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Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-000132-MR

GEORGE R. GAUNT — APPELLANT

v.

APPEAL FROM LARUE CIRCUIT COURT
HONORABLE CHARLES C. SIMMS, III, JUDGE
ACTION NO. 10-CR-00055

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING IN PART,
REVERSING IN PART, AND REMANDING

** ** ** ** **

BEFORE: CAPERTON, CLAYTON, AND VANMETER, JUDGES.

CAPERTON, JUDGE: The Appellant, George "Ricky" Gaunt appeals from his conviction in Larue Circuit Court. Gaunt was convicted of escape in the second degree, unauthorized use of a motor vehicle, and persistent felony offender (PFO) in the second degree. Gaunt received a sentence of five years in prison for escape, enhanced to ten (10) years on the PFO count. He received twelve (12) months and

a $500 fine for unauthorized use of a motor vehicle. On appeal, Gaunt argues that the penalty phase of his trial was flawed such that his right to due process was violated and that the trial court erred when it failed to give a "choice of evils" instruction to the jury. Having reviewed the record, the arguments of the parties, and the applicable law, we affirm in part, and reverse and remand in part.

On February 9, 2010, Gaunt was incarcerated in the Larue County Detention Center (LCDC). Gaunt was classified as a Level One inmate at the LCDC where he worked in the kitchen. On February 9, 2010, Gaunt woke up at 4:15 a.m. to help prepare breakfast. He traveled to the Save-A-Lot grocery store along with another inmate and LCDC employee, Theresa Hatcher, to assist in purchasing supplies for the kitchen. Gaunt later helped with lunch and subsequently with dinner. After dinner, Gaunt met with a Dr. Greenwell for a Bible study. Following that meeting, Gaunt testified that he phoned Brittany, whom he identified as the mother of his child.[1] Gaunt testified that Brittany advised him that their child was not doing well and that, accordingly, he was under the impression that the child might die. Following the phone call, Gaunt returned to his cell. Gaunt testified that he heard the kitchen door open and noticed that the lock had not reengaged. Gaunt testified that, "I had to go check on my son."

Gaunt then left the Larue County Detention Center in its 1999 Ford Crown Victoria. At 8:10 p.m., Kentucky State Trooper Brad Riley was notified that Gaunt had escaped. Trooper Riley proceeded to the LCDC, obtained

[1] During the course of the trial below, Gaunt's stepfather, Loyal Bailey, testified that no DNA test had been performed, and that no one was certain that Gaunt was the child's biological father.

identification information about the automobile, and returned to the Elizabethtown Post to place notification of the escape on the National Crime Information Center computer network. Gaunt and the car were recovered by the Boone County Sheriff's Department at a rest stop in Boone County, Kentucky, at 4 a.m. on February 10, 2010. At trial, Gaunt testified on his own behalf. Gaunt testified that he was going to Cincinnati to see his son in the hospital. Gaunt testified that his plan was to turn himself in and return the car after he had seen his son.

On June 21, 2010, a Larue County grand jury indicted Gaunt, charging him with (1) escape in the second degree; (2) unauthorized use of a motor vehicle; and (3) being a PFO in the second degree. The jury recommended a sentence of five years' imprisonment for escape, and twelve months plus a $500.00 fine for unauthorized use of a motor vehicle. Following Gaunt's conviction for being a persistent felony offender in the second degree, the jury recommended a sentence of ten years' imprisonment.

During the penalty phase of the trial, testimony was provided by Probation and Parole Officer Phillip McCardy and Mr. Joey Stanton, who served on the Kentucky Parole Board from 2007 to 2010. McCardy testified that the normal range on a Class D felony was one to five years, enhanced to five to ten years upon conviction of a PFO second degree. McCardy further testified on direct examination that Gaunt would have to serve twenty percent of his sentence before he would be eligible for parole. Concerning "good time," McCardy testified as follows:

> **McCardy**: There's the good time, he could get certain so many days per month good time credit to be knocked off your sentence, if there's no violations or anything while he's in prison. (sic)
> **Commonwealth**: So are you saying that even though the statute says he'll be eligible in one year it could be less?
> **McCardy**: It could be.

Subsequently, on cross-examination, defense counsel asked Officer McCardy, "When you were talking about good time coming off of the sentence, was that to serve the sentence out or does that change his parole eligibility?" McCardy answered, "I believe that changes his parole eligibility."

