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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-002575-MR

BRIAN K. STAMPER

APPELLANT

v. APPEAL FROM PERRY CIRCUIT COURT
HONORABLE WILLIAM ENGLE, III, JUDGE
ACTION NO. 06-CR-00272

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE AND NICKELL, JUDGES; LAMBERT,¹ SENIOR JUDGE.

¹ Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statute (KRS) 21.580.

ACREE, JUDGE: Brian Stamper appeals from a Perry Circuit Court judgment following a jury verdict finding him guilty of second degree escape and of being a first degree persistent felony offender (PFO). We affirm.

On August 22, 2006, Stamper was an inmate incarcerated in a detention facility, the Kentucky River Regional Jail. That afternoon, he and some fellow inmates were transported in a detention facility van to Perry Circuit Court where Stamper appeared relative to criminal charges pending against him. On the return trip to the detention facility, he and two other inmates jumped out of the jail van's back door and fled. Stamper was captured a short time later and transported back to jail.

The Perry County Grand Jury indicted Stamper on charges of second degree escape pursuant to KRS 520.030.

Prior to his trial, Stamper moved to prohibit the introduction of his prior convictions. Arguing that Stamper's felony convictions were essential to meeting the statutory requirements of KRS 520.030, the Commonwealth asked for, and Stamper agreed to, the following stipulation, read to the jury at the close of the Commonwealth's proof:

The parties hereby stipulate and agree that on August 22, 2006, the defendant Brian Stamper had both been charged with felonies in cases that were not at the time concluded and had also been convicted of felonies.

The jury found Stamper guilty of second degree escape and of being a first degree PFO. On November 21, 2007, the Perry Circuit Court entered its final judgment sentencing Stamper to ten years. This appeal followed.

Stamper's first argument is that the Commonwealth failed to prove that he was being held on a felony charge or felony conviction at the time he escaped from custody; therefore, a directed verdict should have been granted. While this issue has not been properly preserved because Stamper failed to raise it as a basis for directed verdict at trial, he asks this Court to review it for palpable error pursuant Kentucky Rules of Criminal Procedure (RCr) 10.26.

According to RCr 10.26, "[a] palpable error is one that 'affects the substantial rights of a party' and will result in 'manifest injustice' if not considered by the court. . . ." *Schoenbachler v. Commonwealth*, 95 S.W.3d 830, 836 (Ky. 2003). The court in *Schoenbachler* goes on to say that "a conviction in violation of due process constitutes '[a] palpable error which affects the substantial rights of a party' which we may consider and relieve though it was insufficiently raised or preserved for our review." *Id.* at 837.

We see no palpable error in this case. Furthermore, Stamper's argument lacks merit. KRS 520.030 states, in relevant part:

(1) A person is guilty of escape in the second degree when he escapes from a detention facility or, being charged with or convicted of a felony, he escapes from custody.

“ ‘Detention facility’ means any building and its premises used for the confinement of a person[.]” KRS 520.010(4). “ ‘Custody’ means restraint by a public servant pursuant to a lawful arrest, detention, or an order of court for law enforcement purposes[.]” KRS 520.010(2). Stamper did not escape from a detention facility, but from the custody of the officer transporting him to a detention facility.

Therefore, Stamper cannot be found guilty of violating KRS 520.030(1) unless he had been “charged with or convicted of a felony.” Stamper stipulated that at the time of his escape, he had been “charged with felonies in cases that were not at the time concluded and had also been convicted of felonies.”

Stamper argues that we should read into the statute a requirement that the escapee have been in custody relative to a felony charge or felony conviction at the time of his escape. We find no such requirement in KRS 520.030. The issue has been addressed in *Commonwealth v. Johnson*, 615 S.W.2d 1 (Ky.App. 1981).

“Escape” is defined in KRS 520.010(5) as “departure from custody or the detention facility in which a person is held or detained with knowledge that such departure is unpermitted, or failure to return to custody or detention following a temporary leave granted for a specific purpose or for a limited period.” (Emphasis added.)

KRS Chapter 520 clearly delineates the three classifications of escape. The provisions are not ambiguous or uncertain. The penalty imposed is most severe on those who effect this escape by force or threat of force whether it be from custody (arrest) or detention (incarceration). It is less severe when escape is effected by a means without force if it is from detention (incarceration) or if a felon escapes from custody (arrest). It is least severe when the escape is effected from

custody (arrest) alone by one not a felon or not charged with a felony.

Johnson at 1. KRS 520.030 does not require that an escapee be in custody on a pending felony charge at the time of his escape or that an escapee be serving time for an earlier felony conviction. We cannot read that qualification into the statute. *Commonwealth v. Harrelson*, 14 S.W.3d 541, 546 (Ky. 2000) (“We are not at liberty to add or subtract from the legislative enactment or discover meanings not reasonably ascertainable from the language used.”). The stipulation read at the close of the Commonwealth’s case provided sufficient proof of his pending felony charges and prior felony convictions as required under KRS 520.030. Stamper’s motion for a directed verdict was properly denied.

Stamper’s next claim of error is that the trial court erroneously allowed the introduction by the Commonwealth of his prior felony convictions by means of his stipulation to that fact. Again, this issue is unpreserved and can only be reviewed for palpable error. RCr 10.26. In fact, it is more accurate to say the objection was waived. *See, Marshall v. Commonwealth*, 60 S.W.3d 513, 523 (Ky. 2001) (“by agreeing to the stipulation, the defendant waived his claim of error”).

We find no palpable error to justify a review of this issue. Stamper agreed to a stipulation read to the jury of his prior felony convictions that contained no more evidence regarding Stamper’s prior felonies than was necessary to establish culpability under KRS 520.030(1). This challenge is thus improperly raised for the first time on appeal and will not be addressed further.

Finally, Stamper argues that the jury instructions denied him a unanimous verdict. Again, Stamper failed to adequately preserve the issue for appellate review.

We have long maintained that objections must be made to jury instructions in order to obtain review. *See Commonwealth v. Thurman*, 691 S.W.2d 213, 216 (Ky. 1985). RCr 9.42(2) provides:

No party may assign as error the giving or the failure to give an instruction unless he has fairly and adequately presented his position by an offered instruction or by motion, or unless he makes objection before the court instructs the jury, stating specifically the matter to which he objects and the ground or grounds of his objection.

Therefore, we decline further review of Stamper's arguments on appeal regarding the propriety of the instructions.

For the foregoing reasons, the judgment of the Perry Circuit Court is affirmed.

ALL CONCUR.

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