

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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.

Supreme Court of Kentucky **FINAL**

2003-SC-0414-MR

DATE 9-15-05 EJA/Grou/H/DC

TODD LOVETT

APPELLANT

V.

APPEAL FROM MARSHALL CIRCUIT COURT
HONORABLE DENNIS FOUST, JUDGE
02-CR-00056

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Todd Lovett, was convicted in the Marshall Circuit Court of complicity to manufacture methamphetamine and being a persistent felony offender in the second degree. He was sentenced to a total of twenty years imprisonment and appeals to this Court as a matter of right.

On March 9, 2002, Detective Russ Kegel of the Marshall County Sheriff's Office was called to the Shamrock Motel by Deputy Johnson. While serving papers on Terry Stubblefield, Deputy Johnson discovered items in the motel room that he believed to be consistent with the items commonly used to manufacture methamphetamine. Detective Kegel arrived on the scene to find Terry Stubblefield and Billy Lee in the motel room. He also found finished methamphetamine, marijuana, ether cans, rags, and coffee filters. Stubblefield and Lee were arrested for manufacturing methamphetamine.

On March 13, 2002, Detective Kegel received a report that an air tank was found in a creek behind the Farm Bureau Insurance Building, near the Shamrock Motel. At the scene, Detective Kegel discovered the air tank, which had been modified to hold anhydrous ammonia. This tank did not have a gauge and hose that would normally be attached to it, but rather, it had a pipefitting and valve attached. Detective Kegel also discovered an empty ether can, empty ephedrine blister packs, and a box for an air tank of the same model as the one found. The box had a photograph on it of an air tank with a blue hose. Both the box and the air tank appeared to be new.

Apparently, under the mistaken belief that the UPC code could be matched to a particular air tank, Deputy Johnson took the UPC code to Wal-Mart to see if it would reveal any recent sales. Deputy Johnson discovered that Appellant had recently purchased an air tank at Wal-Mart with a check that included his Kentucky I.D. number on March 7, 2002. In addition to the tank, Appellant's receipt also revealed that he purchased thread tape, which can be used to seal a valve when a new valve is attached; Coleman fuel, which can be used in place of ether in manufacturing methamphetamine; a plastic two-way, which can be used in a methamphetamine lab smoker; and rawhide gloves.

Next, Detective Kegel interviewed Stubblefield and Lee. Detective Kegel testified at trial that these interviews linked Appellant to the manufacturing of methamphetamine at the Shamrock Motel.

Appellant was arrested on April 22, 2002. At some point after Appellant's arrest, Detectives Kegel and Byers went to Appellant's house, where his wife gave them permission to look around. The detectives found a new air gauge, an air line, and a

blue hose in a shack next to the house. These items appeared to come from a new air tank, although they did not find one.

Stubblefield and Lee were charged with manufacturing methamphetamine, first degree trafficking in a controlled substance, and wanton endangerment. Pursuant to plea agreements, these individuals pled guilty to first degree trafficking and each received five-year sentences.

At trial, Stubblefield testified that, while he was at the Shamrock Motel, Appellant arrived with a bag containing cold pills, lithium batteries, and a generator used in manufacturing methamphetamine. Appellant also brought a five-gallon air tank. Appellant wanted Stubblefield to steal anhydrous ammonia to manufacture methamphetamine. The two men went to Royster-Clark and stole anhydrous ammonia with two air tanks, and hid one of the tanks behind the insurance building.

Stubblefield testified that he signed an affidavit while he was in jail stating that Appellant had nothing to do with the manufacturing at the Shamrock Motel. Stubblefield also testified that he signed the affidavit because Appellant had threatened him.

Lee testified that he has known Appellant for about twenty-five years, and that he had helped Appellant to manufacture methamphetamine in the past by acting as a lookout. He testified that he ceased manufacturing methamphetamine with Appellant in December 2001.

I.

Appellant's first argument on appeal is that the trial court erred to his substantial detriment by allowing Stubblefield to invoke the Fifth Amendment on certain questions during cross-examination.

During cross-examination, Stubblefield testified that he had never purchased an air tank. He also testified that he was presently under indictment on a separate methamphetamine related charge. Defense counsel attempted to introduce evidence pertaining to that pending charge, and the Commonwealth objected on the ground of relevancy. The trial court held an *in camera* hearing, where Stubblefield was advised of his Fifth Amendment right against self-incrimination. During this *in camera* hearing, Appellant whispered to defense counsel, and defense counsel stated that Appellant objected to the witness pleading the Fifth Amendment. The trial court responded by stating that the objection might be valid if the Commonwealth called Stubblefield knowing that he would plead the Fifth, but it was not valid in this situation where Stubblefield was being cross-examined on a collateral matter.

After the *in camera* hearing, defense counsel asked Stubblefield questions pertaining to his pending charge, to which he plead the Fifth. These questions include whether Stubblefield was present at the place of the alleged crime, whether there was an altered air tank present, whether Stubblefield obtained the air tank, and whether Appellant was at the scene.

