

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-000702-MR

JOSHUA W. TURNER

APPELLANT

v.

APPEAL FROM LAUREL CIRCUIT COURT
HONORABLE GREGORY A. LAY, JUDGE
ACTION NO. 09-CR-00263

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING IN PART,
REVERSING IN PART,
AND REMANDING

** ** * ** * ** *

BEFORE: DIXON, MAZE AND NICKELL, JUDGES.

MAZE, JUDGE: On October 16, 2009, a Laurel County grand jury returned an indictment charging Joshua W. Turner with one count of first-degree possession of a controlled substance (methamphetamine), second offense, and with being a Persistent Felony Offender in the Second Degree (PFO II). On the morning of

trial, the possession charge was amended to a charge for first offense. Following a jury trial, the jury sentenced Turner to five years' imprisonment on the possession charge, enhanced to seven years by virtue of his status as a PFO II.

On appeal, Turner argues that he was entitled to a mistrial due to improper testimony by a police witness. We conclude that Turner was not entitled to a mistrial, however, as he did not request any lesser relief. Turner further argues that the trial court erred by imposing costs and fines on him despite his status as an indigent. Based on recent changes in the law on this issue, we conclude that the imposition of court costs must be reversed and this matter remanded for additional factual findings to determine whether the imposition of court costs is appropriate. Hence, we affirm in part, reverse in part, and remand for additional proceedings.

Turner first argues that the trial court should have granted his motion for a mistrial due to improper testimony about the circumstances surrounding the possession charge. The possession charge arose from events on August 24, 2009. After a pre-trial hearing in a separate case, Turner was taken into custody by the Laurel County Sheriff's Office. In the course of the arrest, Deputy Sheriff Keith Guidi searched Turner and felt an object in Turner's pocket. Deputy Guidi removed the item and found a substance that looked like a ball of bubble gum wrapped in a baggie. Deputy Guidi believed the substance to be methamphetamine, and subsequent testing confirmed this suspicion.

The current case proceeded to trial on January 11, 2011. On the morning of trial, Turner moved to exclude any evidence regarding why he was in

court on August 24, 2009. The trial judge concluded that the jury was entitled to some context as to how the crime occurred, but agreed that it was not necessary for the jury to know why Turner was in court that day. Therefore, the trial court sustained the motion to that extent.

However, when Deputy Guidi was called to testify and was asked how he came into contact with Turner on August 24, 2009, Deputy Guidi began, “we was having a regular pretrial day – criminal day.” At that point, Turner’s counsel objected and moved for a mistrial, citing the court’s pre-trial ruling. The court noted that Deputy Guidi had not divulged any specific information why Turner was in court on August 24, 2009. Nevertheless, the court agreed that his testimony violated its pre-trial ruling and sustained the objection. However, the court denied the motion for a mistrial. The trial court offered to admonish the jury to disregard the testimony, which Turner declined. The court also specifically instructed the Commonwealth to advise Deputy Guidi not to discuss why Turner was in court on August 24, 2009. Turner did not request any other relief.

Turner first argues that a mistrial was necessary because Deputy Guidi’s testimony implied that he arrested while in court on another criminal matter. Turner maintains that he was unfairly prejudiced by this testimony concerning collateral criminal matters. He further argues that an admonition would have been insufficient to cure the prejudice caused by this improper testimony.

“The standard for reviewing the denial of a mistrial is abuse of discretion.” *Bray v. Commonwealth*, 68 S.W.3d 375, 383 (Ky. 2002). A mistrial is an extreme remedy and should be resorted to only when there appears in the record a manifest necessity for such an action or an urgent or real necessity. *Id.* at 384, citing *Clay v. Commonwealth*, 867 S.W.2d 200, 204 (Ky. App. 1993). “The error must be of such character and magnitude that a litigant will be denied a fair and impartial trial and the prejudicial effect can be removed in no other way.” *Tunstull v. Commonwealth*, 337 S.W.3d 576, 591 (Ky. 2011), quoting *Bray v. Commonwealth*, 177 S.W.3d 741, 752 (Ky. 2005).

