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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.

RENDERED: FEBRUARY 20, 2003
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2001-SC-0032-MR

AARION LAMON JOHNSON — APPELLANT

V.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE REBECCA M. OVERSTREET, JUDGE
CASE NO. 99-CR-00848

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING, AND REMANDING IN PART

Appellant, Aarion Lamon Johnson, entered a conditional guilty plea to six (6) counts of Rape in the First Degree, six (6) counts of Burglary in the First Degree, two (2) counts of Sexual Abuse in the First Degree, one (1) count of Attempted Rape in the First Degree, two (2) counts of Sodomy in the First Degree, one (1) count of Assault in the First Degree, one (1) count of Theft by Unlawful Taking Over $300 (TBUT), and two (2) counts of Burglary in the Second Degree on November 8, 2000, reserving the right to appeal on the Appellant's Motion to Suppress. The trial court sentenced Appellant to a total of one hundred (100) years incarceration — twenty (20) years on each of six counts of Rape I, twenty (20) years on four counts of Burglary I, ten (10) years on the remaining two counts of Burglary I, five (5) years on each of two counts of Sexual Abuse I, ten (10) years on one count of Attempted Rape I, twenty (20) years on each of two counts of Sodomy I, twenty (20) years on one count of Assault I, five (5) years on

one count of TBUT, and five (5) years on each of two counts of Burglary II. The trial court ordered that the three counts of Rape I, one count of Sodomy I, and one count of Burglary I were to run consecutively with each other and concurrently with all other counts. Appellant now appeals his conviction to this Court as a matter of right. Ky. Const. § 110(2)(b).

The facts indicate that Appellant burglarized and/or raped at least six (6) women in the Lexington area in early 1999. A search warrant was issued based on a police officer's affidavit detailing an interview on June 11, 1999, with Appellant's cousin and one-time roommate. The roommate stated that Appellant had called him on May 13, 1999, to ask for a ride. Appellant subsequently admitted to the roommate that he had broken into a girl's home earlier that day and had stolen several items. The affidavit also stated that the roommate had later seen evidence of the burglary at the house the two men shared. The affidavit further stated that there had been a report of a rape and burglary on May 13, 1999, and the items listed as missing were exactly those the roommate claimed to have seen at Appellant's house. A subsequent search of Appellant's home on June 11, 1999, revealed many of the items that had been reported stolen by the victim and had been seen by Appellant's roommate. Appellant subsequently confessed to the police and detailed at least five other similar attacks he had committed. Based on this information and other information obtained from Appellant's girlfriend, police executed another search of Appellant's home on June 13, 1999, and obtained evidence implicating Appellant in several other crimes.

Appellant raises five (5) issues on appeal. We will examine each in turn.

I. WAS APPELLANT DENIED DUE PROCESS OF LAW AND SUBJECTED TO CRUEL AND UNUSUAL PUNISHMENT WHEN THE TRIAL COURT IMPOSED A 100 YEAR SENTENCE IN EXCESS OF THE 70 YEAR MAXIMUM ALLOWED BY KRS 532.110.

KRS 532.110(1)(c) provides as follows:

> The aggregate of consecutive indeterminate terms shall not exceed in maximum length the longest extended term which would be authorized by KRS 532.080 for the highest class of crime for which any of the sentences is imposed. In no event shall the aggregate of consecutive indeterminate terms exceed seventy (70) years.

Although the language in KRS 532.110(1) grants the trial court broad discretion by stating that multiple sentences "shall run concurrently or consecutively as the court shall determine. . .," the discretion vested in the trial court is subject to the limitations set out in KRS 532.110(1)(c) above. The trial court exceeded the maximum consecutive indeterminate terms allowable by statute when it sentenced Appellant to an aggregate term of one hundred (100) years imprisonment. Therefore, we reverse and remand for re-sentencing in compliance with KRS 532.110.

