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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD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 OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

RENDERED: MARCH 20, 2008
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2005-SC-000998-MR

DANNY LEE NEW — APPELLANT

V.

ON APPEAL FROM CASEY CIRCUIT COURT
HONORABLE JAMES G. WEDDLE, JUDGE
NO. 05-CR-00023

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

During the evening of January 29, 2005, George Atwood, a Kentucky State Police Detective, offered assistance to two men whose vehicle was stopped near a small grocery store in Mintonville, Casey County, Kentucky. A license check indicated an outstanding arrest warrant for Danny New, the owner of the stalled pickup truck. After one of the men identified himself as New, the detective arrested him, searched him, and searched his truck. The search of New's person revealed bullets for a .357 Magnum handgun and a pouch containing both a small digital scale and a bowl with a powdery residue. The search of the truck revealed a loaded .357 Magnum handgun and a metal cigarette case containing three small packages of a powdery substance. Both the residue on the bowl and the powder in the cigarette case were later identified as methamphetamine. The discovery of the gun and what appeared to be illegal drugs

led to the arrest of New's companion, his stepson Kevin Hall. A subsequent search at the residence of New's fiancée, April Fuson, revealed numerous items used in the manufacture of methamphetamine and other items, such as guns and cars, which, according to Fuson's statement to one of the investigators, New had obtained in exchange for methamphetamine. New and Hall were both charged with manufacturing and trafficking in that drug and with illegal possession of a handgun by a convicted felon, both men being convicted felons. Ultimately the Casey Circuit Court convicted New of the manufacturing and trafficking offenses and sentenced him as a second-degree persistent felony offender (PFO) to consecutive terms of imprisonment totaling thirty-five years.

New appeals as a matter of right from the circuit court's December 2, 2005 Judgment. New raises several allegations of error, but argues primarily that owing to trial counsel's joint representation of Hall, New was denied his right under the Sixth Amendment to the Constitution of the United States to counsel's effective and conflict-free assistance. Convinced that in this case the dual representation of New and Hall did not give rise to an actual conflict, we reject New's argument and affirm the trial court's judgment.

ANALYSIS

I. New Was Not Denied the Effective Assistance of Counsel.

As New correctly notes, the Sixth Amendment guarantees him the effective assistance of trial counsel, Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), and the United States Supreme Court has held that that guarantee is violated when counsel labors under an "actual" conflict of interest, *i.e.*, "a

conflict of interest that adversely affects counsel's performance." Mickens v. Taylor, 535 U.S. 162, 172, 122 S. Ct. 1237, 152 L. Ed. 2d 291 (2002). Reversal is required in such cases regardless of whether counsel's impaired performance is or is not likely to have prejudiced the outcome of the proceeding. A conflict of interest that adversely affected counsel's performance is enough. Cuyler v. Sullivan, 446 U.S. 335, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980).

To guard against such violations and their serious consequences, RCr 8.30 provides that in criminal proceedings where a $500.00 fine or confinement is at stake,

> no attorney shall be permitted at any stage of the proceedings to act as counsel for the defendant while at the same time engaged as counsel for another person or persons accused of the same offense or of offenses arising out of the same incident or series of related incidents unless (a) the judge of the court in which the proceeding is being held explains to the defendant or defendants the possibility of a conflict of interests on the part of the attorney in that what may be or seem to be in the best interests of one client may not be in the best interests of another, and (b) each defendant in the proceeding executes and causes to be entered in the record a statement that the possibility of a conflict of interests on the part of the attorney has been explained to the defendant by the court and that the defendant nevertheless desires to be represented by the same attorney.

See Brewer v. Commonwealth, 206 S.W.3d 313 (Ky. 2006) (discussing this rule). This waiver procedure, bearing as it does on one of the defendant's most fundamental trial rights, should appear on the record and should be undertaken as carefully as the procedures required when a defendant desires to waive counsel and to represent himself, Hill v. Commonwealth, 125 S.W.3d 221 (Ky. 2004), or when he waives trial altogether and pleads guilty.

