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Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-001398-MR

ERNEST MERRIWEATHER — APPELLANT

v.

APPEAL FROM CHRISTIAN CIRCUIT COURT
HONORABLE ANDREW SELF, JUDGE
ACTION NOS. 09-CR-00429 AND 10-CR-00005

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING IN PART, REVERSING IN PART,
AND REMANDING

** ** ** ** **

BEFORE: CLAYTON, STUMBO AND THOMPSON, JUDGES.

STUMBO, JUDGE: Ernest Merriweather appeals from his conviction and sentencing in Christian Circuit Court. Merriweather was convicted of possession of a controlled substance, first-degree, subsequent offense, and of being a persistent felony offender in the first degree. He was sentenced to a total of fifteen years' imprisonment. On appeal, Merriweather makes a number of arguments

concerning pretrial, trial, and sentencing issues. We affirm the majority of the issues, but find that Merriweather is entitled to a new sentencing hearing. We therefore affirm in part, reverse in part, and remand for a new sentencing hearing.

On April 20, 2009, Merriweather allegedly stole Patsy Hale's cell phone. Hale testified at trial that she called the cell phone and it was answered by a man who demanded $150 to reclaim her phone. He directed her to meet him at the intersection of First and Sycamore Streets in Hopkinsville. Hale went to the Hopkinsville Police Station and reported the theft. Officer Brandon Tedford, along with other officers, went to the meeting place and had Hale call the cell phone. The officers saw Merriweather leave a house at 111 Sycamore Street, which is near the intersection, and walk toward the intersection. Merriweather was also talking on a cell phone when he approached the intersection. The officers approached Merriweather and Officer Tedford took the phone from him. The phone was the one Hale reported stolen. Officer Tedford placed Merriweather under arrest. Officer Tedford searched Merriweather incident to arrest and found two baggies of suspected crack cocaine, over $600 in cash, and rolling papers.

After Merriweather's arrest, Officer Franklin Pollard went to the house at 111 Sycamore Street, where he smelled the odor of marijuana. A search warrant was obtained for that address. Among the items found inside were a plate with a razor and powder residue on it, a handgun, baggies, digital scales, and a marijuana "roach." The house was owned by Merriweather's cousin.

Merriweather was indicted for trafficking in a controlled substance in the first degree, receiving stolen property over $300, possession of drug paraphernalia, and of being a persistent felony offender in the first degree. At trial, Merriweather denied having been inside the house at 111 Sycamore Street. He also denied having any crack or the cell phone on his person. He testified that the crack cocaine and cell phone had been found inside the house at 111 Sycamore Street and placed on him by Officer Tedford. A jury convicted Merriweather of the lesser charge of possession of a controlled substance in the first degree and of being a persistent felony offender in the first degree. He was acquitted on all the other charges. This appeal followed.

We will first discuss Merriweather's claim that the trial court erred in denying his motion to suppress the evidence. Merriweather moved to suppress all items seized from him when he was stopped and found to be in possession of Hale's cell phone. Merriweather argued that the initial stop by the Hopkinsville Police was illegal because there were not enough facts for a reasonable officer to believe he had probable cause to arrest Merriweather. Merriweather claims that the fact that he was talking on a cell phone near the intersection of First and Sycamore Streets is too vague to support probable cause.

> When reviewing an order that decides a motion to suppress, the trial court's findings of fact are "conclusive" if they are "supported by substantial evidence." Using those facts, the reviewing court then conducts a [*de novo*] review of the trial court's application of the law to those facts to determine whether the decision is correct as a matter of law.

Commonwealth v. Jones, 217 S.W.3d 190, 193 (Ky. 2006) (citations omitted). "[P]robable cause for arrest involves reasonable grounds for the belief that the suspect has committed, is committing, or is about to commit an offense." *Baltimore v. Commonwealth*, 119 S.W.3d 532, 538-539 (Ky. App. 2003). "To determine whether an officer had probable cause to arrest an individual, we examine the events leading up to the arrest, and then decide 'whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to' probable cause." *Commonwealth v. Mobley*, 160 S.W.3d 783, 786 (Ky. 2005) (*quoting Maryland v. Pringle*, 540 U.S. 366, 371, 124 S.Ct. 795, 800, 157 L.Ed.2d 769 (2003)).

