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Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-000747-MR

BRIAN FUGATE — APPELLANT

v.

APPEAL FROM PERRY CIRCUIT COURT
HONORABLE ALISON C. WELLS, JUDGE
ACTION NO. 14-CR-00025

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON, NICKELL AND VANMETER , JUDGES.

VANMETER, JUDGE: Brian Fugate appeals from a Perry Circuit Court judgment following his conviction by a jury of one count of manufacturing methamphetamine.

Trooper Joshua Huff was on road patrol in Perry County when he saw a Dodge Neon in traffic with the driver's side seatbelt dangling and unfastened. Trooper Huff stopped the Neon and observed two people inside. Neither occupant

moved. When Huff approached the driver's side of the car and told the driver of the unbuckled seatbelt, the driver, Yeart Pratt, responded with a laugh and said, "Yeah, you got me." Trooper Huff then spotted what he suspected to be a methamphetamine "one-step lab" on the floor behind the driver's seat. It consisted of a "tied-off Mountain Dew bottle, lighter fluid, and coffee filters." After spotting the suspected lab, Huff notified dispatch, and another trooper, Richardson, arrived within minutes. Huff asked the two occupants, "You have a meth lab, is it active?" Neither replied.

Trooper Huff removed Pratt from the Neon and conducted field sobriety tests which indicated that Pratt was under the influence. Trooper Richardson conducted a horizontal gaze nystagmus test on Fugate and determined that he was also under the influence. Fugate admitted that he had earlier consumed a suboxone pill, but denied he was intoxicated. The men were placed in separate police cruisers while the officers searched the Neon. The officers placed all the suspected meth lab items on the trunk. Fugate volunteered to Richardson that there was a gun in the Neon. Trooper Huff found the gun and a bottle containing pickling salt by Fugate's seat in the car.

After Huff had taken Pratt from the scene, Fugate gave a statement to Trooper Richardson, which was played for the jury at Fugate's trial. In the statement, which he made in a teary, weepy voice, Fugate admitted knowledge of an active meth lab in the Neon. He also stated that he had been kidnapped by Pratt. He told Richardson that Pratt came upon him and accused him of having sex with

Pratt's girlfriend. Fugate said he got into Pratt's Neon, that Pratt "smacked the sh**" out of him two times, forced him to go to Hazard with him, and told him that he was going to kill him. Fugate told Trooper Richardson that he tried to yell out to Trooper Huff, but that Pratt told him to keep his mouth shut. Fugate also told Trooper Richardson that when he and Pratt realized that Trooper Huff was following them "like God sent him," Pratt began to "sling stuff under [his] seat" and that when they were finally pulled over, Fugate had deliberately asked the officer "three or four questions."

Trooper Richardson testified that Fugate had red eyes and slurred speech. He described him as being upset in the manner that people typically are when performing a field sobriety test, or when they realize they are going to jail, but nothing beyond that. Richardson also testified that an investigation into Fugate's kidnapping story was conducted but no charges relating to the alleged incident were brought against Pratt.

Kentucky State Police Detective Ben Campbell of the specialized drug unit testified about cleaning up the lab components from the Neon. He explained that he responds when uniformed officers spot what they think is a lab. He identified the following items from the Neon: a red Coleman fuel gas can, intact lithium batteries, unused coffee filters, plastic baggies, a pill soak, a Mountain Dew bottle with a tube in the cap, a cold pack, and a second Mountain Dew bottle. Campbell testified that all the components were legal to purchase and that they constituted an inactive one-step meth lab. Campbell selected one piece of tubing from the

Mountain Dew bottle for laboratory testing, but explained that he did not believe it would come back with positive results for methamphetamine due to the inactive state of the lab. He testified that the piece of tubing did in fact come back negative for methamphetamine.

Before Fugate's trial, Pratt pled guilty to manufacturing methamphetamine, driving under the influence, and four counts of wanton endangerment in the first degree.

Fugate was indicted on seven counts, including: manufacturing methamphetamine, first offense; unlawful possession of a methamphetamine precursor; possession of a handgun by a convicted felon; and four counts of wanton endangerment. A jury found him guilty of one charge of manufacturing methamphetamine, first offense, and not guilty of three counts of wanton endangerment. The possession of a meth precursor and the remaining wanton endangerment charge were dismissed by the Commonwealth. The felon in possession of a handgun charge was severed.

Fugate raises three arguments on appeal: (1) that he was entitled to a directed verdict on the charge of manufacturing methamphetamine; (2) the trial court erred in not allowing him to introduce evidence of the past record of Pratt, who was identified as the alternative perpetrator; and (3) that he was improperly ordered to pay court costs and court facility fees.

I. Directed Verdict

"On appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal." *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky.1991). The evidence presented by the prosecution must be more than a mere scintilla. *Id*. at 188.