In addition to the duties imposed upon the trial court, RCr 8.30 also imposes

duties on counsel:

> Upon receipt of any information reasonably suggesting that what is best for one client may not be best for another, counsel shall explain its significance to the defendant and disclose it to the court, and shall withdraw as counsel for one client or the other unless
> (a) each such client who is a defendant in the proceeding executes a written waiver setting forth the circumstances and reiterating the client's desire for continued representation by the same counsel and
> (b) such waiver is entered in the record of the proceeding.

RCr 8.30(3). As with the waiver of other constitutional rights, the waiver of the right to conflict-free counsel should appear on the record as the "intentional relinquishment or abandonment of a known right." United States v. Osborne, 402 F.3d 626, 630 (6th Cir. 2005).

In this case, New and Hall were arraigned one after the other in April 2005 and the same public defender, Shelby Horn, was assigned to both cases. The trial court noted the potential conflict, but permitted Horn to represent both defendants at the arraignment upon Horn's promise that he would withdraw from one case or the other should a conflict develop. In May 2005, Horn filed on behalf of the defendants the following "Waiver of Dual Representation":

> Comes the Defendant, [New/Hall], and acknowledges that he/she has been advised by his/her attorney on or about May 9, 2005, and on several prior occasions, of the possibility of a conflict of interest in one attorney representing him/her and [Hall/New] in that what may be or seem to be in the interest of one client may not be to the best interest of another. The Defendant has been advised, prior to trial, of the possibility of a conflict of interest, and he/she nevertheless desired [sic] to be represented by the same attorney.

The pre-trial record is otherwise silent with respect to this issue. The trial court failed to

give the warnings or conduct the waiver proceeding contemplated by RCr 8.30(1), and Horn never disclosed any conflicts to the court.

New's trial took place in October 2005. By that time, apparently, Hall had agreed to plead guilty, but because the Commonwealth wished to proceed first against New, at the time of New's trial, Hall's case was still pending. New denied the charges. He and Fuson testified that the apparent methamphetamine manufacturing debris discovered at Fuson's residence had been on the property when Fuson moved there some months before New's arrest; and New claimed that the contraband discovered on his person and in his truck belonged to Hall, whose camouflage clothing New was wearing when he was arrested.

After this testimony, attorney Horn approached the bench and informed the court that Hall wanted to testify and that New wanted him to testify, but that he, counsel, doubted his ability to call his own client as a witness against himself. The court thereupon, outside the presence of the jury, conducted a Fifth Amendment colloquy with Hall, informing him of his right not to testify and not to incriminate himself, and receiving Hall's adamant assurance that he understood that right but wished nevertheless to testify on behalf of his stepfather. The court then permitted Horn to call Hall as a defense witness and to elicit testimony from him tending to corroborate New's claim that the gun, the drugs, and the paraphernalia seized from New and from New's pickup truck belonged to Hall and that New knew nothing about them.

New now claims that attorney Horn's representation was adversely affected by his conflicting duties to Hall, and that New's purported waiver of the conflict was insufficient for the purposes of either the Sixth Amendment or RCr 8.30. With this last

contention, at least, we agree. The waiver that conflicted counsel himself obtains pursuant to RCr 8.30(3) is not a substitute for the waiver the trial court should obtain under RCr 8.30(1). Not only is there some concern that conflicted counsel will accurately explain to his client or clients the effects of his own conflict, but even if counsel gives adequate advice, that advice will not appear on the record and one of the principal purposes of the rule is to ensure that the record reflects that the defendant's choice of dual representation or otherwise potentially conflicted counsel was truly knowing and voluntary.

Nevertheless, even where, as here, the trial court fails to abide by the rule and a valid waiver is not obtained, the defendant is not entitled to relief unless, as discussed above, an actual conflict of interest arose such that counsel's performance was adversely affected. Kirkland v. Commonwealth, 53 S.W.3d 71 (Ky. 2001). New contends that Horn's initial reluctance to place Hall on the stand; his comment to the court that he would try to limit his examination of Hall; his not attempting to elicit testimony from the arresting officer that the gun was discovered on Hall's side of the vehicle; and his requesting, when the Commonwealth asked Hall if he was a convicted felon, the standard admonition that that fact was to be considered only as it bore on Hall's credibility, all indicate that Horn's divided loyalties adversely affected his presentation of New's defense. We disagree.