Here, Officer Tedford was the only witness to testify at the suppression hearing and the facts have not been challenged. Merriweather argues that the trial court erred as a matter of law in finding probable cause. We agree with the Commonwealth and find that there was sufficient probable cause to arrest Merriweather. Hale coordinated with the person who had her phone to meet at a specific intersection. At around 9:30 p.m., Hale was talking to the person who had her phone. At the same time, police officers saw a man walking toward the intersection talking on a cell phone. No other person was on the street at the time. An objectively reasonable police officer would have believed that this was the person who had allegedly stolen Hale's cell phone. The trial court did not err in denying Merriweather's motion to suppress.

The next argument on appeal is that the trial court erred in denying defense counsel the opportunity to question a juror about a potential bias. This error was unpreserved; therefore, it will be reviewed pursuant to Kentucky Rules of Criminal Procedure (RCr) 10.26.

> A palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or 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.

RCr 10.26. "[I]f upon consideration of the whole case the reviewing court does not conclude that a substantial possibility exists that the result would have been any different, the error complained of will be held to be nonprejudicial." *Jackson v. Commonwealth*, 717 S.W.2d 511, 513 (Ky. App. 1986) (citation omitted).

During *voir dire*, the Commonwealth inquired as to whether the potential jurors knew Ms. Patsy Hale. There was no response by any of the potential jury members. The Commonwealth called Hale as its first witness. When Hale entered the courtroom, the Commonwealth requested a bench conference and informed the court that a juror had raised her hand and indicated that she knew Hale. The court declined to interview the juror. Defense counsel did not request that the juror be interviewed. Also, it should be noted, that no alternate juror was seated on the panel.

Merriweather argues that "a party charged with a criminal offense is entitled to be tried by a fair and impartial jury composed of members who are disinterested

and free from bias and prejudice, actual or implied or reasonably inferred." *Tayloe v. Commonwealth*, 335 S.W.2d 556, 558 (Ky.1960). We believe it would have been prudent for the trial court to inquire as to how the juror knew Hale, but does the court's failure to do so equate to manifest injustice? We believe, in this case, it does not. Defense counsel did not request that the trial court discover the link between the juror and Hale. Merriweather also did not discover how the juror member knew Hale after the trial so as to inform this Court. We cannot speculate as to how the juror knew Hale, therefore, no bias can be presumed. Furthermore, since Merriweather was acquitted of receiving stolen property (Hale's cell phone), it appears as though he suffered no prejudice from having someone on the jury who knew Hale. We find no error on this issue.

Merriweather also argues that the trial court impermissibly limited the defense's cross-examination of Officer Tedford. During Officer Tedford's cross-examination, defense counsel asked Officer Tedford if he was still employed by the Hopkinsville Police Department, to which the officer answered in the negative. Defense counsel then asked if he had been fired. The Commonwealth objected. At the bench conference, defense counsel argued that the line of questioning was to show Officer Tedford's possible bias[1] by asking him if he had been fired from the Hopkinsville Police Department. Specifically, it was posited that if Officer Tedford was fired from the police department for misconduct, then he may have

[1] From the argument presented at trial and in Merriweather's brief, it appears as though trial counsel meant to question Officer Tedford about dishonesty or misconduct and not bias.

acted improperly on the night Merriweather was arrested.[2] The Commonwealth stated that Officer Tedford was not fired, but that he resigned. The trial court sustained the objection, but allowed defense counsel to ask if the officer had been fired. Defense counsel then asked the officer if he had been fired. Officer Tedford answered that he had not been fired, he had resigned. The trial court would not allow defense counsel to go any further with that line of questioning, finding that it was an irrelevant collateral issue.

We find that this issue was not preserved for our review because no avowal testimony was requested by defense counsel.[3] We therefore do not know what other questions the defense would have asked or what evidence or testimony would have come from further questioning. In reviewing this issue for palpable error pursuant to RCr 10.26, we also find no error. Officer Tedford stated that he was not fired, but that he resigned. This would seem to disprove the defense's theory that he was fired due to misconduct. Again, without avowal testimony, our analysis cannot go further.

We next discuss Merriweather's argument that the Commonwealth improperly introduced a prior conviction from 1995 during the penalty phase. Prior to the penalty phase, the parties discussed the prior felonies to be introduced and instructed on for purposes of the persistent felony offender charge. The

[2] Part of Merriweather's defense was that Officer Tedford planted the drugs and cell phone on him.

