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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000154-MR

DARRIN HELTON — APPELLANT

v.

APPEAL FROM JESSAMINE CIRCUIT COURT
HONORABLE C. HUNTER DAUGHERTY, JUDGE
ACTION NO. 06-CR-00177

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON AND STUMBO, JUDGES; GRAVES,[1] SENIOR JUDGE.

CLAYTON, JUDGE: Darrin Helton appeals his jury conviction of first-degree possession of a controlled substance, possession of drug paraphernalia, and first-degree persistent felony offender (PFO I). We affirm.

[1] Senior Judge John W. Graves sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

FACTUAL SUMMARY

On July 10, 2006, two Nicholasville police officers entered The Bottle Shop bar to serve a warrant on a person believed to be working at the establishment. Mr. Helton was seated at the bar. Officer Gary Resor recognized Mr. Helton from court and remembered his face in connection with an active warrant. Officer Resor and Officer Michael Fleming approached Mr. Helton and asked for his name and social security number. Mr. Helton told the officers that his name was "James Helton." Officer Resor walked outside to verify the name and social security number. Officer Fleming stayed in The Bottle Shop and spoke with another person. The search for James Helton returned no information, and Officer Resor was informed the name given was likely false and that Darrin Helton had an active warrant. Officer Resor reentered The Bottle Shop, but Mr. Helton had exited through a back door. Both of the officers exited through the front door and noticed Mr. Helton walking around the side of the bar. They approached him and placed him under arrest. During a search of Mr. Helton's person, the officers found a crack pipe and crack cocaine.

Mr. Helton filed a motion to suppress this evidence claiming the officers did not have probable cause to arrest him. After an evidentiary hearing on the mater, the trial judge denied Mr. Helton's motion. On November 29, 2006, Mr. Helton requested substitute counsel. He stated that he did not feel his current counsel was there to help him after a confrontation in which she "slapped him with papers" and told him to "shut up." After a witness was presented by Mr. Helton

and both he and his appointed counsel explained what had happened, the trial court denied his motion finding Mr. Helton failed to show good cause.

The jury convicted Mr. Helton of first-degree possession of a controlled substance, possession of drug paraphernalia, first offense, and PFO I. The trial judge issued penalty phase instructions for the jury on each conviction. The instruction for the PFO I enhancement provided, in pertinent part:

> [I]f, and only if, you believe that from the evidence beyond a reasonable doubt all of the following:
>
> A. That prior to June 10, 2006, the Defendant was convicted of 2 Counts of Wanton Endangerment, Second-Degree Criminal Mischief, First-Degree by final judgment of Jessamine Circuit Court on June 11, 2002; AND that prior to committing the offenses for which he was convicted on June 11, 2002, he was convicted of Assault Under Extreme Emotional Disturbance by final judgment of Jessamine Circuit Court on November 8, 1995.

The jury recommended that Mr. Helton be sentenced to one (1) year in prison for possession of a controlled substance enhanced to eighteen (18) years in prison pursuant to the PFO I conviction. The jury recommended a six (6) month sentence upon finding Mr. Helton guilty of possession of drug paraphernalia. This appeal followed.

DISCUSSION

I. JURY INSTRUCTION

Mr. Helton first argues that the trial court erred by providing the jury with an instruction for the charge of PFO I that included his prior misdemeanor convictions for wanton endangerment in the second-degree. Since Mr. Helton did not properly preserve this issue for review, we review it under the substantial error standard of Kentucky Rules of Criminal Procedure (RCr) 10.26.

RCr 10.26 states, "[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." The reviewing Court must decide whether there is a substantial possibility the result in the lower court would have been different without the error. *Schoenbachler v. Commonwealth*, 95 S.W.3d 830, 836 (Ky. 2003).

The Supreme Court of Kentucky has been hesitant to find that a defective jury instruction constitutes palpable error. *See Cash v. Commonwealth*, 892 S.W.2d 292 (Ky. 1995), *Renfro v. Commonwealth*, 893 S.W.2d 795 (Ky. 1995), *Johnson v. Commonwealth*, 184 S.W.3d 544 (Ky. 2005). Likewise, we do not feel Mr. Helton has provided any significant reasons why the jury instruction was palpable error.

Mr. Helton relies on *Harper v. Commonwealth*, 43 S.W.3d 261, (Ky. 2001) to show that a plainly defective jury instruction is palpable error. However, in that case the jury instruction excluded the element of intent that was essential for

conviction under the statute. Here, the jury instruction included Mr. Helton's misdemeanor crimes with his felony convictions. It did not leave out any essential elements of the charge for PFO I. The jury was informed they needed to believe that Mr. Helton was convicted of two prior felonies on separate occasions, and the inclusion of the misdemeanors within that instruction was harmless to the defendant. We fail to see how the inclusion of these misdemeanors in any way prejudiced Mr. Helton, as the jury was previously made aware of all his past convictions.