Appellant argues that he was denied his right to confrontation guaranteed by the Sixth Amendment of the United States Constitution, and Section 11 of the Kentucky Constitution. In particular, Appellant argues that he should have been allowed to impeach Stubblefield's testimony regarding how he obtained the air tank in this case by inquiring into how Stubblefield obtained an air tank in the subsequent incident. Appellant also claims that the inquiry into Stubblefield's pending charge was relevant to show that Stubblefield was able to manufacture methamphetamine later without any aid

from Appellant, thereby disproving the Commonwealth's theory that Appellant was the mastermind behind the plot.

The Commonwealth argues that Appellant did not properly preserve an objection to Stubblefield's invocation of the Fifth Amendment. CR 46 requires "that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court." Under KRE 103(a), a party is only required to state the specific grounds for objection when the trial judge so requests. See also Robert G. Lawson, The Kentucky Evidence Law Handbook § 1.10[4][b], at 38-9 (4th ed. LexisNexis 2003). Although the exchange between Appellant, defense counsel, and the trial judge during the *in camera* hearing was somewhat informal, it is clear from the record that Appellant did, in fact, object to Stubblefield's pleading the Fifth.

"If the prosecution witness refuses to answer questions on cross-examination [while exercising a Fifth Amendment privilege], the defendant's proper remedy is a motion to strike all or part of the witness's direct testimony." Adkins v. Commonwealth, 96 S.W.3d 779, 789 (Ky. 2003). In the instant case, Appellant did not move to strike Stubblefield's testimony. Accordingly, Appellant has no appropriate remedy available on review. We note that even if Appellant had moved to strike Stubblefield's testimony, "a witness's direct testimony generally will not be stricken when the defendant is merely precluded from attacking that witness's credibility." Id. at 790. As such, we deny Appellant's request for relief as a palpable error under RCr 10.26.

II.

Next, Appellant claims that the trial court erred to his substantial detriment by failing to remove his handcuffs during the penalty phase of the trial.

Appellant appeared before the trial court handcuffed and in his prison clothes throughout the penalty phase of his trial, including during his testimony before the jury. According to defense counsel, Appellant was not allowed to change into his street clothes. Defense counsel immediately moved for a mistrial and argued that the prejudice had already been created with the jury. The trial court overruled the motion.

The Commonwealth states that the trial court offered a remedy in allowing Appellant to change. Upon review of the record, we cannot state with certainty that the trial judge ever offered to allow Appellant to change clothes or remove his shackles.

When a defendant appears at trial in prison clothes or in shackles, it can prejudice the jury and impair the defendant's constitutional right to a presumption of innocence. See e.g., Estelle v. Williams, 425 U.S. 501, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976) (appearing at trial in prison clothes implicates an accused's presumption of innocence); Peterson v. Commonwealth, 160 S.W.3d 730, 733 (Ky. 2005) ("The inference of guilt created by restraining a defendant during trial 'relates closely to an accused's constitutional right to be presumed innocent.'") (quoting Hill v. Commonwealth, 125 S.W.3d 221, 223 (Ky. 2004)). Physical restraints during trial are only appropriate under exceptional circumstances, such as good cause to believe an accused may attempt to escape or do violence. Tunget v. Commonwealth, 303 Ky. 834, 198 S.W.2d 785 (1946).

Here, there was no cause to believe that Appellant would be violent or attempt to escape. Appellant's appearance at his penalty phase trial in shackles and prison clothes was in error, but nevertheless, we find this error to be harmless. RCr 9.24. The harm caused by an accused appearing at trial in prison clothes or restraints implicates the presumption of innocence, and Appellant did not have this presumption during his penalty phase because the jury had already found him to be guilty.¹

While there was no harm in the instant case, there was simply no reason for Appellant to have appeared at his penalty phase trial in shackles and prison clothes. It is unclear exactly why Appellant appeared in this manner. In any case, we generally caution courts from allowing this practice regardless of whether or not there is a presumption of innocence.

III.

Appellant alleges that the trial court erred by failing to direct a verdict at the close of the Commonwealth's case. Appellant admits that this issue is not properly preserved, and requests review for possible palpable error. RCr. 10.26.

Appellant argues that the evidence was qualitatively insufficient because the testimonies of Lee and Stubblefield were inconsistent with the Commonwealth's case.² The alleged inconsistencies relate to who bought the air tank that was found near the scene, and whether ether or Coleman fuel was used in the manufacturing process.

¹ While technically there was still a presumption of innocence regarding Appellant's persistent felony offender charge, the detriment to this presumption of innocence is negligible because the jury had already established Appellant's guilt as to the underlying offense.

² Appellant states that he will address the quantity of the evidence in a forthcoming appeal from an RCr 60.02 motion filed in the Marshall Circuit Court.

Appellant also alleges that Stubblefield's testimony is unreliable because he had previously signed an affidavit stating that Appellant had nothing to do with the manufacturing of methamphetamine.

