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Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-001142-MR
AND
NO. 2008-CA-001143-MR

ANDRE LEMOND JONES — APPELLANT

v.

APPEALS FROM CHRISTIAN CIRCUIT COURT
HONORABLE JOHN L. ATKINS, JUDGE
ACTION NO. 06-CR-00374 AND 07-CR-00246

COMMONWEALTH OF KENTCKY — APPELLEE

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: ACREE, CAPERTON AND KELLER, JUDGES.

ACREE, JUDGE: Andre Lemond Jones appeals his sentence of five years for a conviction of rape in the third degree and nine years for a conviction of persistent felony offender in the second degree (PFO II). We cannot say that the outcome of

this case would have been unchanged if false evidence presented by the Commonwealth had been disallowed. Therefore, we vacate and remand.

Jones was indicted first for the alleged first-degree rape of a minor, W.R., on August 11, 2006, and subsequently for PFO II on April 13, 2007. A jury convicted Jones of the lesser-included offense of third-degree rape, concluding that on or about May 28, 2006, Jones, then twenty-three years of age, had engaged in sexual intercourse with W.R., who was then fourteen.

At the penalty phase of the trial, witnesses for the Commonwealth testified about Jones's prior felony convictions, the nature of his offense, and his eligibility f or parole. The jury then sentenced Jones to the maximum five years for the rape charge and nine years, one year less than the maximum, on the PFO II count. Jones now asserts the circuit court committed palpable error[1] by (1) permitting the Commonwealth's presentation of false testimony; (2) applying the modification of KRS 439.3401(1) *ex post facto*; (3) failing to order performance of a Sex Offender Risk Assessment as required by Kentucky Revised Statute (KRS) 532.050; and (4) assuming the role of prosecutor by assisting the Commonwealth in establishing an element of the PFO charge. Jones contends all the alleged errors violate his right to due process as guaranteed by the Fourteenth Amendment of the U.S. Constitution and Sections 1, 2, and 11 of the Kentucky Constitution. We will discuss in greater detail the proceedings before the circuit court as they become relevant to our analysis.

[1] Jones concedes he did not preserve these arguments *sub judice*. We therefore review his arguments on appeal for palpable error only. RCr 10.26.

KRS 439.3401(1)

At various times during the proceedings *sub judice*, the circuit judge expressed the belief that Jones was properly characterized as a violent offender, though he also expressed doubt that the violent offender statute would apply to Jones. Review of the record reveals the circuit court ultimately concluded Jones was a violent offender, though this determination is not part of the judgment and order of sentence.

Jones maintains the circuit court erred in retroactively applying the changes to KRS 439.3401(1) to his conviction. On May 28, 2006, the date of the offense, KRS 439.3401(1) provided as follows:

> As used in this section, "violent offender means any person who has been convicted of or pled guilty to the commission of a capital offense, Class A felony, or Class B felony involving the death of the victim or serious physical injury to a victim, or rape in the first degree or sodomy in the first degree of the victim, burglary in the first degree accompanied by the commission or attempted commission of a felony sexual offense in KRS Chapter 510, burglary in the first degree accompanied by the commission or attempted commission of an assault described in KRS 508.010 [assault in the first degree], 508.020 [assault in the second degree], 508.032 [assault against a family member or member of an unmarried couple], or 508.060 [wanton endangerment in the first degree], burglary in the first degree accompanied by commission or attempted commission of kidnapping as prohibited by KRS 509.040, or robbery in the first degree. The court shall designate in its judgment if the victim suffered death or serious physical injury.

KRS 439.3401(1) (in effect until the July 16, 2006 amendment). Third-degree rape was plainly not identified as a violent offense. The General Assembly amended

the statute in 2006, and the changes took effect on July 16 of that year. The newer version included "[t]he commission or attempted commission of a felony sexual offense described in KRS Chapter 510" among the enumerated violent offenses. KRS 439.3401(1)(d). Third-degree rape is codified in KRS 510.060.

The Commonwealth does not dispute that the retroactive application of the version of the statute which became effective July 15, 2006, would have constituted *ex post facto* application; rather, the Commonwealth contends the circuit judge did not and could not classify Jones as a violent offender, because that responsibility lies with the Department of Corrections (DOC).

