

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001786-MR

CONLEY COTTON

APPELLANT

v. APPEAL FROM HARLAN CIRCUIT COURT
HONORABLE RON JOHNSON, JUDGE
ACTION NO. 04-CR-00081

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING IN PART,
REVERSING IN PART, AND REMANDING

** ** * * * * *

BEFORE: THOMPSON AND WINE, JUDGES; HENRY,¹ SENIOR JUDGE.

WINE, JUDGE: Conley Cotton (“Cotton”) appeals a jury conviction in the Harlan Circuit Court for possession of a controlled substance in the first degree and operating a motor vehicle while under the influence (“DUI”). The jury fixed Cotton’s sentence at five years on the possession charge and thirty days and a \$202 fine on the DUI charge, which the trial court imposed. Cotton argues the trial court abused its discretion when it denied his motion for a mistrial when his prior conviction was revealed at trial. Cotton

¹ Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

further argues the trial court denied his due process rights when it allowed more than a general description of his past crime and vouching from the prosecution during the penalty phase. Having reviewed the record, applicable law, and being otherwise sufficiently advised, we affirm the trial court's judgment of conviction, but reverse and remand for resentencing.

Officers Jason Howard ("Officer Howard") and Brian Moss ("Officer Moss") stopped Cotton on November 25, 2003, because they observed the license plate on his vehicle was expired. When Officer Howard approached Cotton's vehicle, he detected a strong scent of marijuana emanating from the interior. The officers also smelled marijuana coming from Cotton's person. Cotton was unsteady on his feet and failed a field sobriety test. At the scene, Cotton admitted to the officers that he had smoked marijuana two hours earlier. The officers placed Cotton under arrest. Upon searching Cotton, the officers found six small baggies of crack cocaine, empty baggies, and \$200 cash. Cotton told the police that he was an addict and he had smoked a hit of crack cocaine with a marijuana cigarette. Once given his *Miranda* warning, Cotton indicated that he had purchased the drugs in Lexington because he was an addict and drugs were cheaper there. Cotton told the officers that he had previously been convicted of drug possession.

After his arrest, Cotton submitted to blood and urine samples. The results of those samples showed the presence of cocaine, hydrocodone and cannabinoid

metabolytes. In addition, lab personnel were able to verify that the substance found on Cotton's person was cocaine.

Cotton was indicted by a Harlan County grand jury on the charge of trafficking in a controlled substance first degree (cocaine) and operating a motor vehicle under the influence of drugs. Cotton's trial commenced three years later on March 22, 2006. The Commonwealth called Officer Howard as a witness. Officer Howard read directly from his police report about the events that took place on November 25, 2003. Officer Howard even read the portion of his report where Cotton admitted to having previously been convicted of drug possession. At that point, defense counsel objected to the prior conviction being introduced and asked for a mistrial. The trial court denied Cotton's request for a mistrial but instead admonished the jury not to base Cotton's guilt on the fact that he had a prior record.

The jury was instructed on trafficking in a controlled substance and possession of a controlled substance. The jury returned a verdict on the lesser charge of possession of a controlled substance first degree and driving under the influence and recommended a total sentence of five years in prison. The trial court entered a judgment imposing the jury's sentence on May 12, 2006. This appeal followed.

Cotton first argues Officer Howard's testimony that Cotton told him he had a prior conviction for drug possession was in violation of KRE 404(b), entitling him to a mistrial. This issue was properly preserved by defense counsel's objection and motion for a mistrial and subsequent motion for a new trial.

In Kentucky:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible:

- (1) If offered for some other purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident; or
- (2) If so inextricably intertwined with other evidence essential to the case that the separation of the two (2) could not be accomplished without serious adverse effect on the offering party.

KRE 404(b)(1)(2).

Evidentiary rulings are reviewed for an abuse of discretion. *See Barnett v. Commonwealth*, 979 S.W.2d 98, 103 (Ky. 1998). “The test for abuse of discretion is whether the trial judge’s decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999) (citations omitted).

The trial court admonished the jury to disregard the evidence, and there is no showing that the jury was unable to follow the admonition, the effect of the inadmissible evidence was devastating to Cotton, or that the inclusion of the statement was deliberate, “inflammatory” or “highly prejudicial.” *Johnson v. Commonwealth*, 105 S.W.3d 430, 441 (Ky. 2003). Cotton himself made an admission against his own interest by blurting out at the scene that he had a prior conviction for drug possession. Further, Officer Howard never divulged whether the conviction was a felony, just that Cotton had

stated that he had a prior conviction. Finally, there were no motions in limine prior to trial that precluded Officer Howard from reading Cotton's statements into evidence.

