RENDERED: JANUARY 21, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001393-MR

ROGER NORTH — APPELLANT

v.

APPEAL FROM HARLAN CIRCUIT COURT
HONORABLE RUSSELL D. ALRED, JUDGE
ACTION NO. 07-CR-00165

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING IN PART,
VACATING IN PART, AND REMANDING

** ** ** ** **

BEFORE: CAPERTON, MOORE, AND VANMETER, JUDGES.

MOORE, JUDGE: Roger North appeals the Harlan Circuit Court's judgment convicting him of first-degree Trafficking in a Controlled Substance, second offense, sentencing him to fifteen years of imprisonment, and ordering him to pay court costs of $125.00. After a careful review of the record, we affirm in part regarding North's claims involving the expert's testimony and the introduction of

prior convictions evidence because North has failed to demonstrate palpable error pertaining to those claims. We also vacate in part, concerning the imposition of court costs and the prosecutor's statement during penalty phase closing arguments, because those errors were palpable, and we remand the case for further proceedings consistent with this opinion.

I. FACTUAL AND PROCEDURAL BACKGROUND

North was indicted on two counts of Trafficking in a Controlled Substance in the First Degree, Second Offense, a Class B felony. He proceeded to trial, and the jury acquitted him of one count, regarding an incident that occurred on January 30, 2007. However, the jury found North guilty on the other count, which pertained to events that occurred on February 6, 2007, when North sold pills containing methadone to a confidential informant. The jury recommended, and the circuit court imposed, a sentence of fifteen years of imprisonment. The circuit court also ordered North to pay $125.00 in court costs.

North now appeals, contending that: (a) the prosecutor made a comment during the penalty phase closing argument that substantially prejudiced North; (b) the Commonwealth improperly introduced evidence of three police citations from North's prior convictions; (c) the Commonwealth did not provide a foundation to show that its witness was an expert; and (d) the circuit court improperly ordered North to pay court costs.

II. STANDARD OF REVIEW

North acknowledges that none of his appellate claims are preserved for review, yet he asks us to review his claims for palpable error under RCr[1] 10.26. Kentucky Rule of Criminal Procedure (RCr) 10.26 provides as follows: "A palpable error which affects the substantial rights of a party may be considered . . . 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."

> [T]he requirement of "manifest injustice" as used in RCr 10.26 . . . mean[s] that the error must have prejudiced the substantial rights of the defendant, . . . *i.e.*, a substantial possibility exists that the result of the trial would have been different. . . .
>
> [The Kentucky Supreme Court has] stated that upon consideration of the whole case, the reviewing court must conclude that a substantial possibility exists that the result would have been different in order to grant relief.

Castle v. Commonwealth, 44 S.W.3d 790, 793-94 (Ky. App. 2000) (internal quotation marks omitted).

III. ANALYSIS

A. CLAIM REGARDING PENALTY PHASE CLOSING ARGUMENT

North first alleges that during the prosecutor's penalty phase closing argument, he told the jury that North would not have to serve anything close to the amount of time they recommended for his sentence because of parole. North contends that this violated his due process rights and it caused substantial prejudice to him.

[1] Kentucky Rule of Criminal Procedure.

North cites, *inter alia*, *Robinson v. Commonwealth*, 181 S.W.3d 30 (Ky. 2005), in support of his claim. In *Robinson*, the Kentucky Supreme Court held that "[t]he 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." *Robinson*, 181 S.W.3d at 38. "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." *Robinson*, 181 S.W.3d at 38 (internal quotation marks omitted).

In the present case, North contends that no evidence concerning parole eligibility was introduced, but "the prosecutor told the jury that the penalty range of ten (10) to twenty (20) years was only the maximum sentence [North] could receive because it did not include good time or parole." The prosecutor then asked the jury to "keep in mind that [North's] not going to get anything close to the amount of time you set for his punishment."

Pursuant to KRS 532.055(2)(a),[2] during a sentencing hearing that is conducted before a jury,

> [e]vidence may be offered by the Commonwealth relevant to sentencing including:
>
> 1. Minimum parole eligibility, prior convictions of the defendant, both felony and misdemeanor;

[2] A portion of this statute, specifically, KRS 532.055(2)(a)(6), was held to be unconstitutional in *Manns v. Commonwealth*, 80 S.W.3d 439 (Ky. 2002).