Notwithstanding counsel's uncertainty about how best to resolve the ethical conundrum he had brought down upon himself by agreeing to represent both defendants (*see* Columbus Bar Association v. Ross, 839 N.E.2d 918 (Ohio 2006) (attorney sanctioned for inappropriate dual representation)), the fact remains that Hall

did testify and claimed full responsibility for the contraband found on New's person and in the pickup truck. New has not suggested any testimony favorable to his case that counsel failed to elicit from Hall. He concedes, moreover, that Detective Atwood testified during his direct examination that he found the gun under the middle of the front seat. Further questioning about the gun's position was as apt to be harmful to New as helpful, so counsel's decision to forego such questioning cannot be said to have been unreasonable or a reflection of a conflict. Similarly, although counsel obviously would not want to impugn his own witness's credibility, neither would he want to emphasize New's association with a felon, so we cannot say that counsel's request for the limiting admonition adversely affected New's defense.

In sum, while antagonistic defenses are the paradigm example of a conflict which renders dual representation inappropriate, even despite, perhaps, the defendants' waiver of the conflict, Wheat v. United States, 486 U.S. 153, 108 S. Ct. 1692, 100 L. Ed. 2d 140 (1988), in this case the potential for antagonism did not become actual. Rather, New and Hall presented what amounted to a joint or unified defense. New blamed Hall, and Hall attempted to accept the blame. Hall did in fact plead guilty, apparently while New's jury was deliberating. In these circumstances, although they illustrate well enough the problems inherent in any dual representation, it is clear that counsel's defense of New was not significantly impaired by his concurrent representation of Hall. The dual representation, therefore, does not entitle New to relief.

II. New Was Not Entitled to a Directed Verdict.

New also contends that he was entitled to a directed verdict with respect to both

the trafficking and manufacturing charges. As the parties correctly observe, New is not entitled to relief on this ground unless the evidence, considered in the light most favorable to the Commonwealth, could not "induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty." Commonwealth v. Benham, 816 S.W.2d 186, 187 (Ky. 1991).

A. There Was Sufficient Evidence that New Trafficked in Methamphetamine.

With respect to the trafficking charge, New notes that the jury instructions permitted his conviction if the jury believed that he knowingly possessed methamphetamine with the intent "of selling, distributing, or dispensing it to another person." He maintains that the only methamphetamine the police discovered were the three small packages of it contained in the cigarette case found in the pickup. He argues that Hall was the owner of the cigarette case and the methamphetamine it contained and thus that he, New, could not reasonably be found to have possessed methamphetamine with the intent to traffic. Contraband, however, can be jointly possessed, Franklin v. Commonwealth, 490 S.W.2d 148 (Ky. 1972), and joint possession may be inferred where two or more persons are able to exercise dominion and control over it. Pate v. Commonwealth, 34 S.W.3d 593 (Ky. 2004). Here, the methamphetamine was discovered in the middle of the pickup's front seat, where both New and Hall could exercise control over it, and there was ample other evidence—the scale and drug-tainted bowl found on New's person, the apparent packaging of the methamphetamine for distribution, and Fuson's statement to the police that she had witnessed New sell methamphetamine the day before—to permit a rational juror to conclude that New as well as Hall knowingly possessed the drug intending to traffic in it.

B. There Was Sufficient Evidence that New Manufactured Methamphetamine.

Likewise unavailing is New's challenge of his manufacturing conviction. He contends that although the jury instructions permitted the jury to find him guilty if it believed that he actually manufactured methamphetamine or that he possessed all the chemicals or all the equipment required to manufacture it, the evidence supported none of those theories. We disagree. In conjunction with Fuson's statement that she had observed New perform some of the final steps in the manufacturing process and New's statement admitting knowledge of at least one of the methamphetamine manufacturing processes, there was ample evidence at Fuson's residence, in the form of empty cold medicine blister packs, stripped lithium batteries, a characteristically discolored propane tank valve, baking dish, filters, tubing, funnel, spoon, and large plastic jug, to permit the jury to infer that New had actually manufactured the methamphetamine he and Hall possessed. This inference also supports the other theories included in the instructions. As we explained in Johnson v. Commonwealth, 134 S.W.3d 563, 568 (Ky. 2004),

> [a] necessary inference from proof of actual manufacture is that, at some point in time, [the defendant] must have had possession of both all the equipment and all the ingredients necessary to manufacture methamphetamine.

