# ***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## ***NOT TO BE PUBLISHED OPINION***

***THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.***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NOT TO BE PUBLISHED

FINAL
DATE 3-13-03 ELIA, D.C.

# Supreme Court of Kentucky

2001-SC-0506-TG

GEORGE GRIBBONS — APPELLANT

V.

ON TRANSFER FROM COURT OF APPEALS
2001-CA-0929-MR
CASEY CIRCUIT COURT
HONORABLE JAMES WEDDLE, JUDGE
2000-CR-0058

COMMONWEALTH OF KENTUCKY — APPELLEE

**MEMORANDUM OPINION OF THE COURT**

AFFIRMING

George Gribbons was convicted by a Casey County jury of wanton murder, for which he received a sentence of forty years' imprisonment. He appeals to this Court as a matter of right. We affirm his conviction.

On the evening of September 3, 2000, Jerry Lee Evans was shot and killed while in his home. Appellant was arrested that very night. Although Appellant pleaded innocent to the charge of murder, the evidence inculpating him was substantial. At Appellant's trial, the testimony of several key witnesses reconstructed the events that led to Evans' murder. According to the testimony, Appellant was distraught because his estranged wife, Arlene Gribbons, was living with her ex-husband, the victim. Arlene testified that in the past, while intoxicated, Appellant had threatened to kill both her and

Evans. On the evening of the murder, Appellant became drunk, drove to Evans' trailer home, and, while still in his truck, fired two shots from his shotgun. One shot fatally struck Evans in the head. Arlene was present when the murder occurred but escaped unharmed. A police officer who happened to be at the house next door to Evans' heard the shotgun reports and saw a truck, later identified as Gribbons', leave the scene.

Appellant's daughter, Lena Gayle Hughes, found Appellant about an hour after the murder. He was passed out in his truck, which was parked in a ditch on his own property. Hughes removed the shotgun, which she testified contained two empty deer-slug casings and two unfired shells. Hughes drove Appellant to her brother's house and en route Appellant stated, "I got me one or two of 'em." While at his son's house, Appellant admitted to him that he shot Evans. Appellant testified on his own behalf and admitted being drunk that day. He also admitted driving to Evans' home and firing two shots in the direction of the trailer, but Appellant could not recall shooting at any particular target.

The jury was instructed on all degrees of homicide: intentional murder, first-degree manslaughter, wanton murder, second-degree manslaughter, and reckless homicide. The jury ultimately convicted Appellant of wanton murder. He appeals that conviction, alleging four prejudicial errors at trial: (1) the trial court erred by permitting the Commonwealth to amend the indictment on the morning of the trial to include wanton murder; (2) the trial court erred by denying him a continuance after permitting the indictment to be amended; (3) the trial court should have declared a mistrial after a detective testified concerning Appellant's silence during police interrogation; and (4) the

trial court denied Appellant due process and equal protection by refusing to grant his motion to set a twenty-year minimum parole eligibility for his sentence.

**AMENDED INDICTMENT**

On September 14, 2000, Appellant was charged by the Casey County Grand Jury with the intentional murder of Jerry Evans. The trial was scheduled for March 19, 2001, a Monday. On Friday, three days before trial, the Commonwealth moved to amend the indictment to include a charge of wanton murder. On the morning of trial, defense counsel objected to the amendment. Over defense counsel's objections, the trial judge granted the motion to amend. Defense counsel then argued for a one-day continuance to revise her trial strategy; the trial court denied this request. On appeal, Gribbons claims the amendment was improper because it amounted to a "completely different theory of liability" and there was no new evidence to support that theory.

We begin with the rule in question, RCr 6.16, which deals with amendment and provides: "The court may permit an indictment . . . to be amended any time before verdict or finding if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced. . . ." The rule is relatively straightforward and our courts interpret it in like fashion. E.g., Basham v Commonwealth, Ky. App., 703 S.W.2d 480 (1985); Brown v Commonwealth, Ky., 378 S.W.2d 608 (1964) (overruled on other grounds). These cases, like the rule itself, embrace amendment as long as the defendant has notice of the evidence and charges against him. Schambon v. Commonwealth, Ky. 821 S.W.2d 804, 810 (1991) (". . . RCr 6.16 is a lenient rule . . .").

Appellant cites Wolbrecht v. Commonwealth, Ky., 955 S.W.2d 533 (1997), for the proposition that a trial court cannot permit the Commonwealth to amend the

indictment to encompass a new charge. But Appellant's reliance on Wolbrecht is misplaced. In that case, three defendants were charged with killing, or conspiring with one another to kill, the victim. Because the prosecution could not prove who pulled the trigger, the original indictment charged that "one of the defendants shot and killed" the victim. Id. at 534 (emphasis added). Based on testimony at trial, the prosecution realized that an unknown party may have been the murderer so it sought to amend the indictment to charge that the defendants murdered or conspired to murder the victim as a result of which the victim "was shot and killed. . . ." Id. at 537 (emphasis added). The trial judge permitted the amendment, but on appeal this Court reversed that decision because the majority considered the amendment to be a substantive change resulting in a new charge. We concluded that the defense was severely prejudiced because it was "totally unprepared on the issue raised by the amended indictment." Id.

In this case, Appellant was initially charged with intentional murder (KRS 507.020(1)(a)) and the Commonwealth sought to amend the indictment to include wanton murder (KRS 507.020(1)(b)). As we have said before, intentional and wanton murder constitute the same crime. See Evans v. Commonwealth, Ky., 45 S.W.3d 445, 447 (2001). In Schambon, we addressed amendment of an indictment to include a different subsection of the originally charged offense and concluded the amendment was proper:

> The amendment allowed did not result in appellants being charged with a different offense. To the contrary, the amendment merely altered the designation of the subsection of the statute under which appellants were charged. The offense was the same. No additional evidence was required to prove the amended offense and appellants have not shown that they were prejudiced by the amendment. There was no error.