> 2. The nature of prior offenses for which he was convicted;
>
> 3. The date of the commission, date of sentencing, and date of release from confinement or supervision from all prior offenses;
>
> 4. The maximum expiration of sentence as determined by the division of probation and parole for all such current and prior offenses; [and]
>
> 5. The defendant's status if on probation, parole, conditional discharge, or any other form of legal release.

However, KRS 532.055(2)(a) refers to *evidence* that may be presented to show parole eligibility, and *Robinson* involved "false testimony" concerning parole eligibility. In the present case, upon review of the penalty phase closing arguments, it is apparent that there was neither evidence nor testimony introduced regarding parole eligibility. Rather, the prosecutor made the challenged statements himself. Thus, KRS 532.055(2)(a) and *Robinson* are inapplicable to the case at hand, in which the statement at issue was made by the prosecutor, rather than introduced as evidence or testimony.

A case more on point to the present issue before us is *Ruppee v. Commonwealth*, 754 S.W.2d 852, 853 (Ky. 1988). In *Ruppee*, the prosecutor misstated the law concerning parole eligibility during the penalty phase argument. Ruppee's attorney objected, thereby preserving the issue for appellate review. The Kentucky Supreme Court reversed Ruppee's conviction and held that "a jury should not be misadvised by the Commonwealth's Attorney as to the legal effect of

its verdict, nor should a verdict based upon such a misstatement of the law be allowed to stand." *Ruppee*, 754 S.W.2d at 853.

In the present case, the jury instructions stated that the maximum term of imprisonment the jury should recommend was no less than ten years and no more than twenty years. The jury recommended a sentence of fifteen years of imprisonment. Prior to that, during penalty phase closing arguments, the prosecutor improperly advised the jury as to the legal effect of its verdict and told the jury that, due to parole, North was not going to serve "anything close to the amount of time" that the jury set for his punishment. This was improper, pursuant to *Ruppee*, and a substantial possibility exists that North would have received a shorter sentence of imprisonment if the prosecutor had not made this statement, particularly considering that the confidential informant testified that North only sold four pills to him on the date in question. Therefore, this error caused a manifest injustice to North, and it was palpable.

B. CLAIM REGARDING INTRODUCTION OF PRIOR CONVICTIONS EVIDENCE

North next alleges that the Commonwealth improperly introduced evidence of three police citations from North's prior convictions. He contends that the jury received information exceeding the scope of KRS 532.055 when the Commonwealth introduced three police citations from North's prior convictions with information of an original charge for which he was not convicted. North also argues that the police citations should not have been admitted as evidence because

they constitute hearsay and because their introduction constitutes a violation of the Confrontation Clause.

We first note that a certified copy of a citation from the record of a prior conviction is admissible, and it does not constitute hearsay. *See Skeans v. Commonwealth*, 912 S.W.2d 455, 456 (Ky. App. 1995). We also note that "the [C]onfrontation [C]lause does not apply in sentencing proceedings." *U.S. v. Stone*, 432 F.3d 651, 654 (6th Cir. 2005). Therefore, the hearsay and Confrontation Clause aspects of North's claim lack merit.

As noted previously, KRS 532.055(2)(a)(1) and (2) provide that the Commonwealth may produce evidence relevant to sentencing that includes the defendant's prior convictions, particularly "[t]he nature of prior offenses for which he was convicted." In *Cuzick v. Commonwealth*, 276 S.W.3d 260, 264 (Ky. 2009), the Kentucky Supreme Court upheld the admissibility of information contained in a prior citation, but in doing so, the Court stated as follows:

> [W]e do not create a rule that the contents of a citation or other charging document are always admissible during penalty phase. We know that such documents may contain inaccurate or misleading information, as well as information inconsistent with the final judgment. So long as the information is limited to a fair, accurate and general description of the nature of the prior offense, it comports with KRS 532.055 and may be considered by the jury.

