IMPORTANT NOTICE

NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.

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Supreme Court of Kentucky

2000-SC-0130-MR

TERRANCE A. BRASHER — APPELLANT

V.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE LISABETH HUGHES ABRAMSON, JUDGE
1998-CR-2206

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

REVERSING AND REMANDING

Appellant, Terrance Brasher, was convicted of manslaughter in the second degree, trafficking in the first degree while in possession of a firearm, and tampering with physical evidence. Appellant was sentenced to ten years, thirteen years, and one year respectively on each of the convictions. The sentences run consecutively and result in a period of incarceration totaling twenty-four years. Appellant now brings this appeal as a matter of right. Ky. Const. § 110(2)(b). For the reasons set forth herein, we reverse and remand.

Appellant, who was seventeen years of age at the time, was staying at the residence of his girlfriend, Keisha Tiller. During the early morning hours of July 26, 1998, Keisha Tiller's brother, Terrance Tiller, and Melvina Hamilton attempted to enter the residence through the back entrance. Appellant heard someone and pointed a gun

at the back door. As Terrance Tiller inserted his key into the doorlock, Appellant fired a shot through the door, which struck Melvina Hamilton in the chest. After the shooting, Keisha Tiller gathered up some drugs and drug paraphernalia and placed them in a box. Appellant took the box and concealed it in a neighbor's yard. He subsequently returned and placed the gun in the same box.

The police arrived and took Appellant, Keisha Tiller, and Terrance Tiller to the station house for questioning. They all received Miranda warnings, and were questioned about what knowledge they possessed regarding the earlier events. Later that morning, the police told Appellant that Melvina Hamilton passed away. Appellant then confessed that he was the one who shot her earlier that morning. Appellant was subsequently charged with wanton murder, trafficking while in possession of a firearm, and tampering with physical evidence. Appellant was originally brought into court as a juvenile, but was soon transferred to circuit court for trial as an adult on the grounds that a firearm was involved in the crimes charged. A jury found Appellant guilty of second-degree manslaughter, trafficking while in possession of a firearm, and tampering with physical evidence. The jury's recommended sentences totaled twenty-four years, which were to run consecutively, and were adopted by the trial court. Appellant then brought this matter of right appeal.

APPELLANT'S CONFESSION

Appellant argues that his confession should have been suppressed because it was taken in violation of KRS 610.220. KRS 610.220(2) provides that a juvenile cannot be held in custody for more than two hours. Appellant argues that he was in custody for a time period greater than two hours, and his parents were never notified. He argues that he was held illegally and any statements that he made, including his

confession, should have been suppressed by the trial court as "fruit of the poisonous tree."

The trial court denied the motion to suppress Appellant's confession and allowed the confession into evidence. The trial court found that while statutes concerning juveniles, like KRS 610.220, should not be taken lightly, a violation of the statute alone did not support suppression in this case. Rather, the trial court found that given the totality of the circumstances, Appellant understood the consequences of waiving his rights and that the confession was voluntary.

Appellant asserts that KRS 610.220 was violated, and a new trial is required at which his confession would be excluded. We disagree. The violation of KRS 610.220, or any similar statute, should not be the sole determinative factor with regard to a motion to suppress a confession. We find that the better approach, which was followed by the trial court, is to ascertain if the confession was voluntary based on the totality of the circumstances. This approach has been adopted by many of our sister states regarding the voluntariness of a juvenile's statements. State v. Sugg, 456 S.E.2d 469 (W. Va. 1995); In Re Kean, 520 A.2d 1271 (R.I. 1987); Commonwealth v. Williams, 475 A.2d 1283 (Pa. 1984). That being said, however, we cannot ignore the significance of statutes like KRS 610.220 that concern juveniles. Regarding a similar statute, KRS 610.200, it has been said that "where a juvenile defendant properly challenges the voluntariness of his or her confession, trial courts should consider an investigating officer's failure to comply with KRS 610.200 as evidence relevant to the voluntariness inquiry." Murphy v. Commonwealth, Ky., 50 S.W.3d 173, 187 (2001) (Justice Keller, concurring). "[T]rial courts should consider police authorities' compliance with the provisions of KRS 610.200 as an important variable in determining whether a juvenile's

confession was given voluntarily." Id. We recognize that statutes like KRS 610.220 and 610.200 are important for the protection of juvenile defendants in our penal system. However, we decline to accept Appellant's argument that his confession must be automatically suppressed. There existed evidence at trial that tended to show that the interviewing officers did not even know Appellant's age until after he confessed. Trial courts should always consider whether statutes such as KRS 610.220 have been violated in determining whether to suppress a voluntary confession. However, that is only one factor to be considered, and trial courts should review the totality of the circumstances surrounding the confession before a decision is rendered. We find that this is the approach the trial court selected in addressing this issue, and find no error was committed.