A mistrial is appropriate only where the record reveals "a manifest necessity for such an action or an urgent or real necessity." *Skaggs v. Commonwealth*, 694 S.W.2d 672, 678 (Ky. 1985), *cert. denied*, 476 U.S. 1130, 106 S. Ct. 1998, 90 L. Ed. 2d 678 (1986), *citing Wiley v. Commonwealth*, 575 S.W.2d 166, 168 (Ky.App. 1979). When an admonition is given, "[i]t is ordinarily presumed that the admonition controls the jury and removes the prejudice which brought about the admonition." *Clay v. Commonwealth*, 867 S.W.2d 200, 204 (Ky.App. 1993). The trial court immediately admonished the jury not to consider Officer Howard's testimony concerning any admission of guilt by Cotton. With an immediate admonition, we do not believe that the trial court had an urgent or real necessity to declare a mistrial. Under KRE 404(b), the only proper way to introduce evidence of a prior conviction is through cross-examination of the defendant himself. *See Commonwealth v. Richardson*, 674 S.W.2d 515, 517-18 (Ky. 1984). The trial court properly sustained the objection under KRE 404(b). The only question is the appropriate remedy.

Cotton took the stand in his own defense and admitted that he had used cocaine on November 25, 2003. Cotton testified that he had been using drugs heavily that week because he was an addict and was distraught over the death of his brother who had lost his battle with cancer. Cotton also indicated that he only had minimal recollection of his arrest in November because the empty baggies found on his person

represented hits of cocaine he had taken that night. Even without Officer Howard's statements concerning what Cotton told him about his conviction, Cotton admitted at trial that he was in possession and using cocaine that night in November. Therefore, Cotton has failed to show how he was unduly prejudiced as a result of Officer Howard's testimony. Certainly, Cotton has not overcome the presumption that the admonition cured any resulting prejudice. In the absence of evidence to the contrary, we believe that the admonition, at the very least, smoothed out any negative connotation that the prior conviction might have had on Cotton's reputation with the jury. A trial court has discretion in deciding whether to declare a mistrial, with that decision not being disturbed absent an abuse of discretion. *Jones v. Commonwealth*, 662 S.W.2d 483 (Ky.App. 1983). We find no abuse of discretion.

Cotton next argues that he was denied due process during the sentencing phase due to a violation of KRS 532.055 and vouching from the Commonwealth. These errors submitted by Cotton are not properly preserved for this Court's review. However, Cotton argues that, because he received the maximum sentence, these errors affected his substantial rights and he is entitled to a review under the palpable error analysis. RCr 10.26. Specifically, Cotton points to the Commonwealth admitting evidence of his prior felony during the sentencing phase that had in fact been amended to a misdemeanor.

During the sentencing phase of the trial, the Commonwealth submitted three exhibits consisting of Cotton's two previous convictions - one felony conviction and one misdemeanor conviction - and the parole eligibility guidelines and asked that all

three exhibits be submitted to the jury. There being no objections by the defense, the trial court allowed the Commonwealth's exhibits of Cotton's prior convictions. The defense tendered an order that reflected that Cotton's previous felony in 1999 for possession of cocaine first offense had been amended to a misdemeanor.

It is not clear from the record under what provisions the trial court amended the 1999 order from possession of cocaine, a class D felony, to a misdemeanor in 2003. RCr 59.05 reads, "A motion to alter or amend a judgment, or to vacate a judgment and enter a new one, shall be served not later than 10 days after entry of the final judgment." Further, when a sentence for a class D felony is fixed by a jury pursuant to KRS 532.060, but the trial court determines that the sentence of imprisonment is too harsh, then the trial court may lower the sentence to a definite term of imprisonment in a county or a regional correctional institution for a term of one year or less. KRS 532.070. However, the trial court did not have jurisdiction to amend the judgment of conviction four years after the entry of the original order.

That being the case, even though the trial court explained to the jury that Cotton's prior felony had been amended to a misdemeanor disposition, it was not appropriate to submit that the misdemeanor had ever been a felony. *See Curley v. Commonwealth*, 895 S.W.2d 10 (Ky.App. 1995). Even though the parties agreed to submit Cotton's amended conviction to the jury and no objections were made, we conclude that it was palpable error and should be remanded for resentencing.

Finally, Cotton contends that the Commonwealth engaged in vouching during its closing argument to the jury. Cotton asserts that the Commonwealth expressed personal disappointment with Cotton when he said he thought Cotton was a nice guy who wanted to better himself. The Commonwealth told the jury, when referring to Cotton’s prior felony, that a felony would have given Cotton trouble “getting a job and everything else.” Cotton did not object to these statements. But while Cotton is correct that, “[t]he personal opinion of the prosecutor as to the character of a witness is not relevant and is not proper comment[,]” these statements do not constitute palpable error. *Moore v. Commonwealth*, 634 S.W.2d 426, 438 (Ky. 1982).

Accordingly, the judgment of conviction of the Harlan Circuit Court is affirmed in part and reversed in part and this case is remanded for resentencing.

ALL CONCUR.

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