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Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-002426-MR

TORI LYNN VAN BERG — APPELLANT

v.

APPEAL FROM DAVIESS CIRCUIT COURT
HONORABLE HENRY M. GRIFFIN, III, JUDGE
ACTION NO. 06-CR-00429

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, KELLER, AND MOORE, JUDGES.

MOORE, JUDGE: Tori Lynn Van Berg appeals the Daviess Circuit Court's judgment convicting her of first-degree trafficking in a controlled substance and first-degree possession of a controlled substance. She was sentenced to six years of imprisonment for the trafficking conviction and three years of imprisonment for the possession conviction, to be served consecutively. After a careful review of the

record, we affirm because the double jeopardy bar to retrial is inapplicable; there was no palpable error in failing to instruct the jury on entrapment; and the prosecutor's closing arguments did not amount to palpable error.

I. FACTUAL AND PROCEDURAL BACKGROUND

Van Berg was indicted on two charges of first-degree trafficking in a controlled substance, methamphetamine. During her initial trial, the Commonwealth played part of a taped conversation between Van Berg and a confidential informant (CI), before defense counsel objected to the introduction of the tape on the basis that neither counsel nor Van Berg had ever heard the tape. The trial recessed for the day, without any ruling on the defense's objection. According to Van Berg's appellate brief, after court that day, defense counsel

> and the prosecutor . . . examined all the tapes at the prosecutor's office and determined that the tape in question was not on the cassettes that the defense had been provided, but rather on a disk. The prosecutor, unable to play the disk on his recorder, made several unsuccessful attempts to burn a new copy that would play on the prosecutor's recorder. After receiving instructions from the prosecutor on how to play those disks under a computer format, defense counsel took those disks with him, but was unable to play any of them. The next morning, . . . defense counsel was given a cassette copy of the tape, but was only able to review about half of it and not the "good parts" before [trial commenced that day].

Defense counsel then moved for a mistrial or, in the alternative, to suppress the tape. In doing so, defense counsel informed the court that it was not the Commonwealth's fault that the defense had not heard the tape recording prior

to the start of trial. The Commonwealth opposed the suppression motion, arguing that the CI had been in custody for more than a year and she was testifying from memory, and the defense's strategy would be to attack her credibility. The Commonwealth contended that without the tape to back up the CI's testimony, the Commonwealth would be "crippled." The Commonwealth also asserted that because defense counsel had implied during his questioning of other witnesses that the CI had turned the tape recorder on and off, the Commonwealth needed to play the tapes in their entirety to demonstrate there was "no subterfuge." The Commonwealth urged the trial court to deny the defense's motion to suppress and grant the defense's motion for a mistrial on the ground that with a mistrial, the Commonwealth would have a fair trial.

The trial court denied Van Berg's motion to suppress the tape and granted Van Berg's motion for a mistrial, noting that the parties agreed that neither party was at fault regarding the issue of the defense's having not heard the tape recording before trial.

A second trial was initiated, and the jury ultimately found Van Berg guilty of first-degree trafficking in a controlled substance and first-degree possession of a controlled substance. Van Berg was sentenced to six years of imprisonment for the trafficking conviction and three years of imprisonment for the possession conviction, and those sentences were ordered to be served consecutively.

Van Berg now appeals, contending that: (a) the trial court violated her rights under the Double Jeopardy Clauses of the United States and Kentucky Constitutions when it denied her motion to suppress and granted a mistrial; (b) the trial court violated her due process rights when it failed to instruct the jury on an entrapment defense based on the evidence; and (c) the prosecutor violated her due process rights during the penalty phase of closing arguments.

II. ANALYSIS

A. CLAIM REGARDING DOUBLE JEOPARDY VIOLATION

Van Berg first alleges that the trial court violated her rights against double jeopardy under the United States and Kentucky Constitutions when it denied her motion to suppress the tape recording and granted her alternative motion for a mistrial despite there having been no manifest necessity for a mistrial. Van Berg contends there was no manifest necessity for a mistrial because the tape recording of the conversation between Van Berg and the CI was cumulative evidence and the trial court knew when it granted the mistrial that the defense had not had an opportunity to review the entire tape.