We agree with the Commonwealth. "[T]he decision concerning whether or not to classify [a defendant] as a violent offender [will] be made by the Department of Corrections. The circuit court's only role is to make the factual determination set forth in KRS 439.3401(1)." *Hoskins v. Commonwealth*, 158 S.W.3d 214, 217 (Ky. App. 2005). It is the responsibility of the circuit court to reach a factual conclusion as to whether a defendant committed a crime and, if so, which crime he committed. The application of the violent offender statute to a convict's parole eligibility is a matter for the DOC.[2] The circuit judge's remarks that Jones was a violent offender have no effect on the characterization of his crime, and there was therefore no palpable error. This does not end the analysis however.

[2] As stated previously in this opinion, Jones's offense did not qualify him for "violent offender" status; therefore, it would be improper for the DOC to require him to serve eight-five percent of his sentence before attaining eligibility for parole.

Jones argues that *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1962) requires a new trial when the prosecution presents evidence on a material issue which it knows or should know is false. However, "[t]he rule of *Brady v. Maryland* . . . arguably applies in three quite different situations. Each involves the discovery, after trial of information which had been known to the prosecution *but unknown to the defense*." *U. S. v. Agurs*, 427 U.S. 97, 103, 96 S.Ct. 2392 (1976) (Emphasis supplied). The applicable version of KRS 439.3401(1) was no less knowable to the defense than it was to the prosecution. Therefore, *Brady v. Maryland* would seem to be inapplicable here.

However, our own Supreme Court interpreted *Brady v. Maryland* and other similar federal Supreme Court cases in which the conviction itself was reversed to remand a case for re-sentencing because the prosecution presented erroneous evidence regard a defendant's parole eligibility during the original sentencing phase. *Robinson v. Commonwealth*, 181 S.W.3d 30, 38 (Ky. 2005). In *Robinson*, the Court said, "The jury was given information to consider that was obviously confusing to the very people who deal with it on a daily basis." *Id.* That obviously includes defense counsel. It seems not to matter to the Supreme Court that the correct parole-eligibility information was as readily knowable to the defense as to the prosecution. *Robinson* therefore appears to extend *Brady v. Maryland* in Kentucky by eliminating the requirement that the falsity of the evidence presented be unknown to the defense when the presentation of incorrect, or false, testimony by the prosecution (1) occurs during the sentencing phase, (2) misinforms the jury

regarding the time to be served and (3) "[t]here is a reasonable likelihood that the jury was influenced by the incorrect testimony." *Robinson*, 181 S.W.3d at 38.

Without citing *Robinson*, the Supreme Court applied this concept, and arguably extended it further, in *Floyd v. Commonwealth*, No. 2007-SC-000291-MR, 2009 WL 736002 (Ky., Mar. 19, 2009),[3] to remand the case for re-sentencing. Like the case before us, the defendant, Floyd, contended that "the trial court erred by invoking KRS 439.3401, the so-called violent offender statute[.]" *Floyd*, 2009 WL 736002 at *9. While it is true the trial court sentenced Floyd as a violent offender, it was the defendant's counsel who first presented the erroneous sentencing information to the jury, during her closing argument. Nonetheless, our Supreme Court held,

> Because the penalty phase was marred, however, by the erroneous assumption that his parole eligibility would be governed by the violent offender restrictions, we reverse the Judgment to the extent that it imposes sentence and remand to the Fayette Circuit Court for a penalty phase in conformance with this opinion.

Id. at *11.

Applying these Kentucky cases, we conclude that incorrect, or false, testimony was presented by the prosecution during the sentencing phase, misinforming the jury regarding the time Jones was to serve. Before we can affect the judgment, however, we must also conclude that "[t]here is a reasonable

[3] Jones cites both *Robinson* and *Floyd* in his brief. Unpublished Kentucky appellate decisions such as *Floyd*, rendered after January 1, 2003, may be cited for consideration by the court if there is no published opinion that would adequately address the issue before the court. CR 76.28(4)(c). However, though such cases may be cited, we are not bound to follow their reasoning.

likelihood that the jury was influenced by the incorrect testimony." *Robinson*, 181 S.W.3d at 38.

The Commonwealth asserts Jones cannot demonstrate that testimony regarding his status as a violent offender influenced the jury. In support of this argument, the prosecution has identified several factors that might have led the jury to sentence Jones as it did. These factors include the youth of the victim, the nature of the offense, and Jones's criminal history. Jones contends that labeling him a violent offender and informing the jury of that status may have caused the jury first to view his crime as more serious than the General Assembly intended to treat it, and second to increase his sentence to nearly the maximum on one count and 90% of the maximum on the second. We find Jones's argument persuasive. Our analysis is identical to that of the Supreme Court in *Robinson*: "The question remains whether the testimony influenced the jury to render a sentence greater than what it might otherwise have given absent the incorrect testimony. We believe it did and, for sure, can't say it didn't." *Robinson*, 181 S.W.3d at 38.

