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RENDERED: APRIL 26, 2012
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2011-SC-000243-MR

DAVID MCKEE — APPELLANT

V.

ON APPEAL FROM BREATHITT CIRCUIT COURT
HONORABLE FRANK A. FLETCHER, JUDGE
NO. 05-CR-00043

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING IN PART AND VACATING IN PART

On December 17, 2004, Appellant was driving his vehicle on Kentucky 30 in Breathitt County, Kentucky while highly intoxicated. Appellant was traveling in the left lane without his head lights on when his vehicle collided with a car driven by Anthony Wenrick. Michelle Wenrick, Anthony's wife, was a passenger in the front seat and received injuries from which she subsequently died. Appellant, who was not injured, was administered a field sobriety test by Sergeant Elvis Noble of the Jackson Police Department, who had responded to the accident. Appellant failed the test and was arrested. He was then transported to the hospital, where a blood sample was taken. Appellant's blood alcohol level was determined to be 0.18.

Appellant was indicted on charges of wanton murder, fourth-degree assault, and operating a vehicle under the influence of alcohol (DUI). A jury trial was held on October 12-13, 2005. The defense offered no evidence and

Appellant was found guilty of all counts. Thereafter, he agreed to a sentence of imprisonment for twenty (20) years and was ultimately sentenced in accordance with this agreement.

On March 19, 2008, Appellant filed a *pro se* petition, pursuant to RCr 11.42, alleging ineffective assistance of counsel during his trial in 2005. The trial court denied the petition. The Court of Appeals, however, held that Appellant's trial counsel was ineffective and that, but for Appellant's trial counsel's deficient performance, there was a reasonable probability that the outcome of the trial would have been different. The case was remanded to the Breathitt Circuit Court for a new trial. *McKee v. Commonwealth*, No. 2008-CA-001478-MR, 2009 WL 3786274 (Ky.App., Nov. 13, 2009). At the second trial, the jury found Appellant guilty of wanton murder, fourth-degree assault, and DUI; and he was sentenced to imprisonment for a term of twenty-five (25) years. Appellant now brings this appeal as a matter of right. Ky. Const. § 110(2)(b).

Scope of Questioning During Voir Dire

During voir dire, Appellant's counsel sought to ask the jurors if they could consider the full range of penalties, including those for the lesser included offenses of murder, i.e., manslaughter and reckless homicide. The trial court denied the request, explaining that the only offenses the jurors could be questioned about were those for which Appellant was indicted.

Appellant argues that he should have been allowed to question the jurors on the penalty ranges for each of the lesser included offenses. Appellant

concedes that, under *Lawson v. Commonwealth*, 53 S.W.3d 534 (Ky. 2001), he could only question the jurors concerning the penalty ranges of the indicted offenses. However, he now asks us to overturn *Lawson*.

In *Lawson*, this Court carefully weighed the benefits and disadvantages inherent in questioning jurors concerning their ability to consider penalty ranges of offenses. As a result of the confusion that would result from "information overload" on the jurors, we held that jurors may only be questioned concerning the penalty ranges for indicted offenses. *Id.* at 544.

"Stare decisis requires this Court to follow precedent set by prior cases, and this Court will only depart from such established principles when sound reasons to the contrary exist." *Saleba v. Schrand*, 300 S.W.3d 177, 183 (Ky. 2009) (citing *Hilen v. Hays*, 673 S.W.2d 713, 717 (Ky. 1984) and *Gilbert v. Barkes*, 987 S.W.2d 772 (Ky. 1999)) (internal quotations omitted). The holding of *Lawson* was well-reasoned and directly on point in the case sub judice. We do not depart from it today. The trial court properly limited the examination of the jurors' ability to consider penalty ranges to only those of the indicted offenses.

Officer's Testimony

Appellant's next allegation of error involves the testimony of Sergeant Elvis Noble, who was one of the responding officers to the scene of the accident. At trial, Anthony Wenrick and his daughter, Stephanie Moore, testified that Appellant was driving on the wrong side of the road and that his headlights were not on at the time of the collision. Appellant disputed that his headlights

were not on at the time of the crash and stated that he turned his lights and ignition off after the accident. The Commonwealth asked Sergeant Noble if he recalled whether Appellant's headlights were illuminated at the time of the collision. Noble responded: "They were off. And then a witness came up and, it's just Tabitha Collins, stated that the headlights was [sic] off on the vehicle. So I went and I checked the vehicle. I checked the headlight switch. The headlight switch was off." Tabitha Collins, who was driving a minivan close behind the Wenricks' automobile at the time of the accident, told Sergeant Noble at the scene that Appellant's headlights were not illuminated, causing him to check the switch inside the vehicle. Stephanie Moore was a passenger in Collins's van.

