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Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-002500-MR

STANLEY RILEY — APPELLANT

v.

APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE LEONARD L. KOPOWSKI, JUDGE
INDICTMENT NO. 04-CR-00330

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: BARBER, HENRY, AND KNOPF, JUDGES.

HENRY, JUDGE: Stanley Riley appeals from a November 22, 2004 judgment of the Campbell Circuit Court sentencing him to ten years imprisonment. Upon review, we affirm.

On May 22, 2004, at around 11:00 p.m. in Campbell County, Officer Brady Buemi was on patrol on Highway 27 when he observed a car driven by Riley pass him at a high rate of speed. Buemi proceeded to follow Riley and attempted to pull him over after observing him weaving erratically in his lane. Riley

failed to immediately pull over, however, and a pursuit ensued that ultimately involved multiple police officers. During the pursuit, Buemi thought that he saw Riley throw multiple items out of his car. Riley eventually did pull over onto the shoulder of Interstate 275, where he was subsequently questioned by Buemi and another officer.[1]

Riley was first asked why he did not stop initially, and he responded with slurred speech. He was then asked if he had been drinking and answered in the affirmative. Riley was subsequently seated in the back of a police cruiser in handcuffs and placed under arrest because of his "fleeing" from the police after the initial efforts to get him to pull over. When asked his name, Riley apparently responded that it was "Scott McIntosh," although he denies this; the officers at the scene were unable to verify this information because Riley had no identification on his person. When warned that giving a false name to a police officer was a crime, Riley again stated that his name was "Scott McIntosh." During this period of time, Buemi noticed that several cases of tools were located in the back seat of Riley's car. He ran the serial numbers of the tools through a database to determine if they had been reported stolen, but the database contained no information about them.

[1] Additional details about this pursuit are provided below.

After Buemi had left to take Riley to the police station to be booked, the other officers who had been brought into the pursuit began looking for the items that Riley had allegedly thrown from his window. When they were unable to find anything, a call was placed to Buemi asking him to return and identify where he had seen the items thrown from the car. Upon his arrival, Buemi exited his vehicle to speak to the other officers, specifically the canine unit. At that point, Riley managed to open the back door of the police cruiser in which he was held and made an effort to escape on foot. The officers made a perimeter around the area and – four to five hours later – found Riley lying down in a wooded area.

As for the tools found in the back of Riley's car, it was later discovered that they had been stolen from Edward Stamper. Stamper owned a garage that was divided into two work spaces – one used by him in his home restoration business and the other rented to a gentleman named T.J. Nash. Stamper's tools were stored in his portion of the garage and were used on a regular basis. He noticed that the tools were missing when he visited the garage and found that the back door was open and that a portion of a plywood partition had been removed to gain access to the area where the tools were kept. Stamper subsequently filed a police report, and the tools were returned to him within two to three weeks.

Riley apparently had worked for Stamper and Nash in the past doing odd jobs. On the weekend that the tools were stolen, Stamper had seen Riley and another person at the garage shooting a B.B. gun. One of the men asked Stamper for some money, but he informed them that he did not have any. At the time, Riley was not doing any work for Stamper, and it was unknown as to whether he was doing any work for Nash. Stamper left the garage approximately five minutes after his arrival.

Riley's version of events is as follows: On the evening of May 22nd, he and a friend drove to a concrete business to borrow money from a person there in order to buy some beer. Afterwards, while riding around, they suffered a flat tire and went to Stamper's garage to change it. While there, Riley heard noises in the garage and determined that they sounded like someone removing ladders from a building on an adjacent piece of property owned by T.J. Nash. After he finished changing the tire, Riley headed towards the property to investigate the noises. At that point, he saw someone running from the building who he said resembled a man named "Scott McIntosh." He also noticed a pile of tools at the back of the building and claimed that, because he did not want them to be stolen, he planned to load them into the car, take his friend home, pick up the girl who owned the car, and drive back to the garage to call the police. Riley would testify that he had no license due to a

previous DUI and had been drinking that night, so he did not want to call the police until after he had picked up the car's owner.

