# 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# NOT TO BE PUBLISHED OPINION

**THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD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 OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.**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: NOVEMBER 25, 2009
NOT TO BE PUBLISHED



# Supreme Court of Kentucky

2009-SC-000044-MR

MICKEY TOOLEY — APPELLANT

V.

ON APPEAL FROM MONROE CIRCUIT COURT
HONORABLE EDDIE C. LOVELACE, JUDGE
NO. 08-CR-00035

COMMONWEALTH OF KENTUCKY — APPELLEE

**MEMORANDUM OPINION OF THE COURT**

**AFFIRMING IN PART AND VACATING IN PART**

On April 11, 2008, Tompkinsville Probation and Parole Officer Jeff Taylor and Detective Eddie Paul Murphy of the Pennyrile Drug Task Force were driving in the Harlan Heights section of Tompkinsville, Kentucky. While on Short Street, Officer Taylor observed Appellant, Mickey Tooley, driving a blue Chevy Lumina. Officer Taylor knew that Appellant did not have a valid driver's license, and Detective Murphy subsequently pulled the vehicle over. Appellant admitted that he did not have a valid driver's license, and when Detective Murphy told him that he was under arrest for driving with a DUI-suspended license, Appellant ran away through a nearby yard. He was quickly apprehended and placed under arrest.

A search incident to arrest conducted by Detective Murphy revealed a crack pipe, a piece of plastic containing crack cocaine, and two pill bottles.

The label on one pill bottle was made out to "Jennifer Lundsford" and contained liquid hydrocodone. The label on the other pill bottle was in Appellant's name and contained hydrocodone pills of varying strengths, Xanax, buspirone pills, and another rock of crack cocaine. Detective Murphy also discovered cash in the sum of $1,032 in various denominations in Appellant's pockets. Appellant informed Officer Taylor that his mother had given him the money to buy forks and spoons.

A trial by jury was held on November 18, 2008. Appellant was convicted of first-degree trafficking in a controlled substance, second offense; second-degree trafficking in a controlled substance, second offense; and possession of drug paraphernalia, second offense. For these felony convictions, Appellant received a combined sentence of 35 years. Appellant was also convicted of possession of a controlled substance not in its original container; driving on a DUI-suspended license, second offense; and fleeing and evading police in the second degree. For these misdemeanor convictions, the jury assessed fines in the total amount of $1,250. He now appeals the final judgment entered as a matter of right, Ky. Const. § 110(2)(b).

Appellant raises two issues on appeal: (1) the trial court failed to define "dispense" in the jury instructions, which led to a denial of Appellant's right to a unanimous verdict; and (2) the trial court erroneously imposed fines upon Appellant, as he was an indigent defendant.

***Jury Instructions***

The instructions to which Appellant takes issue are the following:

**INSTRUCTION NO. 2**

**DEFINITIONS**

**POSSESSION** – Means to have actual physical possession or otherwise to exercise actual dominion or control over a tangible object.

**SELL** – Means to dispose of a controlled substance to another person for consideration or in furtherance of commercial distribution.

**DISTRIBUTE** – Means to deliver other than by administering or dispensing a controlled substance.

**DISPENSE** – Means to deliver a controlled substance to an ultimate user.

**INSTRUCTION NO. 3**

**TRAFFICKING IN A CONTROLLED SUBSTANCE IN THE FIRST DEGREE**

You will find the Defendant guilty of Trafficking in a Controlled Substance in the First Degree under this Instruction, if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:

**A.** That in this county on or about the 11th day of April, 2008, and before the finding of the Indictment herein, he had in his possession a quantity of cocaine;

**AND**

**B.** That he knew the substance so possessed by him was cocaine;

**AND**

**C.** That he had the cocaine in his possession with the intent of selling, distributing, or dispensing it to another person.

**INSTRUCTION NO. 5**

**TRAFFICKING IN A CONTROLLED SUBSTANCE IN THE SECOND DEGREE**

You will find the Defendant guilty of Trafficking in a Controlled Substance in the Second Degree under this Instruction, if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:

**A.** That in this county on or about the 11th day of April, 2008, and before the finding of the Indictment herein, he had in his possession a quantity of hydrocodone;

**AND**

**B.** That he knew the substance so possessed by him was hydrocodone;

**AND**

**C.** That he had the hydrocodone in his possession with the intent of selling, distributing, or dispensing it to another person.

Appellant argues that these instructions are erroneous because they fail to give the complete statutory definition for the term "dispense." KRS 218A. 010(8). Appellant concedes that there was sufficient evidence to believe he possessed drugs with the intent to sell, but maintains that there was no

evidence he possessed the drugs with the intent to dispense or distribute them, pursuant to the statutory definitions. KRS 218A.010(8) and (10). This issue is not preserved, but Appellant nevertheless requests review pursuant to RCr 10.26.

