

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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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: AUGUST 21, 2003
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2002-SC-0033-MR

FINAL

DATE 9-11-03 E:AG x3w:4,DC
APPELLANT

CHARLES O'DELL SHORES

V. APPEAL FROM WHITLEY CIRCUIT COURT
HONORABLE PAUL BRADEN, JUDGE
INDICTMENT NO. 98-CR-00055

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Charles O'Dell Shores, was convicted of murder and first-degree robbery following a jury trial in the Whitley Circuit Court. The jury recommended that Appellant serve consecutive sentences of fifty years and ten years respectively. The trial court entered its final judgment in accordance with the jury's recommendation and sentenced Appellant to a term of imprisonment in the state penitentiary totaling sixty years. He therefore brings this appeal as a matter of right. Ky. Const. § 110(2)(b).

On the morning of April 14, 1998, Willis Knuckles, the victim, was found dead in his Whitley County residence. He had suffered a gunshot wound to the head, which was the apparent cause of death.

On June 8, 1998, Appellant was indicted for murder and robbery in the first degree by the Whitley County grand jury. After approximately three years of pre-trial

proceedings, Appellant was brought to trial on the aforementioned charges in the Whitley Circuit Court on September 25, 2001.

At trial, the Commonwealth argued that Appellant went to the victim's residence on either the late evening of April 13, 1998, or the early morning of April 14, and murdered the victim while in the course of robbing him.

Appellant admitted to visiting the victim's residence, but argued that he did so in order to obtain pills for his back pain. Appellant testified that he knocked on the door to the victim's residence, but no one responded. However, something could be heard coming from the home, perhaps a television or radio. He further testified that he knocked repeatedly until the door eased open. Appellant then ventured inside the residence calling out the victim's name, but still, no response was forthcoming. Appellant testified that he found the victim shot in the head, and subsequently fled the scene because he was frightened.

Following a three day trial, the jury returned guilty verdicts on both the murder and first-degree robbery charges. The jury recommended Appellant receive a prison term of fifty years on the murder charge and ten years on the robbery charge, to run consecutively for a total of sixty years. At the sentencing hearing, the trial court adopted the jury's recommendation and sentenced Appellant accordingly. Appellant then brought this matter of right appeal.

Appellant presents the following four points of error in this appeal: I. whether the trial court erred to Appellant's substantial prejudice by refusing to compel specific performance of a plea agreement he had reached with the Commonwealth; II. whether the trial court abused its discretion when it refused to allow the avowal testimony of witness Richard Adams before the jury; III. whether the trial court abused its discretion

when it allowed evidence of a spent bullet found at the crime scene to be presented at trial; and IV. whether the trial court committed reversible error when it denied Appellant's motion for a directed verdict on the charge of first-degree robbery.

After considering the errors alleged and reviewing the record, we affirm for the reasons set forth below.

I.

The Commonwealth and Appellant apparently struck a tentative plea agreement where the murder charge would be amended to second-degree manslaughter and the robbery charge would be dismissed. Appellant would enter a plea of guilty to second-degree manslaughter, and the Commonwealth would recommend a prison sentence of six years. In an order dated November 16, 1999, the trial court ordered Appellant to appear for a December 13, 1999, status conference regarding the Commonwealth's plea offer. The order provided that Appellant had until November 13, 1999¹ to accept the offer and further provided that the deadline could not be extended by agreement of the parties. Appellant apparently did not accept the agreement by the date of the scheduled status conference.

On January 10, 2000, Appellant signed the Commonwealth's plea offer. Appellant was then scheduled to return to court on February 14, 2000, for entry of a plea. However, after discussing the plea agreement with the victim's family and learning that the family was not satisfied with it, the Commonwealth decided to withdraw its offer to Appellant and, on February 11, 2000, moved the trial court to set a date for trial. In response, Appellant objected to the Commonwealth's motion and moved the

¹ Considering this order was dated November 16, 1999, and the next status conference was scheduled for December 13, 1999, it is our view that the November 13, 1999, deadline to accept the plea offer was written in error. Instead, we conclude that it should have been entered as "December 13, 1999."

trial court to enforce the terms of the plea agreement. On May 12, 2000, the trial court ordered that the Commonwealth's plea offer be presented to it. In an order dated June 27, 2000, the trial court rejected the Commonwealth's offer. The index to the record indicates that Appellant was released on bond and a trial was scheduled before the court entered that order.

