

Commonwealth of Kentucky
Court of Appeals

NO. 2014-CA-000315-MR

MARCUS J. LAWRENCE

APPELLANT

v. APPEAL FROM WARREN CIRCUIT COURT
HONORABLE STEVE ALAN WILSON, JUDGE
ACTION NO. 12-CR-00150

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: CLAYTON, D. LAMBERT, AND NICKELL, JUDGES.

CLAYTON, JUDGE: Following a trial by jury in the Warren Circuit Court, Marcus J. Lawrence was convicted of trafficking in a controlled substance, first degree; promoting contraband, first degree; tampering with physical evidence; possession of marijuana; possession of drug paraphernalia; failure to properly signal; giving a peace officer a false name; and, being a persistent felony offender,

first degree. As recommended by the jury, he was sentenced to a total of fifteen years.

Lawrence, *pro se*, appeals from the February 6, 2014 judgment of conviction. Having carefully considered the arguments and reviewed the record, we affirm.

BACKGROUND

On July 8, 2011, at 12:50 a.m., a patrol officer with the Bowling Green Police Department (hereinafter “BGPD”), Blake Allen, observed Lawrence stop on the roadway, back up, and turn right into an apartment complex without using a turn signal. Allen decided to conduct a traffic stop. After Lawrence parked and got out of the car, Allen approached him. When Allen got near Lawrence, he smelled a strong odor of marijuana emanating from Lawrence. Allen asked Lawrence to take a field sobriety test. Lawrence agreed and passed the test.

However, because of the smell of marijuana, Allen asked Lawrence for consent to search, and Lawrence agreed. When Allen searched Lawrence, he found a small baggie of marijuana in the left front pocket of his shorts. At this point, Allen asked Lawrence for his name in order to cite him for the traffic violation and/or the marijuana possession.

Allen advised Lawrence that providing a false name was a chargeable offense. Lawrence responded that his name was “David Blakey,” and provided a date of birth and a social security number. Allen contacted dispatch to run the identifiers but this information was not on file. Lawrence then informed Allen that

his driver's license had been issued in Indiana, but Allen found it, too, was not on file. Once it was ascertained that Lawrence had given false identifiers, Allen detained him to investigate his identity. Lawrence was searched for weapons, handcuffed, and placed in the backseat of the police cruiser.

Meanwhile, a second BGD officer, Robbie Perry, arrived to provide assistance. Perry observed a female at the apartment complex who had come out of her apartment and appeared to be viewing the stop. The woman said that she was Facebook friends with Lawrence, and he was there to visit her. Nevertheless, she could not provide Lawrence's real name since he used an alias on his Facebook account.

Eventually, Lawrence provided an address in Bowling Green, which allowed the officers to determine his name and birth date. They matched this information with his driver's license. The process from the initial stop to the verification of Lawrence's identity took approximately an hour and a half. During this time, Lawrence did not fight or resist arrest.

While the officers were checking Lawrence's identity, they contacted canine unit officer, David Marshall, who was also with the BGD. He came to the scene and performed a canine search of the car. The canine search of Lawrence's car indicated the presence of a controlled substance. The resulting search of the car revealed two marijuana "roaches," rolling papers, and digital scales.

Lawrence was charged with possession of the above items and providing a false name. The officers took him to the Warren County Detention

Center. Before entering the detention center, Lawrence was asked if he had any contraband on him. The officers informed him that it was a felony to take contraband into the detention center. Lawrence answered in the negative. They proceeded to the processing and booking area where Lawrence's handcuffs were removed.

While Lawrence was being processed, Warren County Detention Center (hereinafter "WCDC") deputy, Chad Whitaker, asked him again whether he had any drugs on his person. Then, Whitaker instructed Lawrence to empty his pockets. At this time, Lawrence reached into his waist and crotch area and put something plastic into his mouth. After Whitaker saw Lawrence put the plastic into his mouth, he asked him three times to spit the object out. When Lawrence refused, Whitaker deployed his taser to restrain Lawrence's movement and stop the chewing. After the administration of the first taser, Whitaker assisted Lawrence to the floor.