Thus, even ignoring Matheney v. Commonwealth, 191 S.W.3d 599 (Ky. 2006), in which we reinterpreted the manufacturing statute in effect at the time of New's offense and abrogated our prior holding that required proof of either all the necessary chemicals or all the necessary equipment, the proof at New's trial supported each of the manufacturing theories presented to the jury. The trial court, in sum, did not err by denying New's motions for a directed verdict.

III. New's Trial Was Not Marred by Palpable Error.

Finally, New alleges three errors which he concedes were not preserved by appropriate objection at trial but which, he contends, so plainly undermined the fairness of the proceedings as to amount to palpable error. Under RCr 10.26, a palpable error is an error which is apparent from the record, which affects the substantial rights of a party, and which has resulted in a manifest injustice. Relief may be granted for palpable error only upon a showing of "probability of a different result or error so fundamental as to threaten a defendant's entitlement to due process of law." Martin v. Commonwealth, 207 S.W.3d 1, 3 (Ky. 2006). New's allegations fail to meet this standard.

A. The Commonwealth Did Not Allege Inconsistent Theories Against New and Hall.

New first complains that the Commonwealth should not have been permitted to proceed against both him and Hall as principals of the trafficking offense. Only one of them, he contends (Hall), could have possessed the methamphetamine seized from the pickup truck, and only the possessor could be guilty of trafficking. The other, he insists, could have been guilty of nothing greater than complicity. The Commonwealth's proceeding against both of them as principals, New argues, involves the Commonwealth in inconsistent factual representations amounting to a due process violation. The simple answer to this contention is, as noted above, that contraband may be jointly possessed, and there was thus no inconsistency in the Commonwealth's allegations that both New and Hall possessed the seized methamphetamine with the intent to traffic.

B. The Commonwealth's Failure to Make a Penalty-Phase Opening Statement Does Not Entitle New to Relief.

Next, New notes that under RCr 9.42(a) once the jury is sworn

> [t]he attorney for the Commonwealth shall state to the jury the nature of the charge and the evidence upon which the Commonwealth relies to support it.

He complains that at the beginning of the penalty phase in this case the Commonwealth violated this rule by waiving its opening statement and thus failing to apprise the jury of the nature of the PFO charge. He relies on Farris v. Commonwealth, 111 Ky. 236, 63 S.W. 615 (1901), a case construing the old Criminal Code of Practice, for the proposition that compliance with this rule is mandatory. Under the old Code, however, a defendant's failure to object at trial waived this defect, Robinson v. Commonwealth, 310 Ky. 353, 220 S.W.2d 846 (1949), and the former Court of Appeals subsequently explained that the new rule was not intended to be stricter than the old one. Calhoun v. Commonwealth, 378 S.W.2d 222 (Ky. 1964). We conclude that while it would have been better practice for the Commonwealth to have made the statement contemplated by the rule, in the absence of a contemporaneous objection, its failure to do so does not entitle New to relief.

C. The Admission of Prior Offense Evidence Including Charges Subsequently Amended Did Not Amount to Palpable Error.

New's last allegation of palpable error concerns the evidence of prior offenses introduced during the penalty phase of his trial and the alleged use the prosecutor made of that evidence in his closing argument to the jury. The Commonwealth introduced records, both indictments and final judgments, from three prior felony convictions. New was charged with and pled guilty to second-degree burglary in

Rockcastle County. He was charged with first-degree burglary in Wayne County and pled guilty to an amended charge of receiving stolen property. In Pulaski County he was originally indicted for first-degree burglary and theft by unlawful taking, but that indictment was later amended to charge receiving stolen property, and it was to these latter charges, plus, it appears, third-degree burglary, that New pled guilty. Notwithstanding the amended charges in Wayne and Pulaski Counties, the Commonwealth introduced the original indictments reflecting the more serious charges that did not result in convictions, and it noted the superseded charges as it explained the various documents to the jury during closing argument. New contends that the evidence of superseded charges should not have been introduced and that the Commonwealth compounded the error by "urging the jury to impose a harsher sentence in the instant case because [New] had received breaks in his earlier cases."

