

**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**NOT TO BE PUBLISHED OPINION**

***THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.***

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Supreme Court of Kentucky **FINAL**

2005-SC-0254-MR

DATE 9-14-06 E. J. Brantley

MICHAEL SPARKS

APPELLANT

V. APPEAL FROM BOYD CIRCUIT COURT  
HONORABLE C. DAVID HAGERMAN, JUDGE  
04-CR-169-002 AND 04-CR-252

COMMONWEALTH OF KENTUCKY

APPELLEE

**MEMORANDUM OPINION OF THE COURT**

AFFIRMING, IN PART, AND REVERSING AND REMANDING, IN PART

A Boyd Circuit Court jury convicted Appellant, Michael Sparks, of one count of trafficking in a controlled substance in the first degree, KRS 218A.1412, and found him to be a persistent felony offender in the first degree, KRS 532.080. The jury sentenced Appellant to ten years in prison for trafficking in a controlled substance in the first degree, but declined to enhance the penalty under the persistent felony offender statute, resulting in a total sentence of ten years' imprisonment. Nevertheless, the trial court sentenced Appellant to twenty years' imprisonment. Appellant appeals to this Court as a matter of right, Ky. Const. § 110(2)(b), asserting two claims of reversible error: (1) the failure of the trial court to sentence Appellant to the correct term of imprisonment, and (2) the failure of the trial court to allow voir dire concerning the panel's ability to consider the full range of sentences available.

Appellant, his mother Ethel Keelin, and his brother Walter Sparks were indicted for trafficking in a controlled substance in the first degree, KRS 218A.1412. Appellant and his mother each were indicted on three counts, and his brother was indicted on two counts. All three were tried jointly. Appellant was charged with selling oxycodone, a controlled substance, on May 30, June 1, and June 3 of 2004. He was also charged with being a persistent felony offender in the first degree, KRS 532.080(3).

The drug trafficking indictments against Appellant, Ethel Keelin, and Walter Sparks arose from eight controlled drug buys conducted by Charles McIntyre, a confidential informant for the Ashland Police Department. All transactions were monitored and recorded by Ashland Police Department Detective Michael Crawford. McIntyre and Detective Crawford testified concerning the details of the controlled buys, and the recordings were played for the jury. However, the sound quality of the recordings was poor, and the transactions were not visible to Detective Crawford.

The jury acquitted Appellant of the June 3 charge and was unable to reach a verdict on the May 30 charge, resulting in a mistrial. However, the jury convicted Appellant of the June 1 charge and then found him guilty of being a persistent felony offender in the first degree.

**I. SENTENCING.**

KRS 532.080 provides that:

(1) When a defendant is found to be a persistent felony offender, the jury, in lieu of the sentence of imprisonment assessed under KRS 532.060 for the crime of which such person presently stands convicted, shall fix a sentence of imprisonment as authorized by subsection (5) or (6) of this section. . . .

....

(6) A person who is found to be a persistent felony offender in the first degree shall be sentenced to imprisonment as follows:

....

(b) If the offense for which he presently stands convicted is a Class C or Class D felony, a persistent felony offender in the first degree shall be sentenced to an indeterminate term of imprisonment, the maximum of which shall not be less than ten (10) years nor more than twenty (20) years.

Appellant was convicted of one count trafficking in a controlled substance in the first degree, a Class C felony. KRS 218A.1412. The jury sentenced him to ten years in prison on that charge. As he had been convicted of two previous felonies and is over twenty-one years of age, he was also charged with and convicted of being a persistent felony offender in the first degree. KRS 532.080(3). The jury chose to sentence Appellant to ten years in prison in lieu of the previous sentence for trafficking, following the dictates of KRS 532.080(1) and KRS 532.080(6)(b). Therefore, in accordance with the statute, Appellant's sentence should have been ten years' imprisonment.