The Commonwealth then called Stanton, who had previously testified during the guilt phase of the trial. Concerning the concept of "good time," the following exchange took place between Stanton and counsel for the Commonwealth:

> **Stanton**: I'll try to explain, there's two different types of "good time" – there's meritorious good time. It's set by the legislators that when you are sentenced, whether one year or five years ten years, twenty years, that you receive an automatic 25% reduction from your sentence when you first go in. So 25% of that is knocked off of your time. So if you give a person a year, 25% of that is knocked off. Then there is statutory … good time, that could be, in addition to the, excuse me – meritorious good time. Pardon me. Meritorious good time is separate. It's in addition but separate from statutory good time, that is, if a person completed a GED, if they complete a drug program, or if they do for work credit, or if the Department of Corrections as far as the Commissioner, in the Commonwealth of Kentucky, decide they want to give that person good time, or the warden of the institution can do the same.

> **Commonwealth**: Okay, so if you'll look at this board I was using with the probation officer, okay? Are you telling us that if the five-year sentence is handed down by this jury, and the parole eligibility per the statute is 20%, one year, 25% of that, of one year, is knocked off when he walks into the jail?
>
> **Stanton**: Correct.

On cross-examination of Stanton, defense counsel attempted to clarify the issue. Counsel elicited testimony from Stanton that good time and parole eligibility are two separate entities, insofar as one does not affect the other. Nevertheless, during the course of closing arguments, counsel for the Commonwealth stated as follows:

> You can take Mr. Stanton's testimony however you want, but the fact is, you give someone five years, 25% is taken off the top right at the beginning. Whether you want to say it's off the parole eligibility or off the entire sentence, whatever, the fact remains what you give them, they don't get all of it.

Thereafter, on December 21, 2010, the Larue Circuit Court entered judgment against Gaunt, sentencing him to imprisonment for a total of ten years plus the fine of $500.00. It is from those convictions that Gaunt now appeals to this Court.

As his first basis for appeal, Gaunt argues that the penalty phase of the trial was so fraught with error that his right to due process was violated. Gaunt acknowledges that this error is unpreserved, but requests palpable error review pursuant to Kentucky Rules of Criminal Procedure (RCr) 10.26.

First, Gaunt argues that his right to due process was violated during the penalty phase because of the introduction of incorrect or false testimony by the probation and parole officer and, secondly, that this error was compounded with the Commonwealth's second witness at the penalty phase which affirmed the incorrect information on direct examination about good time credit affecting parole eligibility. Gaunt asserts that the specific issue of a probation and parole officer informing the jury that "good time credits would be figured into the defendant's parole eligibility" was addressed in *Robinson v. Commonwealth,* 181 S.W.3d 30, 38 (Ky. 2005). Therein, our Kentucky Supreme Court held:

> Although statutory good time is listed in the sentence calculation on a prisoner's resident record card, the prisoner does not actually receive credit for his good time until he reaches the minimum parole eligibility.

Thus, Gaunt argues that pursuant to *Robinson*, since a prisoner does not receive credit for good time until he reaches the minimum parole eligibility, then any good time credit earned does not affect the date of the parole eligibility itself. Gaunt asserts that the testimony elicited by the Commonwealth to the contrary was material and, thus, a violation of his due process rights. While acknowledging that his counsel attempted to clarify the use of "good time" credits for parole eligibility during cross-examination, Gaunt nevertheless asserts that the conflicting testimony provided would have confused the jury. Gaunt argues that this testimony was material and likely influenced the jury's decision, particularly since he received the maximum sentences for his offenses.

Gaunt argues that the aforementioned alleged error was further compounded by the introduction of confusing or misleading testimony given by Joey Stanton. On February 9, 2009, when the incident resulting in Gaunt's escape charge occurred, Stanton was serving as a consultant to the Larue County Detention Center.[2] Stanton testified that he investigated the incident in his capacity as a consultant. Stanton testified during the penalty phase of the trial concerning parole eligibility and good time credit. Stanton also opined as to the likelihood of a Class D felon's receiving parole. On that subject, he testified as follows:

> **Commonwealth**: Ok. When you were on the Parole Board, how were D felons, just in your experience and personal knowledge of being on the Parole Board, how were D felons normally treated?
>
> **Stanton**: First of all let me explain to you – A class D felon was never seen face-to-face by the Parole Board. Under administrative regulations, a class D felon is a "file review." You have the paperwork in your hands and you go through and look at that and you determine from different aspects: prior felonies, any history of problems within the jail, um, social behavior, um various things, threat to community, things like that, and then you review that and then you make your decision. And it's a two-person panel, which has to be unanimous. And then their decision is made.
> If they're not unanimous, it goes back to the full board of nine members and those nine members will vote and majority will have to rule, five members of that nine makes that determination. As far as Class D felons, this state right now is in one of the fastest growing states as far as incarceration, but to the wisdom of some of the people in Frankfort –

[2] While serving as a consultant to the LCDC in 2007, Stanton was appointed to the Kentucky Parole Board by Governor Ernie Fletcher. Stanton testified that his term on the Parole Board ended on June 30, 2010. He became a full-time employee of the LCDC on July 1, 2010.