II. WAS APPELLANT DENIED DUE PROCESS OF LAW, EQUAL PROTECTION OF THE LAW, AND SUBJECTED TO CRUEL AND UNUSUAL PUNISHMENT WHEN THE TRIAL COURT REFUSED TO DECLARE KRS 439.3401 UNCONSTITUTIONAL; OR IN THE ALTERNATIVE, SET A MINIMUM PAROLE ELIGIBILITY OF TWENTY YEARS FOR APPELLANT.

Appellant argues that this issue is preserved for appeal by motion and a hearing that occurred on December 8, 2000. It appears from the record that the conditional plea agreement was entered into on November 8, 2000, and did not set out any specific reservations for appeal. The Judgment on Guilty Plea entered by the trial court on November 8, 2000, states only that the court is "reserving the Defendant's rights to an

appeal on his Motion to Suppress." RCr 8.09, in part, states, "[w]ith the approval of the court a defendant may enter a conditional plea of guilty, reserving in writing the right, on appeal from the judgment, to review of the adverse determination of any specified trial or pretrial motion." Since there is no written ruling of the trial court specifically allowing Appellant the right to appeal the constitutionality of KRS 439.3401, or in the alternative, set a minimum parole eligibility date, this issue is not preserved for review and is not properly before this Court. However, because we must remand for re-sentencing in any event, and in the interests of judicial economy, we will note that in light of our recent decision in Hughes v. Commonwealth, Ky., 87 S.W.3d 850 (2002), the legislative amendments to KRS 439.3401 in 1998 do not affect this Court's reasoning in Sanders v. Commonwealth, Ky., 844 S.W.2d 391 (1992).

KRS 439.3401 sets out parole requirements for violent offenders and states in relevant part:

> (2) A violent offender who has been convicted of a capital offense and who has received a life sentence (and has not been sentenced to twenty-five (25) years without parole or imprisonment for life without benefit of probation or parole), or a Class A felony and receives a life sentence, or to death and his sentence is commuted to a life sentence shall not be released on probation or parole until he has served at least twenty (20) years in the penitentiary. Violent offenders may have a greater minimum parole eligibility date than other offenders who receive longer sentences, including a sentence of life imprisonment.
>
> (3) A violent offender who has been convicted of a capital offense or Class A felony with a sentence of a term of years or Class B felony who is a violent offender shall not be released on probation or parole until he has served at least eighty-five percent (85%) of the sentence imposed.

Appellant argues that the application of KRS 439.3401(3) in his situation means that he

must serve at least eighty-five (85) years before he is eligible for parole, whereas, an offender sentenced to life imprisonment may be released on parole after having only served twenty (20) years. In Sanders, supra, this Court held that KRS 439.3401 should be interpreted as requiring service of fifty percent (50%) of a term of years sentence *or* twelve (12) years (pre-amendment figures), *whichever is less*, before parole eligibility. Id. at 394. In Hughes, supra, we addressed this very issue and held:

> [T]he 1998 amendment of KRS 439.3401(3) changed only the length of the period of parole disability from fifty percent (50%) to eighty-five percent (85%) of the imposed sentence. The amendment did not address the interpretation of the statute set forth in Sanders. . . . "[T]he failure of the legislature to change a known judicial interpretation of a statute [is] extremely persuasive evidence of the true legislative intent."

Id. at 855-856 (citation omitted). Nor does the addition of the language "[v]iolent offenders may have a greater minimum parole eligibility date than other offenders who receive longer sentences, including a sentence of life imprisonment," to KRS 439.3401(2) indicate a contrary legislative intent. Id. at 856. "The reference to 'other offenders' obviously refers to offenders other than 'violent offenders.' Parole eligibility guidelines for 'other offenders' are generally established by the parole board, *KRS 439.340(3),* and nonviolent offenders obviously have earlier parole eligibility dates. 501 KAR 1:030 § 3. Furthermore, *KRS 439.3401(2)* pertains only to life sentences." Id. Accordingly, we hold that this Court's interpretation of KRS 439.3401 in Sanders, supra, still applies notwithstanding the 1998 legislative amendments.