Whitaker continued to ask Lawrence to spit out the object, but whenever the taser stopped, Lawrence continued chewing. Further, he resisted being handcuffed. Other deputies were present and came to help Whitaker. Ultimately, Whitaker held the taser on a nerve cluster near Lawrence's jaw to get him to open his mouth and spit out the plastic bag, which he did. Whitaker testified that he did not want to harm Lawrence but was concerned about his safety since he might choke or overdose. Lawrence resisted the handcuffs after he spit

out the bag, and the officers used the taser on him one more time. He then complied and allowed himself to be handcuffed.

Next, Lawrence was taken to the booking room to wait for Emergency Medical Services. The detention center medical staff examined Lawrence but refused to admit him because, according to him, he had consumed an unknown quantity of pills. Lawrence was then transported to the medical center.

The plastic bag, which Lawrence spit out, contained fifteen to twenty smaller bundles of a white powdery substance. It was sent to the lab and the examination determined that the substance was 8.435 grams of cocaine. Lawrence was indicted on February 15, 2012.

During the pendency of the action, Lawrence, through counsel, filed several motions. On August 5, 2013, the trial court conducted a status hearing and rescheduled the hearing on the motions. At this time, Lawrence asked to represent himself. The trial court agreed to hold a *Faretta* hearing. Additionally, the trial court ordered the Commonwealth to produce videos of the traffic stop and the booking at the detention center, or provide testimony as to the reason for the unavailability of the videos.

Following a hearing on August 29, 2013, the trial court denied Lawrence's motions. Further, the trial court denied Lawrence's request to represent himself because, according to the trial court, the waiver of his counsel was not an intelligent one. Notwithstanding the trial court's order, Lawrence's counsel filed another motion for a *Faretta* hearing.

On November 14, 2013, the trial court held another *Faretta* hearing. The trial court determined that Lawrence could represent himself since he understood the facts. However, since Lawrence did not understand the law, the trial court appointed standby counsel for the trial.

On December 5 and 10, 2013, Lawrence was tried by a jury. He took the stand on the second day of the trial and testified in his own defense. The jury found him guilty on all counts and recommended a fifteen-year sentence. Before sentencing Lawrence, the trial court ordered a psychiatric evaluation of Lawrence to be performed by Kentucky Correctional Psychiatric Center to determine whether Lawrence was a danger to himself. After Lawrence was evaluated, a competency hearing was held. At this hearing, Lawrence was represented by counsel. The trial court found Lawrence to be competent. The judgment of conviction was entered on February 21, 2014, and the trial court sentenced Lawrence to fifteen years as recommended by the jury. Additional facts will be provided as needed. Lawrence now appeals from this judgment.

The trial court granted Lawrence's motion to proceed *in forma pauperis* and appointed the Department of Public Advocacy ("DPA") to represent him on appeal. During the pendency of the action, the Kentucky Court of Appeals received a motion from the DPA to withdraw as counsel for Lawrence. It seems that after DPA was appointed as Lawrence's counsel on appeal and met with Lawrence, he fired them. He left a recorded telephone message with DPA stating

that he did not want them to represent him and followed up with a letter stating the same.

On June 9, 2014, the DPA filed motions with the Court of Appeals to withdraw from this appeal and permit Lawrence to file a *pro se* brief. DPA indicated in the motion that Lawrence did not desire representation by them. On August 18, 2014, the Court granted the DPA's motions to withdraw as counsel and for Lawrence to have an extension of time to file a *pro se* brief. Further, the Court ordered that Lawrence file a *pro se* brief.

ANALYSIS

On appeal, Lawrence makes fifteen arguments challenging the propriety of the judgment. To begin, several arguments function only as headings and are merely statements of error. In fact, the first six arguments are merely headings without argument. See below:

1. The trial court judge and prosecutor was [sic] in error refusing to provide exculpatory items of material evidence in violation of Title 28 U.S.C.A. Rule 37 & *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194.
2. The trial court judge and prosecutor was [sic] in error, not informing the jury of direct violations under the Fourth, Fifth, Sixth, Eighth, and Thirteenth Amendments violations that had already occurred under the federal constitution with prejudice.
3. The trial court judge was in error refusing to apply Title 28 U.S.C.A. Rule 37 of the (Fed. Rules Civ. P.) spoliation of evidence sanctions against the prosecution and officer for direct discovery violations.

