

RENDERED: JULY 5, 2019; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-000353-MR
AND
NO. 2017-CA-000521-MR

NICHOLAS CARR

APPELLANT

v. APPEALS FROM CAMPBELL CIRCUIT COURT
HONORABLE FRED A. STINE, V., JUDGE
ACTION NO. 16-CR-00224

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING IN PART AND
VACATING IN PART

** ** * * * **

BEFORE: CLAYTON, CHIEF JUDGE; MAZE AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Nicholas Carr brings this appeal from a February 27, 2017, amended judgment of the Campbell Circuit Court sentencing him to a total of sixteen-years' imprisonment and ordering him to pay \$165 in court costs and a \$600 public defender fee. We vacate the public defender fee but otherwise affirm.

In March 2016, Carr was indicted for one count of importing heroin and two counts of trafficking in a controlled substance in the first degree. A

persistent felony offender in the second degree (PFO 2) charge was later added. In January 2017, a jury found Carr guilty on all counts and recommended a concurrent sentence of eight years for importing heroin and five years for each trafficking charge, enhanced by the PFO 2 to sixteen years for the importing charge and ten years for each trafficking charge, all to be served concurrently. Carr was sentenced in accordance with the jury's verdict, after which he filed Appeal No. 2017-CA-000353-MR. Carr later filed Appeal No. 2017-CA-000521-MR from an amended judgment. We consolidated both appeals.

In Carr's first argument, he contends his conviction for importing heroin and trafficking in a controlled substance violates his constitutional right against double jeopardy because those offenses:

are essentially the same crime with Importing Heroin involving bringing the drug into Kentucky from across state lines. Once the jury found Mr. Carr guilty of importing heroin, it had no choice but to find him guilty of first-degree trafficking in a controlled substance. The jury had already found Mr. Carr guilty beyond a reasonable doubt of every element listed in the trafficking instruction.

Appellant's Brief at 6. We disagree.

We begin first by noting the double jeopardy issue was not raised before the trial court, so our review is for palpable error under Kentucky Rule of

Criminal Procedure (RCr) 10.26.¹ A “palpable error must involve prejudice more egregious than that occurring in reversible error.” *Ernst v. Commonwealth*, 160 S.W.3d 744, 758 (Ky. 2005), *overruled on other grounds by Mason v. Commonwealth*, 559 S.W.3d 337 (Ky. 2018). To reach the required level of egregiousness a party must show the “probability of a different result or error so fundamental as to threaten a defendant's entitlement to due process of law.” *Martin v. Commonwealth*, 207 S.W.3d 1, 3 (Ky. 2006). Indeed, “[i]mplicit in the concept of palpable error correction is that the error is so obvious that the trial court was remiss in failing to act upon it *sua sponte*.” *Lamb v. Commonwealth*, 510 S.W.3d 316, 325 (Ky. 2017). Our review proceeds accordingly.

In 2015, the Kentucky General Assembly enacted a new criminal statute regarding the importing of heroin, set out in KRS 218A.1410 which reads as follows:²

- (1) A person is guilty of importing heroin when he or she knowingly and unlawfully transports any quantity of heroin into the Commonwealth by any means with the intent to sell or distribute the heroin.
- (2) The provisions of this section are intended to be a separate offense from others in this chapter, and shall be

¹ Kentucky Rules of Criminal Procedure 10.26 provides in relevant part that “[a] palpable error which affects the substantial rights of a party may be considered 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.”

² Kentucky Revised Statutes 218A.1410 was amended in 2017, and the revisions are not relevant to this appeal.

punished in addition to violations of this chapter occurring during the same course of conduct.

(3) Importing heroin is a Class C felony, and the defendant shall not be released on probation, shock probation, conditional discharge, or parole until he or she has served at least fifty percent (50%) of the sentence imposed.

The issue on appeal thus looks at whether Carr's conviction for importing heroin is for the same course of conduct as his conviction for trafficking in a controlled substance and whether the General Assembly intended multiple punishments for those offenses.

Both the Fifth Amendment to the United States Constitution and Section 13 of the Kentucky Constitution forbid a person from being "twice put in jeopardy of life or limb" "for the same offense." U.S. Constitution Amendment V; Kentucky Constitution Section 13; *McNeil v. Commonwealth*, 468 S.W.3d 858, 866 (Ky. 2015). However, in regard to multiple punishments, the double jeopardy clause is limited to preventing the sentencing court from prescribing a greater punishment than that intended by the legislature. *Id.* (citing *Missouri v. Hunter*, 459 U.S. 359, 366 (1983)). In *McNeil*, the Kentucky Supreme Court concluded that the court's task in determining the permissibility of imposing multiple punishments under separate laws involving a singular transaction or course of conduct by a defendant is to analyze and determine the legislature's intent. *McNeil*, 468 S.W.3d at 866-67.

KRS 218A.1410(2) constitutes a clear expression of the General Assembly's intent for the crime of importing heroin as a separate offense from other crimes set out therein. And, the legislative intent is clearly expressed that the sentence for importing heroin is to apply cumulatively to other crimes, including trafficking in controlled substances. Thus, we need not resort to any other rules of statutory construction. We simply must determine whether the punishment the trial court imposed on Carr for both crimes exceeded that which the General Assembly intended. *See Missouri v. Hunter*, 459 U.S. at 366.

KRS 218A.1410(3) states that the crime of importing heroin is a Class C felony, punishable by a maximum sentence of ten-years' imprisonment. *See also* KRS 532.020(1)(b). The trial court sentenced Carr to eight-years' imprisonment on the importing heroin charge (enhanced to sixteen years by PFO 2) and five years each on the two trafficking in a controlled substance charges (enhanced to ten years by PFO 2), to run concurrently for a total sentence of sixteen-years' imprisonment. The sentence did not exceed the express intention of the General Assembly, as stated in KRS 218A.1410(2). Therefore, no double jeopardy violation occurred.

