. When asked again how he obtained possession of the credit cards, this time he said that he and a friend were driving down the road and noticed a wrecked car. See id. at 88. They stopped, and his friend exited Ansteatt's vehicle and took a purse from the wrecked vehicle. See id. They removed the contents of the purse, then discarded the purse and decided to go shopping at Wal-Mart. See id.

Contrary to Ansteatt's arguments, we believe that both of these statements were relevant. Further, the first statement was admissible as an utterance forming a part of the issue of fraudulent use of a credit card. See R. Lawson, The Kentucky Evidence Law Handbook § 8.05 II, at 361-63 (3d ed. Michie 1993). In other words, Ansteatt's act of representing that he was Eric Applegate was in perpetration of the fraud. See KRS 434.650. The relevancy of the statements exists without regard to the truth of any assertions contained in the statements. See Lawson, supra at 362. Moreover, the second statement was admissible under KRE 804(b)(3) as a statement against interest.

Ansteatt's fifth argument in support of reversal is that the trial court erred in instructing the jury on the penalties for the two misdemeanor counts during the guilt phase of the trial. Ansteatt further alleges that such error denied Ansteatt a fair trial and due process. In so arguing, Ansteatt admits that this error is not preserved. However, he argues that the error is palpable, manifest and substantial, thus allowing review under RCr 10.26.

In support of his argument, Ansteatt cites Commonwealth v. Philpott, Ky., 75 S.W.3d 209 (2002), for the proposition that instructing a jury on the penalty range during the guilt phase in felony cases denies due process. In Philpott, the Kentucky Supreme Court certified the law with respect to the following issue:

> WHETHER THE "TRUTH-IN-SENTENCING" STATUTE, KRS 532.055(1) MANDATES THAT A JURY CANNOT BE ADVISED OF MISDEMEANOR SENTENCING INFORMATION DURING THE GUILT PHASE OF A FELONY TRIAL?

Id. at 211.

After considering the relevant statutes and case law, the court answered the question as follows:

> We hold now that in the trial of a "felony case," *i.e.,* any trial in which a jury could return a verdict of guilty of a felony offense, the jury shall not be instructed on the penalty ranges of any offense, whether the primary or a lesser included offense. If, upon the conclusion of such a trial, the jury returns a verdict of guilty of

> a lesser included misdemeanor offense, no additional evidence shall be admitted, the jury shall immediately be instructed on the penalty range for that offense, and the attorneys shall be allowed additional argument only on the issue of punishment, following which the jury shall retire to deliberate its verdict on that issue. If, upon the conclusion of the trial of a multicount indictment, the jury returns verdicts finding the defendant guilty of both felony and misdemeanor offenses, and if either of the parties intends to offer evidence pursuant to KRS 532.055(2), the procedure described in the preceding sentence shall first be followed with respect to the misdemeanor convictions, after which the procedure described in KRS 532.055(2) and (3) shall be followed with respect to the felony convictions.
> The law is so certified.

Id. at 213-14 (internal citations omitted).

Although Philpott differs factually in that the issue arose when the trial court advised the jury of penalty ranges of lesser-included misdemeanor offenses during the guilt phase of a felony trial, where as here misdemeanor charges were joined in an indictment with a felony, the court does set forth the proper blanket procedure applicable to both circumstances. Based on the analysis behind the rule, however, for the following two reasons, we cannot conclude that the trial court's procedure in this case amounts to a palpable error affecting Ansteatt's substantial rights. See RCr 10.26.

First, the Kentucky case of Lawson v. Commonwealth, Ky., 53 S.W.3d 534, 544 (2001), "holds that meaningful *voir dire* requires that the jury be informed of the penalty range of the

indicted offense(s) but not of enhanced or lesser included offenses." Philpott, 75 S.W.3d at 213. Thus, the penalty range information furnished to the jury by the instructions in this case was cumulative to information furnished during voir dire. See Trial Transcript, November 15, 2001, p. 34; Philpott, 75 S.W.3d at 213. Second, the jury determined Ansteatt guilty of one felony and two misdemeanors. Any misdemeanor sentence imposed (whether one day or twelve months) was required to run concurrent with the felony sentence imposed, and any error was harmless error in that Ansteatt would not serve any additional time in prison on his misdemeanor convictions.

Ansteatt's final assertion of error is more troubling. Ansteatt asserts that the trial court erred in allowing evidence during the sentencing hearing of Ansteatt's prior charges that resulted in convictions on amended charges. This error is preserved for our review.

Under KRS 532.055(2)(a), "[e]vidence may be offered by the Commonwealth relevant to sentencing including: . . . (2) [t]he nature of prior offenses for which he was convicted." As to what is meant by the term "nature," the Kentucky Supreme Court has stated that "all that is admissible as to the nature of a prior conviction is a general description of the crime." Robinson v. Commonwealth, Ky., 926 S.W.2d 853, 855 (1996). In any case, it is hoped that counsel for the defense and

prosecution can, with negotiation, agree on the language to be used. See id. If they cannot agree, the trial judge is to make that determination. See id.

In this case, counsel for the defense argued against the Commonwealth's use of the charging instrument in presenting the nature of prior offenses for which Ansteatt was convicted because, in some cases, Ansteatt was convicted of misdemeanors when he was originally charged with felonies. Since the defense and prosecution could not agree on the language to be used, the trial court made the determination that the Commonwealth could read from the charging instrument. The exact relevant testimony was as follows:

> [W]esley Ansteatt was indicted on or about May 22nd, 2001, for the charge of theft by unlawful taking of $300.00 or more, which is a class D felony. That was amended by the final judgment of the Boone Circuit Court in case number 01-CR-196 on or about October 31st, 2001, to the offense of theft by unlawful taking under $300.00, which is a class A misdemeanor . . .
> Number four is another indictment from September 24th, 1996, for the felony offense of trafficking in a controlled substance, first degree, which is a class C felony, which was amended by final judgment of the Boone Circuit Court under case number 96-CR-00160, entered on or about June 25th, 1997, to the misdemeanor offense of facilitation to trafficking, a class A misdemeanor . . .
> The fifth offense was another indictment for a felony on December 8, 1995, for trafficking in marijuana within a thousand yards of a school, which is a class D felony, and that was amended by final

> judgment of Kenton Circuit Court, case number 95-CR-528-001, entered on or about August 21st, 1996, to the offense of complicity to trafficking in marijuana, under eight ounces, which is a misdemeanor . . .

See Trial Transcript, November 15, 2001, pp. 186-87, 189-90.

In other words, in each case above, Ansteatt was charged with a crime other than for which he was convicted; yet the information of the original charge was given to the jury. A charge is an accusation while a conviction is a determination of guilt. Although defense counsel attempted to elicit testimony as to the distinction between a charge and a conviction, the jury was still free to consider this information in its sentencing deliberations. Considering that the language of KRS 532.055(2)(a)(2) specifically says "[t]he nature of prior offenses for which he was convicted," we conclude that a description of the original charge, for which Ansteatt was not convicted, was inadmissible. Accordingly, we reverse and remand for a new sentencing phase. See Hudson v. Commonwealth, Ky., 979 S.W.2d 106, 110 (1998).

For the foregoing reasons, the final judgment and sentence of imprisonment of the Grant Circuit Court is affirmed in part and reversed and remanded in part for sentencing.

ALL CONCUR.

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