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Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-000003-MR

CHRISTOPHER H. FIELDS — APPELLANT

v.

APPEAL FROM PERRY CIRCUIT COURT
HONORABLE WILLIAM ENGLE, III, JUDGE
ACTION NO. 14-CR-00038

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: DIXON, D. LAMBERT AND MAZE, JUDGES.

DIXON, JUDGE: Christopher H. Fields appeals to this court from his conviction in the Perry Circuit Court of first-degree possession of a controlled substance, and possession of drug paraphernalia with intent to use. He was ordered to serve two years in prison, and fined $500.00.

Fields raises five issues on appeal: the trial court committed reversible error by 1) overruling his motions to excuse six prospective jurors for cause; 2) failing to grant his motion to suppress evidence obtained from an unlawful search; 3) permitting the Commonwealth to violate its discovery order; 4) permitting the Commonwealth to appeal to local prejudice and request in closing argument that the jury send a message to the community; 5) and, erroneously levying misdemeanor fines and court costs against an indigent defendant. We reverse and remand on the first issue. However, we will address all issues likely to recur upon retrial.

FACTS AND PROCEDURAL HISTORY

On November 29, 2013, after learning from a confidential informant that Fields and Maudie Couch were using methamphetamine at the trailer home of an elderly woman called Granny, Hazard city police officers, Bradley Couch and Paul Campbell, went to the residence to further investigate. On their way to the residence, the officers ran a criminal background check on Fields and Maudie and discovered that Maudie had an active warrant for her arrest. As the officers approached the back door of the residence, they observed Maudie look out the window and then proceed to a back room of the trailer home. The officers knocked on the door and Granny answered. Upon officers' request, Granny agreed to let the officers enter the residence to effectuate the arrest of Maudie.

After entering Granny's residence, the officers proceeded to the back room where they found Maudie hiding in a closet and observed Fields sitting on a

bed. Fields, claiming that he shared the room with Maudie, vociferously ordered the officers out of the room. Ignoring Fields' demands, police officers arrested Maudie and handcuffed Fields for their own safety. The officers then obtained Granny's permission to search the bedroom. A bag of methamphetamine was found underneath a pillow on the bed on which Fields was sitting, and a light bulb with methamphetamine residue was found in the overhead light fixture. On September 30, 2014, a Perry Circuit jury found Fields guilty on the charges of first-degree trafficking in a controlled substance and possession of drug paraphernalia with the intent to use. This appeal follows.

DISCUSSION

I. Failure to Strike Jurors for Cause

On appeal, Fields first argues the trial court erred when it overruled his motions to excuse for cause six jurors. Kentucky Rules of Criminal Procedure 9.36(1) provides: "[w]hen there is reasonable ground to believe that a juror cannot render a fair and impartial verdict on the evidence, that juror shall be excused as not qualified." The Supreme Court of Kentucky has found reversible error where a defendant has had to use a peremptory challenge to excuse a potential juror who should have been stricken for cause, thereby preventing the defendant from using the peremptory challenge to strike another juror whom he wished to challenge. *Marsch v. Commonwealth,* 743 S.W.2d 830 (1988). Before this Court will consider a complaint regarding jury selection, the defendant must have exhausted all of his peremptory challenges and identify on the strike sheet any additional

jurors he would have struck. *Sluss v. Commonwealth*, 450 S.W.3d 279, 284 (Ky. 2014). We will find no error "if the other jurors the defendant would have used his peremptory strikes on do not actually sit on the jury[.]" *Id*.

The issue of the trial court's failure to strike jurors for cause was properly preserved for appellate review. Fields exhausted all of his peremptory challenges and identified on the strike sheet the other jurors that he would have struck had he not been compelled to use his peremptory challenges on jurors who should have been stricken for cause. Fields' list of jurors on whom he would have used his peremptory strikes included two jurors who ultimately sat on the jury.

During *voir dire*, some of the potential jurors indicated that they might have a family history with methamphetamine. Individual *voir dire* was conducted on those jurors to determine if they could be fair and impartial, and if they were able to consider the full range of penalties applicable to the crimes charged. Fields contends that he was forced to use preemptory challenges on jurors 729, 742, 536, 591, 557, and 537, who clearly should have been stricken for cause.