Riley also indicated that, while driving to pick up the car's owner, he did not notice Officer Buemi traveling behind him or beside him until he eventually made eye contact with him, due in part to the fact that tools and other items in the back seat blocked his view and in part to the fact that he was focused on the road in front of him. He also stated that he did not hear any sirens because of his radio. Riley acknowledged trying to run away from the police after he was arrested, but claimed that he never told them that his name was "Scott McIntosh"; instead, he testified that he was attempting to tell them that he thought "Scott McIntosh" was trying to steal Stamper's tools, but he "didn't get a chance to do that." Riley also acknowledged that Stamper's garage is located only a few blocks from the Newport police station.

As a result of the events noted above, Riley was arrested on seven charges of criminal conduct: aggravated driving under the influence, first-degree fleeing or evading police (motor vehicle), first-degree fleeing or evading police (on foot), second-degree escape from custody, receiving stolen property over $300.00, first-degree wanton endangerment, and giving a police officer a false name. A preliminary hearing was

held, probable cause was found, and the case was referred to the Campbell County Grand Jury. On July 8, 2004, the grand jury indicted Riley on counts of receiving stolen property worth more than $300.00,[2] second-degree fleeing or evading police,[3] giving a police officer a false name,[4] third-degree escape from custody,[5] and being a first-degree persistent felony offender.[6] On July 23, 2004, Riley appeared in Campbell Circuit Court and entered a plea of "not guilty" to the charges pending against him.

The matter eventually proceeded to trial on October 18, 2004. After all testimony and evidence was presented, the jury found Riley guilty of all five counts in the indictment. On November 22, 2004, the trial court entered a judgment consistent with the jury's verdict and sentenced Riley to a total of ten (10) years imprisonment. This appeal followed.

On appeal, Riley first argues that the evidence presented at trial was insufficient to prove him guilty of fleeing/evading the police or of receiving stolen property, and that he was therefore entitled to a directed verdict on both charges. We are obligated to review this argument under the standard set forth in Commonwealth v. Benham, 816 S.W.2d 186

[2] Pursuant to Kentucky Revised Statute ("KRS") 514.110.

[3] Pursuant to KRS 520.100.

[4] Pursuant to KRS 523.110.

[5] Pursuant to KRS 520.040.

[6] Pursuant to KRS 532.080.

(Ky. 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.” Id. at 187 (Citation omitted). “On motion for 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.” Id. Moreover, “[f]or 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.” Id. A defendant is entitled to a directed verdict if the Commonwealth produces no more than a “mere scintilla” of evidence of guilt. Id. at 187-88.

As to the fleeing/evading charge, and as noted in part above, Officer Buemi testified that he drove up behind Riley’s car on Highway 27 when it passed him at a high rate of speed “well over” the posted 35-mph speed limit and when he noticed that the car’s license plate illumination bulb was not working. While following Riley, Buemi observed that he was driving erratically and was weaving back and forth across his lane. Accordingly, Buemi attempted to initiate a DUI stop and followed

Riley's car with his lights on; however, Riley made no effort to pull over. Buemi testified that these events occurred at night, that there were no cars between his patrol car and Riley's car, and that the patrol car lights were "very bright." Buemi indicated that he then initiated his siren, but Riley still made no effort to pull over. Eventually Buemi pulled up next to Riley's car on Interstate 471 and initiated a foghorn, but Riley still did not stop. The cars proceeded to merge onto Interstate 275. Buemi testified that his lights and siren continued to be on and that he maintained a distance of 30 to 50 feet behind Riley's car. He also noted that, by that time, he had called in five or six more police officers to join in the pursuit of Riley, and that their lights and sirens were also in operation. Buemi also indicated that he observed Riley throwing items from his vehicle while the police were in pursuit. Eventually, Buemi pulled up next to Riley's car again and initiated his foghorn a second time, at which point Riley looked at Buemi and pulled over onto the shoulder of Interstate 275. Buemi testified that he had followed Riley for approximately 3.5 miles with his lights and siren in operation before Riley finally stopped.