Under both the United States and Kentucky Constitutions, jeopardy attaches once a jury is impaneled and sworn. *See Cardine v. Commonwealth*, 283 S.W.3d 641, 646-47 (Ky. 2009). Thus, both constitutions "guarantee that no person shall be tried twice for the same offense." *Commonwealth v. Scott*, 12 S.W.3d 682, 684 (Ky. 2000). "Once jeopardy attaches, prosecution of a defendant before a jury other than the original jury or contemporaneously-impaneled

alternates is barred unless 1) there is a 'manifest necessity' for a mistrial or 2) the defendant either requests or consents to a mistrial." *Cardine*, 283 S.W.3d at 647 (internal quotation marks omitted). "Manifest necessity has been described as an 'urgent or real necessity.' The propriety of granting a mistrial is determined on a case by case basis." *Scott*, 12 S.W.3d at 684 (internal quotation marks and footnote omitted).

Van Berg cites *Cardine* in support of her argument that the trial court should not have granted a mistrial, but should have granted her motion to suppress the tape recording instead. However, *Cardine* is distinguishable from the present case. In *Cardine*, the trial court *sua sponte* granted a mistrial after the Commonwealth proffered "late-discovered cumulative evidence" in the form of a witness. *Cardine*, 283 S.W.3d at 650. The Kentucky Supreme Court held that the trial court in Cardine's case erred in granting a mistrial, reasoning that "[i]t was within the trial court's discretion to exclude [the] witness without undue prejudice to the Commonwealth if it did not want to grant a continuance. Having these viable options precludes a finding of manifest necessity, and it was thus an abuse of discretion to grant the mistrial." *Cardine*, 283 S.W.3d at 650.

Unlike the situation in *Cardine*, however, in the present case, Van Berg moved for the mistrial herself as an alternative motion to her motion to suppress the tape recording. In *Cardine*, the mistrial was entered on the trial court's own motion. As the *Cardine* Court noted, "[o]nce jeopardy attaches, prosecution of a defendant before a jury other than the original jury or

contemporaneously-impaneled alternates is barred unless 1) there is a 'manifest necessity' for a mistrial *or 2) the defendant either requests or consents to a mistrial*." *Cardine*, 283 S.W.3d at 647 (internal quotation marks omitted) (emphasis added). Therefore, in *Cardine*, the Supreme Court analyzed whether there was a manifest necessity for a mistrial because the mistrial was entered *sua sponte* by the trial court. In the present case, there is no need to determine whether there was a manifest necessity for a mistrial because Van Berg requested the mistrial herself, even though she requested it as an alternative to suppression. Van Berg cannot complain now on appeal that the circuit court gave her the relief she requested. Thus, the circuit court did not err in granting Van Berg's motion for a mistrial.

However, even if a criminal defendant successfully moves for a mistrial, under the United States Constitution, she may still "invoke the bar of double jeopardy in a second effort to try" her if "the conduct giving rise to the successful motion for a mistrial was intended to provoke the defendant into moving for a mistrial." *Oregon v. Kennedy*, 456 U.S. 667, 679, 102 S.Ct. 2083, 2091, 72 L.Ed.2d 416 (1982); *see also Stamps v. Commonwealth*, 648 S.W.2d 868, 869 (Ky. 1983). Further, under the Kentucky Constitution, a "party seeking to prevent his retrial upon double jeopardy grounds must show that the conduct giving rise to the order of mistrial was precipitated by bad faith, overreaching or some other fundamentally unfair action of the prosecutor or the court." *Terry v. Commonwealth*, 153 S.W.3d 794, 804 (Ky. 2005) (quoting *Tinsley v. Jackson*, 771

S.W.2d 331, 332 (Ky. 1989)). In the present case, defense counsel admitted to the trial court that the Commonwealth was not at fault, and the trial court noted that the parties agreed that neither party was at fault. Therefore, the double jeopardy bar to retrial is inapplicable in this case.

B. CLAIM REGARDING ENTRAPMENT DEFENSE

Van Berg next asserts that the trial court violated her due process rights under the United States and Kentucky Constitutions when it failed to instruct the jury on an entrapment defense, despite evidence in the case that she alleges satisfied the elements for a defense of entrapment. Van Berg acknowledges that this claim was not preserved for appellate review, but she asks this Court to review it for palpable error.

Pursuant to RCr[1] 9.54(2),

> [n]o party may assign as error the giving or the failure to give an instruction unless the party's position has been fairly and adequately presented to the trial judge by an offered instruction or by motion, or unless the party makes objection before the court instructs the jury, stating specifically the matter to which the party objects and the ground or grounds of the objection.

Because Van Berg neither proffered nor moved for an entrapment jury instruction, this issue is unpreserved for appellate review. RCr 9.54(2); *see also Taylor v. Commonwealth*, 995 S.W.2d 355, 362 (Ky. 1999).