4. The trial court judge was clearly racist, partial, bias and prejudiced and committed criminal offenses under Title 18 U.S.C.A. §§§§ 1506, 1509, 1510, 1512 and 1513 of the (Fed R. Crim. P.) allowing the destruction of material and physical evidence that are relevant discovery items.
5. The trial court judge and prosecutor made sure no person equal to Marcus J.'s age, sex, gender, race or religious groups had a chance to be selected to serve as a juror before peremptory [sic] challenges began in violation of the Fourteenth Amendment equal protections and due process clause of the federal constitution.
6. The trial court judge and prosecutor was [sic] in dishonor and error claiming they lacked the authority to dismiss all charges due to multiple procedural violations and structural errors insisting a jury trial take place in violation of the federal constitution and criminal laws of the United States.

The Kentucky Rules of Civil Procedure (CR) have certain mandated processes for making arguments in briefs. As stated in CR 76.12(4)(c)(v):

(v) An “ARGUMENT” conforming to the statement of Points and Authorities, with ample supportive references to the record and citations of authority pertinent to each issue of law and which shall contain at the beginning of the argument a statement with reference to the record showing whether the issue was properly preserved for review and, if so, in what manner.

Lawrence’s discussion of the first six arguments lacks not only ample supportive references and citations of pertinent authority for these claims, but also any authority whatsoever except for references without explanation to one federal case, some federal amendments, and one federal statute. Lawrence completely fails to provide any analysis, any arguments or any legal authority for why the trial court’s

alleged errors violate his state and federal constitutional rights. Rather, he simply makes broad statements of error. Thus, Lawrence leaves the task of determining, researching and making his arguments to this Court. That is not the function or responsibility of this Court. *See Harris v. Commonwealth*, 384 S.W.3d 117, 130-31 (Ky. 2012). Appellants who desire review by this Court must ensure their briefs comply with our Rules of Civil Procedure. For those reasons, Lawrence's first six arguments will not be addressed.

Lawrence's next three arguments, 7-9, allege a violation of the Fourteenth Amendment, obstruction of justice, and further violations of the Fourth, Eighth, Thirteenth, and Fourteenth Amendments. The factual issue implicated in the argument is his allegation that the prosecution destroyed and otherwise failed to turn over evidence. In particular, Lawrence questions the lack of videotapes from the in-car video of the original stop, the surveillance records from the jail, and the administration of a taser at the WCDC.

The genesis of this argument is one of Lawrence's six pretrial motions, which was a motion to compel discovery of any audio and/or video recordings from the detention center. A hearing was held on August 29, 2013, on all of Lawrence's pretrial motions. Following the hearing, the trial court denied all of Lawrence's pretrial motions including the motion to compel discovery. The standard of review of a trial court's decision was an abuse of discretion.

Commonwealth v. English, 993 S.W.2d 941, 945 (Ky. 1999). The test for abuse of

discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *Id.*

Officer Allen testified that the in-car video would have recorded the July 8, 2011 stop. The recorder turns on when he initiates a traffic stop, and after the stop, he labels the video according to the nature of the stop. Although videos labeled as felonies remain in the system longer than videos labeled as misdemeanors, Lawrence's stop was logged as a misdemeanor since he was charged with possession of marijuana and giving a false name. These charges are misdemeanors. Allen never thought to change the designation on the video when Lawrence was later charged with felonies.

Chief Deputy Missy Causey testified about the cameras in the detention center. She explained that a camera was in place in the holding area, and two cameras were located in the booking area. These cameras would have recorded Lawrence's altercation with the jail staff. Nonetheless, these cameras run on a nine-day loop of video to a DVR. After nine days of recordings, the tape is recorded over unless jail staff are notified to pull the tape. Causey stated that Lawrence did not request the tape during the nine-day period. She also maintained that no discussion ever occurred suggesting it be deleted. Further, no policy exists that requires the jail to keep copies of recordings. Causey also provided that because the taser does not have a camera on it, no video recording of the taser was made that night.