Further, in *Robinson v. Commonwealth*, 926 S.W.2d 853 (Ky. 1996), the Court held that "all that is admissible as to the nature of a prior conviction is a general description of the crime." *Robinson*, 926 S.W.2d at 855. The Court also held that

"KRS 532.055(2)(a) permits the introduction of prior convictions of the defendant, not prior charges subsequently dismissed." *Robinson*, 926 S.W.2d at 854.

North contends that the Commonwealth improperly introduced citations from three of his prior offenses, two of which stated that North was charged with driving under the influence and another one which stated that he was charged with public intoxication – controlled substance. One of the cases in which he was charged with driving under the influence actually resulted in the charge being amended and North pleading guilty to the amended charge of reckless driving.

Because North was convicted of a different offense than the one charged in that January 9, 1999 citation, the admission of that citation was misleading to the jury, and it was improperly admitted as evidence during the penalty phase. Additionally, the April 25, 2002 citation for driving under the influence of intoxicants was admitted during the penalty phase and it stated that the charge was based on North having slurred speech, admitting taking Xanax prescription medicine and methadone, failing various field sobriety tests, and refusing substance tests. The presentation of this information to the jury went beyond the "general description of the crime" that is permitted. Therefore, this information should not have been admitted. *See Hudson v. Commonwealth*, 979 S.W.2d 106, 110 (Ky. 1998) (noting that reading to a jury "information regarding the factual circumstances of each [prior] conviction from the warrants or uniform

citations" is "clearly beyond the limitation set forth in *Robinson*[, 926 S.W.2d at 855] and therefore, should not have been admitted.").

Furthermore, admitting into evidence the April 17, 2008 citation from North's public intoxication – controlled substance charge was improper because that citation also included the factual circumstances which lead to the citation. Therefore, the citation should not have been admitted.

Regardless, although we find the aforementioned citations were improperly admitted in the present case, North failed to preserve this issue for appellate review, and we must therefore review it for palpable error. North's conviction in the present case was for first-degree Trafficking in a Controlled Substance, second offense, and evidence of his prior conviction for Trafficking in a Controlled Substance was admitted as an exhibit in the trial court, and North does not contest its admissibility. Therefore, we do not find that a substantial possibility exists that the result of North's trial would have been different if the three citations charging him with driving under the influence and public intoxication had not been admitted during the penalty phase, considering that the prior judgment for Trafficking in a Controlled Substance was also admitted. Therefore, these errors were not palpable, and this claim lacks merit.

C. CLAIM REGARDING EXPERT TESTIMONY

North next alleges that the Commonwealth did not provide a foundation to show that its witness, Nancy Hibbits, who was employed by the state crime lab, was an expert. North contends that Ms. Hibbits "testified and simply

stated, without any foundation, that the pills had methadone in them." He also asserts that Ms. Hibbits "never testified as to any knowledge, skill, experience, training, or education which qualified her to render the opinion that the pills tested contained methadone." North argues that Ms. Hibbits "never testified as to the principles and methods used in testing the drugs."

However, because North did not raise these issues in the trial court, he is essentially arguing that the trial court should have *sua sponte* held a hearing under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). Because this issue is not preserved for our review, we must review it for palpable error. In *Clay v. Commonwealth*, 291 S.W.3d 210 (Ky. 2008), the Kentucky Supreme Court noted that it had previously "'decline[d] to speculate on the outcome of an unrequested *Daubert* hearing, or to hold that the failure to conduct such a hearing *sua sponte* constitutes palpable error.'" *Clay*, 291 S.W.3d at 217 (quoting *Tharp v. Commonwealth*, 40 S.W.3d 356, 368 (Ky. 2000)). The Court then noted that, in addition to the expert's testimony, "there was DNA evidence and testimony from two fellow inmates who claimed [Clay] had confessed." *Clay*, 291 S.W.3d at 217. Therefore, the Court held that the "claim was unpreserved and there was no palpable error." *Clay*, 291 S.W.3d at 217.

