

RENDERED: JANUARY 7, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-001744-MR

EDWIN RECALDE

APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE GREGORY M. BARTLETT, JUDGE
ACTION NO. 08-CR-00555

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
VACATING AND REMANDING

** ** * ** * **

BEFORE: CAPERTON, MOORE, AND VANMETER, JUDGES.

MOORE, JUDGE: Edwin Recalde appeals from the final judgment of the Kenton Circuit Court convicting him of sexual abuse in the first degree (two counts) and sentencing him to six years' imprisonment. For the following reasons, we vacate the judgment of sentence and remand for a new sentencing hearing.

During the sentencing phase of Recalde's trial, the Commonwealth called a probation and parole officer to testify as to parole eligibility for convicted

offenders. The parole officer testified that the crime of sexual abuse in the first degree was a Class D felony that carried a sentence of one to five years in prison on each count and that an offender convicted of a Class D felony with an aggregate sentence of one to five years would have his case reviewed by the Parole Board after serving 15% of the sentence pursuant to KRS¹ 439.340.² The parole officer also testified regarding the eligibility of a reduction in sentence pursuant to “good time credits.” Thereafter, the jury recommended three years on each count to be served consecutively for an aggregate sentence of six years’ imprisonment, which the trial court imposed. This appeal followed.

Recalde claims the Commonwealth’s presentation of the parole officer’s testimony violated the due process guarantees of the state and federal constitutions. Specifically, he contends he would become eligible for parole after serving 20% of his sentence, rather than 15%, and the parole officer’s incorrect testimony in this respect led the jury to recommend a more severe sentence than it would have otherwise recommended. Additionally, the parole officer explained the concept of “good time credit” to the jury, including that by operation of statute, any inmate may receive a reduction in his sentence of ten days per month of his sentence; an inmate who achieves certain education levels while incarcerated may receive an additional ninety days reduction in his sentence; and an inmate may also receive a

¹ Kentucky Revised Statute.

² KRS 439.340(3)(a) provides: “A nonviolent offender convicted of a Class D felony with an aggregate sentence of one (1) to five (5) years who is confined to a state penal institution or county jail shall have his or her case reviewed by the Parole Board after serving fifteen percent (15%) or two (2) months of the original sentence, whichever is longer.”

reduction of seven days per month of his sentence for merit service. *See* KRS 197.045. But the parole officer failed to disclose that Recalde, as a sex offender, was not eligible to receive the credit, except for educational credit, until completion of the Sex Offender Treatment Program. Thus, it is undisputed, and the Commonwealth concedes, that the parole officer erroneously testified before the jury in regard to the amount of time Recalde would have to serve before he would become eligible for parole.

While deliberating, the jury returned a question to the court: “Is length of time you are monitored dependent on length of sentence?” The court heard from counsel for Recalde and the Commonwealth and the issue of good time credit was specifically discussed in determining how the court would answer the question for the jury. The court responded to the jury’s question with “yes.”

Recalde admits these errors were not preserved for our review and thus implores us to address it under the palpable error standard of RCr³ 10.26. Under that rule,

an unpreserved error may be noticed on appeal only if the error is “palpable” and “affects the substantial rights of a party,” and even then relief is appropriate only “upon a determination that manifest injustice has resulted from the error.” An error is “palpable,” we have explained, only if it is clear or plain under current law and in general a palpable error “affects the substantial rights of a party” only if “it is more likely than ordinary error to have affected the judgment.” An unpreserved error that is both palpable and prejudicial still does not justify relief unless the reviewing court further determines that it has resulted in a manifest injustice, unless, in other words,

³ Kentucky Rules of Criminal Procedure.

the error so seriously affected the fairness, integrity, or public reputation of the proceeding as to be “shocking or jurisprudentially intolerable.”

Commonwealth v. Jones, 283 S.W.3d 665, 668 (Ky. 2009) (citations omitted).

The Commonwealth’s response to Recalde’s argument is that the parole officer’s incorrect testimony did not amount to palpable error and is harmless. We disagree and are perplexed at the argument that an inmate’s potentially serving additional time in prison before becoming parole eligible -- due to erroneous information presented to a jury-- does not rise to substantial injustice or can amount only to harmless error.

The Kentucky Supreme Court addressed the issue of a parole officer’s incorrect testimony during the sentencing phase of trial in the case of *Robinson v. Commonwealth*, 181 S.W.3d 30 (Ky. 2005). In *Robinson*, the Commonwealth presented the testimony of a probation and parole officer who incorrectly testified about good time credits as it related to the defendant’s parole eligibility. The Court stated:

The use of incorrect, or false, testimony by the prosecution is a violation of due process when the testimony is material. This is true irrespective of the good faith or bad faith of the prosecutor. When the prosecution knows or should have known that the testimony is false, the test for materiality is whether “there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.”

Id. at 38 (citations omitted). The Court emphasized the Commonwealth “relied, almost solely, on [the officer’s] testimony to persuade the jury to recommend the maximum sentence[.]” and held “[t]here is a reasonable likelihood that the jury

was influenced by the incorrect testimony.” *Id.* The defendant received consecutive sentences on felony charges totaling thirty years’ imprisonment, with misdemeanor sentences set to run concurrently. The Court held the incorrect testimony of the parole officer to be palpable error.

Following *Robinson*, we cannot agree with the Commonwealth that the inaccurate and misleading testimony by the parole officer before the jury during the sentencing phase does not amount to palpable error. In *Robinson*, the Supreme Court stated

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. . . . The jury was given information to consider that was obviously confusing to the very people who deal with it on a daily basis. There is a reasonable likelihood that the jury was influenced by the incorrect testimony.

181 S.W.3d at 38.

Here, not only did the parole officer incorrectly testify as to eligibility requirements for “good time credits” as in the *Robinson* case, but also as to the percentage of time Recalde would have to serve before he became parole eligible. We see no rational way to distinguish *Robinson* from this case. Consequently, we must conclude that there is at least a reasonable likelihood that the two errors in the testimony of the parole officer during Recalde’s sentencing phase could have influenced the jury’s decision, and to quote from the Supreme Court, we “for sure, can’t say it didn’t.” *Id.*

Recalde's sentence is hereby vacated, and we remand this case to the Kenton Circuit Court for a new sentencing hearing.

CAPERTON, JUDGE, CONCURS.

VANMETER, JUDGE, DISSENTS.

BRIEFS FOR APPELLANT:

Linda Roberts Horsman
Assistant Public Advocate
Department of Public Advocacy
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Todd D. Ferguson
Assistant Attorney General
Frankfort, Kentucky