Lawrence argues that the prosecution violated *Brady v. Maryland*,¹ which holds that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment. *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196-97, 10 L. Ed. 2d 215 (1963). Lawrence also maintains that failure to do so is reversible error. He goes on to suggest that the trial court allowed the prosecution to destroy evidence, again violating his constitutional rights.

However, other than conclusory statements, Lawrence provides no evidence that the prosecution, under the aegis of the trial court, destroyed the evidence. Instead, the trial court listened to the explanation of the WCDC procedures related to videotaping. It then determined that no videotapes existed because of the normal protocol related to the videotaping process.

In *Collins v. Commonwealth*, 951 S.W.2d 569 (Ky. 1997), the Kentucky Supreme Court adopted the holding in *Arizona v. Youngblood*, 488 U.S. 51, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988). Thus, as authorized by *Youngblood*, absent a showing of bad faith, the due process clause is not implicated by “the failure of the State to preserve evidentiary material of which no more can be said that it could have been subjected to tests, the results of which might have exonerated the defendant.” *Collins*, 951 S.W.2d at 572 (quoting *Youngblood*, 488 U.S. at 57, 109 S.Ct. at 337).

¹ Throughout his brief, Lawrence fails to provide citations for the cases he uses to support his arguments. This failure is contrary to CR 76.12(4)(c)(v).

Moreover, the Supreme Court later held that the due process clause is implicated only when the failure to preserve the missing evidence was intentional and the potentially exculpatory nature of the evidence was known when it was lost or destroyed. *Estep v. Commonwealth*, 64 S.W.3d 805, 810 (Ky. 2002). In addition, a defendant is not precluded from exploring, commenting on, or arguing inferences about the Commonwealth's failure to collect or preserve any evidence. *Id.*

Here, the trial court found that Allen did not destroy the in-car video and no bad faith action could be ascribed to the BYPD. Additionally, the trial court ascertained that no mistake or negligence occurred with the detention center's video routinely being overwritten in a nine-day loop and that the process was not unreasonable. The trial court, however, believed that the missing videos were relevant and allowed Lawrence to discuss the missing video before the jury so that it could be considered by them during their deliberations. In fact, Lawrence testified at his trial and gave his version of the traffic stop and the events at the WCDC, which, according to him, the videos would have shown.

To conclude, the trial court did not abuse its discretion in denying the motion to compel discovery of videos that did not exist and appropriately found that no untoward behavior on the part of law enforcement occurred to destroy exculpatory evidence. Thus, Lawrence's arguments 7-9 are not persuasive.

In argument 10, Lawrence maintains that because mental health employees of the Commonwealth have documented false mental conditions and

disorders that are being held against him, it is a violation of the Fifth and Fourteenth Amendments. Initially, we note that Lawrence has not followed the requirements of the Rules of Civil Procedure for making this argument in his brief. Specifically, he has not preserved the issue. Notably, the direct appeal involves the propriety of the jury verdict against Lawrence. Nowhere does he demonstrate that this issue was alluded to during the trial. Therefore, Lawrence has not provided us with a viable argument for review. Hence, no error arose under this argument.

In argument 11, Lawrence complains that even before peremptory challenges were articulated, the trial court excluded every member of his race, age, gender, and religious groups. He asserts that this exclusion violates the Fourteenth Amendment. This argument was preserved when an objection was made that the jury did not have any African-Americans in the venire panel. The trial court overruled the objection but in doing so pointed out that the only African-American panel member had been excused from the jury prior to the venire panel being seated.

Once again, Lawrence, contrary to the mandate of CR 76.12(4)(c)(v), did not develop the argument factually, legally, or provide legal support with appropriate citations. As previously noted, it is not the province of this Court to make Lawrence's case. Nonetheless, we will address the rudiments of the contention. Although Lawrence casts doubt on the diversity of the jury based on age, gender, and religion, as well as race, he provides no information regarding the jury and these factors.