Appellant alleges that the trial court denied his rights to due process under both the federal and state constitutions when it failed to enforce the plea agreement he had reached with the Commonwealth. He seeks this Court to reverse his convictions and instruct the trial court to specifically enforce the plea agreement. We decline to do so, since we find that Appellant's constitutional rights have not been violated.

"A plea bargain standing alone is without constitutional significance; in itself it is a mere executory agreement which, until embodied in the judgment of a court, does not deprive an accused of liberty or any other constitutionally protected interest." Mabry v. Johnson, 467 U.S. 504, 507, 104 S. Ct. 2543, 2546, 81 L. Ed. 2d 437, 442 (1984). Here the trial court never accepted the plea agreement, nor did Appellant enter a plea. Since the plea agreement was never "embodied in the judgment" of the trial court, Appellant cannot validly claim constitutional error. Therefore, the trial court did not err to Appellant's substantial prejudice.

In addition, it is within the discretion of the trial court to accept or reject a guilty plea. RCr 8.08. If a trial court determines not to accept a defendant's guilty plea, this Court will not disturb such, unless it is clear that there has been an abuse of discretion. Skinner v. Commonwealth, Ky., 864 S.W.2d 290, 294 (1993). Here there is no evidence that the trial court abused its discretion in rejecting the plea agreement. The trial court did not allow the Commonwealth to withdraw the plea bargain; rather, the trial

court ordered that the motion to enter a guilty plea and the Commonwealth's offer be presented to it.

Once an "offer is made by the prosecution and accepted by the accused, either by entering a plea or by taking action to his detriment in reliance on the offer, then the agreement becomes binding and enforceable." Smith v. Commonwealth, Ky., 845 S.W.2d 534, 537 (1993). If the trial court had actually accepted a guilty plea pursuant to a plea agreement from Appellant, and then allowed the Commonwealth to withdraw the plea offer, then there is no question that a reversal of this case would issue. See, e.g., Matheny v. Commonwealth, Ky., 37 S.W.3d 756 (2001) (where this Court held that the Commonwealth and the trial court were bound by the terms of the plea agreement after it had been accepted by the trial court). However, that is not the case in this matter because the trial court never accepted a plea of guilty. Furthermore, as stated in Smith, supra, in order to enforce any agreement with the Commonwealth, Appellant must demonstrate that he relied on the agreement to his detriment. Maschenik v. Goff, Ky., 837 S.W.2d 891, 892 (1992). Appellant has failed to so demonstrate.

Under the circumstances, we cannot say that the trial court abused its discretion with regard to this issue.

II.

Richard Adams, Appellant's former stepson, was one of the witnesses presented by the Commonwealth. During cross-examination, Appellant's defense counsel attempted to question Adams regarding previous arrests and charges against him. The trial court sustained the Commonwealth's objection to this line of questioning. The testimony was not presented before the jury, but was put on the record by avowal. The avowal testimony reveals that Adams was arrested in 1998 in Whitley County for armed

robbery. It appears that the charges against Adams were not submitted to the grand jury and/or dismissed.

The gist of Appellant's argument is that the avowal evidence should have been presented to the jury to show that Adams was testifying in order to curry favor with the Commonwealth.

Generally, a witness may not be impeached by evidence of particular wrongful acts. CR 43.07 provides that:

A witness may be impeached by any party, without regard to which party produced him, by contradictory evidence . . . but not by evidence of particular wrongful acts, except that it may be shown by the examination of a witness, or record of a judgment, that he has been convicted of a felony.

It is manifest that an exception exists to the general rule. For example, in Chesapeake & Ohio Railway Co. v. Pittman, 283 Ky. 63, 138 S.W.2d 962 (1940), where the plaintiff's attorney was also the local prosecuting officer, our predecessor Court held that a witness in a civil case, who had an indictment pending against her, could be impeached by evidence of bias in order to show that her testimony was possibly influenced by a desire to seek leniency from the plaintiff's attorney in his capacity as prosecutor. See also, Spears v. Commonwealth, Ky. App., 558 S.W.2d 641 (1977) (where it was held that evidence of an indictment pending in the same court against the principal witness for the Commonwealth was competent and admissible to show possible bias); Davis v. Alaska, 415 U.S. 308, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974).

After reviewing the avowal evidence, we are not convinced that Adams gave his testimony in order to garner favor from the prosecuting authority of Whitley County. The Commonwealth stated that it had not entered into any deal with Adams in exchange for his testimony. Adams also stated that he had not received any sort of deal. Moreover,

there is no indictment pending against Adams regarding the alleged robbery. In his reply brief, Appellant argues that the Commonwealth could still submit the robbery charge against Adams to the grand jury. However, this is mere speculation. Adams was arrested in 1998, shortly after he reached his eighteenth birthday. Adams testified at Appellant's trial almost three years later. There is simply nothing in the record to suggest Adams was under any perceived threat of prosecution which encouraged him to testify.