III. DID THE TRIAL COURT ERR IN REFUSING TO SUPPRESS EVIDENCE OBTAINED BY AN ALLEGEDLY DEFECTIVE SEARCH WARRANT.

Appellant alleges that the sworn affidavit of the police officer detailing the

interview with Appellant's roommate contained false or misleading information and was so lacking in probable cause that officers should not have reasonably relied upon it. Specifically, Appellant contends that the "anonymous informant" (Appellant's cousin/roommate) referred to in the affidavit was not reliable because there was no mention that the roommate suspected Appellant of having raped and beaten his (roommate's) wife on June 11, 1999, thus providing a motive to lie about Appellant's involvement.

> The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and the 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a 'substantial basis for . . . conclud[ing]' that probable cause existed.

Beemer v. Commonwealth, Ky., 665 S.W.2d 912, 914-915 (1984) (citation omitted) (quoting Illinois v. Gates, 462 U.S. 213, 238-239, 103 S. Ct. 2317, 2332, 76 L. Ed. 2d 527, 548 (1983)). The affidavit of June 11, 1999, sets forth the information provided by Appellant's former roommate and specifically states the basis of the knowledge. The fact that the roommate may have been prompted to contact authorities because he believed his own wife to have been attacked by Appellant does not destroy his reliability or veracity as Appellant contends.

Likewise, the fact that the information was not provided to the police officer until twenty-nine days after the evidence was seen at the house does not render the affidavit defective. There remained a fair probability that evidence of the crime would still be present at Appellant's house even twenty-nine days after the attack. Specifically, the affidavit stated that Appellant had given a pair of gloves stolen from the May 13th victim

to his girlfriend who also resided at Appellant's home. There is no indication that the gloves would be "the type of property which would have been disposed of promptly after the burglary" as Appellant argues as the basis for his claim that there was no probable cause to believe the stolen property would still be located at his home when the warrant was issued. Also, it is widely accepted that "suppression of evidence obtained pursuant to a warrant should be ordered only on a case-by-case basis and only in those unusual cases in which exclusion will further the purposes of the exclusionary rule." United States v. Leon, 468 U.S. 897, 918, 104 S. Ct. 3405, 3418, 82 L. Ed. 2d 677, 695 (1984). We do not believe this to be one such case.

Furthermore, even assuming the affidavit was somehow defective, this Court adopted the good faith exception to the exclusionary rule in Crayton v. Commonwealth, Ky., 846 S.W.2d 684 (1992). Also, in Commonwealth v. Litke, Ky., 873 S.W.2d 198 (1994), this Court revisited its adoption of the good faith exception and applied it specifically to technical deficiencies in an affidavit underlying a search warrant. In Litke, supra, we upheld the validity of the search by way of the good faith exception even though the affidavit was deficient with regard to time specificity. In that case, the fraudulent activity was alleged to have taken place sometime within the span of several years. In the case at bar, there is only a twenty-nine day delay from the date the roommate saw the evidence until he reported it to police, and there is no indication from the record that the issuing magistrate or the serving officers executed the warrant in bad faith. During the suppression hearing, the detective who prepared the affidavit testified that in addition to the facts recited above, the informant advised him that the items in question were still in Appellant's apartment as late as June 7, 1999, and that the clothing worn by the rapist was also located there. Therefore, we hold that the initial

search of Appellant's home was proper as well as any subsequent search resulting therefrom.

IV. WERE APPELLANT'S DUE PROCESS RIGHTS VIOLATED BY THE TRIAL COURT'S FAILURE TO HOLD A COMPETENCY HEARING AS REQUIRED BY KRS 504.100.