Defense Counsel: Objection – There was no question there.

Trial Court: I'll sustain the objection.

Commonwealth: Was the objection over the Frankfort comment or over his …

Trial Court: No, we've gone way beyond the question that was asked. So let's ...

Commonwealth: My question was, 'How were Class D felons normally treated on the Parole Board?'

Stanton: Would you elaborate a little more on that question?

Commonwealth: Are they paroled quicker than felons, people that are convicted of Cs and Bs?

Stanton: They have a higher rate of parole than any other, uh, a C or B, or an A – yes.

Commonwealth: That answered my question, thank you.

Gaunt argues that the Commonwealth was allowed to present evidence of his minimum parole eligibility, pursuant to Kentucky Revised Statutes (KRS) 532.055(2)(a)(1), and that it did so through its first witness, the probation and parole officer. Thus, Gaunt argues that calling Stanton as its second witness went beyond the Commonwealth's right to present evidence of minimum parole eligibility. Gaunt argues that the testimony elicited by the Commonwealth that the likelihood for parole for a Class D felon was misleading. Gaunt argues that the testimony was not probative of the evidence before the court and was, therefore, irrelevant and incompetent evidence under Kentucky Rules of Evidence (KRE)

403. Accordingly, he argues that because it is both irrelevant and speculative, the testimony as to the likelihood of parole for Class D felons does not meet the requirement set forth in KRE 703 that evidence be helpful to the jury.

In response to Gaunt's assertions that he was denied due process during the penalty phase of his trial, the Commonwealth first argues that this issue was not properly preserved for appellate review and urges this Court to deny Gaunt's request for palpable error review. The Commonwealth argues that it is severely prejudiced because Gaunt's failure to object deprived the Commonwealth of the opportunity to clarify or correct any misstatements of fact, and that it has been placed in the position of having to present or refute evidentiary questions for the first time on appeal without the benefit of trial court objections which could have provided a developed trial court record.

Alternatively, the Commonwealth argues that any confusing testimony was either clarified by further testimony, was not objected to, or was otherwise not prejudicial. While acknowledging that Officer McCardy initially testified incorrectly that "good time" reduces an inmate's parole eligibility date, the Commonwealth notes that this testimony was subsequently clarified by Stanton, and that following this clarification Gaunt's counsel did not object further. Concerning the argument that Stanton incorrectly stated that twenty-five percent of the sentence is cut off as soon as an inmate is incarcerated due to "meritorious" good time, the Commonwealth argues that Stanton was "obviously" referring to

statutory good time.[3] Concerning Stanton's testimony as to the differences between fifteen- and twenty-percent parole eligibility for Class D offenders, the Commonwealth argues that Stanton's testimony was correct on this issue. It argues that parole eligibility of fifteen percent is set forth in KRS 439.340(3)(a) and is only applicable to nonviolent Class D felons with sentences of imprisonment from one to five years. The Commonwealth argues that Stanton's testimony took place prior to the time that the jury enhanced Gaunt's sentence with the PFO charge and, therefore, was correct concerning Gaunt's Class D felony sentence at that time. Accordingly, the Commonwealth argues that nothing cited in Gaunt's brief rises to the level of prejudice necessary to require reversal. We disagree and reverse and remand on this issue for a new penalty phase.

First, we address Gaunt's request for palpable error review. RCr 10.26 provides that, "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." To be palpable, an error must result in manifest injustice, either through the probability of a different result or error so fundamental as to threaten a defendant's entitlement to due process of law. *Jones v. Commonwealth*, 331 S.W.3d 249, 256 (Ky. 2011).

[3] The Commonwealth attempts to support this assertion with an explanation of the manner in which the Department of Corrections records credit for "good time" – actually crediting the time in advance, as a "placeholder" so the Department only has to make its calculations annually.