Accordingly, we hold it was not an abuse of discretion for the trial court to refuse to allow the avowal evidence to be put before the jury.

III.

In his brief, Appellant alleges that it was error for the trial court to admit a spent bullet found at the crime scene into evidence, since it had not been properly identified. The Commonwealth, in its brief, states that defense counsel's objection to the introduction of the spent bullet was on the basis of relevancy. In his reply, Appellant concedes that defense counsel made an objection referring to relevancy, but, nonetheless, contends that it is clear that defense counsel was arguing that the Commonwealth could not provide a proper foundation on which the spent bullet could be admitted. We do not agree with this contention.

An examination of the record reveals that defense counsel not only objected on the basis of relevancy before the first witness took the stand, he again objected to the relevance of the spent bullet during the Commonwealth's direct examination of witness Charles Lanham.

Defense Counsel: If your Honor, please, this is at the point right now I feel that I must bring this up about the relevancy of this. I don't see any relevancy to this examination.

Contrary to the Appellant's contention, the objection to the spent bullet was couched in terms of relevancy.

In order for the spent bullet to be admissible as evidence pursuant to the relevancy standard, it must have "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." KRE 401. In our view the trial court allowed evidence of the spent bullet to be admitted because its probative value outweighed its prejudicial effect. KRE 403. "It is a well-settled principle of Kentucky law that a trial court ruling with respect to the admission of evidence will not be reversed absent an abuse of discretion." Commonwealth v. King, Ky., 950 S.W.2d 807, 809 (1997). It was within the sound discretion of the trial judge to determine whether the evidence was relevant, and we hold that he did not abuse that discretion.

We agree with the views expressed in the opinion People v. Gonzalez, 193 A.D.2d 360, 361, 597 N.Y.S.2d 44, 46 (N.Y. App. Div. 1993), wherein it was written:

We reject defendant's argument that it was error to admit a spent bullet found at the scene. It cannot be trivialized as mere coincidence that a bullet was promptly recovered at the scene of an alleged shooting, and the bullet was, thus, "sufficiently connected" with defendant to be relevant to an issue in the case.

Here the spent bullet casing was promptly recovered at the crime scene and was sufficiently connected to this case. Furthermore, Appellant's argument that no blood or tissue was found on the spent bullet goes to the weight of the evidence, as opposed to its admissibility. It was the role of the jury as fact-finder to weigh the spent bullet, along with the other evidence submitted at trial, in reaching its decision.

We also note that, regardless of whether the objection was made on the basis of relevancy or proper identification, the trial court did not commit error in overruling said

objection. The spent bullet was linked to the crime scene by place, time, and circumstance.

Accordingly, we conclude that the trial court did not commit reversible error when it permitted the spent bullet to be admitted as evidence.

IV.

Finally, Appellant asserts reversible error in the trial court's refusal to direct a verdict of acquittal on the first-degree robbery charge.

The Commonwealth argued that during the commission of the robbery/murder Appellant stole items from the victim, including, inter alia, a derringer pocket pistol, a .38 special pistol, and money. Roger Knuckles, the victim's brother and a key witness for the Commonwealth on the prosecution of the robbery charge, testified that the above-mentioned items were missing from the victim's residence. The Commonwealth also introduced evidence that Appellant began paying numerous bills immediately following the victim's death.

It appears that Appellant's central contention regarding this issue is that the testimony of the victim's brother is too incredible to be believed. We are not persuaded.

"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, Ky., 816 S.W.2d 186, 187 (1991). Additionally, whenever the trial court considers a defendant's motion for a directed verdict, the trial court must assume that the evidence presented by the Commonwealth is true. Id.

Whether the testimony given by the victim's brother is credible or not is a question to be decided by the jury. Here the jury determined that Appellant was guilty of

first-degree robbery beyond a reasonable doubt. We cannot say that it was clearly unreasonable for the jury to make that decision. Thus, we find no error.

Wherefore, for the reasons aforesaid, the judgment of the Whitley Circuit Court is hereby affirmed.

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

George G. Seeling
Assistant Attorney General
Criminal Appellate Division
Officer of the Attorney General
1024 Capital Center Drive, Suite 200
Frankfort, KY 40601