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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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 16, 2005
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2003-SC-0363-MR

JAMES I. DAWSON, JR. — APPELLANT

V.

APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE CRAIG Z. CLYMER, JUDGE
01-CR-00102

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

I. INTRODUCTION

Appellant, James Dawson, was convicted of First-Degree Trafficking in a Controlled Substance and First-Degree Possession of a Controlled Substance, and he was sentenced to twenty-five years imprisonment. He contends (1) that the trial court erred in not asking him whether he consented to his lawyer's decision to admit guilt during opening statement, (2) that a mistrial should have been declared based upon the testimony of the arresting officer as to Appellant's resistance during his arrest, and (3) that the possession charge should have merged with the trafficking charge. Because Appellant admitted his guilt on cross-examination, the court offered to instruct the jury on the improper testimony, and the possession and trafficking charges arose from separate events, we find no error. Accordingly, we affirm Appellant's convictions.

II. BACKGROUND

On April 7, 2001, Appellant was driving to a local bar to assist his girlfriend, Melanie Dawson, in closing the bar. As Appellant neared the bar, he noticed a woman standing by the road, waving her arms in an attempt to flag him down. When Appellant stopped his car, the women entered his car and told Appellant that there were two men who wanted to buy crack cocaine. The woman said that although she had already received money for the cocaine, she had no intention of delivering the cocaine to the men. After identifying the car in which the purported drug purchasers were located, the woman opened the car door and walked away, leaving a small amount of crack cocaine in the passenger seat. Appellant, seeing an opportunity to make some money, drove to where the men were parked and sold some of the crack to them. After securing his money, Appellant left the men, taking with him a small piece of the crack the woman had left in his car. Shortly thereafter, police stopped Appellant and arrested him for trafficking and possession of cocaine.

Appellant was indicted for First-Degree Trafficking in a Controlled Substance and First-Degree Possession of a Controlled Substance, and he entered a plea of not guilty. Prior to trial, Appellant made two motions. First, he sought to dismiss the possession charge, arguing that this charge was a lesser-included offense of trafficking in cocaine. The trial court denied this motion. Second, Appellant made a motion to exclude any testimony relating to an altercation between Appellant and the arresting police officer, Sergeant Hayden, at the time of arrest, insisting that such evidence would be unduly prejudicial to Appellant. The trial court agreed and prohibited the admission of any evidence concerning this encounter.

In his opening statement, Appellant's lawyer said that Appellant had sold crack cocaine and retained a small quantity in his car, thereby admitting that Appellant had committed both of the offenses with which he was charged. Based upon this admission, the trial judge summoned the attorneys to the bench. The trial judge stated that the admissions meant that there was no contest in this case, and he asked Appellant's lawyer if he would agree to a stipulation. Appellant's lawyer refused and, despite the admissions, insisted that he be allowed to proceed with his case. The judge did not directly question Appellant about this trial strategy.

During trial, the Commonwealth called Sergeant Hayden to testify. Although the court had ruled such testimony inadmissible, Hayden, without being asked about the altercation, mentioned that there was a minor struggle between Appellant and himself at the time of arrest. Appellant's lawyer immediately objected, arguing that the admission of this evidence, in light of the court's prior ruling on the motion in limine, warranted a mistrial. The judge denied the motion for a mistrial, but stated that he would be willing to give a curative admonition to the jury, i.e. direct the jury to disregard the testimony concerning the altercation between Appellant and Sergeant Hayden. Appellant's lawyer rejected the judge's offer to give the jury a curative admonition.

The jury convicted Appellant on both counts and recommended a sentence of twenty years for Trafficking and five years for Possession, to be served consecutively, and the judge entered final judgment in accord with the jury's recommendation. Appellant has appealed to this court as a matter of right.[1]

III. ANALYSIS

We address the issues in the order in which they appear in Appellant's brief.

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[1] KY. CONST. §110(2)(b).