Juror 729 stated that, approximately fifteen years prior, her former brother-in-law was addicted to methamphetamine. She acknowledged that she would be harsher on someone possessing methamphetamine as opposed to marijuana, but agreed that she could follow the court's instructions and weigh the evidence fairly.

Juror 742 stated that people in her close family had a history of methamphetamine use. Her nephew had been incarcerated several times due to

methamphetamine use, and her soon-to-be sister-in-law had her children taken away from her because of methamphetamine use. She further stated that she had no sympathy for drug users. Without prompting, however, she immediately explained that she did not think her family experience would affect her judgment with Fields because every person is different. She also agreed that her family experience with methamphetamine would not cause her to be any harsher during the sentencing phase of this case.

Juror 536 stated that he did not like drug users. His mother was a drug user and his younger sister was on methamphetamine while she was pregnant. He gained custody of his sister's daughter for a short period of time because of his sister's drug use. He further stated that there was a "real bad" drug problem in Perry County and that drug users should be cracked down upon. However, he made clear that he could sit and listen to the evidence and weigh his opinion based on the facts of the case as they are proven.

Juror 591 stated that because of his family experiences with methamphetamine, he did not think he could be fair at sentencing. His first cousin had her children taken away because of drug use. He stated that he could base his judgment in the guilt phase on the evidence, but if found guilty he would probably be unfair. When asked by defense counsel if he thought he could be fair at sentencing, he responded, "not really." When asked by the Commonwealth if he could listen to the court's instructions if Fields is found guilty, he answered, "I don't know." No further questions were asked of this juror.

Juror 557 stated that she had a relative who was sent to prison because of a drug-related offense. She surmised that prison probably saved her relative's life. She stated that she would feel better if she found Fields guilty because of the therapeutic effects of prison. However, she was clear that the effects of drugs on her family would not affect her ability to be fair and impartial as to guilt and potential punishment.

Juror 537 stated that she started a neighborhood watch and had been indirectly threatened by known drug dealers. She said her experience as part of the neighborhood watch would affect her differently as opposed to someone who has not been a part of a neighborhood watch. However, she concluded that her life experiences would not affect her ability to be fair.

Fields argues that the trial court erred when it refused to dismiss the six potential jurors for cause. He insists that the challenged jurors' life experiences, and statements that they might be harsher on methamphetamine users, show a probability of bias.

The determination of whether to excuse a juror for cause is within the sound discretion of the trial court and unless there is a clear abuse of discretion, we will not reverse the trial court's determination. *Pendleton v. Commonwealth*, 83 S.W.3d 522, 527 (Ky. 2002). "[T]he decision to exclude a juror for cause is based on the totality of the circumstances, not in response to any one question." *Fugett v. Commonwealth,* 250 S.W.3d 604, 613 *(*Ky. 2008*)*. "The court must weigh the probability of bias or prejudice based on the entirety of the juror's responses as

well as the juror's demeanor. *Shane v. Commonwealth,* 243 S.W.3d 336, 338 (Ky. 2007), *as modified* (Apr. 9, 2008). After considering the totality of the circumstances, the court must determine "whether, after having heard all of the evidence, the prospective juror can conform his views to the requirements of the law and render a fair and impartial verdict." *Thompson v. Commonwealth,* 147 S.W.3d 22, 51 (Ky. 2004) (quoting *Mabe v. Commonwealth,* 884 S.W.2d 668, 671 (Ky.1994))

With the exception of Juror 591, we agree with the trial court that none of the answers given by the five other prospective jurors indicated an inability to be fair and impartial. Each of these five potential jurors indicated that he or she had had experiences with methamphetamine within their family that might affect his or her decision if chosen to sit as a juror in this case. All indicated a strong dislike for methamphetamine, and some indicated that because of their life experiences they might be "harsher" on a person who uses methamphetamine.

We do not agree that these jurors' life experiences with methamphetamine or the statements intimating that their life experiences may make them "harsher" act as an automatic disqualification from service. *See Paulley v. Commonwealth*, 323 S.W.3d 715, 721 (Ky. 2010). It can be presumed that all jurors bring life experiences that have shaped their attitudes about crime and punishment. One juror may have had life experiences that make him harsher, while another juror may have had life experiences that make her more apt to be lenient. Neither inclination is determinative of whether a juror is qualified to

serve. What the trial court must determine is whether a juror's life experiences prevent that juror from conforming his or her views to the requirements of the law and rendering a fair and impartial verdict and sentence. "While a juror is disqualified if he or she cannot consider the minimum penalty, excusal for cause is not required merely because the juror favors severe penalties, so long as he or she will consider the full range of penalties." *Hodge v. Commonwealth*, 17 S.W.3d 824, 837 (Ky. 2000) (internal citations omitted).