Deputy Guidi’s testimony did not create a manifest necessity for the declaration of a mistrial in this case. As the trial court recognized prior to trial, the jury was entitled to some context regarding how the possession charge arose. Deputy Guidi merely mentioned that August 24, 2009, was a criminal pretrial day. This brief reference did not necessarily imply that Turner himself was before the court on a criminal charge. To the extent that may have, this type of evidentiary error is easily cured by an admonition to the jury to disregard the testimony. *Graves v. Commonwealth*, 17 S.W.3d 858, 865 (Ky. 2000). Turner specifically rejected the court’s offer of an admonition or other relief. Under the circumstances, the trial court did not abuse its discretion by denying Turner’s motion for a mistrial.

Turner next challenges the trial court’s imposition of \$155 in court costs following his conviction. Shortly after his arraignment, Turner filed an

affidavit of indigency and requested appointment of counsel. The trial court found Turner to be indigent and appointed counsel. Turner points to KRS 31.110(1)(b), which states that when counsel is appointed for a “needy person,” “[t]he courts in which the defendant is tried shall waive all costs.” Since he had previously been found to be a “needy person” under the statute, Turner argues that the trial court was not authorized to impose court costs on him.

In several recent cases, the Kentucky Supreme Court reversed orders imposing the statutory costs upon defendants previously found to be “needy” for purposes of KRS Chapter 31. *Wiley v. Commonwealth*, 348 S.W.3d 570 (Ky. 2010); *Ladriere v. Commonwealth*, 329 S.W.3d 278 (Ky. 2010); and *Travis v. Commonwealth*, 327 S.W.3d 456 (Ky. 2010). But more recently, in *Maynes v. Commonwealth*, 361 S.W.3d 922 (Ky. 2012), the Court held “that [a] trial court [is] authorized ... to impose court costs [on a defendant] despite [his] status as an indigent defendant entitled to the services of a public defender.” *Id.* at 929.

In so holding, the Court distinguished between KRS 31.110, which provides for appointment of counsel to a “needy” person, and KRS 23A.205, which provides for imposition of court costs in a criminal case “unless the court finds that the defendant is a poor person as defined by KRS 453.190(2) and that he or she is unable to pay court costs and will be unable to pay the court costs in the foreseeable future.” The Court pointed out that in *Wiley*, *Ladriere*, and *Travis*, the defendants were all sentenced to more than twenty years and there was no reasonable basis to conclude that they would be able to pay court costs in the

foreseeable future. By contrast, the defendant in *Maynes* was ordered to pay \$130 in court costs within six months after the entry of a diverted incarceration sentence. Given these circumstances, the Supreme Court concluded that the imposition of court costs was authorized under KRS 23A.205. *Id.* at 932-33.

In short, *Maynes* imposes a fact-based test under which the trial court must have some reasonable basis to believe that the defendant can or will soon be able to pay court costs. *Id.* at 930. *See also Butler v. Commonwealth*, 367 S.W.3d 609, 616 (Ky. App. 2012). Here, the trial court ordered Turner to pay \$155 in court costs “within sixty (60) days from release from custody.” These court costs are relatively modest and the court gave Turner a reasonable amount of time to pay the costs following his release from incarceration. On the other hand, Turner was sentenced to seven years’ imprisonment, to be served consecutively with a sentence imposed in another case. These factors significantly diminish any expectation that Turner could reasonably be expected in the near future to acquire the means to pay even these costs. Furthermore, the trial court granted Turner’s motion to proceed *in forma pauperis* on appeal, finding that he remains a “poor person” within the meaning of KRS 453.190(2).

Considering the uncertain state of the law on this issue over the past several years, we cannot criticize the trial court’s handling of the question of court costs. But based on the holding in *Maynes*, we conclude that additional factual findings are necessary to support the imposition on court costs in this case. Therefore, we must remand this matter for additional findings to determine

whether Turner can be reasonably expected to acquire the means to pay these court costs in the near future or within the time allowed following his release from incarceration.

Accordingly, the judgment of conviction by the Laurel Circuit Court is affirmed, except with respect to the imposition of court costs. We remand that issue for additional factual findings as set forth in this opinion.

ALL CONCUR.

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