RENDERED: DECEMBER 3, 2010; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001265-MR

DAVID WAYNE ALLEN APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE FREDERIC COWAN, JUDGE
ACTION NO. 06-CR-003939

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, JUDGE; HENRY AND ISAAC,[1] SENIOR JUDGES.

HENRY, SENIOR JUDGE: A Jefferson Circuit Court jury found David Wayne Allen guilty of complicity to manufacture methamphetamine and sentenced him to seventeen years' imprisonment. He argues the trial judge's comments to the jury invaded the jury's fact finding authority and denied him a fair trial. He then argues

[1] Senior Judges Michael L. Henry and Sheila R. Isaac sitting as Special Judges by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

that Section 11 of the Kentucky Constitution requires jury sentencing and Kentucky Revised Statute (KRS) 532.055 which was followed during his sentencing hearing is unconstitutional. We disagree and affirm the judgment and sentence of the Jefferson Circuit Court.

On December 27, 2005, a state trooper clocked a white Jeep Cherokee traveling 77 miles per hour in a 55 miles per hour zone. The driver did not comply with the trooper's motions to pull over to the side of the road but instead sped off. The trooper gave chase at some times exceeding 100 miles per hour. Because of the unsafe speed, the trooper abandoned the chase and eventually lost sight of the vehicle. A short time later, the trooper responded to a call of a car that had crashed into a telephone pole. When he arrived at the scene, he found a white Jeep Cherokee but there was no driver in sight. After running the license plates, the trooper was notified the vehicle had been reported stolen.

Inside the vehicle was an inactive mobile methamphetamine lab and items associated with manufacturing methamphetamine including a Mason jar. The police also recovered a digital camera and a receipt showing the purchase of pseudoephedrine, which is an over-the-counter drug used to manufacture methamphetamine. Investigation led to a woman who in turn led police to David Wayne Allen. He was depicted in photographs from the digital camera and his fingerprint matched one taken from the Mason jar.

At the beginning of the trial the judge admonished the jury that they were not to be influenced by personal feelings of sympathy "one way or the other."

He also listed a number of factors the jury should consider. These included the "interest or the lack of interest" in the trial's outcome as well as the "conduct or demeanor" of witnesses along with any "bias or prejudice." He then indicated the jury should consider the "clearness or lack of clearness" of any witness recollection of facts as well as the "reasonableness" of the testimony. He directed the jury to "take into account" all facts and circumstances that might tend to support of discredit any testimony.

After hearing the evidence, the jury returned a guilty verdict on the charge of complicity to manufacture methamphetamine but not guilty on all other charges. The jury then fixed Allen's sentence at seventeen years' imprisonment.

Allen does acknowledge that after he filed his appeal, the Kentucky Supreme Court rendered a not-to-be published memorandum opinion in the case of *Caldwell v. Commonwealth,* 2010 WL 2471567 (Ky. 2010) (2009-SC-0384-MR). In that case, the Supreme Court examined the same two issues Allen raises here. *Caldwell* involved a case where the same trial judge gave a jury the same admonitions and then referenced the same sentencing statute, imposing a twenty-year sentence instead of the seventeen-year sentence Allen received. While not binding on our determinations, we find the opinion nevertheless instructive. *See* Kentucky Rules of Civil Procedure (CR) 76.28(4)(c); and Rules of the Supreme Court (SCR) 1.030(8)(a).

As in *Caldwell,* Allen did not object to the trial court's jury admonitions and we therefore review this matter for "palpable error." Kentucky

Rules of Criminal Procedure (RCr) 10.26. Comments by a trial judge "which may reflect upon the credibility of a witness or tend to indicate the court's view of the quality or weight of the evidence are considered improper." *Chism v. Lampach,* 352 S.W.2d 191, 194 (Ky. 1961).

Here however, the trial court's comments did not relate to any specific evidence or witness because none had been presented to the jury when the trial court delivered the admonitions. The comments were fair and favored neither side. We agree they were a "well-intentioned effort to give jurors helpful guidance in how to find facts from evidence presented in the courtroom." *Caldwell* at *2. We can find nothing in the comments that lead us to believe they in any manner influenced the jury's deliberations for or against either party. Absent a direct showing of some impropriety we can find nothing that leads us to conclude there was palpable error because of the trial court's remarks.

Next, Allen argues KRS 532.055 is unconstitutional and as a result, his sentence was improper because the statute places the jury determinations in a mere advisory role. We disagree. Like *Caldwell,* Allen did not preserve this alleged error for appellate review and failed to notify the Attorney General of the constitutional challenge.

"When the constitutionality of an act of the General Assembly affecting the public interest is drawn into question in any action, the movant shall serve a copy of the pleading, motion or other paper first raising the challenge upon the Attorney General." CR 24.03. The Kentucky Supreme Court has repeatedly

held the notice provisions are mandatory. *Benet v. Commonwealth,* 253 S.W.3d 528, 532 (Ky. 2008). Absent compliance with the notice requirements, we can find nothing in Allen's argument that convinces us review is appropriate.

Further, we would again review this matter to determine if there was "palpable error." RCr 10.26. Any error in having a jury "recommend" a sentence rather than "fix" that punishment does not rise to the level of palpable error in this case because both the judge and jury each issued the same sentence of seventeen years. We again agree "he fails to demonstrate any constitutional violation actually affecting him in any concrete manner." *Caldwell* at *2.

Finding no error, we affirm the judgment and sentence of the Jefferson Circuit Court.

ALL CONCUR.

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