

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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED “NOT TO BE PUBLISHED.” PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

Supreme Court of Kentucky

FINAL

2006-SC-000864-MR

DATE 11-26-07 E. H. G. D.C.
APPELLANT

DAVID BRENT HAMILTON

V. ON APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE MARTIN F. MCDONALD, JUDGE
NO. 04-CR-002544

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

In this matter of right appeal, Appellant argues that the trial court erred in amending the indictment to charge him with First-Degree Assault, the Robbery instruction was in error because it did not allow the jury to determine if the knife was a deadly weapon, and the trial court erred in running his enhanced sentences consecutively where the jury was not given an opportunity in the instructions to determine how the sentences would run. Upon review of the arguments, the record, and the applicable law, we adjudge that Appellant waived the issue of the defective indictment pursuant to RCr 8.18, and the remaining arguments, which were not properly preserved, did not rise to the level of palpable error.

On the evening of August 29, 2004, Alan Porter had just delivered a pizza to an apartment complex. When Porter returned to his truck and sat down, a man approached the driver's side of the truck from the rear and demanded all his money.

When Porter refused to give him the money, the man produced a knife and began stabbing Porter about his upper body through the window of the car. At this point, Porter gave the man his money, a total of \$44.00. However, the man did not stop stabbing Porter. Porter estimated that he was stabbed in his trunk area and upper extremities a total of 12-13 times. The robber kept telling Porter to put his truck in Park, but Porter could not because he had a manual transmission. At some point, the robber told Porter that he was done with him. Porter then managed to drive himself toward the front of the apartment complex and call 911. On the 911 call, Porter told the dispatcher that he had just been robbed by a black male dressed in a green shirt that had a logo on it. During the call, Porter saw his assailant drive past him in a red Oldsmobile with a damaged front end. Porter was able to give the police a description of the Oldsmobile and some of the numbers on the car's license plate. Shortly after the incident, Porter made a photo pack identification of Appellant, David Hamilton, as the man who had robbed him. At trial, Porter identified a photo of the auto Hamilton was driving on the night of August 24th as the car he had seen driving away from the scene. Porter also identified at trial a photo of Hamilton at the time of his arrest as the man who had stabbed him.

Hamilton was arrested on the night of the robbery after he was stopped by police for a traffic-related offense and then fled the scene, leading to a police chase. Upon searching his Oldsmobile after the arrest, police found two knives and \$44.00 in cash.

Hamilton was indicted on September 9, 2004. The caption of the indictment states that he is being charged with: Count One - Robbery in the First Degree (KRS 515.020); Count Two - Assault in the First Degree (KRS 508.010); and Count Three - Persistent Felony Offender in the First Degree (KRS 532.080). However, in the body of

the indictment, Count Two charges that Hamilton “committed the offense of Robbery in the Second Degree when, in the course of committing a theft, he used or threatened the immediate use of physical force upon Alan Porter, with the intent to accomplish the theft.” There is no mention of Assault in the First Degree in the body of the indictment.

On the first day of trial, prior to commencement of the trial, defense counsel noted the discrepancy between the caption and body of the indictment, but agreed with the Commonwealth that the intent of the grand jury had been to indict Hamilton for First-Degree Assault instead of a second Robbery charge. The trial judge opined that under the circumstances an amendment to the indictment was permitted by the criminal rules. In attempting to amend the indictment, the trial court mistakenly hand-wrote the new charge under Count Two as Robbery in the 1st Degree, instead of Assault in the First Degree. For purposes of this appeal, Hamilton apparently does not contest that the trial court intended to amend Count Two of the indictment to Assault in the First Degree.

Hamilton was tried by a jury on August 16-17, 2006, and found guilty of Robbery in the First Degree, Assault in the First Degree, and for being a Persistent Felony Offender in the First Degree (PFO I). The jury recommended a sentence of twenty (20) years on the Robbery and twenty (20) years on the Assault, to be served consecutively, for a total of forty (40) years. For the PFO I, the jury recommended that each twenty (20)-year sentence be enhanced to thirty-five (35) years. However, the instruction form did not allow for a recommendation of how the enhanced sentences were to be run, and the omission was noted only after the jury had been discharged. The trial court stated that it would decide what to do about the enhanced sentences at final sentencing.