Appellant contends that Sergeant Noble's reference to Tabitha Collins's statement violated his right of confrontation under the Sixth Amendment to the United States Constitution and Sections 2 and 11 of the Kentucky Constitution. The Commonwealth argues that the statement was non-testimonial and, thus, did not violate Appellant's right of confrontation under *Crawford v. Washington*, 541 U.S. 36 (2004).

"*Crawford* held that the Sixth Amendment prohibits the admission of the testimonial statement of a declarant who does not appear at trial, unless the declarant is unavailable to testify and the defendant had a prior opportunity for cross-examination." *Peters v. Commonwealth*, 345 S.W.3d 838, 842 (Ky. 2011). Appellant did not preserve this issue at trial, but requests we review it on appeal for palpable error. *Id. at* 843; RCr 10.26. "When an appellate court

engages in a palpable error review, its focus is on what happened and whether the defect is so manifest, fundamental and unambiguous that it threatens the integrity of the judicial process." *Martin v. Commonwealth*, 207 S.W.3d 1, 5 (Ky. 2006). "A party claiming palpable error must show a probability of a different result or error so fundamental as to threaten a defendant's entitlement to due process of law." *Peters* at 843 (citing *Martin v. Commonwealth,* 207 S.W.3d 1, 3 (Ky.2006)).

Regardless of whether the admission of the out of court statement was improper under *Crawford,* it did not rise to the level of palpable error because it was cumulative of the other testimony at trial. The Commonwealth introduced evidence suggesting the Appellant's headlights were off in order to prove that his conduct was wanton. Both Anthony Wenrick and Stephanie Moore testified that Appellant's headlights were not on at the time of the collision. Moore and Wenrick also testified that Appellant was driving on the wrong side of the road. Further, Sergeant Noble testified that the headlight switch was off when he examined Appellant's car at the scene. The only evidence to the contrary was Appellant's statement that the headlights were on at the time of the accident and that he turned them off afterwards.

Appellant argues that the testimony was not cumulative because it came from a police officer, whereas all the other testimony concerning the headlights came from "afflicted" parties. He contends that hearing it from a police officer had a greater impact on the jury. We disagree. Sergeant Noble attributed the statement to Tabitha Collins, not to his own observations. The jury heard that

Sergeant Noble was relaying what he had been told by Tabitha Collins. Thus, there was no danger of the jury giving any additional credibility to the testimony. Admitting the statement did not create the probability of a different result at trial. Error, if any, in admitting this testimony was not palpable.

Prosecutor's Statements During Closing Argument

At trial, the defense argued that Anthony Wenrick was intoxicated at the time of the collision. This argument was based on the diagnosis in Wenrick's medical records of "acute alcohol intoxication" and a clinical chemistry laboratory report listing his blood alcohol level as 0.4H mg/d. Wenrick denied drinking any alcohol that day or at any time in the six months prior to the accident. In response to this argument, the Commonwealth elicited testimony from Dr. John Hunsaker and Mr. Brent Benning suggesting that the medical records had simply omitted the letter "l" ("dl" or deciliters) from the unit of measurement of Wenrick's blood alcohol level. Dr. Hunsaker testified that this omission meant that Wenrick's blood alcohol level was approximately 1,000 times lower than was indicated by the report. Dr. Hunsaker also testified that the body produces very low levels of alcohol on its own, but that those levels were virtually undetectable unless measured with specialized instruments.

In reference to this testimony during closing argument, the prosecutor stated:

> And counsel stood here and argued how drunk Anthony Wenrick and Michelle was [sic], but he failed to mention that both Mr. Benning and Dr. Hunsaker told you that level, you're . . . the food you would eat in your stomach would create a level higher than that. You don't have to drink a drop. The bacteria from the food that you

consumed would cause you to have a higher . . . to have this level or higher.

Appellant did not object to this statement at trial, but claims that it constituted palpable error because it was based on scientific evidence which was not introduced at trial. It is true that Mr. Benning did not testify concerning the effects of food on blood alcohol levels. It is unclear if Dr. Hunsaker's testimony was that food could have been the sole cause of Wenrick's blood alcohol level. However, it is clear from the record that the general implication of both Dr. Hunsaker's and Mr. Benning's testimonies was that Wenrick's blood alcohol level was at a negligible amount on the night of the accident. "This Court has repeatedly held that a prosecutor is permitted wide latitude during closing arguments and is entitled to draw reasonable inferences from the evidence." *Commonwealth v. Mitchell,* 165 S.W.3d 129, 132 (Ky. 2005) (citing *Lynem v. Commonwealth,* 565 S.W.2d 141 (Ky. 1978)). We consider closing arguments "as a whole." *Young v. Commonwealth,* 25 S.W.3d 66, 74–75 (Ky. 2000).