A. Admission of Guilt

Appellant contends that, based upon his attorney's admission of guilt during his opening statement and closing argument, the trial court had the responsibility to find out whether Appellant had knowingly, voluntarily, and intelligently consented to this strategy. In making his argument, Appellant relies upon Wiley v. Sowders ("Wiley I"),[2] a Sixth Circuit case involving an appeal of a denial of a habeas corpus petition of Earl Wiley. The court said that "where counsel advises his client that the latter's guilt should be admitted, the client's knowing consent to such trial strategy must appear outside the presence of the jury on the trial record in the manner consistent with Boykin[v. Alabama]."[3] This language supports Appellant's claim that the trial judge erred in refusing to question Appellant concerning defense counsel's "strategic" admissions of guilt.

The Sixth Circuit, however, revisited this issue only a year later in the similarly styled Wiley v. Sowders ("Wiley II"),[4] which involved an appeal of a denial of a habeas corpus petition of Early Wiley's brother, Elmer Wiley. In Wiley II, the Sixth Circuit clarified its position in Wiley I, saying that such colloquies, though preferred, are not required.[5] Thus, the rule is that although trial judges have the authority to question defendants about their acquiescence in trial strategy, such interrogation is not required

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[2] 647 F.2d 646 (6th Cir. 1981).

[3] Id. at 650.

[4] Wiley v. Sowders, 669 F.2d 386 (6th Cir. 1982).

[5] Id. at 389.

and is left to the discretion of the trial judge.[6] We cannot say that the trial judge abused his discretion in not conducting such a colloquy with Appellant.[7]

Furthermore, Appellant, himself, admitted to possessing and trafficking cocaine when he was cross-examined by the prosecutor. The prosecutor asked, "You don't deny that you sold cocaine to Detective Waters on April 7th, right?" Appellant responded, "Right." Next, the prosecutor asked, "You don't deny that you had cocaine in your pocket when the police arrested you, right?" Again, Appellant responded, "Right." Appellant not only did not hesitate in answering these questions but unequivocally admitted his guilt with no discernible uncertainty or lack of conviction. Our review of the record indicates that Appellant gave the trial judge no reason to question the voluntariness of his consent to the lawyer's chosen trial strategy, thus the failure to engage in a Boykin colloquy was not error.

Moreover, the fact that Appellant admitted to selling and possessing cocaine likely diffused or, at least, superceded any prejudice caused by his lawyer's comments, thus rendering any error in his lawyer's comments harmless. Given that the jury heard what amounted to a confession from Appellant while he was on the stand, there is no "substantial possibility that the result would have been any different"[8] had the lawyer not admitted Appellant's guilt. Thus, if there was error, it was rendered harmless by Appellant's own testimony.[9]

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[6] Wiley v. Sowders, 669 F.2d 386, 389 (6th Cir. 1982).

[7] See Furnish v. Commonwealth, 95 S.W.3d 34, 52 (Ky. 2002) ("Thus, contrary to Appellant's argument, the trial court did not err in failing to conduct a sua sponte inquiry as to Appellant's consent to his counsel's strategy.").

[8] Commonwealth v. McIntosh, 646 S.W.2d 43, 45 (Ky. 1983).

[9] CR 9.24.

Finally, as we have noted in similar cases, Appellant's argument in this regard "is essentially an ineffective assistance of counsel claim."[10] Such claims must be raised in a post-trial RCr 11.42 motion and not on direct appeal.[11]

B. Motion for a Mistrial

Appellant also contends that the trial judge erred in refusing to declare a mistrial when Sergeant Hayden testified as to the struggle during Appellant's arrest, which the trial court had previously ruled inadmissible. We agree with Appellant that Sergeant Hayden's reference to a minor struggle at the time of arrest was inadmissible, but we do not agree with Appellant's contention that this statement, standing alone, warrants the extreme remedy of a mistrial. Upon a motion for mistrial, a court will only declare a mistrial "when there is a fundamental defect in the proceedings which will result in a manifest injustice."[12] This "manifest necessity" language underscores the dramatic nature of granting a motion for mistrial. In this case, there was overwhelming evidence, apart from Sergeant Hayden's testimony, of Appellant's guilt. In fact, when asked about the charges against him on cross-examination, Appellant admitted that he sold and possessed cocaine. Thus, any improper reference to a minor struggle at the time of arrest was harmless.