After drawing all fair and reasonable inferences in favor of the Commonwealth, "if the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given," and the trial court should reserve to the jury "questions as to the credibility and weight to be given to such testimony." Commonwealth v. Benham, 816 S.W.2d 186, 187 (Ky. 1991). The evidence presented at trial includes, but is not limited to, direct testimony describing Appellant's activities related to the manufacturing of methamphetamine, and the fact that Appellant had purchased an air tank of the exact same type that police recovered at the scene. There was enough evidence to allow a reasonable juror to find Appellant guilty, and the jury was free to evaluate the credibility of the Commonwealth's witnesses and inconsistencies in testimony.

IV.

Appellant alleges the occurrences of several instances of prosecutorial misconduct. Appellant requests relief under RCr 10.26 because these issues are not properly preserved.

First, Appellant argues that the Commonwealth erred by introducing evidence of Lee's and Stubblefield's guilty pleas. At trial, defense counsel initially mentioned these guilty pleas during his opening statement. The Commonwealth elicited this information during the direct testimonies of both Lee and Stubblefield, and the defense counsel probed into these guilty pleas during the cross-examinations of both men. In his closing

argument, defense counsel argued that Lee and Stubblefield were not credible witnesses because they only implicated Appellant to receive lesser sentences through guilty pleas. In closing, the Commonwealth argued that Lee and Stubblefield had already received their sentences and therefore had nothing to gain by lying at trial.

Appellant relies on Tipton v. Commonwealth, 640 S.W.2d 818 (Ky. 1982), which states that it is improper to use the conviction of a co-indictee as substantive evidence of guilt of the indictee on trial. In the instant case, the Commonwealth did not use the plea agreements as substantive evidence against Appellant as contemplated by Tipton. Appellant used the plea bargains to attack the credibility of the witnesses, and in response, the Commonwealth permissibly did the same to bolster their credibility. Tipton, supra, at 820 (evidence of a plea agreement may be used to impeach co-indictee) (citing Parido v. Commonwealth, 547 S.W.2d 125 (Ky. 1977)).

Next, Appellant argues that the Commonwealth improperly commented on the credibility of witnesses. In particular, Appellant claims that the prosecutor improperly made an appeal to his own personal belief and opinion. Based on the record, we do not find that the prosecutor stated personal beliefs or opinions regarding the credibility of witnesses.

Lastly, Appellant claims that the Commonwealth engaged in misconduct by failing to compile a bill of particulars despite Appellant's repeated requests to do so. The record reveals that the Commonwealth fully complied with the trial court's discovery order. Appellant argued *pro se* that the Commonwealth should provide a bill of particulars stating with specificity what Appellant had done. The trial court determined that the Commonwealth had provided Appellant with all of the evidence it would use at

trial, and, acting within its sound discretion, denied Appellant's motion to supplement the bill of particulars. See James v. Commonwealth, 482 S.W.2d 92, 93 (Ky. 1972)(granting a bill of particulars is within the sound discretion of the trial court).

In sum, we find no instances of prosecutorial misconduct.

V.

Next, Appellant alleges that the trial court erred by striking a certain juror for cause. This juror was the neighbor of Appellant's father. Although he stated that he could be fair-minded, this juror also stated that he was uncomfortable sitting on the jury, and that it would put him in a difficult situation. Striking a juror for cause rests within the sound discretion of the trial court, and we find no abuse of discretion here. Barth v. Commonwealth, 80 S.W.3d 390, 399 (Ky. 2001).

VI.

Finally, Appellant argues that the trial court erred by overruling a motion to dismiss his indictment without a hearing. In his motion, Appellant alleged that Detective Kegal's testimony to the grand jury regarding the use of the UPC bar code was false and misleading.

Generally, a court will not go behind an indictment to scrutinize the quality or sufficiency of the evidence presented to the grand jury. Jackson v. Commonwealth, 20 S.W.3d 906, 908 (Ky. 2000); Commonwealth v. Baker, 11 S.W.3d 585, 588 (Ky. App. 2000). A court may only utilize its supervisory power to dismiss an indictment where a prosecutor knowingly or intentionally presents false, misleading or perjured testimony to the grand jury that results in actual prejudice to the defendant. Baker, supra (citing Bank of Nova Scotia v. United States, 487 U.S. 250, 108 S.Ct. 2369, 101 L.Ed.2d 228

(1988)). Appellant has not demonstrated such a flagrant abuse of the grand jury process. See Id.

The judgment and sentence of the Marshall Circuit Court are affirmed.

All concur.

COUNSEL FOR APPELLANT

Euva D. May
Department of Public Advocacy
100 Fair Oaks Lane
Frankfort, KY 40601

COUNSEL FOR APPELLEE

Gregory D. Stumbo
Attorney General

Todd D. Ferguson
Assistant Attorney General
Office of Attorney General
Criminal Appellate Division
1024 Capital Center Drive
Frankfort, KY 40601