KRS[1] 218A.1432 provides that

> 1) A person is guilty of manufacturing methamphetamine when he knowingly and unlawfully:
>
> (a) Manufactures methamphetamine; or
>
> (b) With intent to manufacture methamphetamine possesses two (2) or more chemicals or two (2) or more items of equipment for the manufacture of methamphetamine.

The jury instructions closely tracked the statute, providing in part as follows:

> You will find the defendant guilty of manufacturing methamphetamine under this instruction if . . . you believe from the evidence beyond a reasonable doubt all of the following: . . . he knowingly had in his possession with the intent to manufacture methamphetamine two (2) or more of the chemicals or two (2) or more of the items of the equipment necessary for its manufacture.

Fugate argues that he was entitled to a directed verdict on this charge because the Commonwealth failed to prove the elements of "knowingly," "possession," "intent," "two or more of the chemicals or two or more of the items of equipment," and "necessary." Although Fugate contends that his argument was preserved for appeal, our review of the record shows that when he made his

[1] Kentucky Revised Statutes.

motion for a directed verdict, he raised only the argument that the Commonwealth had failed to offer any evidence to support a finding of "two or more of the chemicals or two or more of the items of equipment" necessary for manufacture. "Pursuant to CR[2] 50.01 '[a] motion for directed verdict shall state specific grounds therefor.'" *Daniel v. Commonwealth*, 905 S.W.2d 76, 79 (Ky. 1995). "[A] party's failure to state the specific grounds for a directed-verdict motion 'forecloses appellate review.'" *Sevier v. Commonwealth*, 434 S.W.3d 443, 454 (Ky. 2014). "Absent extreme circumstances amounting to a substantial miscarriage of justice, an appellate court will not engage in palpable error review pursuant to RCr[3] 10.26 unless such a request is made and briefed by the appellant." *Shepherd v. Commonwealth*, 251 S.W.3d 309, 316 (Ky. 2008). We have not identified any extreme circumstances in this case that would warrant palpable error review, and consequently we will address only Fugate's preserved argument: no proof that the items described by Detective Campbell were what they were purported to be was presented at trial, and nothing except the tubing had been tested, which, in any event, contained no drug residue.

The trial court denied the directed verdict motion, finding sufficient evidence that at least two items of equipment necessary for manufacture were present. The trial court's conclusion was fully supported by the testimony of Trooper Huff, who described the items found in the Neon, and that of Detective

[2] Kentucky Rules of Civil Procedure.

[3] Kentucky Rules of Criminal Procedure.

Campbell, who stated that the components recovered from the vehicle constituted an inactive one-step methamphetamine lab. Furthermore, KRS 218A.1432 does not require that the equipment test positive for the presence of methamphetamine.

A motion for a directed verdict should only be granted when "looking at the evidence as a whole, it would be clearly unreasonable for a jury to find the defendant guilty, under any possible theory, of any of the crimes charged in the indictment[.]" *Acosta v. Commonwealth*, 391 S.W.3d 809, 817 (Ky. 2013) (quoting *Campbell v. Commonwealth*, 564 S.W.2d 528, 530 (Ky. 1978)). In light of the testimonial evidence regarding the items recovered from the Neon, it was not clearly unreasonable for the jury to find Fugate guilty of manufacturing methamphetamine, and therefore, the trial court did not err in denying the motion for a directed verdict.

II. Admission of evidence of prior bad acts by Pratt

Fugate argues that the trial court abused its discretion when it refused to admit evidence of prior bad acts committed by Pratt, the driver of the Neon. Fugate sought to admit testimony from Knott County police officers that in 2012 Pratt had been arrested for possession of drugs and a firearm, and had been criminally charged in connection with one of those incidents, although he was never convicted. Fugate argues that he was deprived of his due process right to present a defense based on the "alleged alternative perpetrator" or "aaltperp" theory. The trial court ruled that Fugate could proceed with the theory that Pratt

was the alternative perpetrator, but could not use the Knott County investigations to do so because they were unrelated to the facts of the case being tried.

Our standard when reviewing a question of admissibility of evidence is whether the trial court abused its discretion. *Johnson v. Commonwealth*, 105 S.W.3d 430, 438 (Ky. 2003). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky.1999).

"The balancing of the probative value of . . . evidence against the danger of undue prejudice is a task properly reserved for the sound discretion of the trial judge." *Id*. "[P]reserved evidentiary and other non-constitutional errors will be deemed harmless . . . if we can say with fair assurance that the judgment was not substantially swayed by the error." *Ordway v. Commonwealth*, 391 S.W.3d 762, 774 (Ky. 2013).

"[A]lthough . . . evidence of a person's prior crimes or bad acts is not admissible merely as proof of the person's bad character, KRE[4] 404(b) permits the admission of such evidence for other substantive purposes such as proof of motive, opportunity, intent, or identity." *McPherson v. Commonwealth*, 360 S.W.3d 207, 213 (Ky. 2012). In *Beaty v. Commonwealth*, 125 S.W.3d 196 (Ky. 2003), the Kentucky Supreme Court held that one way to advance an "aaltperp" theory of defense is to establish that an alternative perpetrator had both the motive and opportunity to commit the crime. *Gray v. Commonwealth*, 480 S.W.3d 253, 267

[4] Kentucky Rules of Evidence.

