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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD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 OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.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: JANUARY 22, 2009
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2007-SC-000666-MR

JESSIE FITTS — APPELLANT

V.

ON APPEAL FROM FULTON CIRCUIT COURT
HONORABLE TIMOTHY A. LANGFORD, JUDGE
NO. 07-CR-00062

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING IN PART REVERSING IN PART

In an indictment returned on April 26, 2007, Appellant, Jessie Fitts was charged with three counts of trafficking in a controlled substance. The charges stemmed from an undercover drug buy operation conducted by the Fulton County, Kentucky, Sheriff's Department over the course of several months. The indictment alleged the trafficking offenses were committed on September 8, 2006, September 20, 2006, and October 21, 2006. The indictment also charged Appellant with being a second-degree persistent felony offender (PFO II).

A jury trial was held July 11-12, 2007. The jury found appellant guilty of the three trafficking charges.[1] The trial court split the penalty phase into two

[1] KRS 218A.1412, Class C felonies, which carry a penalty of 5-10 years.

parts.[2] The first part was the "truth-in-sentencing" phase. As to Appellant's criminal history, a probation and parole officer testified that Appellant had two speeding tickets in Fulton District Court; and an April 17, 2007 conviction in Graves County, Kentucky, for possession of a controlled substance (cocaine), as amended down from trafficking, for which he had received five years probated, along with a no-insurance conviction for which he had received 90 days probated. Following the truth-in-sentencing phase, the jury returned with a recommended sentence of five years on each of the three trafficking counts, to run consecutively, for a total of fifteen years. The Court then held the PFO phase. The Commonwealth used the April 17, 2007 possession conviction as the basis for the PFO II. The jury found Appellant guilty of PFO II, and recommended that one of the five year sentences be enhanced to ten years, and that the other two remain five years, for a total of twenty years imprisonment. In accordance with the jury's recommendation, the trial court sentenced Appellant to twenty years. Appellant appeals to this Court as a matter of right.

Appellant first contends that the PFO II conviction was error because he was not a convicted felon at the time the trafficking offenses were alleged to have occurred. Appellant concedes this error is unpreserved but requests palpable error review. The Commonwealth does not dispute that the PFO II conviction appears to be in error. We agree.

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[2] Both the Appellant's and Commonwealth's briefs recognized that this procedure was out of the ordinary, as does this Court, but did not raise this as an error.

"KRS 532.080 requires that *all* prior felony convictions used as a basis for enhancing a present felony conviction must have been obtained *prior* to the date of commission of the present felony." Dillingham v. Commonwealth, 684 S.W.2d 307, 309 (Ky.App. 1984). Dillingham was cited with approval and followed by this Court in Bray v. Commonwealth, 703 S.W.2d 478, 479-480 (Ky. 1985). The Commonwealth's proof showed Appellant's only prior felony conviction was the Graves County conviction for possession of a controlled substance. The final judgment of conviction on this felony was entered on April 17, 2007. The Commonwealth's evidence showed the present offenses were committed on September 8, 2006, September 20, 2006, and October 21, 2006, before Appellant had become a convicted felon per the April 17, 2007 judgment. Therefore, the PFO II conviction was error.

To show palpable error, an Appellant must show the probability of a different result or error so fundamental as to threaten his entitlement to due process of law. Brooks v. Commonwealth, 217 S.W.3d 219, 225 (Ky. 2007). An unlawful conviction is clearly palpable error. See In re Winship, 397 U.S. 358, 364 (1970) ("The Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.") Therefore, the PFO II conviction must be reversed. Further, while the erroneous PFO II conviction does not affect the trafficking convictions, it resulted in an improper enhancement of Appellant's sentence. Accordingly, the twenty-year sentence must be vacated.

Appellant additionally argues that comments by the prosecutor during his closing argument in the truth-in-sentencing phase (which preceded the PFO phase) were improper. Appellant takes issue with the following remarks by the prosecutor:

> But this is not his first mistake, and that's what I can't get past, ladies and gentlemen. If this was his first offense, if he was a 19 or 20 year old person and had made one mistake, I'd probably be up here saying "let's give him probation," but its not. He was convicted of possession of cocaine in Graves County and you heard Ms. Meeks say it was amended down from trafficking. Not only was he trafficking in this county, he was trafficking in Graves County also. I'm going to ask you to make a hard decision and I'm going to ask you to sentence him to ten years on each count and to run them consecutive, because I don't believe he will learn his lesson. He didn't learn his lesson in April, and unless something different happens, and I don't think you being lenient on him is going to let him know that he cannot do this. I don't want anybody selling drugs to his grand, to his children, Mrs. Fitt's grandchildren. And if you send out a message to the community that it will not be tolerated, perhaps we can stop some of it.