Here, jurors 729, 742, 536, 557 and 537 were each unequivocal in his or her ability to remain unbiased and judge the case based on the evidence. All expressed the ability to conform their views to the requirements of the law and render a fair and impartial judgment and sentence. When asked whether they could consider the full range of sentences, all of the prospective jurors answered in the affirmative. The trial judge, taking into account the gravity of the jurors' life experiences, as well as their responses and demeanor, found the jurors capable of putting aside their own experiences with methamphetamine and judging the case on its own merits. The trial judge is the sole arbiter of credibility and we give great deference to the ability of the trial judge to consider factors such as tone of voice, facial expressions, and demeanor, in context with the content of the prospective jurors' testimony. Giving due deference to the trial court's credibility determination and its ability to contextually understand the substance of the testimony, we do not believe that the trial judge abused his discretion when he declined to dismiss jurors 729, 742, 536, 557, and 537.

We do, however, believe that the trial court erred when it refused dismiss for cause juror 591 for cause. Juror 591 repeatedly expressed doubt about whether he could be fair and impartial in sentencing. The Commonwealth, in an attempt to "rehabilitate" the prospective juror asked if the juror could follow the Court's instructions if Fields was found guilty and the juror responded "I don't know."

In order to satisfy the right to a fair and impartial jury, the jury must possess the ability to consider the full range of penalties. *Lawson v. Commonwealth*, 53 S.W.3d 534, 541 (Ky. 2001). The Supreme Court of Kentucky has repeatedly cautioned trial courts about failing to strike jurors for cause when doubt exists about the juror's ability to be fair and impartial. In *McDaniel v. Commonwealth*, 341 S.W.3d 89 (Ky. 2011), the Court found reversible error where a juror was "truly equivocal with regard to his ability to render an impartial judgment[.]" And in *Paulley*, *supra*, the Court, finding reversible error when the trial court did not strike a juror who was equivocal with regard to her ability to be fair and impartial noted, "When asked directly whether she could be fair and impartial, the juror stated *she was not sure.*...The last word on this crucial subject was the juror's honest-seeming expression of doubt about her ability to be fair and impartial." *Id*. at 721.

Here, the juror's last words on his ability to be fair and impartial showed doubt that he could follow the instructions of the court if Fields was found guilty. The trial judge, obviously reluctant to strike the juror, found that the juror's

life experiences would not affect his ability to be fair and impartial. However, we find nothing in the potential juror's testimony or responses to rehabilitative questions which would indicate that he could lay his preconceived notions aside and act as a fair and impartial juror.

When it comes to the issue of impartiality, "equivocation is simply not good enough." *McDaniel*, 341 S.W.3d at 94. A juror's statements and demeanor must support the trial court's decision to seat him, given the totality of the circumstances. To do less would give defendants a substantial right "with one hand and take [it] away with the other." *Id*. (quoting *Shane,* 243 S.W.3d at 339). "[W]e must afford a criminal defendant the benefit of the doubt as it pertains to a juror's ability to be impartial. *Paulley*, 323 S.W.3d at 721. Given the equivocal responses provided by juror 591 regarding his ability to be fair and impartial in sentencing, we conclude that juror 591 should have been excused for cause, allowing Fields to use one of his preemptory challenges for another use.

Having concluded that Fields is entitled to a new trial, we address the following issues given the likeliness of recurrence on remand.

II. Failure to Suppress Search

Fields claims that the trial court erred when it failed to grant his motion to suppress evidence obtained from the unlawful search of the room where the methamphetamine was located. Our standard of review of a suppression determination is two-fold. First, the factual findings of the court are conclusive if they are supported by substantial evidence. Second, we conduct a *de novo* review

to determine whether the court's decision is correct as a matter of law. *Garcia v. Commonwealth*, 185 S.W.3d 658, 661 (Ky. Ct. App. 2006) (citing *Stewart v. Commonwealth,* 44 S.W.3d 376, 380 (Ky.App.2000)).