Carr next argues that the trial court violated Kentucky Rules of Evidence (KRE) 608³ and/or KRE 609⁴ by permitting the Commonwealth to

³ Kentucky Rules of Evidence (KRE) 608 provides in relevant part:

question him about the details of his prior felony conviction. Again, we find no palpable error.

On direct examination, Carr's counsel asked Carr how he deduced the identity of the confidential informant. In response Carr stated that the informant had called him seeking to purchase drugs and she was the only person who ever called him about "something like that." Trial record December 15, 2016 at 10:15:07 *et seq.* Carr repeatedly gave inconclusive answers on cross-examination regarding whether he had sold drugs to support his own drug habit prior to the

(b) Specific instances of conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness: (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified. No specific instance of conduct of a witness may be the subject of inquiry under this provision unless the cross-examiner has a factual basis for the subject matter of his inquiry.

⁴ KRE 609(a) provides in relevant part:

For the purpose of reflecting upon the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record if denied by the witness, but only if the crime was punishable by death or imprisonment for one (1) year or more under the law under which the witness was convicted. The identity of the crime upon which conviction was based may not be disclosed upon cross-examination unless the witness has denied the existence of the conviction.

incidents which underlie his indictment, testifying he had not sold drugs to others “at this time.” After the trial court overruled Carr’s objection that the Commonwealth was being argumentative, Carr admitted he had sold drugs in 2012.

Carr argues the Commonwealth should not have been permitted to ask him about whether he had sold drugs previously. Because Carr’s objection below was not based upon KRE 608 or 609, we again review only for palpable error under RCr 10.26 and KRE 103(e). Carr is correct that KRE 609 permits a witness to be asked if he/she is a convicted felon but prevents questions regarding the specifics of that felony, unless the witness denies the conviction. And, prior to the exchange at issue, Carr admitted he was a convicted felon.

However, the Commonwealth did not ask Carr about the specifics of his prior felony conviction(s). In other words, there was not a facial, direct violation of KRE 609’s prohibition against inquiring about the details of a witness’s prior conviction. In fact, Carr’s trafficking conviction was not mentioned. Second, Carr opened the door to questions by testifying that no one had called him to ask for drugs prior to the informant doing so. The Commonwealth was not required to accept that sweeping assertion, which is untenable given his previous trafficking conviction. In short, the questions did not

cause a manifest injustice, especially considering the strong evidence introduced at trial against Carr.

We likewise find no palpable error under KRE 608. That rule generally allows questioning regarding specific instances of prior bad behavior on cross examination “if the behavior reflects on the witness's character for truthfulness.” *Allen v. Commonwealth*, 395 S.W.3d 451, 464 (Ky. 2013). Thus, under KRE 608 “[a]s long as the conduct in question is so probative [regarding truthfulness], whether it resulted in a criminal conviction or not, the court may, in its discretion, allow inquiry into it” *Id.* at 466.

Carr contends that his trafficking conviction has no direct relationship to his truthfulness. That argument misses the mark, however. The Commonwealth asked Carr at trial if he had sold drugs previously only in response to his testimony that no one other than the informant had ever called him seeking drugs. Carr’s previous conviction means the Commonwealth was permitted to challenge his specious, facially untruthful testimony that no one had called him seeking drugs before the informant did so. We find no palpable error under KRE 608.

Carr’s next argument is that the trial court erred by levying \$165.00 in court costs (payable in monthly installments beginning within sixty days after his release from custody) because he was represented by a public advocate. Carr lodged no objection with the trial court to the imposition of costs. The Kentucky

Supreme Court has repeatedly held in this situation that an appellate court may not disturb the imposition of costs. *See, e.g., Spicer v. Commonwealth*, 442 S.W.3d 26, 35 (Ky. 2014); *Roe v. Commonwealth*, 493 S.W.3d 814, 831 (Ky. 2015) (“A sentencing error only occurs when a defendant's poverty status is clearly established and the trial judge imposes costs contrary to that finding.”) Since Carr’s poverty status was not raised at trial, this Court will not vacate the imposition of court costs in this case.

Finally, Carr argues the trial court erred when it imposed a \$600.00 public defender fee, which also was to be paid via monthly installments upon his release from custody. This issue also was not raised before the trial court, but we may review it as a potential sentencing error or for palpable error.

Like the imposition of court costs, the imposition of a public defender fee falls squarely within the holding of *Spicer*. Unlike the court costs issue, however, *Spicer* mandates vacating the public defender fee in this case.

In *Spicer*, the court held in relevant part:

Appellant in this case was represented by a public defender at the time of sentencing, and was granted *in forma pauperis* status on appeal. Thus, it is clear his indigency continued throughout trial. There is simply no record of any hearing in which the trial court later found good cause to determine the defendant should not continue to be considered an indigent person. Thus, without such findings, the court's imposition of a \$450.00 attorney fee was improper, and we now vacate it.

Spicer, 442 S.W.2d at 34-35. The trial court here did not have a hearing to determine whether Carr was indigent, instead merely opining at sentencing that it saw no reason Carr could not pay the fee. Because this case is indistinguishable from *Spicer*, the imposition of a public defender fee was a palpable error and must be vacated.

For the foregoing reasons, the judgment of the Campbell Circuit Court is affirmed on all issues except as to the imposition of a public defender fee, which is vacated.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Karen Shuff Maurer
Assistant Public Advocate
Department of Public Advocacy
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Andy Beshear
Attorney General of Kentucky
Frankfort, Kentucky

James C. Shackelford
Assistant Attorney General
Frankfort, Kentucky