Buemi testified that when he questioned Riley after pulling him over about why he did not stop, Riley was unable to answer the questions due to slurred speech, and he admitted that he had been drinking. Riley testified that he did not realize

that he was being pursued until he made eye contact with Buemi when he pulled up beside him. He also claimed that he did not see Buemi behind him because the tools and other items in the back seat blocked his view through the rear view window. Riley also indicated that he did not hear any sirens or see any lights because he had the radio cranked "wide open" and was concentrating on the road in front of him. Riley further testified that he had been drinking on the night in question and was driving without a driver's license due to a previous DUI; he stated that these facts made him want to avoid contact with police until after he picked up the girl who owned the car that he was driving.

In order for a person to be found guilty of second-degree fleeing or evading police in a motor vehicle, it must be proven that "[w]hile operating a motor vehicle with intent to elude or flee, the person knowingly or wantonly disobeys a recognized direction to stop his vehicle, given by a person recognized to be a peace officer." KRS 520.100(1)(b). Riley argues that the evidence does not support a conclusion that he intended to flee from Buemi or that he knowingly or wantonly disobeyed a recognized direction to stop. He notes that testimony from both he and Buemi supports that he pulled over as soon as he saw Buemi driving next to him. Riley also points out that Buemi testified that he was driving at 60 to 65 miles per

hour for the entire period of time in which Buemi pursued him, and that at no point did Riley attempt to accelerate away from him. Riley further contends that his conduct was consistent with his testimony that he had been drinking, that he did not have a driver's license, and that he had a previous DUI in that "all of [his] attention would have been focused on the road in front of him to safely get the car returned to its owner."

However, after reviewing the record as a whole – particularly the facts noted above - and considering the standards set forth by Benham, we believe a guilty verdict as to this offense is well-supported by the evidence. The facts pointed to by Riley were properly left to the consideration of the jury along with the evidence noted above. Consequently, we cannot say that the jury was "clearly unreasonable" in reaching its verdict.

Likewise, we do not believe that the jury was "clearly unreasonable" in finding Riley guilty of the receiving stolen property charge. In order for a person to be proven guilty of receiving stolen property worth more than $300.00, it must be proven that said person "receives, retains, or disposes of movable property of another knowing that it has been stolen, or having reason to believe that it has been stolen, unless the property is received, retained, or disposed of with intent to restore it to the owner." KRS 514.110(1).

Here, Riley was proven to have been driving a car filled with tools that were shown to have been stolen from Edward Stamper's garage. Moreover, there is no dispute that the tools were stolen out of the garage by someone. Riley's possession of the tools alone is prima facie evidence that he knew that they were stolen and consequently sufficient to submit the issue to the jury, a fact that is acknowledged by Riley. See KRS 514.110(2); KRS 514.110 Kentucky Crime Commission/LRC Commentary (1974); see also Deskins v. Commonwealth, 488 S.W.2d 697, 699 (Ky. 1972) (Citations omitted). Riley still argues, however, that he was entitled to a directed verdict because of his "repeated testimony that he intended to return the property, along with his behavior in not fleeing the police," as the Commonwealth "offered no evidence to rebut his statements that he intended to return the stolen property." Again, however, we believe that these facts were properly submitted to the jury for its consideration and a directed verdict was properly denied – particularly since the testimony in question from Riley directly involves issues of credibility and the weight to be given to said testimony, which are matters purely for the jury. See Benham, 816 S.W.2d at 187; Deskins, 488 S.W.2d at 699 ("It was the peculiar province of the jury to believe or disbelieve the appellant's explanation or alibi.") (Citations omitted).