At final sentencing, the court sought to give effect to the jury’s probable intent. The court adjudged that since the jury recommend a total forty (40)-year sentence

before the sentences were enhanced by the PFO I, the jury surely would not have intended to run the enhanced sentences concurrently for a lesser total sentence of thirty-five (35) years. Accordingly, the trial court ordered that the enhanced sentences be run consecutively for a total of seventy (70) years. This matter of right appeal followed.

Hamilton first argues that Count Two of the indictment could not be amended to charge him with Assault in the First Degree because the grand jury did not indict him for that offense. RCr 8.18 states, "Defenses and objections based on defects in the institution of the prosecution or in the indictment or information other than it fails to show jurisdiction in the court or charge an offense may be raised only by motion before trial. . . Failure to present any such defense or objection as herein provided constitutes a waiver thereof. . . ." Although defense counsel raised the issue of the discrepancy between the caption and the body of the indictment in this case, defense counsel agreed that the grand jury had intended to charge Hamilton in Count Two with Assault in the First Degree and allowed the indictment to be amended to so reflect the grand jury's intent. Given that the circuit court properly had jurisdiction in the matter and the indictment did not fail to charge an offense, the issue of whether the indictment could be amended to charge Hamilton with Assault in the First Degree was waived under RCr 8.18.

Hamilton next argues that the conviction for Robbery in the First Degree must be reversed because the instruction did not require a jury finding that the knife used in the crime was a deadly weapon. In Thacker v. Commonwealth, 194 S.W.3d 287 (Ky. 2006), which was rendered prior to the trial in the instant case, this Court held that whether an object is a deadly weapon pursuant to a First-Degree Robbery charge, is a

question of fact for the jury. However, defense counsel did not object to the instructions in the present case or submit an instruction that would have allowed for the jury to make the finding on whether the knife was a deadly weapon. Accordingly, we will review the argument only for palpable error pursuant to RCr 10.26. Under RCr 10.26, “an error is reversible only if a manifest injustice has resulted from the error.” Martin v. Commonwealth, 207 S.W.3d 1, 3 (Ky. 2006) (quoting Graves v. Commonwealth, 17 S.W.3d 858, 864 (Ky. 2000)). “To discover manifest injustice, a reviewing court must plumb the depths of the proceeding ... to determine whether the defect in the proceeding was shocking or jurisprudentially intolerable.” Id. at 4.

KRS 500.080(4)(c) defines a “deadly weapon” as “[a]ny knife other than an ordinary pocket knife or hunting knife.” In Thacker, 194 S.W.3d at 291, the Court adjudged that it was harmless error to withhold from the jury the determination of whether the weapon used by the defendant was a deadly weapon where there was little doubt that the jury would have found the 22-caliber revolver was a deadly weapon. In the case at bar, the victim testified that the knife used to stab him looked like a steak knife. Porter described the knife as being very sharp and having a long thin blade, about six to eight inches in length. Neither of the two knives that were discovered in Hamilton’s vehicle, which were displayed to the jury, appeared to be a pocket knife or a hunting knife. We do not see that manifest injustice resulted from the failure to allow the jury to make the finding on whether the knife was a deadly weapon in this case. Hence, there was no palpable error.

Hamilton’s final argument is that it was error for the trial court to order that his enhanced sentences be run consecutively, in the absence of an opportunity for the jury to make a recommendation on how the enhanced sentences should be run. Defense

counsel failed to object to the instructions and failed to submit his own instructions which would have allowed for the jury to make the recommendation at issue. It was not until the jury had already been dismissed that the defect in the instructions was discovered. At final sentencing the defense argued that the trial court could not presume to know what the jury intended in sentencing Hamilton and, in the absence of a recommendation by the jury, the court should run the enhanced sentences concurrently for a total of thirty-five (35) years.

We adjudge that Hamilton did not raise the issue before the trial court in a timely manner. Hence, as with the previous assignment of error, we will review this argument only for palpable error under RCr 10.26.

Pursuant to KRS 532.055(2), the jury's determination of whether sentences should be run concurrently or consecutively is only a recommendation and is not binding on the court. Wombles v. Commonwealth, 831 S.W.2d 172 (Ky. 1992). When multiple sentences of imprisonment are imposed, KRS 532.110(1) provides that the court shall determine whether the sentences will be run concurrently or consecutively. Thus, the trial court has the final say on how the sentences will be run. Given that the trial court had the authority to run Hamilton's sentences consecutively even had the jury recommended that they be run concurrently, we cannot say that it was palpable error for the court to order that the sentences be run consecutively.

The judgment of the Jefferson Circuit Court is hereby affirmed.

All sitting. All concur.

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