There is a factual dispute as to whether Fields was a co-tenant or overnight guest of the property owned by Granny. When officers entered the room in which they found the methamphetamine, Fields claimed that he shared the room with Maudie and ordered the officers to leave. Fields insists that he was a co-tenant and his refusal to consent to the search makes the search unreasonable and invalid as to him. *See Georgia v. Randolph,* 547 U.S. 103, 106, 126 S.Ct. 1515, 1519, 164 L.Ed.2d 208 (2006) (holding that a physically present co-occupant may refuse to consent to the search, which renders the warrantless search unreasonable and invalid as to him or her).

The trial court, in its order overruling Field's motion to suppress, specifically found that Fields was not a co-tenant of the trailer home owned by Granny and therefore the search was reasonable based on Granny's consent. *See Illinois v. Rodriguez*, 497 U.S.177, 110 S.Ct. 2793, 111 L.Ed. 148 (1990) (holding that the Fourth Amendment's prohibition against warrantless entry of a person's home does not apply to a situation in which voluntary consent has been obtained). The court based its findings primarily on the testimony of Maudie. Maudie testified that she lived in the trailer home with Granny and Granny's son, and that Fields came to the house that day to visit. Maudie's testimony constitutes substantial evidence that Fields was not a co-tenant. Therefore, the trial court's

finding of that fact on that matter is conclusive. *See Anderson v. Commonwealth*, 352 S.W.3d 577, 583 (Ky. 2011).

The United States Supreme Court has held that a person who is merely present with the consent of the household may not assert a Fourth Amendment right. *See Minnesota v. Carter,* 525 U.S. 83, 119 S.Ct. 469, 142 L.Ed.2d 373 (1998). Here, the trial court determined that Fields was not a co-tenant or an overnight guest of the trailer home at 216 Willow Lane; he was merely at the residence with the consent of Maudie and Granny. Applying the trial court's findings of fact to the law, it is clear that Fields has no standing to contest the search of Granny's residence.

III. Failure to Sanction Commonwealth for Discovery Violation

Fields claims that the trial court erred when it permitted the Commonwealth to violate its discovery order, the discovery rules, and *Brady*,[1] by turning over discovery after the beginning of trial. We decline to address this contention as it is not likely to recur on retrial.

IV. Allowing the Commonwealth to Appeal to Local Prejudices

Purvis argues that the trial court erred when it permitted the Commonwealth to appeal to local prejudice and request that the jury "send a message" to the community. In his closing argument of the penalty phase, the Commonwealth's Attorney stated in pertinent part:

[1] *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct 1194, 10 L.Ed.2d 215 (1963). The Supreme Court held that 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, irrespective of good faith or bad faith of prosecution.

> When I was a Commonwealth attorney from ’01 to ’06, I left this office, we had no methamphetamine cases. The closest one we had is a couple of folks were making methamphetamine. They got high from the fumes, passed out and hit a tree. The tree was in Leslie County; not Perry. Now I have come back to this office after six years. We have all seen this proliferating. It is not good, it is proliferating. This is a ridiculous substance. We are going to ask you to recommend or to give a sentence to this defendant of the maximum three years. You have heard the terms for eligibility. We are going to ask you to square that off with the maximum for three years. People in Perry County need to know the concern and the abject problems being caused by methamphetamine. We don’t need it here.

In Kentucky, wide latitude is enjoyed by counsel during closing arguments. *Wheeler v. Commonwealth,* 121 S.W.3d 173, 180 (Ky. 2003), *cert. denied,* 541 U.S. 1051, 124 S.Ct. 2180 (2004). While our Supreme Court has always expressed its rejection of a send a message to the community argument at the guilt stage, *see Brewer v. Commonwealth,* 206 S.W.3d 343, 348–51 (Ky. 2006); *Young v. Commonwealth,* 25 S.W.3d 66, 73 (Ky. 2000); *Ordway v. Commonwealth*, 391 S.W.3d 762, 797 (Ky. 2013), it has recently expressed that that type of argument is not necessarily barred at the sentencing phase of a trial. *Cantrell v. Commonwealth,* 288 S.W.3d 291, 297-298 (Ky. 2009) (holding that a prosecutor was authorized during closing argument in penalty phase of methamphetamine manufacturing prosecution to make a deterrence argument, encouraging jurors to “send a message” by returning the maximum sentence). In the sentencing phase, counsel may properly argue for the jury to send a message to the community provided the arguments are narrowly focused on deterrence