As New correctly notes, in Robinson v. Commonwealth, 926 S.W.2d 853 (Ky. 1996), this Court vacated the defendant's sentence and remanded for re-sentencing because during the trial's penalty phase the Commonwealth had introduced an unauthenticated criminal history printout from Ohio which included dismissed charges as well as charges resulting in convictions and because a victim of one of the defendant's prior crimes, an assault, had been permitted to testify at length concerning the specifics of that crime. We held that the admission of the criminal history printout was erroneous, in part because "KRS 532.055(2)(a) [part of the truth-in-sentencing statute] permits the introduction of prior convictions of the defendant, not prior charges subsequently dismissed." 926 S.W.2d at 854. We also held that the victim's testimony should not have been admitted because under the truth-in-sentencing statute "all that is

admissible as to the nature of a prior conviction is a general description of the crime." 926 S.W.2d at 855.

In Maxie v. Commonwealth, 82 S.W.3d 860 (Ky. 2002), however, we approved the introduction for truth-in-sentencing purposes of an indictment that charged the offense of which the defendant had been convicted. Notwithstanding the fact that the indictment recited certain details of the offense, we held that introduction of the indictment comported with Robinson because the "indictment provided nothing more than a 'general description' of the crime with which Appellant was charged." 82 S.W.3d at 866.

In light of these precedents it is arguable that no error occurred in this case. Although Robinson precludes the use of dismissed charges for truth-in-sentencing purposes, the Wayne and Pulaski County indictments reflected charges that were not dismissed but amended. The facts alleged in those indictments, therefore, continued to serve as general descriptions of the behavior underlying New's eventual guilty pleas, and under Maxie the admission of that information would not constitute reversible error. Maxie, however, should not be understood as endorsing the use of indictments as proof of PFO status, nor as proof for truth-in-sentencing purposes except where the indictments comport with Robinson. As this case demonstrates, indictments pose the risk of tainting the sentencing proceeding with allegations and charges that are no longer relevant. The better practice remains to restrict sentencing proof to the judgments of conviction. We need not resolve this issue conclusively, however, for even if the superseded charges from Wayne and Pulaski Counties should have been redacted or otherwise excluded under Robinson, their admission does not amount to

palpable error. As noted above an error is not palpable unless there is a substantial probability that it affected the outcome of the proceeding. There is no such probability here. Contrary to New's assertions, the Commonwealth did not argue that New's amended charges in earlier cases provided a reason for treating him severely in this case. Its references to the superseded Wayne and Pulaski County charges were little more than an attempt to explain the documents to the jury. The jury's fairly stiff penalty recommendation is far more likely the result of New's multiple prior offenses, his involvement of his young stepson in his criminal activities, and the prosecutor's argument concerning parole eligibility than the result of the superseded charges. Given Maxie's approval of the use of at least some indictments for truth-in-sentencing purposes, moreover, the Commonwealth's use of the indictments in this case, even if erroneous, cannot be deemed misconduct.

CONCLUSION

In sum, notwithstanding the risk of reversible conflict with which joint representation is fraught, attorney Horn's representation of New was not impaired by his joint representation of New's stepson. The attorney's potential conflict of interest did not ripen into an actual conflict, and so does not entitle New to relief. There was sufficient evidence, moreover, to support the jury's verdicts convicting New of methamphetamine manufacture and trafficking, and New's trial was not rendered manifestly unjust by any palpable error. Accordingly, we affirm the December 2, 2005 Judgment of the Casey Circuit Court.

All sitting. Lambert, C.J., Abramson, Cunningham, Minton, Noble, and Scott, JJ., concur. Schroder, J., concur in result only.

COUNSEL FOR APPELLANT:

Thomas M. Ransdell
Assistant Public Advocate
Department of Public Advocacy
100 Fair Oaks Lane
Suite 302
Frankfort, Kentucky 40601

COUNSEL FOR APPELLEE:

Jack Conway
Attorney General

Jeffrey A. Cross
Assistant Attorney General
Criminal Appellate Division
Office of the Attorney General
1024 Capital Center Drive
Frankfort, Kentucky 40601