[3] [T]rial attorneys in Kentucky must offer avowal testimony from the witness himself or herself in order to preserve such an issue for appellate review [.]" *Commonwealth v. Ferrell*, 17 S.W.3d 520, 523 (Ky. 2000).

Commonwealth had certified documents relating to three prior felonies, but only a CourtNet printout regarding the 1995 felony. The trial court determined that a CourtNet document is not reliable enough to be used as proof of a prior felony for persistent felony offender purposes and the parties agreed to remove the 1995 felony conviction from the persistent felony offender instructions.

During the penalty phase, Merriweather testified on his own behalf. On cross-examination, the Commonwealth asked him if he had a felony conviction from 1995. The defense objected, arguing that the 1995 conviction was not to be mentioned. The trial court overruled it and allowed the Commonwealth to ask the question. Merriweather responded that he did not remember whether or not he had a felony conviction from 1995. Merriweather argues that it was improper for the trial court to allow the question since the Commonwealth only had an inadmissible CourtNet document relating to the 1995 conviction.

The case of *Finnell v. Commonwealth*, 295 S.W.3d 829 (Ky. 2009), is relevant to this analysis.

> During the penalty phase of a trial, the Commonwealth may offer evidence of a defendant's prior convictions, both felony and misdemeanor. KRS [Kentucky Revised Statutes] 532.055(2)(a)(2) (truth-in-sentencing statute). However, in order to obtain a conviction for persistent felony offender, the Commonwealth *must* prove the status by introducing evidence of one prior felony conviction for PFO in the second degree and two or more prior felony convictions for PFO in the first degree. KRS 532.080(1),(2). This is obviously done after the guilt phase of the trial, and if there is a PFO charge, the jury first decides the penalty

> for the underlying offenses, then the enhancement that comes from the PFO status, if any.
>
> This Court has approved using documents, such as certified copies of the judgment, to prove the prior convictions, and this Court has allowed the official records of convictions to be read to the jury. *E.g., Martin v. Commonwealth,* 13 S.W.3d 232, 235 (Ky.1999); *Kendricks v. Commonwealth,* 557 S.W.2d 417, 419 (Ky.1977). However, as Justice Combs pointed out in his dissent in *Commonwealth v. Mixon,* 827 S.W.2d 689 (Ky.1992), there must be an "*official* record or judgment" forming the basis of the evidence, because there is a presumption of regularity of official records upon which a defendant can rely. *Id.* at 693 (emphasis added). The majority in *Mixon* found no palpable error when testimony came from an uncertified document, but that should not be read as an endorsement of using anything other than official records or certified copies thereof.
>
> CourtNet is a product that is compiled by the Administrative Office of the Courts (AOC) that is generally useful for investigation into a person's background, but it is not intended as an official record of that background. In fact, CourtNet's user agreement states that the AOC "*CANNOT GUARANTEE* the accuracy of information obtained via CourtNet." Criminal Justice Agency, CourtNet Individual User Agreement, http:// courtnet. kycourts. net/ courtnet/ manuals/ Court Net CJIndividual. pdf. It further states that "[d]ata obtained from this system is not an official court record" and that "[i]nformation received from CourtNet ... may not at any particular moment reflect the true status of court cases." *Id.*

Id. at 834.

In *Finnell*, *supra*, the Commonwealth spent eight minutes reading from a CourtNet printout listing all of the defendant's prior fourteen misdemeanor convictions and a single felony conviction. The Commonwealth had already

proven the felony conviction via a certified copy of the judgment for persistent felony offender purposes and was using the CourtNet document to introduce evidence for truth-in-sentencing purposes. The Kentucky Supreme Court stated: "[i]t appears from this that the Commonwealth thought it had to prove the [persistent felony offender status] with a copy of a certified judgment, but could introduce truth-in-sentencing evidence with something less. This is not so." *Id.* at 835. The Court went on to say:

> The purpose of truth in sentencing is to insure that a jury is well-informed about the person on trial. *Commonwealth v. Bass,* 777 S.W.2d 233, 234 (Ky. 1989). It is geared toward giving the jury information relevant to arriving at an appropriate sentence for the offender. *Williams v. Commonwealth,* 810 S.W.2d 511, 513 (Ky. 1991). It is apparent that the legislature believed that an offender's prior criminal history had weight in deciding how he should be punished, and since that is the effect of such evidence, it must be competent to prove the convictions. It naturally follows that evidence based on a document such as CourtNet, which proclaims that it is not official, may not reflect the true status of cases, and whose accuracy cannot be guaranteed, is not competent to be weighed in fixing a penalty. Introducing fourteen misdemeanors would be irrelevant if it did not have an effect on the sentence. Given the effect such evidence is assumed to have, it cannot be said that it had no effect on the [persistent felony offender] penalty as well as that for the underlying offenses.
>
> CourtNet is not an appropriate document to use to influence a jury's decision on fixing a penalty. It lacks the requisite indicia of reliability necessary to reliably prove a defendant's prior convictions. To do that, the evidence of prior convictions must come from the official court record, or certified copies thereof.

Id.

In the case at hand, the Commonwealth sought to elicit testimony from Merriweather about his 1995 conviction for truth-in-sentencing purposes, not persistent felony offender purposes. The Commonwealth did not introduce the CourtNet document showing the 1995 conviction into evidence, it only used it as a basis to inquire from Merriweather as to whether the conviction existed. Had the Commonwealth sought to use the CourtNet document to impeach Merriweather, or tried to introduce it when Merriweather stated he did not remember a 1995 conviction, then that would have been improper. Unlike in *Finnell*, the Commonwealth in this case did not introduce the CourtNet document and its contents into evidence; therefore, there is no error.

We do find, however, that there was an error in the penalty phase that necessitates a remand for a new penalty phase. The penalty phase instructions required the jury to decide if Merriweather would be punished for possession of cocaine or for possessing cocaine for a second time (a.k.a. subsequent offense). The jury would then have to determine whether the possession offense would be enhanced with the persistent felony offender status. In order to prove the subsequent offense enhancement of the possession of cocaine charge, one prior possession conviction had to be introduced into evidence. In order to prove the persistent felony offender status enhancement, two prior felony convictions had to be introduced. In all, Merriweather had three prior felony convictions, two possession of a controlled substance convictions (hereinafter Conviction 1 and

Conviction 2) and a theft by unlawful taking over $300 conviction (hereinafter Conviction 3).

The Commonwealth cannot use the same prior conviction as both a possession of a controlled substance subsequent offense enhancement and a persistent felony offender enhancement because it would violate the Constitution's protections against Double Jeopardy. *Morrow v. Commonwealth*, 77 S.W.3d 558, 562 (Ky. 2002). For example, if Merriweather only had one prior conviction, such as a conviction for possession of a controlled substance, then that conviction could only be used as a subsequent offense enhancement or a persistent felony offender enhancement, not both. In the case at hand, Merriweather had three prior felonies. This could have allowed the Commonwealth to seek both the subsequent offense enhancement and the persistent felony offender enhancement.

However, this is not what happened in the jury instructions. The jury instructions listed Conviction 1 and Conviction 2 in the subsequent offense portion and Conviction 1, Conviction 2, and Conviction 3 in the persistent felony offender portion. Conviction 1 and Conviction 2 were used to prove both enhancements. Even though Merriweather had enough prior felony convictions for both enhancements, the jury could have used one of the drug convictions for both enhancements. In other words, the jury could have used Conviction 1 for both the subsequent offense enhancement and the persistent felony offender enhancement. Under *Morrow*, *supra*, this is a Double Jeopardy violation and reversal is required. We therefore remand for a new penalty phase.

Merriweather also argues on appeal that the trial court erred in ordering the forfeiture of the $659.13 is cash found on Merriweather when he was arrested. Merriweather argues that because he was acquitted of the trafficking charge, the money found on him was not part of a drug transaction and therefore not subject to forfeiture. We disagree.

Pursuant to KRS 218A.410(1)(j),

> [e]verything of value furnished, or intended to be furnished, in exchange for a controlled substance in violation of this chapter, all proceeds, including real and personal property, traceable to the exchange, and all moneys, negotiable instruments, and securities used, or intended to be used, to facilitate any violation of this chapter; except that no property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by him or her to have been committed or omitted without his or her knowledge or consent. It shall be a rebuttable presumption that all moneys, coin, and currency found in close proximity to controlled substances, to drug manufacturing or distributing paraphernalia, or to records of the importation, manufacture, or distribution of controlled substances, are presumed to be forfeitable under this paragraph. The burden of proof shall be upon claimants of personal property to rebut this presumption by clear and convincing evidence. The burden of proof shall be upon the law enforcement agency to prove by clear and convincing evidence that real property is forfeitable under this paragraph[.]