Regardless of whether Wenrick's blood alcohol level could have occurred naturally from food, the testimony at trial was that the actual level was such a minute amount that it would not have had a physical effect on Wenrick. As such, we cannot say that the statement created a substantial possibility of a different result or resulted in a manifest injustice.

The second comment by the Commonwealth compared Appellant's act of driving while intoxicated to the act of placing a time bomb in the courthouse. While discussing Appellant's mens rea, the prosecutor said:

> I would submit to you that that is tantamount to setting out a time bomb in this courthouse. Somebody sets a time bomb to go off here at 2:15. It's the same thing. People are going to be killed. Driving down the road with your lights off, 7:30 on a Friday night, drunk, somebody's going to get killed.

Appellant argues that this statement was improper for a plethora of reasons, including confusing wanton and intentional acts, insinuating that Appellant was a terrorist, and transferring the status of victim onto the jury. We disagree.

It is clear from the statement that the Commonwealth was attempting to illustrate its argument that Appellant's conduct was wanton on the night of the crash. The example of the bomb, while somewhat severe, was not a misstatement of the law nor was it an unreasonable inference from the evidence. Thus, we cannot say that a manifest injustice resulted from it. Neither of these statements made by the prosecutor during closing argument rose to the level of palpable error.

Double Jeopardy

Lastly, Appellant contends that the instructions given to the jury on the wanton murder and DUI charges violated his double jeopardy rights under Section 13 of the Kentucky Constitution and the Fifth and Fourteenth Amendments to the United States Constitution.

Jury Instruction No. 3 for Count I (DUI) read as follows:

> You will find David McKee guilty of operating a motor vehicle while under the influence of alcohol if, and only if, you believe from the evidence alone and beyond a reasonable doubt all of the following:

1. That in Breathitt County, Kentucky on or about December 17, 2004 and within twelve months before the finding of the Indictment herein that he *operated a motor vehicle*;

AND

2. That while doing so, he was *under the influence of alcohol.*

Jury Instruction No. 4 for Count II (Murder) read as follows:

You will find that the Defendant, David McKee, is guilty of Murder 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 17th day of December, 2004 and before the finding of the Indictment herein, David McKee *operated a motor vehicle under the influence of alcohol* and thereby caused the death of Michelle Wenrick;

AND

B. That in so doing, he was wantonly engaging in conduct which created a grave risk of death to another and thereby caused the death of Michelle Wenrick under circumstances manifesting an extreme indifference to human life.

(Emphasis added).

"[I]n order to determine whether two offenses [are] the same for double jeopardy purposes: 'the test to be applied is . . . whether each provision requires proof of an additional fact which the other does not.'" *Grundy v. Commonwealth*, 25 S.W.3d 76, 85 (Ky. 2000) (quoting *Blockburger v. United States*, 284 U.S. 299, 304 (1932)). In *Grundy*, the defendant was charged with first-degree burglary and second-degree assault. *Id.* at 87. While the two statutes unquestionably contained different elements, the analysis hinged on

whether the jury instructions required proof of separate and distinct facts. *Id.* This Court, in *Grundy,* found:

> The first degree burglary instruction required the jury to find that Grundy "caused physical injury to Johnny Marlow who was not a participant in the crime." The second degree assault instruction required the jury to find that Grundy "intentionally caused physical injury to Johnny Marlow by striking him with a dangerous instrument." Second degree assault, therefore, requires the proof of two additional elements: (1) a culpable mental state (the defendant intentionally caused physical injury), and (2) the defendant caused the physical injury with a dangerous instrument. Accordingly, first degree burglary and second degree assault satisfy the Blockburger "additional element" test and double jeopardy principles do not bar Grundy's conviction for both offenses.

Id. (Emphasis in original).

The DUI and wanton murder statutes involved in the case sub judice, like the statutes in *Grundy,* clearly contain separate elements. Because of this fact, a conviction for DUI would not bar a prosecution for wanton murder. However, unlike in *Grundy,* the jury instruction for DUI in this case did not require proof of an additional fact not contained in the wanton murder instruction. The DUI instruction required proof of two facts: (1) that Appellant operated a motor vehicle; and (2) that while doing so, he was under the influence of alcohol. Both of these facts were required to be proven under the instruction for wanton murder as well. Consequently, Appellant's convictions for DUI and wanton murder constitute double jeopardy. The remedy is to vacate the DUI conviction since it is the lesser offense. *Brown v.*

Commonwealth, 297 S.W.3d 557, 563 (Ky. 2009); *Clark v. Commonwealth*, 267 S.W.3d 668, 678 (Ky. 2008).

Based upon the foregoing, Appellant's convictions for wanton murder and fourth-degree assault are hereby affirmed. The conviction for DUI is vacated.

Minton, C.J.; Abramson, Cunningham, Noble, Schroder and Venters, JJ., concur. Scott, J., concurs in result only.

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