Riley next argues that reversible error occurred when the prosecutor expressed his personal opinion as to Riley's credibility during cross-examination. The exchange in which this alleged error occurred reads as follows, with the most relevant portions italicized:

> Commonwealth ("C"): And you interrupted a burglary in process ...
>
> Riley ("R"): Yes, sir.
>
> C: ... right? Is that your story? How far did you get with changing your tire?
>
> R: I was in the ... I was taking the ... changing the tire whenever I heard the (inaudible) going on in the back.
>
> C: Okay, and what did you do at that point?
>
> R: I went ahead and finished putting the ... other tire on there, let it down, put the jack back in the garage and walked around there.
>
> C: And then you saw somebody running away?
>
> R: Well, I just got a glimpse of 'em running out in between the buildings.
>
> C: So it is your story that they continued in their burglary, carrying the stuff out while you are right next door changing the tire. Is that your story?
>
> R: No, that's not what I said. I said I heard them ladders clanging around ... went back there to see who was back there fooling with T.J. Nash's stuff.
>
> C: Well, it wasn't T.J. Nash's stuff, was it?

R: *Where that building's at, yeah, he's got ladders and stuff on the top of the building. You can go down there and look for yourself if you don't believe me.*

C: *Well, I don't believe you. I don't believe anything you say. But ...*

Defense counsel ("DC"): Objection.

R: Go down there and check for yourself ...

DC: Argumentative.

R: ... is all I can tell you.

Trial court: Sustained.

C: But it wasn't T.J. Nash's stuff that you had in your car, was it?

R: No.

In general, when reviewing claims of prosecutorial misconduct, we must rule based on the overall fairness of the entire trial and not just on the misconduct of the prosecutor. Slaughter v. Commonwealth, 744 S.W.2d 407, 411-12 (Ky. 1987), cert. denied, 490 U.S. 1113, 109 S.Ct. 3174, 104 L.Ed.2d 1036 (1989). There is little question that the prosecutor's comment here was inappropriate. However, the problem with which Riley is faced is that our Supreme Court had held that "[m]erely voicing an objection, without a request for a mistrial or at least for an admonition, is not sufficient to establish error once the objection is sustained." Hayes v. Commonwealth, 698 S.W.2d 827, 829 (Ky. 1985) (Citation omitted). Here, Riley's

objection was sustained by the trial court, and the record does not show that any further action (i.e., a request for a mistrial or a request that the jury be admonished) was requested by defense counsel. "In the absence of a request for further relief, it must be assumed that appellant was satisfied with the relief granted, and he cannot now be heard to complain." Baker v. Commonwealth, 973 S.W.2d 54, 56 (Ky. 1998). Riley has made no request for this issue to be considered pursuant to the palpable error standard set forth in RCr[7] 10.26, but – even if he had – we do not believe that the conduct here rises to that level. Accordingly, we must reject Riley's contention of error as to this issue.

Riley's final argument is that error resulted when the Commonwealth made repeated references to a DUI without proving the elements of the charge and without relating it to motive. He contends that there was testimony from Officer Buemi that he originally intended to stop Riley because it was suspected that he was driving under the influence, and that he intended to arrest Riley for that same reason. He argues that this testimony was inappropriate because neither Buemi nor any other police officer offered any evidence or testimony regarding a field sobriety or toxicology test. Riley also notes that, although he answered "yes" when asked if he had had anything to

[7] Kentucky Rules of Criminal Procedure.

drink on the night in question, no testimony was produced as to how much he had actually consumed. He ultimately contends that the "continued reference and highlighting of the allegation tainted [his] opportunity for a fair trial."

Riley acknowledges that these contentions were not raised at trial and are consequently unpreserved for our review; however, he asks us to consider them under the "palpable error" standard set forth by RCr 10.26, which reads 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 preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error.