objectives. *Hall v. Commonwealth*, 337 S.W.3d 595, 612 (Ky. 2011). However, "[a]ny effort by the prosecutor in his closing argument to shame jurors or attempt to put community pressure on jurors' decisions is strictly prohibited." *Cantrell,* 288 S.W.3d. at 299. In other words, "prosecutors may not argue that a lighter sentence will 'send a message' to the community which will hold the jurors accountable or in a bad light." *Id.*

In this case, we reject Fields' contentions that the argument advanced by the Commonwealth during closing arguments in the sentencing phase was improper. The Commonwealth merely spoke of the rising methamphetamine problem in Perry County and asked the jury to return a maximum sentence, in part to send a message to other would-be criminals that this type of crime will not be tolerated in the county. In light of our Supreme Court's recent decisions on the matter, we are of the opinion that the statements made by the Commonwealth were permissible. The statements were narrowly focused on deterrence and did not rise to the level of "shaming" the jury by implying that the community would view them in a bad light if they did not impose the maximum sentences. Accordingly, the trial court did not err in allowing the Commonwealth's closing argument.

V. Erroneous Misdemeanor Fines and Court Costs

Fields claims that the trial court erroneously levied misdemeanor fines and court costs against an indigent defendant. This issue is not preserved. However, Fields argues that preservation is unnecessary because the issue results

from a sentencing decision contrary to statute and may be raised for the first time on appeal. *See Travis v. Commonwealth*, 327 S.W.3d 456, 459 (Ky. 2010).

Subsection (4) of Kentucky Revised Statutes (KRS) 534.040 provides that "[f]ines required by this section shall not be imposed upon any person determined by the court to be indigent pursuant to KRS Chapter 31." Recently in *Trigg v. Commonwealth*, 460 S.W.3d 322 (Ky. 2015), the Kentucky Supreme Court clarified *Travis* with respect to the failure to preserve perceived error in the imposition of court costs. Quoting *Spicer v. Commonwealth*, 442 S.W.3d 26 (Ky. 2014), the Court explained:

> If a trial judge was not asked at sentencing to determine the defendant's poverty status and did not otherwise presume the defendant to be an indigent or poor person before imposing court costs, then there is no error to correct on appeal. This is because there is no affront to justice when we affirm the assessment of court costs upon a defendant whose status was not determined. It is only when the defendant's poverty status has been established, and court costs assessed contrary to that status, that we have a genuine "sentencing error" to correct on appeal [despite lack of preservation].

Trigg, 460 S.W.3d at 333.

The Court further explained that the same analysis applies to the imposition of fines upon persons determined indigent. "Unless the imposition of a fine upon an indigent or 'needy' person is apparent on the face of the judgment or is in obvious conflict with facts established in the record (such as plainly having been found indigent at all stages of the trial proceedings), we do not regard it as a sentencing error..." *Id*.

At the time of trial, Fields had completed an affidavit of indigency and was represented by the Department of Public Advocacy throughout the entire trial court proceedings. Furthermore, Fields was granted the right to proceed with his appeal in *forma pauperis*. The fact that Fields was indigent was obvious based on facts in the record. Therefore we consider the imposition of fines a sentencing error. The trial court erred when it imposed fines as part of Fields' sentence. Upon retrial, the court should not impose fines upon Fields if he is again determined to be indigent.

However, unlike the imposition of fines, the question of whether the trial court erred in imposing court costs turns on whether Fields is a "'poor person' under KRS 453.190(2) and KRS 23A.205." *Galloway v. Commonwealth* 424 S.W.3d 921, 930 (Ky. 2014). Fields did not ask the trial court to make a finding as to whether he was a poor person. Therefore, there is no error to correct on appeal. If, upon retrial, Fields is reconvicted and wishes to challenge, on appeal, the imposition of court costs, he must first ask the judge at sentencing to make a finding on whether or not he is considered a "poor person" under the statutes.

For the foregoing reasons, the judgment of the Perry Circuit Court is reversed and this case is remanded for further proceedings.

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