II. MOTION FOR SUBSTITUTE COUNSEL

Mr. Helton next contends the trial court violated his right to counsel by denying his *pro se* motion for substitute counsel. He argues there was a complete breakdown in communication between his counsel and himself after she "slapped him with papers" and told him to "shut up."

"An indigent defendant is not entitled to the appointment of a particular attorney, and a defendant who has been appointed counsel is not entitled to have that counsel substituted unless adequate reasons are given." *Deno v. Commonwealth*, 177 S.W.3d, 753, 759 (Ky. 2005). "Good cause has been described as: (1) a 'complete breakdown of communications between counsel and defendant;' (2) a 'conflict of interest;' and (3) that the 'legitimate interests of the defendant are being prejudiced.'" *Id*. (*citing Baker v. Commonwealth*, 574 S.W.2d

326.) The trial court has sound discretion to determine whether good cause exists for substitute counsel.

A trial judge is required to thoroughly investigate defendant's allegations. *Deno*, 177 S.W.3d at 759. In *Deno*, the trial judge was found to have adequately investigated the allegations by allowing the defendant to fully describe in detail the objections with his attorney, then allowing the defendant's attorney to respond to the allegations, and subsequently questioning both parties regarding the specific allegations.

Here, the trial court allowed Mr. Helton to fully describe his allegations, present a witness to corroborate his story, and allowed for the appointed counsel to respond to the allegations. The judge questioned Mr. Helton about any instances where he felt his attorney was not performing her job adequately, but he cited to no other instances of a breakdown in communications. The trial court thoroughly investigated Mr. Helton's allegations and we see no evidence of an abuse of discretion.

III. MOTION TO SUPPRESS

Mr. Helton next claims the trial court committed error when it denied his motion to suppress because Officers Resor and Fleming lacked reasonable suspicion to approach him and ask for his name and social security number. Though Mr. Helton's brief states the police department's warrantless search and seizure of him was not supported by probable cause, essentially the argument made is that the initial contact with Mr. Helton inside the bar amounted to an illegal

Terry stop, and the crack pipe and crack cocaine were fruits of that illegal stop. *Terry v. State of Ohio*, 392 U.S. 1, 22, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

Mr. Helton did not challenge the legality of Officer Resor's initial questioning of him inside The Bottle Shop. As a result, we conclude this issue was not preserved for appeal. *See Gray v. Commonwealth*, 150 S.W.3d 71, 73, (Ky. App. 2004). In the motion to suppress and during the suppression hearing, Mr. Helton argued that the police lacked probable cause to arrest him outside of the bar, and thus did not have the right to search his person. He claimed he was originally arrested for alcohol intoxication when he walked out back of the bar, and at the time of that arrest the police had not yet confirmed an outstanding warrant. He stated, "[i]t is apparent that the stop for alcohol intoxication was just a ruse to further detain Mr. Helton while they searched for any warrants." The issue of reasonable suspicion or an illegal *Terry* stop was not raised at trial. As such, an argument on appeal concerning a lack of reasonable suspicion during the encounter between the officers and Mr. Helton inside the bar prior to his arrest has not been properly preserved and may not now be ruled upon.

IV. CRUEL PUNISHMENT

Finally, Mr. Helton argues that his eighteen (18) year sentence for possession of cocaine enhanced as a PFO is cruel and unusual punishment in violation of Section 17 of the Kentucky Constitution and the 8th Amendment of the United States Constitution.

The permissible severity for a particular sentence is "purely a matter of legislative prerogative." *Hampton v. Commonwealth*, 666 S.W.2d 737, 741 (Ky. 1984) (*citing Rummel v. Estelle*, 445 U.S. 263, 100 S. Ct. 1133, 63 L. Ed. 2d 382 (1980)). KRS 532.080(6)(b) states:

> If the offense for which he presently stands convicted is a Class C or Class D felony, a persistent felony offender in the first degree shall be sentenced to an indeterminate term of imprisonment, the maximum of which shall not be less than ten (10) years nor more than twenty (20) years.

It is uncontested that Mr. Helton was convicted of a Class D felony. It is also uncontested that the jury found him to be a PFO I; thus, his punishment could have been within a range of ten (10) to twenty (20) years pursuant to KRS 532.080 sentencing guidelines. Mr. Helton was sentenced to eighteen (18) years. Accordingly, we do not find an eighteen (18) year sentence to be cruel punishment under either Section 17 of the Kentucky Constitution or the 8th Amendment of the U.S. Constitution.

Mr. Helton argues an eighteen (18) year sentence for possession of ten (10) dollars worth of crack cocaine is severe and cruel under state and federal law. However, this argument has no merit. The eighteen (18) year sentence was imposed for Mr. Helton's conviction as a PFO I, and the underlying conviction (possession of crack cocaine) is only relevant as to what class felony it is considered for sentencing guidelines in KRS 532.080.

For the following reasons the order of the Jessamine Circuit Court is affirmed.

ALL CONCUR.

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