A "palpable error" is one that is easily perceived or obvious. Nichols v. Commonwealth, 142 S.W.3d 683, 691 (Ky. 2004). "Manifest injustice" refers to "[a]n error in the trial court that is direct, obvious, and observable, such as a defendant's guilty plea that is involuntary or that is based on a plea agreement that the prosecution rescinds." Id., citing Black's Law Dictionary 974 (7th ed. 1999). A showing of "manifest injustice" requires proof that, upon consideration of the whole case, an error must have prejudiced the substantial rights of a defendant to such an extent that a substantial possibility exists that the result of the trial would have been different.

Castle v. Commonwealth, 44 S.W.3d 790, 793-94 (Ky.App. 2000) (Citation omitted); see also Partin v. Commonwealth, 918 S.W.2d 219, 224 (Ky. 1996).

In response to the issues raised by Riley, the Commonwealth points out that the DUI references made at trial were very limited in nature and occurred only in the following instances: (1) In his opening statement, the Commonwealth's Attorney noted that it was only after seeing Riley's car weaving that Officer Buemi decided to pull the car over due to his suspicion that it was being operated by an "impaired driver"; (2) Buemi testified that, because he observed Riley's car weaving back and forth across the road, he decided to "initiate a DUI stop, to try to see if he was DUI"; and (3) Buemi additionally testified that his basis for deciding to arrest Riley and to take him into custody "was DUI first, then it went into fleeing after he would not stop." The Commonwealth further notes that, of the four witnesses that it called to the stand, only Officer Buemi made any reference to the "DUI portion" of the case, and that no DUI references of any kind were made during closing argument. It also adds: "It is extremely significant that each reference to DUI, impaired driving, driving under the influence or any other variation of the terms were (sic) only referred to in the context of initiating the stop for suspicion of DUI."

The Commonwealth also argues that the "attempted traffic stop for suspicion of DUI is the single event that led to this entire case (and the multiple charges against Appellant)," and that the complained of testimony was consequently admissible under KRE[8] 404(b)(2). This rule allows for the introduction of "other bad acts" evidence that is "so inextricably intertwined with other evidence essential to the case that separation of the two (2) could not be accomplished without serious adverse effect on the offering party." The Commonwealth argues that the suspicion of DUI "is so intermixed with the charges in this case that its exclusion would have caused serious adverse effect if the Commonwealth had been unable to offer this portion of the evidence." It also contends that "Appellant's drinking could be inferred to support why he did not speed up to high speeds during the chase or clouded his judgment as to whether or not to pull over."

The Commonwealth finally points out that "the Appellant himself made his alcohol use, specifically regarding the evening of May 22, 2004, more of an issue than the Commonwealth." In particular, Riley offered the following testimony: (1) He and a friend borrowed money on the night in question to buy a twelve-pack of beer and were "driving around" that evening; (2) In explaining why he did not want to contact

[8] Kentucky Rules of Evidence.

the police when he first found the stolen tools, he stated that it was because he knew that he was driving without a driver's license and that he had been drinking; and (3) He told the jury that he did not have a driver's license because he had a previous DUI.

In reviewing the arguments made by the parties and the record as a whole, we cannot say that "manifest injustice" occurred here, as we fail to see how a substantial possibility exists that the result of the trial would have been different had this evidence not been introduced. See Castle, supra. Indeed, had an objection to the items in question been made at trial and overruled, we would likely have been unable to find that the trial court abused its discretion in doing so. Officer Buemi's efforts to make Riley pull over, and the subsequent chase, were initiated by his suspicion that Riley was driving under the influence, and the DUI references that he made appear to have been limited to this context. Moreover, the record indicates that Riley made numerous references at trial to his drinking on the night in question, which certainly calls into question how he could be prejudiced by the Commonwealth's similar comments in that respect. Accordingly, we do not believe that Riley is entitled to relief on this issue under the palpable error standard.

With all of Riley's contentions herein having been rejected, the judgment of the Campbell Circuit Court is affirmed.

ALL CONCUR.

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