In the present case, in addition to Ms. Hibbits's testimony, the confidential informant testified that on February 6, 2007, he met officers at a park, they searched him and his vehicle, and gave him a recording device. He attested that he then drove to a car wash where he met North and bought four methadone

pills from North.[3] Additionally, North himself notes in his appellate brief that one of the officers testified that on February 6, 2007, he followed the confidential informant to the car wash and saw North in the vehicle that the informant alleged he bought the pills out of, and after the alleged purchase of the pills, the informant gave the officer suspected methadone pills. Thus, there was other evidence aside from Ms. Hibbits's testimony suggesting that the pills contained methadone. North's claim regarding Ms. Hibbits's expert testimony is not preserved for appellate review, and there was no palpable error in admitting it at trial.

D. CLAIM REGARDING FINE OF COURT COSTS

Finally, North contends that the circuit court improperly ordered North to pay court costs. The Commonwealth concedes that the circuit court should not have imposed court costs, and the Commonwealth states in its brief that "[i]f this court finds manifest injustice, this Court should vacate the portion of the judgment imposing court costs."

The trial court's record states that North was found by the trial court to be indigent. Pursuant to KRS 31.110(1)(b), the trial court should have waived all court costs, and we find that it was a manifest injustice for the court to order North to pay court costs. Therefore, this error was palpable.

Accordingly, the judgment of the Harlan Circuit Court is affirmed in part, regarding North's claims involving the expert's testimony and the

[3] The recording of the transaction was played for the jury, but when we reviewed the portion of the video-recorded trial when the recording was played for the jury, the recording was largely inaudible on the DVD of the jury trial.

introduction of prior convictions evidence. The judgment of the Harlan Circuit Court is also vacated in part, concerning the imposition of court costs and the sentencing that was based on the prosecutor's misleading statement during penalty phase closing arguments, and the case is remanded for a new sentencing consistent with this opinion.

CAPERTON, JUDGE, CONCURS.

VANMETER, JUDGE, CONCURS IN PART, DISSENTS IN PART, AND FILES SEPARATE OPINION.

VANMETER, JUDGE, DISSENTING IN PART: I respectfully dissent from so much of the majority opinion as vacates and remands the judgment for a new sentencing hearing.

Under RCr 10.26, an unpreserved error may be reviewed on appeal if the error is "palpable" and "affects the substantial rights of a party." Even then, relief is appropriate only "upon a determination that manifest injustice has resulted from the error." *Id*. An error is "palpable," only if it is clear or plain under current law. *Brewer v. Commonwealth*, 206 S.W.3d 343 (Ky. 2006). Generally, a palpable error "affects the substantial rights of a party" only if "it is more likely than ordinary error to have affected the judgment." *Ernst v. Commonwealth*, 160 S.W.3d 744, 762 (Ky. 2005) (citation omitted). Furthermore,

> An unpreserved error that is both palpable and prejudicial does not justify relief unless the reviewing court further determines that it has resulted in a manifest injustice, unless, in other words, 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) (quoting *Martin v. Commonwealth*, 207 S.W.3d 1, 4 (Ky. 2006)). The Kentucky Supreme Court current cases on palpable error review have, therefore, established **three** requirements which must be satisfied in order for relief to be granted: (1) a clear or plain error (2) which was prejudicial to the defendant and (3) and which resulted in manifest injustice.

The majority opinion cites *Ruppee v. Commonwealth*, 754 S.W.2d 852 (Ky. 1988), in support of the conclusion that North is entitled to a new sentencing hearing. The facts in *Ruppee*, however, are that the prosecutor made a misstatement of law **and** defense counsel objected. *Ruppee*, thus, did not involve analysis under the palpable error rule.

While I agree that the Commonwealth failed to introduce evidence of parole eligibility in compliance with KRS 532.055(2)(a), no question exists that North is eligible for parole. In my view, North has failed to demonstrate that the fairness, integrity or public reputation of the proceeding is shocking or jurisprudentially intolerable. A criminal sentence of fifteen years for a conviction of first-degree trafficking in a controlled substance, second offense, especially in light of North's criminal history, is neither shocking nor jurisprudentially intolerable. I would affirm the trial court's judgment in all respects.

BRIEF FOR APPELLANT:

Brandon Neil Jewell
Assistant Public Advocate
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky
Frankfort, Kentucky

Susan Roncarti Lenz
Assistant Attorney General
Frankfort, Kentucky