This Court has previously found similar instructions to be reversible error. See Commonwealth v. Whitmore, 92 S.W.3d 76 (Ky. 2002). In Whitmore, a trafficking instruction was given that allowed the jury to find the defendant guilty if he possessed crack cocaine "with the intent to distribute, dispense, sell, or transfer it to another person." Id. at 80. Like the instant case, Whitmore argued that the evidence would only support a conviction for intent to sell crack cocaine to another person. Id. Because no evidence was introduced to show that Whitmore possessed cocaine with the intent to manufacture or dispense it, we held that the instruction violated the unanimity requirement. Id. at 81.

In Whitmore, however, the error was preserved. Id. ("[S]uch error, when preserved, [is] not subject to a harmless error analysis."). Here, we must determine if the error was palpable. Palpable error is one "which affects the substantial rights of a party [and] may be considered . . . by an appellate court on appeal, even though insufficiently raised or preserved for review . . . ." RCr 10.26. The basic palpable error review, where an unpreserved error requires reversal, is "if a manifest injustice has resulted from the error," which means there "is [a] probability of a different result or [the] error [is] 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).

While we believe that the instruction as given was improper, we do not agree with Appellant that the error was palpable. See Commonwealth v. Rodefer, 189 S.W.3d 550 (Ky. 2006). The most logical inference from the evidence is that the jury based its verdict on either the theory of possession with intent to sell or possession with intent to distribute, as ample evidence was introduced to support both. Here, as in Rodefer, Appellant's defense throughout trial was that he was an addict who possessed the drugs simply for personal use. Appellant possessed a large amount of drugs, most of which were contained in two different pill bottles. Evidence showed that Appellant had two rocks of crack cocaine that were separately wrapped. Additionally, Appellant had approximately $1,032 in various denominations in his pockets. No evidence was introduced at trial to support the theory that Appellant possessed drugs with the intent to "dispense" as defined under KRS 218A.010(8). Thus, no reasonable juror could have convicted Appellant of anything but possession with intent to sell or possession with intent to distribute. These facts show that the inclusion of an improper jury instruction did not create a "substantial possibility that the result would have been any different." Abernathy v. Commonwealth, 439 S.W.2d 949, 952 (Ky. 1969) (overruled in part by Blake v. Commonwealth, 646 S.W.2d 718 (Ky. 1983)). Therefore, the error in the jury instructions did not "seriously affect the

fairness, integrity or public reputation of judicial proceedings." Brock v. Commonwealth, 947 S.W.2d 24, 28 (Ky. 1997). As such, the error in the instructions was not palpable.

***Imposition of Fines***

Appellant next contends that the trial court's imposition of $1,250 in fines was in violation of KRS 534.040(4), because the trial court had already recognized his indigent status pursuant to KRS Chapter 31. Appellant concedes that this alleged error is not preserved for appellate review, but nonetheless requests the Court to review the issue pursuant to the palpable error standard of RCr 10.26.

Subsection (4) to KRS 534.040 provides that "[f]ines required by this section shall not be imposed upon any person determined by the court to be indigent pursuant to KRS Chapter 31." This Court said in Simpson v. Commonwealth, 889 S.W.2d 781 (Ky. 1994):

> "Pursuant to the statute, the judge must independently determine the appropriateness of any fine, and if so, the appropriate amount and method of payment thereof. In so doing, the judge must also consider whether the appellant is indigent. In this connection, we observe that at sentencing in this case, the appellant was represented by an assistant public advocate. Thus, we may assume that the trial judge had already determined that the appellant was indigent."

Id. at 784.[1]

[1] While in Simpson, the fines were imposed for felonies, and not for misdemeanors as in this case, both KRS 534.030(4) and KRS 534.040(4) have the same language prohibiting the imposition of fines upon indigent defendants.

At the time of trial, Appellant was receiving the services of a public defender, and he was granted the right to appeal in *forma pauperis*. So, as the Commonwealth concedes, the trial court clearly erred in imposing a fine. We find that, in this case, the trial court's imposition of $1,250 in fines resulted in manifest injustice.

The judgment of the Monroe Circuit Court is hereby affirmed, except for the portion thereof imposing fines. As Appellant's underlying convictions are not affected by this ruling, we vacate only that portion of the final judgment imposing $1,250 in fines, and remand the case to the Monroe Circuit Court for re-sentencing in accordance with this opinion.

Minton, C.J.; Cunningham, Schroder, Scott and Venters, JJ., concur. Abramson and Noble, JJ., concur, but would emphasize that there was no unanimity problem with the instructions in this case because as given, "dispense" can only be read to mean essentially the same thing as the definition for "sell" and "distribute."

COUNSEL FOR APPELLANT:

Erin Hoffman Yang
Assistant Public Advocate
Department of Public Advocacy
100 Fair Oaks Lane, Suite 302
Frankfort, KY 40601

COUNSEL FOR APPELLEE:

Jack Conway
Attorney General

John Paul Varo
Assistant Attorney General
Office of Criminal Appeals
Office of the Attorney General
1024 Capital Center Drive
Frankfort, KY 40601