(Ky. 2016). More recently, the Kentucky Supreme Court has cautioned that "the motive-and-opportunity approach articulated in *Beaty* is not the only path to advance an aaltperp theory and it is certainly not an absolute prerequisite for admission into evidence." *Id.* It held that the true threshold for admitting aaltperp evidence is the balancing test found in KRE 403, which prompts the trial court to weigh the probative value of the evidence against the risk of prejudice at trial, including confusing the issues or misleading the jury. *Id*.

The record shows that Fugate was able to introduce into evidence the fact that Pratt was the driver of the Neon, that he was charged at the same time as Fugate, and that he pled guilty to manufacturing methamphetamine, being a convicted felon in possession of a firearm, four counts of wanton endangerment, driving under the influence, and the seatbelt charges. Fugate also introduced into evidence the recorded statement he made to Trooper Richardson in which he essentially accused Pratt of threatening, assaulting and kidnapping him. Fugate was able to present fully his theory of Pratt as the aaltperp. Evidence of the prior incidents involving Pratt would serve only to show that Pratt had been accused of possessing drugs and a firearm years before. The incidents did not involve the manufacture of methamphetamine or the possession of the components of a methamphetamine lab. The evidence was therefore of limited probative value and could serve to confuse or mislead the jury, as the trial court stated, from the consideration of the actual set of facts they were meant to be evaluating. Under the

circumstances, the trial court did not abuse its discretion in refusing to admit the evidence.

III. Costs and fees

Finally, Fugate argues that the trial court erred in imposing court costs in the amount of $130 and court facility fees in the amount of $25. KRS 23A.205(2) provides for the mandatory payment of court costs by persons convicted of a crime in Circuit Court, "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." Fugate acknowledges that this allegation of error is unpreserved, but he argues that it is a sentencing error that cannot be waived by the failure to object.

The Kentucky Supreme Court recently clarified this area of law in *Spicer v. Commonwealth*, 442 S.W.3d 26 (Ky. 2014). Spicer, like Fugate, had been represented by a public defender and also permitted to proceed on appeal *in forma pauperis*. The trial court assessed court costs; Spicer failed to object. On appeal, Spicer argued that the unpreserved error should be addressed as a sentencing error. The Supreme Court disagreed, stating as follows:

> "[T]his Court has inherent jurisdiction to cure ... sentencing errors." *Jones v. Commonwealth*, 382 S.W.3d 22, 27 (citing *Travis v. Commonwealth*, 327 S.W.3d 456, 459 (Ky. 2010)). A "sentencing issue" constitutes "a claim that a sentencing decision is contrary to statute ... or was made without fully considering what sentencing options were allowed by statute. . . ." *Jones v. Commonwealth*, 382 S.W.3d at 27 (Ky. 2011) (citing *Grigsby v. Commonwealth*, 302 S.W.3d 52, 54 (Ky.

> 2010)). The phrase "sentencing is jurisdictional" is simply a "manifestation of the non-controversial precept that an appellate court is not bound to affirm an illegal sentence just because the issue of the illegality was not presented to the trial court." *Jones v. Commonwealth*, 382 S.W.3d at 27.
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> The assessment of court costs in a judgment fixing sentencing is illegal only if it orders a person adjudged to be "poor" to pay costs. Thus, while an appellate court may reverse court costs on appeal to rectify an illegal sentence, we will not go so far as to remand a facially-valid sentence to determine if there was in fact error. 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.
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> In this case, the record does not reflect an assessment of Appellant's financial status, other than that he was appointed a public defender and permitted to proceed on appeal *in forma pauperis*. A defendant who qualifies as "needy" under KRS 31.110 because he cannot afford the services of an attorney is not necessarily "poor" under KRS 23A.205. *Maynes v. Commonwealth*, 361 S.W.3d 922, 929 (Ky. 2012). Thus, simply because Appellant was represented by a public defender does not mean he is necessarily exempt from court costs. Because the trial judge's decision regarding court costs was not inconsistent with any facts in the record, the decision does not constitute error, "sentencing" or otherwise, and we affirm the imposition of court costs and the arrest fee.

Spicer, 442 S.W.3d at 35.

Similarly, in Fugate's case, the record does not show that his financial status was ever assessed under KRS 23A.205. Simply because he was represented by a public defender and permitted to proceed on appeal *in forma pauperis* does not necessarily mean he is exempt from court costs. Because there is no "sentencing error" to correct, we affirm the imposition of the court costs and facility fees.

For the foregoing reasons, the final judgment and sentence of the Perry Circuit Court is affirmed.

ALL CONCUR.

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