The Commonwealth sought the forfeiture of the $659.13 because it was found on Merriweather's person, along with drugs.

> It is well-established that the Commonwealth bears the burden of proof in forfeiture actions. *Osborne v. Commonwealth,* 839 S.W.2d 281 (Ky.1992). To meet its burden of proof and make a *prima facie* case, the

> Commonwealth must produce "slight evidence of traceability." *Id.* at 284. This means that the Commonwealth must "produce some evidence that the currency or some portion of it had been used or was intended to be used in a drug transaction." *Id.* If the Commonwealth provides additional proof that the currency sought to be forfeited was found in close proximity, then it is deemed sufficient to make a *prima facie* case. If the Commonwealth establishes its *prima facie* case, the burden is then on the defendant to rebut this presumption by clear and convincing evidence. *Id.*

Smith v. Commonwealth, 339 S.W.3d 485, 487 (Ky. App. 2010). In addition, a conviction for trafficking is not required to show money found in close proximity to drugs is subject to forfeiture. *Id.* at 487 – 488.

In the case at hand, we find that the Commonwealth provided "slight evidence of traceability" sufficient to make a *prima facie* case. Testimony revealed that Merriweather was in possession of two baggies of crack cocaine, which, according to Officer Tedford, indicated more than just personal use. Additionally, there was testimony that Merriweather had been seen exiting the house at 111 Sycamore Street and during a subsequent search of that residence, officers found a handgun, baggies, digital scales, and a marijuana roach. These items are suggestive of drug trafficking. This is evidence that the money had been used or was intended to be used in a drug transaction. *See Smith*, *supra*.

The burden then shifted to Merriweather to prove by clear and convincing evidence that the money was not part of a drug transaction. Merriweather's only evidence was that the money was obtained from gambling and work. The trial court found that this did not rebut the presumption that the cash was forfeitable.

> The Court of Appeals . . . [is] entitled to set aside the trial court's findings only if those findings are clearly erroneous. And, the dispositive question that we must answer, therefore, is whether the trial court's findings of fact are clearly erroneous, i.e., whether or not those findings are supported by substantial evidence. "[S]ubstantial evidence" is "[e]vidence that a reasonable mind would accept as adequate to support a conclusion" and evidence that, when "taken alone or in the light of all the evidence, . . . has sufficient probative value to induce conviction in the minds of reasonable men." Regardless of conflicting evidence, the weight of the evidence, or the fact that the reviewing court would have reached a contrary finding, "due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses" because judging the credibility of witnesses and weighing evidence are tasks within the exclusive province of the trial court. Thus, "[m]ere doubt as to the correctness of [a] finding [will] not justify [its] reversal," and appellate courts should not disturb trial court findings that are supported by substantial evidence.

Moore v. Asente, 110 S.W.3d 336, 353-354 (Ky. 2003)(citations omitted). We find that the trial court's finding regarding the forfeiture of Merriweather's cash was not clearly erroneous.

Merriweather makes one final argument on appeal. He argues that he was entitled to the remedial benefit of the amended statutes KRS 218A.1415 and KRS 532.080(8).[4] After the guilt phase of Merriweather's trial, but before the penalty phase, the amended version of these two statutes became effective. The old version of KRS 218A.1415 set the maximum penalty for its violation at ten years' imprisonment. The amended version set the maximum penalty at three years. The previous version of KRS 532.080 allowed a persistent felony offender penalty

[4] Respectively, the possession of a controlled substance and persistent felony offender statutes.

enhancement for possession of a controlled substance conviction. The amended version specifically excluded KRS 218A.1415 from persistent felony offender enhancement. Merriweather was sentenced under the old versions of the statutes and received a total of fifteen years' imprisonment. Under the amended version, the maximum sentence he could have received would have been three years. Because we are reversing and remanding for a new penalty phase, we find this issue is moot. It can be taken up again by Merriweather at the trial level.

Based on the foregoing, we affirm in part, reverse in part, and remand for a new penalty phase.

THOMPSON, JUDGE, CONCURS.

CLAYTON, JUDGE, CONCURS IN RESULT ONLY.

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