Furthermore, the trial court offered to admonish the jury to disregard Sergeant Hayden's reference to a "minor struggle." We have previously held that where an admonishment is sufficient to cure an error and the defendant fails to ask for the admonishment, we will not review the error.[13] Thus, because the judge's offer to

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[10] Furnish, 95 S.W.3d at 52.

[11] Id.; Humphrey v. Commonwealth, 962 S.W.2d 870, 872 (Ky. 1998).

[12] Gould v. Charlton Co., Inc., 929 S.W.2d 734, 738 (Ky. 1996).

[13] Graves v. Commonwealth, 17 S.W.3d 858, 865 (Ky. 2000).

admonish the jury would have rectified the problem under Johnson v. Commonwealth[14] and Appellant's lawyer not only failed to ask for relief but actually declined relief when offered, we hold that the trial court did not err in denying Appellant's motion for a mistrial.

C. Merger of Charges

Appellant argues that he was denied due process based upon the trial court's refusal to merge the possession charge with the trafficking charge. We disagree.

Appellant relies primarily on Jackson v. Commonwealth,[15] where we said that possession of a controlled substance is a lesser-included offense of trafficking in a controlled substance.[16] Although Appellant correctly states the holding of Jackson, he fails to note a distinguishing factor between Jackson and this case. The defendant in Jackson, unlike Appellant, was charged with trafficking and possession for actions arising out of one transaction involving a single quantity of drugs. In such a situation, we said that possession of a controlled substance must merge with a trafficking charge when there is one transaction. Similarly, in Johnson v. Commonwealth,[17] where we had to determine whether the Appellant could be found guilty of possession and manufacture of methamphetamine, we said that "the answer turned on whether the defendant was convicted for possessing the same methamphetamine he was convicted of manufacturing."[18] Here, Appellant sold cocaine to the undercover officers, thus giving rise to the trafficking charge. After this transaction, Appellant drove away with more

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[14] 105 S.W.3d 430, 431 (Ky. 2003) ("A jury is presumed to follow an admonition to disregard evidence and the admonition thus cures any error.").

[15] 633 S.W.2d 61 (Ky. 1982).

[16] Id.

[17] 134 S.W.3d 563 (Ky. 2004).

[18] Id. at 568.

cocaine still in his car, thus giving rise to the possession charge. He was not charged with nor convicted of possessing the cocaine that he sold. So, under these facts, two charges against Appellant were justified, as there were two distinct events involving two distinct quantities of cocaine, and the prosecution and conviction for both offenses is not barred since a single course of conduct did not "establish the commission of more than one (1) offense."[19] Merger, therefore, is inapplicable in this case as Appellant committed two separate offenses and convictions for both are not barred.[20]

IV. CONCLUSION

Appellant admitted guilt during cross-examination, rejected the court's offer to admonish the jury regarding impermissible testimony, and was charged with Trafficking and Possession of separate quantities of cocaine. For these reasons, we find no error and affirm Appellant's convictions.

Lambert, C.J.; Cooper, Graves, Johnstone, Scott and Wintersheimer, JJ., concur.

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[19] KRS 505.020(1).
[20] Id.

COUNSEL FOR APPELLANT:

Shelly R. Fears
Assistant Public Advocate
Department of Public Advocacy
100 Fair Oaks Lane, Suite 302
Frankfort, Kentucky 40601-1133

COUNSEL FOR APPELLEE:

Gregory D. Stumbo
Attorney General

Michael Harned
Assistant Attorney General
Office of Attorney General
Criminal Appellate Division
1024 Capital Center Drive
Frankfort, Kentucky 40601-8204

Matthew D. Nelson
Assistant Attorney General
Office of Attorney General
Criminal Appellate Division
1024 Capital Center Drive
Frankfort, Kentucky 40601-8204