TRIAL COURT'S REFUSAL TO GRANT SEPARATE TRIALS

Appellant asserts that it was error for the trial court to fail to sever the trials on the wanton murder and drug trafficking charges. Appellant further claims that he suffered unfair prejudice based on the fact that evidence concerning the murder charge would not be otherwise admissible in a separate trial for the trafficking offense. Likewise, Appellant claims that evidence concerning the trafficking charge would not otherwise be admissible in a separate trial for the murder. We disagree with Appellant's assertions and find no error in the trial court's decision to not grant separate trials.

RCR 6.18 provides for joinder of two or more offenses if they are "transactions connected together or constituting parts of a common scheme or plan." RCr 9.16 provides that a trial court must grant separate trials if it appears that a joinder of offenses would be prejudicial to the defendant. In general, we have held that a trial judge has broad discretion in deciding if a motion for separate trials should be granted

or denied, and a defendant has the burden of showing that he was prejudiced and that there was a clear abuse of discretion. Sherley v. Commonwealth, Ky., 889 S.W.2d 794, 800 (1994); Harris v. Commonwealth, Ky., 556 S.W.2d 669, 670 (1977). Here it was incumbent upon Appellant to show that the trial judge abused her discretion in not granting his motion to sever the wanton murder and trafficking offenses into separate trials. Because Appellant failed to show any abuse by the trial judge, he has not proven that he suffered any prejudice in having the two charges tried at the same time.

It is our opinion that the murder and trafficking offenses were closely connected in order to be joined under RCr 6.18. The weapon that caused the death of Melvina Hamilton was found in the same location as the narcotics and paraphernalia, over which Appellant possessed control. Appellant was also convicted of tampering, which can be linked to both the wanton murder and drug trafficking charges. In addition, the specific trafficking charge in question involves possession of a firearm. Here the firearm was the weapon used to end the life of Melvina Hamilton. There was ample evidence to support joining the offenses into one trial. Appellant has made no showing that he was prejudiced by the trial court's decision. Hence, we find no error in the trial court denying Appellant's motion for separate trials.

JURY INSTRUCTIONS

Appellant contends that the jury instructions concerning imperfect self-protection were improperly worded and deprived him of his right to present a defense to a properly instructed jury and his right to a fair trial. We agree.

The jury was instructed on three different degrees of homicide: wanton murder, second-degree manslaughter, and reckless homicide. Based on the evidence, Appellant was also entitled to instructions on the defenses of self-protection, protection

of others, protection against burglary, and imperfect self-defense (i.e., wanton or reckless belief as to need for, or degree of, physical force.) See KRS 503.050 and KRS 503.120. At the jury-instruction hearing, the parties discussed the appropriate imperfect self-protection instructions based on our decision in Elliott v. Commonwealth, Ky., 976 S.W.2d 416 (1998), in which we shed light on the proper application of KRS 503.120(1).

Defense counsel argued that according to Elliott, if the defendant had a wanton belief regarding the need for or degree of protection required, the defendant could not be convicted of a homicide greater than second-degree manslaughter and if the defendant had a reckless belief regarding self-protection, the defendant could not be convicted of a homicide greater than reckless murder. The trial court, however, concluded that under Elliott, if a defendant had a wanton or reckless belief regarding self-protection, that belief merely precluded a conviction for intentional homicide. That is, under the trial judge's interpretation of Elliott, a defendant's reckless belief regarding self-protection could preclude an intentional homicide conviction, but could not reduce a conviction from second-degree manslaughter to reckless homicide. Accordingly, the trial judge instructed the jury that if it found that the defendant had either a reckless or wanton belief regarding self-protection, "[t]hen the defenses of self-protection, protection of others and protection against burglary were not available to the Defendant and you will find the Defendant either not guilty or guilty under Instructions No. 1 [wanton murder], 2 [second-degree manslaughter], and 3 [reckless homicide] without regard to those defenses." (Emphasis added). The trial court arrived at this instruction by altering model jury instruction §11.08B (see 1 Cooper, Kentucky Instructions to Juries (Criminal)).