Sex Offender Risk Assessment

Jones next contends the circuit erred in failing to order a Sex Offender Risk Assessment. While the Commonwealth agrees such assessment was mandatory, it asserts the error was not prejudicial.

It is mandatory for a circuit court to order a Sex Offender Risk Assessment. "If the defendant has been convicted of a sex crime, . . . prior to determining the sentence . . . , the court shall order a comprehensive sex offender presentence

evaluation of the defendant[.]" KRS 532.050(4). "'Shall' is mandatory[.]" KRS 446.010(30). Although it was error for the circuit court to fail to order a Sex Offender Risk Assessment, we need not determine whether that error is reversible because the judgment is being reversed for the limited purpose of conducting a new sentencing hearing. Upon remand, the circuit court will have the opportunity to comply with the mandate of KRS 532.050(4) before Jones is sentenced anew.

The circuit court's participation in the Commonwealth's case

Jones's final ground on appeal is that the circuit court assumed the role of prosecutor in raising a question about an element of the PFO II charge. Jones contends that without this intervention, the Commonwealth would have been unable to meet the elements of PFO II. The Commonwealth responds that the circuit court's intervention was not inappropriate. The Commonwealth is correct, and we add that, even if the circuit court did overstep its bounds, its actions did not rise to the level of palpable error.

At sentencing the Commonwealth presented the testimony of deputy clerk Tami Pritchett, who advised the jury of Jones's birth date, the prior felony offenses for which he had been convicted, the length of his prior sentences, and the dates the previous judgments were entered. The prosecutor then indicated she had finished her direct examination of the witness. Before Pritchett left the witness stand, however, the circuit judge called for a bench conference; the following exchange ensued:

> Circuit court (to the Commonwealth): How are you going to prove when they [the prior felony offenses] happened, that he was over the age of eighteen when he committed those offenses?
>
> Prosecutor: I planned on getting that in through Tiffany, but I'll- I will ask [Pritchett].
>
> Circuit court: Well, she's only got the judgment; she doesn't know anything about that.

The prosecutor then retrieved the previous indictments from a location outside the courtroom and asked Pritchett, still on the stand, to look at the indictments and tell the jury the date of each prior offense. The Commonwealth also asked Pritchett to restate Jones's birth date. She confirmed that both of Jones's prior offenses had been committed after he turned eighteen years old.

"The trial judge cannot by the form of his question or his manner indicate to the jury his opinion as to the credibility of the witness being interrogated or the guilt or innocence of the accused." *Terry v. Commonwealth*, 153 S.W.3d 794, 802-03 (Ky. 2005) (citing *Caudill v. Commonwealth*, 293 Ky. 674, 170 S.W.2d 9, 10 (1943)). In the instant case, however, the circuit court gave no impression to the jury that the judge favored the prosecution or believed Jones was guilty because the exchange of which Jones complains took place during a bench conference, out of the hearing of the jury.

Further, even if the circuit court had not inquired into the Commonwealth's evidence, and the Commonwealth had failed to meet all the elements of the PFO II charge, the result likely would have been the same. Upon a motion for a directed

verdict by Jones's counsel, the Commonwealth would undoubtedly have moved to reopen its case in order to present the evidence, and the circuit court likely would have granted that motion. It would not have been error to do so. *Marshall v. Commonwealth,* 625 S.W.2d 581, 583 (Ky. 1981) (trial court had not "abused its broad discretionary power here by permitting the introduction of this evidence in this bifurcated persistent felony stage of the proceedings" upon reopening the case after the prosecution rested), *cited with approval in Stokes v. Commonwealth* , 275 S.W.3d 185, 191 (Ky. 2008). The missing evidence, which the Commonwealth readily retrieved at trial, would have been presented to the jury, and the element would have been met.

Conclusions

Jones presents no grounds justifying the reversal of his conviction. However, there is a reasonable possibility that the jury was impacted by the erroneous or false testimony that Jones was a violent offender. It is on this basis that we vacate Jones's sentences for third-degree rape and PFO II and remand for a new penalty phase of the trial, with instructions that the circuit court order a Sexual Offender Risk Assessment as mandated by KRS 532.050(4).

ALL CONCUR.

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