The trial court addressed the issue of Appellant's competency for trial on numerous occasions. On August 27, 1999, Appellant requested and the court ordered a mental evaluation be performed. On January 7, 2000, Appellant stipulated to Dr. Harwell Smith's report stating that Appellant was competent to stand trial and based upon that report, along with evidence in the record, the trial court found Appellant competent. On March 3, 2000, the parties again stipulated to reports of Dr. Smith and Appellant's own expert, Dr. Ruth, finding Appellant competent to stand trial. The reports of both experts were entered into the record. Further, the trial court entered an order dated March 6, 2000, specifically finding Appellant competent to stand trial. On November 8, 2000, at entry of Appellant's conditional guilty plea, the trial court again inquired into Appellant's competency and reiterated that the court had previously found Appellant competent based on the parties' stipulations and specific findings. Finally, on December 8, 2000, the Commonwealth requested that the court enter an order stating that if Dr. Smith was called to testify as a witness "he would testify based upon his report and the findings in his report, which was previously provided to the parties." The court's order further stated that "[b]ased upon this stipulation and the findings in the report, the Court hereby finds that the Defendant is competent to stand trial." This order dated December 8, 2000, was signed by all parties.

KRS 504.100 mandates that the court *shall* hold a hearing to determine whether the defendant is competent to stand trial. Likewise, a defendant cannot waive a

competency hearing. Mills v. Commonwealth, Ky., 996 S.W.2d 473, 486 (1999). In the case at bar, Appellant did not, in fact, waive his competency hearing, but instead merely stipulated to the testimony of the examining experts who both found Appellant competent to stand trial. On numerous occasions, the trial court made findings of competency based upon the report of Dr. Smith and the evidence in the record. On one occasion, the court suggested that Dr. Smith should be subpoenaed in order to testify to his findings, but defense counsel agreed to stipulate to what Dr. Smith would have testified to if called and subsequently his report was admitted into the record. The abundance of caution exhibited by the trial judge and the numerous times competency was addressed in the proceedings below suggest that the trial court conducted a thorough evaluation of Appellant's competency to stand trial. KRS 504.100 requires no more. Therefore, we find that the requirement of KRS 504.100 mandating that the trial court hold a hearing to determine competency was satisfied in this case and as a result, Appellant was not denied due process of law.

It should also be noted that even if the proceedings conducted by the trial court were not considered sufficient to satisfy the requirements of KRS 504.100, such would be harmless error. In Mills, supra, this Court held that a defendant's waiver of the mandatory competency hearing was harmless error. Specifically, we noted that Mills could not rely on the expert's report on appeal because it found him competent and having pointed to no other evidence in the record that he could have relied upon to show that the trial court should have questioned his competency, we held harmless error applied. Id. at 486. Similarly here, Appellant cannot rely on either of the expert reports to prove that his competency should have been questioned because both concluded Appellant was competent to stand trial. Accordingly, we find that even if the

trial court had failed to hold a competency hearing in compliance with KRS 504.100, such a failure would have amounted to harmless error.

V. WERE APPELLANT'S DUE PROCESS RIGHTS VIOLATED WHEN THE TRIAL JUDGE FAILED TO RECUSE HERSELF.

This issue was not properly preserved for review by this Court and will therefore not be heard on appeal. RCr 8.09.

CONCLUSION

For the foregoing reasons, the judgment of the Fayette Circuit Court is hereby affirmed, but due to the sentencing error, we remand for correction of Appellant's sentence in conformity with this opinion.

All concur.

COUNSEL FOR APPELLANT:

Richard Hoffman
Assistant Public Advocate
Department of Public Advocacy
100 Fair Oaks Lane, #302
Frankfort, Ky 40601

COUNSEL FOR APPELLEE:

A. B. Chandler, III
Attorney General
Capitol Building
Frankfort, KY 40601

Kent T. Young
Assistant Attorney General
Office of the Attorney General
Criminal Appellate Division
1024 Capital Center Drive
Frankfort, KY 40601-8204