In Commonwealth v. Hager, Ky., 41 S.W.3d 828 (2001), we revisited the "wanton or reckless belief qualification." Unlike Elliott, Hager involved both intentional and unintentional homicide instructions, so the resolution of the present issue is more readily apparent. In Hager, Justice Cooper wrote that " . . .a recklessly held belief in the need to act in self-protection is a defense to an offense requiring either intent or wantonness . . . ." Hager at 842 (emphasis added). It is clear from Hager that the position advocated by defense counsel at trial in this case was correct. The instructions the trial court gave the jury effectively nullified Appellant's self-protection defense if the jury found Appellant acted recklessly or wantonly. Appellant was ultimately convicted of second-degree manslaughter, a crime with a wanton mental state. Under Hager, if the jury found that Appellant acted recklessly in defending himself, he should not have been convicted of a homicide greater than reckless homicide. Because the instructions in this case do not permit that result, they are improper. Because this error may have resulted in a conviction of second-degree manslaughter instead of reckless homicide, we cannot say the error was harmless. Accordingly, we reverse the trial court on this issue and remand this case for a new trial consistent with this opinion and our opinion in Hager.

EVIDENCE CONCERNING TRAFFICKING CONVICTION

Appellant contends that the evidence was insufficient to support a conviction for the trafficking offense. He now asks this Court to reverse this case and direct the trial court to enter a directed verdict of acquittal on the trafficking charge. Appellant concedes taking possession of the drugs, but asserts his clear intent was directed toward disposal or destruction of the drugs. He further asserts that this is all that the Commonwealth could prove.

We have held a "trial court is expressly authorized to direct a verdict for the defendant if the prosecution produces no more than a mere scintilla of evidence." Commonwealth v. Benham, Ky., 816 S.W.2d 186, 187-88 (1991). Here the Commonwealth produced evidence far greater than a mere scintilla. There is evidence that Appellant exercised control over the drugs when he placed the gun in the box containing the drugs, which he had already deposited in a neighbor's yard. In addition, only the fingerprints of Appellant could be identified on the box containing the drugs. While much of the evidence is circumstantial, it cannot be said that there was a lack of sufficient evidence for a rational jury to reach a decision. Whenever a motion for a directed verdict is made, "the trial court must assume that the evidence for the Commonwealth is true, but reserving to the jury questions as to the credibility and weight to be given to such testimony." Id. At 187. Without question, the evidence presented was sufficient to go to the jury, and we find nothing improper with the jury's decision. The trial court did not commit error when it denied Appellant's motion for directed verdict of acquittal.

TRIAL COURT'S REFUSAL TO ALLOW APPELLANT'S CROSS-EXAMINATION OF DETECTIVE KEARNY

Appellant contends that he was denied his right to confrontation when the trial court would not permit him to cross-examine Detective Kearny, the officer who elicited Appellant's confession, regarding an earlier suppression hearing. Appellant sought to question Kearny about his knowledge of KRS 610.220 and if he was aware of Appellant's age. The trial judge would not allow that line of questioning on cross-examination because she did not want the substance of the suppression hearing to be presented before the jury. Appellant asserts that the trial court's decision was incorrect,

and that the testimony elicited from Kearny on cross-examination was relevant to show bias. We agree with Appellant that the trial court should have allowed his cross-examination. It was error for the trial court to not allow the jury to hear the cross-examination of Kearny. However, we find the error to be nonprejudicial. The test of nonprejudicial, or harmless, error is whether there is any substantial possibility that the outcome of the case would have been any different without the presence of that error. Commonwealth v. McIntosh, Ky., 646 S.W.2d 43, 45 (1983). While we agree that Appellant should have been allowed to cross-examine Kearny in order to show bias, the avowal produced no testimony that would have influenced the jury's decision.

"PROFILE" TESTIMONY

Appellant also alleges that it was error for the trial court to allow a former narcotics officer to give testimony, which Appellant characterizes as "profile" testimony. However, this issue was not properly preserved because the objection was not timely made. RCr 9.22. Appellant also urges this Court to review this issue as "substantial error" under RCr 10.26. We decline to do so because there is nothing to suggest that manifest injustice occurred. This issue is not preserved and merits no consideration from this Court.

For the foregoing reasons, the judgment of the Jefferson Circuit Court is reversed and this case is remanded for trial in accordance with this Opinion.

Lambert, C.J.; Graves, Johnstone, Keller, and Stumbo, JJ., concur. Cooper, J., concurs in result only. Wintersheimer, J., dissents without opinion.

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ORDER GRANTING PETITION FOR REHEARING AND WITHDRAWING AND REISSUING OPINION

The petition for rehearing filed by the Appellant, Terrance A. Brasher, is hereby granted. There shall be no additional briefing.

The Memorandum Opinion of the Court rendered herein on June 13, 2002, is hereby withdrawn and the attached Memorandum Opinion is reissued in lieu thereof.

Lambert, C.J.; Cooper, Graves, Johnstone, Keller, and Stumbo, JJ., concur. Wintersheimer, J., dissents and would not grant rehearing.

Entered: February 20, 2003.

CHIEF JUSTICE