Our courts have enunciated at least three factors to be considered before an appellate court determines that a particular issue should be reviewed for palpable error. First, the error must be obvious, and must undermine the defendant's constitutional right to a fair and impartial adjudication. The test for determining if an error is palpable, under this rule, is whether it is substantive and obvious, or otherwise seriously affects the fairness, integrity, or public reputation of the judicial proceeding. *See Commonwealth v. Mixon*, 827 S.W.2d 689, 693 (Ky. 1992). Secondly, the error must affect the substantive rights of the defendant. RCr 10.26. Finally, the error must have resulted in "manifest injustice." Our courts have held that there is no manifest injustice unless there is a substantial possibility that the outcome would have been different but for the error. *See Castle v. Commonwealth*, 44 S.W.3d 790 (Ky.App. 2000).

Sub judice, we believe palpable error review to be warranted. In *Robinson v. Commonwealth*, our Kentucky Supreme Court undertook a palpable error review when the defendant claimed that the testimony of a probation and parole officer was false or incorrect. The Commonwealth asserts that *Robinson* is distinguishable. We disagree. In *Robinson*, as in the matter *sub judice*, the Commonwealth pointed out in its closing argument, incorrectly, that good time credits would be figured into the defendant's parole eligibility. The Commonwealth argues that *Robinson* was based upon incorrect factual assumptions which could have been corrected or clarified at trial had the defendant objected, which it asserts is somehow different than what happened herein. We see

no distinguishable difference and, accordingly, review this matter for palpable error.

In reviewing this issue, we note that KRS 197.045[4] provides for the possibility of good time credits. That provision clearly indicates that good time credits are not automatically applied to a sentence. Certainly, the statute provides that upon completion of certain education programs and degrees, one will receive credit. Otherwise, however, the statute clearly provides that one, "may receive a credit on his sentence," and that such credit is "for each month served." Thus, contrary to the interpretation urged by the Commonwealth, the credit is not actually "taken off the top" of a sentence, but rather accrues in conjunction with time served.

As our Supreme Court held in *Robinson, supra*, "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 (quoting *United States v. Agurs*, 427 U.S. 97, 103 (1976)). Moreover, when the

[4] That provision provides that, "Any person convicted and sentenced to a state penal institution may receive a credit on his sentence of not exceeding ten (10) days for each month served, except as otherwise provided in this section, to be determined by the department from the conduct of the prisoner. In addition, the department shall provide an educational good time credit of ninety (90) days to any prisoner who successfully receives a general equivalency diploma or a high school diploma, a two (2) or four (4) year college degree, a two (2) year or four (4) year certification in applied sciences, or a technical education diploma as provided and defined by the department, or who completes a drug treatment program or other program as defined by the department that requires participation in the program for a minimum of six (6) months; prisoners may earn additional credit for each program completed. The department may forfeit any good time previously earned by the prisoner or deny the prisoner the right to earn good time in any amount if during the term of imprisonment, a prisoner commits any offense or violates the rules of the institution."

maximum sentence has been imposed by the verdict, prejudice is presumed. *Taulbee v. Commonwealth*, 438 S.W.2d 777, 779 (Ky. 1969).

This Court is of the opinion that *sub judice*, the Commonwealth should have known that the testimony elicited concerning the effect of good time credits on parole eligibility was false. Despite attempts by defense counsel to clarify same, the Commonwealth again, in its closing argument, reiterated that the distinction between the two was irrelevant. We do not, however, find it to be a distinction without a difference and cannot conclude with any certainty that the testimony from Stanton and the remarks made during the closing argument did not confuse the jury, or lead it to give a greater sentence than it might have without this information. Accordingly, we believe reversal for a new penalty phase is warranted.

As his second basis for appeal, Gaunt argues that the trial court erred in failing to give a "choice of evils" instruction to the jury. Gaunt argues that this issue was preserved on appeal because his trial counsel requested a jury instruction on extreme emotional disturbance (EED), which was denied after discussion with the court. In the alternative, Gaunt requests palpable error review.

Gaunt states that the defense theory throughout the trial was justification. Gaunt took the stand in his own defense, and testified as follows:

> **Commonwealth**: Do you think it's a defense to anyone else that has a sick child or a sick parent to leave the jail, because they think something bad is going to happen to their family member?

Gaunt: That's not up to me to decide, ma'am.

Commonwealth: Do you think that's a defense for you?

Gaunt: Yes ma'am.

Commonwealth: So you think you should be held "not guilty" of escape because you had a sick child?

Gaunt: No ma'am.