Regardless, even if we were to review this claim for palpable error, the claim lacks merit. Pursuant to RCr 10.26,

[1] Kentucky Rule(s) of Criminal Procedure.

> [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.

Regarding the defense of entrapment, the Kentucky Supreme Court has held that

> [e]ntrapment is a defense to a crime available to a defendant if [the defendant] was induced or encouraged to engage in [the criminal] conduct by a public servant seeking to obtain evidence against him for the purpose of criminal prosecution, and the defendant was not otherwise disposed to engage in such conduct at the time of the inducement. Entitlement to the defense requires satisfaction of both prongs of the test, inducement and absence of predisposition.

Morrow v. Commonwealth, 286 S.W.3d 206, 209 (Ky. 2009) (internal quotation marks and citation omitted).

The statute setting forth the defense of entrapment is KRS 505.010, which provides:

> (1) A person is not guilty of an offense arising out of proscribed conduct when:
>
> > (a) He was induced or encouraged to engage in that conduct by a public servant or by a person acting in cooperation with a public servant seeking to obtain evidence against him for the purpose of criminal prosecution; and
> >
> > (b) At the time of the inducement or encouragement, he was not otherwise disposed to engage in such conduct.

> (2) The relief afforded by subsection (1) is unavailable when:
>
> > (a) The public servant or the person acting in cooperation with a public servant merely affords the defendant an opportunity to commit an offense; or
> >
> > (b) The offense charged has physical injury or the threat of physical injury as one (1) of its elements and the prosecution is based on conduct causing or threatening such injury to a person other than the person perpetrating the entrapment.
>
> (3) The relief provided a defendant by subsection (1) is a defense.

If the only action by the CI, on behalf of the Sheriff's Department, was to "make a purchase from one known or suspected to be dealing in the product," this does not constitute entrapment. *Shanks v. Commonwealth*, 463 S.W.2d 312, 314 (Ky. 1971).

> The cases generally support the rule that the defense of entrapment cannot successfully be sustained if the accused has previously been engaged in a course of similar crimes or if he has previously formed a design to commit the crime with which he is charged or similar crimes or is willing to commit the crime as shown by ready compliance.

Shanks, 463 S.W.2d at 314. "Predisposition, the principal element in the defense of entrapment, focuses upon whether the defendant was an 'unwary innocent' or, instead, an 'unwary criminal' who readily availed himself of the opportunity to perpetrate the crime." *Morrow*, 286 S.W.3d at 210 (internal quotation marks omitted).

Van Berg contends that she had no prior history of drug offenses and that the CI induced her into transferring methamphetamines to the CI. She alleges that the CI sought "to buy a substantial quantity of methamphetamines from [Van Berg], who repeatedly refused to sell the informant methamphetamines, but on two occasions transferred methamphetamine to the informant." (Capitalization changed and emphasis removed). Van Berg asserts that, at the time of the inducements, she "was not otherwise disposed to engage in the transfer." (Capitalization changed).

During oral arguments in this matter, a question was raised concerning whether there had been any prior contact between the CI and Van Berg before the CI went to the jewelry store where Van Berg worked, inquiring about purchasing methamphetamine from Van Berg. Specifically, during oral arguments, Van Berg's counsel claimed that the CI and Van Berg had no relationship prior to the first transfer of methamphetamine. However, the Commonwealth was resolute that there had been a telephone conversation between Van Berg and the CI prior to the first transfer of methamphetamine, to which Van Berg's counsel replied that he had never alleged there was no telephone conversation, only that the CI and Van Berg had no relationship. We reviewed the trial tapes, and note that the following exchange occurred between the prosecutor and the CI during the CI's trial testimony:

> Prosecutor: Now, with regards to Ms. Van Berg, whose idea was it? How did her name come up between you and the Sheriff's Department?

> CI: Umm, somebody that had worked with them told me that they would like to have Tori, and . . . Tori had contacted me in the past. I didn't really know her at that time. . . . Anyway, that person had suggested that I bring Tori's name up to them, and I did.
>
> Prosecutor: Her name, did it come from you, or did it come from the Sheriff's Department?
>
> CI: No, it came from me.
>
> Prosecutor: Okay. Now, in January of 2006, had you ever met Tori Van Berg?
>
> CI: No, I had talked to her on the phone a couple of times, but I did not know her.
>
> Prosecutor: What was the nature of those phone conversations? Was this right in January of '06, or are we talking about other times?
>
> CI: No, this was before I had been arrested. . . . She had called me, gotten my number from somebody and had called me requesting some meth.