Appellant argues that the remarks that Appellant's conviction for possession "was amended down from trafficking", that Appellant "was trafficking in Graves County" and that he "didn't learn his lesson in April" (referring to the April 17, 2007 conviction in Graves County) were improper, because Appellant was not convicted of trafficking in Graves County, and there was no evidence that Appellant had committed any crimes since April. Appellant further contends that the closing improperly accused him of selling drugs to children and contained an improper "send a message" argument.

Appellant made no objections during the aforementioned truth-in-sentencing phase closing, but contends that the issue is "preserved in part," due to an objection he made during the prosecutor's closing in the guilt phase. In his guilt phase closing, the prosecutor told the jury "You stand for the community. Tell him it's not all right to do this. That somewhere, someone's got to draw the line." Appellant's objection to these remarks and motion for mistrial were overruled. This ruling is not raised on appeal. Appellant contends that this guilt phase objection preserves the issue in part (apparently referring to the "send a message" remarks), because defense counsel may have thought that a second objection was unnecessary or futile. We disagree. KRS 532.055 divides felony trials into two separate hearings: the guilt phase; and if found guilty, a separate sentencing hearing. Although there is no Kentucky case directly on point, we opine that a separate hearing requires a separate objection for preservation. Therefore, we review for palpable error only. Young v. Commonwealth, 25 S.W.3d 66, 73-75 (Ky. 2006).

It goes without saying that the prosecutor's remark to "send out a message to the community that it will not be tolerated" is an improper "send a message" argument. Brewer v. Commonwealth, 206 S.W.3d 343, 350-351 (Ky. 2006); Young, 25 S.W.3d at 73-75. The Commonwealth "is not at liberty to place upon the jury the burden of doing what is necessary to protect the community." Commonwealth v. Mitchell, 165 S.W.3d 129, 132 (Ky. 2005) (citing King v. Commonwealth, 253 Ky. 775, 70 S.W.2d 667 (1934)). It was also improper for the prosecutor to accuse Appellant of "trafficking in Graves

County" when Appellant was not convicted of this crime. KRS 532.055 permits the introduction of prior convictions. See Robinson v. Commonwealth, 926 S.W.2d 853, 854 (Ky. 1996) (recognizing that KRS 532.055 does not authorize the introduction of prior charges subsequently dismissed). In Brown v. Commonwealth, 763 S.W.2d 128, 130 (Ky. 1989), we recognized that evidence of acquittals is without probative value, "but is potentially prejudicial in that the jury may be persuaded that the defendant escaped justice in the earlier case and resolve to see that it does not happen again." This rationale would similarly apply to the prosecutor's comment in the present case.[3] Finally the prosecutor's remarks that Appellant "didn't learn his lesson in April" (apparently referring to the April 17, 2007 conviction), and reference to selling drugs to Appellant's children were improper. Although counsel has wide latitude in closing statements, the statements must have a basis in the evidence before the court. Mondie v. Commonwealth, 158 S.W.3d 203, 213-214 (Ky. 2005). There was no evidence in this case that Appellant had sold drugs to children. Further, there was no evidence that Appellant had committed any crimes since his April 17, 2007, conviction in Graves County.

Although the aforementioned statements were improper, we cannot say that manifest injustice resulted, particularly in light of the fact that the jury did not recommend the maximum sentence. See Young, 25 S.W.3d at 74-75 (setting forth factors to consider in palpable error analysis of prosecutorial

[3] We note that it was similarly improper for the probation and parole officer to testify that the possession conviction was as amended down from trafficking, however, no objection was made and this issue was not raised on appeal.

misconduct in penalty phase closing statements). Although the prosecutor implored the jury to sentence Appellant to ten years (the maximum) on each count and run the sentences consecutively for a total of thirty years, the jury returned with a sentence of five years (the minimum) on each count, albeit to run consecutively, for a total of fifteen years. In reviewing for palpable error, we also consider the trial court's power to modify, within the limits provided by KRS 532.060, a jury's recommended sentence that it believes is unduly harsh. Id. at 75. In the present case, although the jury recommended the five-year sentences run consecutively, the trial court is not required to run them consecutively. Nichols v. Commonwealth, 839 S.W.2d 263, 265 (Ky. 1992). Accordingly, we cannot say Appellant suffered manifest injustice as would require a wholly new sentencing phase.

While the PFO II conviction and twenty-year sentence must be vacated, having found no palpable error in the truth-in-sentencing-phase (which preceded the erroneous PFO phase) the jury's initial recommendation of five years on each count to run consecutively remains valid. Therefore, we remand to the trial court for a new final sentencing considering the jury's initial recommendation.

All sitting. All concur.

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