With regard to racial diversity on a jury, for a defendant to succeed on a challenge to the racial composition of the jury panel, he or she must show: “(1) that the group alleged to be excluded is a ‘distinctive’ group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.” *Duren v. Missouri*, 439 U.S. 357, 364, 99 S.Ct. 664, 668, 58 L.Ed.2d 579 (1979). Additionally, the burden is on the defendant to establish these factors. *Johnson v. Commonwealth*, 292 S.W.3d 889, 894 (Ky. 2009). Lastly, “[i]t is not enough to merely allege a particular jury failed to represent the community.” *Miller v. Commonwealth*, 394 S.W.3d 402, 409, (Ky. 2011).

In the case at hand, the first prong of the *Duren* test is met because African-Americans constitute a distinctive group in the community. *See Rodgers v. Commonwealth*, 285 S.W.3d 740, 759 (Ky. 2009). But Lawrence has not given any information demonstrating that the second and third prong have been met. He never provided information concerning the number of African-Americans in Warren County or established systematic exclusion of the group in the jury selection process. *Mash v. Commonwealth*, 376 S.W.3d 548, 552 (Ky. 2012)

The Sixth Amendment, as applied to the states through the Fourteenth Amendment, guarantees the right to an impartial jury “drawn from a source fairly representative of the community.” *Taylor v. Louisiana*, 419 U.S. 522, 538, 95

S.Ct. 692, 702, 42 L.Ed.2d 690 (1975). Concerning the second and third prongs, Lawrence broadly asserts that no member of his race, age, gender, and religious group were present. But, as previously noted, he provided no information about the racial composition of Warren County or evidence of systematic exclusion of members of his race from the jury. Therefore, he failed to establish any violation of his constitutional right to a fair jury. Having failed to establish a *prima facie* violation of the fair cross-section requirement, we agree that the trial court properly overruled Lawrence's objection to the composition of the jury panel.

Lawrence's final four arguments, 12-15, make the following assertions:

12. His current imprisonment is a deprivation of his statutory, civil, and constitutional rights and creates a civil cause of action. Further, he argues that courts have the jurisdiction to award monetary sanctions for discovery violations.

13. All named tortfeasors are liable for his personal injuries.

14. The destruction of the videotapes, either accidentally or purposely, is a conspiracy and all defendants are liable for these illegal acts.

15. Lawrence lists seven amendments and two groups of statutes for which his rights were violated.

Again, numerous problems exist with Lawrence's arguments.

Clearly, as previously explained, Lawrence has not followed the strictures of CR 76.12(4)(c)(v). First, an appellate brief must present an argument with "supportive references to the record." His arguments make no reference to the record. Second,

CR 76.12(4)(c)(v) requires the brief to refer to the record where each error was preserved. After review of Lawrence's brief, it is apparent that no error claimed in arguments 12-15 shows whether it was preserved or should be discussed as palpable error.

Next, under CR 76.12(4)(c)(v), an Appellant's brief must have an "ARGUMENT" section conforming to the Statement of Points and Authorities, which includes citations of authority pertinent to each issue of law. CR 76.12(4)(c)(v). Regarding Lawrence's last four arguments, his brief lacks any references or authority whatsoever and provides only several case and statutory names without appropriate citations. Moreover, Lawrence completely neglects to provide any analysis, any arguments, or any legal authority for these arguments. By making only broad statements of error, this Court would be left with the task of determining, researching and making the arguments for him. That is not the function or responsibility of this Court. *Harris*, 384 S.W.3d at 130-31)(citing *Doherty v. City of Chicago*, 75 F.3d 318, 324 (7th Cir.1996)). Finally, three of these arguments, 12-14, proclaim tort and criminal claims unrelated to this action and, hence, are not pertinent to a direct appeal of a criminal conviction.

To summarize, appellants who desire review by this Court must ensure their briefs comply with our Rules of Civil Procedure and are appropriate for review. These last four arguments are not and, thus, this Court will not address them.

For the foregoing reasons, the judgment of the Warren Circuit Court is affirmed.

ALL CONCUR.

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