821 S.W.2d at 810. As in Schambon, the charged offense here was the same as the amended offense and no new evidence was required or presented to support the new charge. Further, Appellant has demonstrated no prejudice from the amendment. While we do not condone late amendment by the Commonwealth as trial strategy, there is no allegation that the Commonwealth engaged in such a practice, and we find no error.

**CONTINUANCE**

Appellant next argues that after the trial court permitted the Commonwealth to amend the indictment, he should have been granted a continuance in order to revise his trial strategy. Appellant requested a continuance, but his request was denied. RCr 6.16 explicitly permits the trial court to grant a continuance when the indictment is amended: "If justice requires, . . . the court shall grant the defendant a continuance when such an amendment is permitted." The question in this case is reduced to whether justice required the continuance; we agree with the trial court that it did not.

First, it was readily foreseeable that the indictment would be amended. As discussed, supra, intentional murder and wanton murder are the same offense. Also, as the trial judge remarked at the pretrial hearing, the commentary to the penal code cites shooting into an occupied building as a textbook example of wanton murder. See KRS 507.020, commentary. ("Typical of conduct contemplated for inclusion in 'wanton' murder is: shooting into . . . an occupied building . . . .") But not only did the plain letter of the law suggest the indictment could be amended, before trial, defense counsel's own trial strategy would have resulted in amendment during trial. Defense counsel planned an intoxication defense to intentional murder. This defense would have negated the intentional murder charge, but would have supported a wanton murder

charge. See e.g., Brown v. Commonwealth, Ky., 575 S.W.2d 451 (1978). (Intoxication is a defense to crimes involving intentional mental state, but not to crimes involving wanton mental state.) Because the possibility of amendment was imminently foreseeable, defense counsel should have been prepared for it.

In defense of his position, Appellant again looks to Wolbrecht, 955 S.W.2d 533. As stated, supra, Wolbrecht is distinguishable from this case because there the prosecution introduced a new theory of the case, which the defense was unapprised of and unable to defend against without additional time. In the present case, there was no new theory and defense counsel should have been aware of the possibility of amendment. Appellant also suggests that a continuance would have provided him an opportunity to explore available plea bargain options or a different defense, extreme emotional distress. We find these arguments equally unconvincing. After receiving the prosecution's motion to amend the indictment, defense counsel had some time (a weekend) to evaluate her strategy in the event her objection to the motion was overruled. Also, she could have attempted to negotiate a plea bargain after the motion was granted, but before trial began. It appears that no such attempt was made.

The granting of a continuance lies within the sound discretion of the trial judge. Having reviewed the record in this case, we find no abuse of discretion.

**POLICE TESTIMONY CONCERNING DEFENDANT'S SILENCE**

Appellant next urges this Court to reverse his conviction because a witness for the prosecution commented on his post-Miranda silence. Detective Antle attempted to interview Appellant shortly after his arrest. At trial, the prosecutor questioned Detective Antle about the meeting. The prosecutor was attempting to determine Appellant's state

of sobriety when he asked: "What was his condition, Detective Antle?" The detective responded: "He was sober enough in my opinion, and of sound enough judgment, to realize what his rights were, and that he wasn't gonna talk to me." (Emphasis added.) Defense counsel immediately objected and, at the ensuing bench conference, moved for a mistrial. The trial court overruled the objection, but offered and gave an admonition.

Appellant correctly suggests that evidence of a defendant's post-Miranda silence is inadmissible. See Wainwright v. Greenfield, 474 U.S. 284, 106 S. Ct. 634, 88 L. Ed. 2d 623 (1986); Doyle v. Ohio, 426 U.S. 610, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976); Holland v. Commonwealth, Ky., 703 S.W.2d 876 (1985); Niemeyer v. Commonwealth, Ky., 533 S.W.2d 218 (1976) (overruled on other grounds). Based on these cases, the detective's comment was improper. But all of these cases involve deliberate prosecutorial questioning intended to communicate the forbidden information. That is not what occurred here. In this case, the prosecutor asked a proper question and the detective answered by improperly appending the fact of Appellant's silence. We have previously held that such testimony amounts to harmless error. See Wallen v. Commonwealth, Ky., 657 S.W.2d 232, 233 (1983). It certainly does not present the "manifest necessity" required to grant a mistrial. Bray v. Commonwealth, Ky., 68 S.W.3d 375 (2002) (quoting Skaggs v. Commonwealth, Ky., 694 S.W.2d 672 (1985)).

**MINIMUM PAROLE ELIGIBILITY**

Appellant was sentenced to forty years' imprisonment for the crime he committed. Under the violent offender statute, KRS 439.3401(3), Appellant would have to serve 85% of his term (34 years) before he would be eligible for parole. Based on

the fact that a person who receives a life sentence in Kentucky is eligible for parole after twenty years (KRS 439.3401(2)), Gribbons filed a motion at the final sentencing hearing to have his parole eligibility reduced to twenty years. The trial judge agreed with Appellant that a term of twenty years' imprisonment before parole eligibility seemed appropriate under our laws and suggested that Appellant submit an order prescribing the lesser term. There is no evidence in the record that Appellant ever submitted such an order. On appeal, Appellant reiterates his contention that twenty years is the appropriate minimum term. We agree that the minimum parole eligibility is 85% of Appellant's sentence or twenty years, whichever is less. Hughes v. Commonwealth, Ky., 87 S.W.3d 850 (2002). However, it is inappropriate for a trial judge to set a minimum parole eligibility date. That is a function of the parole board, which presumably is aware of the law.

For the foregoing reasons we affirm the judgment of the Casey Circuit Court.

All concur.

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