(Video Record 08/01/07, 10:40:05 - 10:41:10).

In the present case, the CI testified at trial, and the tape recordings of the CI's interactions with Van Berg[2] were also presented as evidence during trial. The CI testified that the Daviess County Sheriff's Department provided a transmitter and a tape recorder to the CI for meetings she had with Van Berg on different occasions. On the first such occasion, the CI went to the jewelry store where Van Berg worked and inquired about buying some methamphetamine. Van Berg did not have any with her, so she scheduled another meeting for later that day

[2] These audiotape recordings were largely inaudible on the videotape recording we reviewed of the jury trial.

to give the CI some of the drug. When they met later that day, Van Berg transferred some methamphetamine to the CI.

On the second occasion, which occurred approximately one and a half weeks later, the CI and Van Berg met at a bowling alley. Van Berg asked the CI if the CI could get a tank of anhydrous ammonia for Van Berg's friend. The CI told Van Berg that she did not want money for the exchange, but instead wanted Van Berg to give her methamphetamine in exchange for the tank of anhydrous ammonia. A day later they met again, and Van Berg transferred more methamphetamine to the CI. During that meeting, they talked more about the proposed transfer of the tank. The CI told Van Berg that she would want half an ounce of methamphetamine in exchange for the tank of anhydrous ammonia. Van Berg told the CI that she would inform her friend of this proposal.

Based on the evidence presented at trial, Van Berg was readily compliant with the CI's first request for methamphetamine. Van Berg may have been reluctant to sell the drug to the CI, but she was not reluctant to transfer the drug. Additionally, Van Berg herself initiated the second discussion regarding the exchange of a tank of anhydrous ammonia for the drug. The Daviess County Sheriff's Department, through the CI, merely provided Van Berg an opportunity to transfer methamphetamines, and Van Berg took advantage of that opportunity. Therefore, the trial court did not commit palpable error when it failed to instruct the jury on the defense of entrapment.

C. CLAIM REGARDING PROSECUTORIAL MISCONDUCT DURING CLOSING ARGUMENTS

Finally, Van Berg contends that the prosecutor engaged in misconduct during penalty phase closing arguments, resulting in violations of her due process rights under the United States and Kentucky Constitutions. Specifically, she alleges that the prosecutor engaged in misconduct when he improperly used a "send a message" argument during the closing arguments of the sentencing phase. Van Berg acknowledges that this claim was not preserved for appellate review, but she asks us to review this claim for palpable error.

The United States Court of Appeals for the Sixth Circuit has stated:

> For the prosecutor's misconduct to violate the defendant's due process rights, it is not enough that the prosecutors' remarks were undesirable or even universally condemned; instead those comments must so infect the trial with unfairness as to make the resulting conviction a denial of due process. The touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor, because the aim of due process is not punishment of society for the misdeeds of the prosecutor but avoidance of an unfair trial to the accused. To succeed on this claim, the petitioner must demonstrate that the prosecutor's conduct was both improper and flagrant.

Beuke v. Houk, 537 F.3d 618, 646 (6th Cir. 2008) (internal quotation marks, brackets, and citations omitted).

During the penalty phase's closing arguments in the present case, the prosecutor stated, *inter alia*, as follows:

> What I do . . . is remind the jury that you all are spokespersons for the community. And as such your sentence guides not only myself as a prosecutor in future cases, but also guides the actions of these law enforcement officers. And what I simply say is if you believe that these officers need to be working on other things, doing other stuff, and it's not that big of a concern, tell me that. And you tell me that by giving her the minimum and running them concurrently. If you think this is a serious problem, they need to continue aggressively seeking these individuals out, enforcing the law, tell me that. Tell them that. You do that in your verdict.

Then, near the end of his closing argument, the prosecutor noted: "We accept whatever verdict that you issue in this regard, and we will take that message with us."

Regarding "send a message" closing arguments, the Kentucky Supreme Court has held that

> even at the penalty phase, the "send a message" argument shall be channeled down the narrow avenue of deterrence. Any effort by the prosecutor in his closing argument to shame jurors or attempt to put community pressure on jurors' decisions is strictly prohibited. Prosecutors may not argue that a lighter sentence will "send a message" to the community which will hold the jurors accountable or in a bad light.