Inexplicably, the final judgment provides that Appellant "shall be confined to the State Penitentiary for a maximum term of Ten (10) Years on the charge of First Degree Trafficking in a Controlled Substance, and Ten (10) years on the charge of First Degree Persistent Felony Offender, to run consecutively, for a total sentence of Twenty (20) Years." The judgment is contrary to KRS 532.080 and our ruling in Pace v. Commonwealth that "any attempt to run the persistent felony offender conviction either concurrently with or consecutively to the underlying offense on which it is based . . . is improper." 636 S.W.2d 887, 891 (Ky. 1982), overruled on other grounds by Commonwealth v. Harrell, 3 S.W.3d 349 (Ky. 1999); see also Wellman v. Commonwealth, 694 S.W.2d 696, 698 (Ky. 1985). Although counsel failed to object to

the improper sentence at final sentencing,<sup>1</sup> “sentencing is jurisdictional [and] it cannot be waived by failure to object.” Wellman, 694 S.W.2d at 698. Therefore, as Appellant’s sentence is in clear violation of KRS 532.080, we remand the case to the Boyd Circuit Court for re-sentencing.

## II. VOIR DIRE.

Appellant argues the trial court committed reversible error by failing to allow voir dire on the subject of the proper range of penalties for the indicted offenses. During voir dire, co-defendant Ethel Keelin’s counsel attempted to question jurors about whether they could consider the full range of punishment for the crime of trafficking in a controlled substance in the first degree, i.e., five to ten years’ imprisonment. The prosecutor objected to the questioning, arguing that such information was not admissible until the penalty phase of the trial. The trial court sustained the prosecutor’s objection and Keelin’s counsel moved for a mistrial, stating that the law clearly allowed such questioning. The motion was denied and Keelin’s counsel renewed the motion for a mistrial twice prior to the penalty phase of the trial. Appellant’s counsel joined only in the last of the renewed motions.

Lawson v. Commonwealth specifically holds that voir dire regarding the jury’s ability to consider the full range of penalties for each indicted offense is permissible. 53 S.W.3d 534, 541-44 (Ky. 2001). However, to preserve an error for appeal, a party must timely inform the trial court of the perceived error and request the relief to which he considers himself entitled. See West v. Commonwealth, 780 S.W.2d 600, 602 (Ky. 1989); RCr 9.22. Furthermore, “where two or more defendants are being tried together, it is incumbent upon each party to timely make the court aware of his objection to any of

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<sup>1</sup> The trial judge did not announce the actual sentence imposed during final sentencing, which may explain the lack of an objection.

the proceedings.” Price v. Commonwealth, 474 S.W.2d 348, 350 (Ky. 1971). Appellant did not join in the original motion for a mistrial and indeed only joined in the second renewed motion. Thus, his objection is untimely, and the issue is not preserved for appeal.

As a result, Appellant requests palpable error review, arguing that the failure to allow voir dire affected his substantial rights and resulted in manifest injustice. RCr 10.26; Brock v. Commonwealth, 947 S.W.2d 24, 28 (Ky. 1997).

A finding of palpable error must involve prejudice more egregious than that occurring in reversible error, and the error must have resulted in manifest injustice. Authorities discussing palpable error consider it to be composed of two elements: obviousness and seriousness, the latter of which is present when a failure to notice and correct such an error would seriously affect the fairness, integrity, and public reputation of the judicial proceeding. A court reviewing for palpable error must do so in light of the entire record; the inquiry is heavily dependent upon the facts of each case.

Ernst v. Commonwealth, 160 S.W.3d 744, 758 (Ky. 2005) (internal citations and quotations omitted). Although the trial court's failure to allow voir dire concerning the jury's ability to consider the full range of penalties was incorrect, it does not rise to the level of palpable error. The mistake did not concern evidence affecting the validity of Appellant's conviction but merely a lack of voir dire about sentencing. As Appellant ultimately received the minimum allowable sentence for his persistent felony offender conviction, his substantial rights were not affected, and no manifest injustice resulted from the trial court's error. Thus, no palpable error occurred.

Therefore, we affirm Appellant's convictions but remand this case to the Boyd Circuit Court for re-sentencing in accordance with this opinion.

All concur.

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