

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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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: JUNE 17, 2004
NOT TO BE PUBLISHED

Supreme Court of Kentucky **FINAL**

2003-SC-0549-TG DATE 7-8-04 E.A.G. reu. H.P.C.

TERRANCE A. BRASHER

APPELLANT

TRANSFER FROM COURT OF APPEALS
NO. 2003-CA-1474

V.

JEFFERSON CIRCUIT COURT NO. 98-CR-02206
HON. LISABETH HUGHES ABRAMSON, JUDGE

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Brasher appeals from a judgment of the Jefferson Circuit Court sentencing him to ten years imprisonment on a conditional guilty plea to second-degree manslaughter. That sentence is to be served concurrently with a fourteen-year sentence for first-degree trafficking while in possession of a firearm and tampering with physical evidence.

The only question presented is whether the circuit judge erred in holding that this Court had not reversed the judgment and sentence on the tampering and trafficking charges in a previously rendered opinion.

Originally, Brasher was convicted by a jury of second-degree manslaughter, tampering with physical evidence and first-degree trafficking in a controlled substance while in possession of a firearm. He was sentenced to ten years on the manslaughter

charge, one year for tampering and thirteen years for trafficking, to run consecutively, for a total of twenty-four years.

On appeal of that first judgment, Brasher raised several claims of error, including: that the homicide charge should have been severed from the other offenses and that the jury instructions on imperfect self defense were defective. This Court initially rendered an opinion on June 13, 2002, affirming the judgment of conviction. Specifically, we held that the jury instruction issue was unpreserved because the objection by Brasher was unclear and his tendered jury instructions were not in the record. As to the remaining issues, the court found no error.

After Brasher was permitted to supplement the record with his tendered jury instructions, this Court granted rehearing, withdrew the previous opinion and rendered a new opinion on February 20, 2003, "Reversing and Remanding." In the new opinion, a majority of this Court held that the jury instructions on imperfect self defense were erroneous. The court concluded its analysis of that issue by stating: "Accordingly, we reverse the trial court on this issue and remand the case for a new trial consistent with this opinion and with our opinion in [Commonwealth v.] Hager." The final sentence of the opinion stated: "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."

On remand, a question arose at a pretrial hearing concerning the interpretation of the February opinion, to wit: whether the court reversed the entire judgment of conviction or only reversed the manslaughter conviction. Brasher took the position that the opinion reversed the entire judgment of conviction. He indicated to the circuit judge that if she accepted his interpretation, then the Commonwealth was willing to run all the sentences concurrently for a total of thirteen years. The position of the Commonwealth

was that this Court only reversed the manslaughter conviction; that the thirteen year sentence for the trafficking and the one year sentence for tampering had not been reversed, and that the defendant was still facing a fourteen year sentence for those two combined charges.

The circuit judge agreed with the Commonwealth's interpretation. After Brasher's motion for reconsideration was denied, he entered a conditional guilty plea to second-degree manslaughter, reserving his right to appeal the interpretation by the circuit judge of this Court's opinion. The circuit judge accepted the conditional plea, and sentenced Brasher to ten years on the manslaughter charge, to run concurrently with the fourteen year sentence for the tampering and trafficking offenses, for a total of fourteen years. Upon accepting transfer from the Court of Appeals, this appeal followed.

Brasher argues that the circuit judge erred by holding that this Court had not reversed the judgment and sentence on the tampering and trafficking charges. He contends that this Court's failure to explicitly state in the caption that it was "Affirming in Part and Reversing in Part" and to make a similar declaration in the final sentence of the opinion, indicated our intention that the entire judgment of conviction was to be reversed. Brasher claims that reversing the entire judgment was appropriate given that he had sought to sever the charges. We disagree.

Although the caption and final sentence of the opinion could have been more precise, when the opinion is read in its entirety, it is clear that the majority of the court was reversing the manslaughter conviction only and affirming the trafficking and tampering charges. As previously noted in this opinion, the court concluded its analysis of the jury instruction issue by stating: "Accordingly, we reverse the trial court on **this**

issue and remand the case for a new trial consistent with this opinion and with our opinion in [Commonwealth v.] Hager.” (emphasis ours). The court rejected the other issues raised by Brasher, including his claim that the charges should have been severed. Consequently, the circuit judge did not err in refusing to retry Brasher on the charges for which this Court found no error.

Brasher has not been prejudiced in any way and he has not been denied any due process right under the federal or state constitutions.

The judgment of conviction and sentence entered July 7, 2003 is affirmed.

All concur except Stumbo, J., who concurs in result only.

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