Cantrell v. Commonwealth, 288 S.W.3d 291, 299 (Ky. 2009). In *Cantrell*, the appellant's argument was preserved for appellate review, so the issue was reviewed under a reversible error standard, rather than for palpable error. This Court has also noted that "the Commonwealth is not at liberty to place upon the

jury the burden of doing what is necessary to protect the community." *McMahan v. Commonwealth*, 242 S.W.3d 348, 351 (Ky. App. 2007).

In *Brewer v. Commonwealth*, 206 S.W.3d 343 (Ky. 2006), the Kentucky Supreme Court found that the Commonwealth's closing argument asking the jury to "'send a message' to the community was improper," but that it did not amount to palpable error. *Brewer*, 206 S.W.3d at 351.

In *Young v. Commonwealth*, 25 S.W.3d 66 (Ky. 2000), the Kentucky Supreme Court "examine[d] the criteria relevant for palpable error review of alleged instances of prosecutorial misconduct in sentencing phase closing arguments." *Young*, 25 S.W.3d at 74. The Court held as follows:

> An appellate court's review of alleged error to determine whether it resulted in "manifest injustice" necessarily must begin with an examination of both the amount of punishment fixed by the verdict and the weight of evidence supporting that punishment. Other relevant factors, however, include whether the Commonwealth's statements are supported by facts in the record and whether the allegedly improper statements appeared to rebut arguments raised by defense counsel. Finally, we must always consider these closing arguments "as a whole" and keep in mind the wide latitude we allow parties during closing arguments.

Young, 25 S.W.3d at 74-75 (footnotes omitted). The Court in *Young* also noted "that Kentucky's sentencing procedures do not give juries absolute sentencing authority. KRS 532.070(1) leaves the final determination regarding sentencing up to the trial court." *Young*, 25 S.W.3d at 75. The Court held that Kentucky's statutory scheme "does not insulate all sentencing phase errors from palpable error

review, [but the Court] believe[s] Kentucky's sentencing procedures provide an additional layer of protection from prejudice which . . . should [be] consider[ed] in the context of RCr 10.26 review." *Young*, 25 S.W.3d at 75.

In the present case, Van Berg acknowledges in her appellate brief that the maximum sentence was not imposed on either of the counts against her. Rather, she was sentenced to six years of imprisonment for the trafficking conviction, which was one year above the minimum sentence for that crime,[3] and she was sentenced to three years of imprisonment for the possession conviction, which was two years above the minimum sentence for that crime.[4] Both sentences were ordered to be served consecutively, although she contends that the circuit court should have exercised its discretion and ordered them to be served concurrently. Pursuant to KRS 532.110, the trial court had the discretion to choose to run the sentences concurrently or consecutively. Considering Van Berg's willingness to not only transfer methamphetamine to the CI, but also to facilitate the production of methamphetamine by inquiring about whether the CI could obtain a tank of anhydrous ammonia for Van Berg's friend to make the drug, we find that the court did not err in exercising its discretion to run Van Berg's sentences consecutively for a total of nine years.

As for the other factors the *Young* Court stated should be considered in determining whether a prosecutor's "send a message" closing argument

[3] The maximum possible sentence for this conviction was ten years of imprisonment.

[4] The maximum possible sentence for this conviction was five years of imprisonment.

amounted to palpable error, the Commonwealth's allegedly improper statements in this case were not supported by evidence in the record, and there is no argument that they were used to rebut arguments made by the defense.

The Commonwealth stated that the jury's sentence recommendations would "send a message" to law enforcement and to the prosecutors regarding whether they should continue pursuing and prosecuting drug traffickers. We find this argument improper and, if it had been preserved for appellate review, it likely would have resulted in a reversal of Van Berg's sentence. Therefore, we recommend that the Commonwealth's Attorney heed our warning and refrain from using this "send a message" argument in future cases.

However, in the present case, the claim was not preserved, and we must review it for palpable error. We do not find that it amounted to palpable error, particularly considering that the jury only recommended a sentence one year above the statutory minimum for the trafficking conviction, and a sentence two years above the statutory minimum for the possession conviction. Moreover, the circuit court reviewed the jury's recommended sentences and made the final determination to adopt the jury's recommendations, giving Van Berg an "additional layer of protection from prejudice which we should consider in the context of RCr 10.26 review." *Young*, 25 S.W.3d at 75. Therefore, we find that the prosecutor's closing arguments, although improper, did not amount to palpable error under the circumstances of this case.

Accordingly, the judgment of the Daviess Circuit Court is affirmed.

ALL CONCUR.

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