Commonwealth: So you think you should be held guilty?

Gaunt: Yes ma'am.

After the jury was excused, the trial court expressed concern over the testimony offered by Gaunt, stating:

> I guess I'm somewhat at a loss, I think Mr. Gaunt testified that he should be found guilty of the escape – I don't, I've never had that happen before, is he wanting to enter a plea to that or is he wanting the jury to find him guilty of that? I'm somewhat confused after that testimony.

Defense counsel explained, "I believe he still wants the jury to decide and to decide his punishment … by way of some clarification, I am going to ask for an EED instruction." Defense counsel and the court then engaged in a discussion of whether an EED instruction was available for the charge of escape in the second degree. The court determined that it did not think EED was a defense applicable to escape, and declined to instruct the jury as to any theory of defense or justification.

Gaunt now argues that he had a right to have the jury instructed as to his proposed defense, and that if EED itself was not appropriate as a justification

defense,[5] then it should have been included under a "choice of evils" instruction as codified in KRS 503.030. Essentially, Gaunt argues that, as in "the case of an individual speeding through a school zone to get a dying person to the hospital," he chose to escape from the Larue County Detention Center in order to see his child, whom he believed was dying in the hospital. Gaunt argues that he was prejudiced by the lack of an instruction, and that reversal is warranted.

In response, the Commonwealth again asserts that RCr 10.26 is not a substitute for the contemporaneous objection requirement. It states that the Kentucky Supreme Court has not yet ruled that a failure to request a "choice of evils" instruction amounts to palpable error. The Commonwealth argues that in this instance, the question was not a palpable error, did not affect Gaunt's constitutional rights, and did not result in manifest injustice.

Alternatively, the Commonwealth argues that Gaunt never requested a "choice of evils" jury instruction and that, notwithstanding this fact, there was no reason for the trial judge to have given such an instruction to the jury. The Commonwealth argues that under the law of this Commonwealth, it does not appear that the "choice of evils" defense applies to an escape charge. It asserts that there was nothing in Gaunt's testimony to indicate that he thought himself to be in physical danger, and that the defense does not apply when the defendant believes

[5] Gaunt seems to tacitly acknowledge, and we agree, that an EED instruction was not appropriate for the charge of escape in the second degree. EED is not listed as a separate justification defense under KRS Chapter 403. While statutorily available for the crimes of murder, manslaughter, fetal homicide, and assault, Gaunt is not charged with any of those defenses *sub judice.* Accordingly, we believe the court appropriately denied Gaunt's request for an EED instruction, and do not address this issue further herein.

that someone else is in physical danger. In addition, the Commonwealth argues that since Gaunt acknowledged his child was already being cared for in the hospital, there was no evidence that his decision required an immediate choice to avoid further injury, as the law requires. Accordingly, the Commonwealth asserts that there was no error. We agree and affirm on this issue.

We address only the Commonwealth's argument that the "choice of evils" defense is not available based on the facts *sub judice* because it is dispositive. We begin our analysis with KRS 503.030(1), which sets forth the elements of a "choice of evils" defense, and states as follows:

> Unless inconsistent with the ensuing sections of this code defining justifiable use of physical force or with some other provision of law, conduct which would otherwise constitute an offense is justifiable when the defendant believes it to be necessary to avoid an imminent public or private injury greater than the injury which is sought to be prevented by the statute defining the offense charged, except that no justification can exist under this section for an intentional homicide.

Essentially, in order for a "choice of evils" defense to apply, it must be shown that a defendant's conduct was necessitated by a specific and imminent threat of injury under circumstances which left him with no reasonable and viable alternative, other than the violation of the law for which he stands charged. *Senay v. Commonwealth*, 650 S.W.2d 259, 260 (Ky. 1983).

Sub judice, according to Gaunt's own testimony, he chose to escape because he believed that his son was ill, in the hospital, and might be dying. There was nothing in Gaunt's testimony to indicate that he believed himself to be in any

danger, nor that he believed he could do anything to change the condition of his child's health by being present at the hospital. Accordingly, we agree with the court below that there was simply no evidence to justify a jury instruction on the "choice of evils" defense.

Wherefore, for the foregoing reasons, we hereby reverse the December 21, 2010, Final Judgment of Conviction entered by the Larue Circuit Court, and remand this matter for a new penalty phase in accordance with the opinion contained herein.

CLAYTON, JUDGE, CONCURS.

VANMETER, JUDGE, CONCURS IN RESULT ONLY.

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