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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD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 OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.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: FEBRUARY 21, 2013
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2011-SC-000707-MR

RONALD SIMPSON — APPELLANT

V.

ON APPEAL FROM KENTON CIRCUIT COURT
HONORABLE MARTIN J. SHEEHAN, JUDGE
NO. 11-CR-00167

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Ronald Simpson appeals as a matter of right from an October 17, 2011 Judgment of the Kenton Circuit Court convicting him of robbery in the third degree. Ky. Const. § 110(2)(b). Finding Simpson to be a Persistent Felony Offender in the first degree ("PFO 1") the jury enhanced his sentence from two to twenty years imprisonment, and the trial court sentenced him accordingly. Simpson raises one issue on appeal: that the trial court erred by limiting voir dire to the penalty range on the indicted offense. For the reasons stated herein, we affirm the Judgment of the Kenton Circuit Court.

RELEVANT FACTS

On February 16, 2011, officers with the Covington Police Department responded to a disturbance at a grocery store in Covington, Kentucky. Upon arrival, the officers noticed a broken window above a door to the store. The officers were met by the manager, who allowed them entry to the store. They

made their way to the back of the store to access a cat-walk between the ceiling and roof. Once there, an officer shone his flashlight and observed Ronald Simpson by some ductwork with his hands in the air. Simpson then fell through the ceiling onto the floor below. When Simpson attempted to stand, the officers dispatched their canine to subdue him. He was taken into custody shortly thereafter.

Simpson was indicted by a Kenton County grand jury on March 3, 2011. He was charged with one count of third-degree robbery and one count as a persistent felony offender in the first degree ("PFO 1"). At trial, defense counsel moved the trial court to allow him to voir dire the jury regarding the penalty range of ten to twenty years, the applicable range for the third-degree robbery with PFO 1 enhancement. Citing *Lawson v. Commonwealth*, 53 S.W.3d 534 (Ky. 2001), the trial court denied his motion and explained that the parties could not question the panel about the range of penalties for any lesser-included offenses or for persistent felony offender status.

Simpson was found guilty of third-degree burglary and first-degree PFO status. As noted, the trial court accepted the jury's recommendation and sentenced him to two years imprisonment, enhanced to twenty years.

ANALYSIS

Simpson challenges the trial court's decision to limit voir dire to questions regarding the indicted offense only, urging this Court to overrule *Lawson v. Commonwealth* and reverse his convictions. He contends that despite the trial court's proper application of *Lawson*, his rights to due process

and a fair trial under the Fifth and Fourteenth Amendments to the United States Constitution and §§ 2 and 11 of the Kentucky Constitution were violated when he was prohibited from questioning the panel regarding the PFO-enhanced range of penalties. Finding that the trial court properly applied *Lawson*, we find no error.

Our decision in *Lawson* limited voir dire to questions about the possible sentences for the charged offense, and prohibited questioning regarding PFO status and lesser-included offenses. 53 S.W.3d at 544 ("We believe voir dire should examine jurors' ability to consider only the penalty ranges for the individual indicted offenses without PFO enhancement."). The Court identified four specific risks associated with allowing full-bore penalty range questioning during voir dire: (1) overemphasis of the sentencing phase as probable, *i.e.*, suggesting there would be a finding of guilt; (2) implication of "unfettered sentencing discretion;" (3) in the case of PFO status, "implicit disclosure of the defendant's prior criminal record; and (4) "substantial risk of misinformation" in attempting to define penalty ranges. *Id.* In crafting the rule in *Lawson,* this Court sought to strike a balance between "overgeneralizing the inquiry" and "overloading the jury with information." *Id.* at 534.

Now, Simpson asks us to overturn our decision in *Lawson* to allow future venire persons to answers questions regarding the full range of penalties beyond those associated with the indicted offense. To illustrate how the intention of *Lawson* may still be effectuated while opening voir dire to questions regarding the full range of penalties, Simpson directs this Court to a

handful of Texas decisions. *Hanon v. State*, 269 S.W.3d 130 (Tex. App. 2008) (*citing Jack v. State*, 867 S.W.2d 942 (Tex. App. 1993) (Texas courts allow parties to voir dire the venire "about the law applicable to the enhancement of punishment as long as the explanation is hypothetical and does not inform the jury of any specific allegation in the enhancement paragraph of the indictment."); *Estes v. State*, 873 S.W.2d 771 (Tex. App. 1994) (for the proposition that the government is barred from mentioning prior convictions during voir dire). Simpson also claims that *Lawson* undermines Kentucky's Truth-In-Sentencing Statute, Kentucky Revised Statute ("KRS") 532.055, that functions "providing the jury with information relevant to delivering an appropriate sentence."

This Court encountered similar arguments in *Jacobsen v. Commonwealth*, 376 S.W.3d 600 (Ky. 2012), where a defendant charged with first-degree burglary and second-degree PFO sought to voir dire the panel regarding the full range of potential sentences. In *Jacobsen*, the appellant claimed that the issues in his case were straightforward enough so that describing PFO status enhancement to the jury would not be confusing or misleading.[1] 376 S.W.3d at 608. Further, he contended that *Lawson* prevented him from identifying potential jurors who would elect to sentence him to the maximum penalty "once presented with that option." *Id.* The *Jacobsen* Court declined to overrule *Lawson*, finding that "the sort of

[1] Jacobsen involved a single count of robbery subject to second-degree PFO enhancement. His case did not involve either the possibility of lesser included offenses or, with only one charge, any possibility of consecutive sentencing.

sentencing bias with which Jacobsen purports to be concerned is unusual . . . and so does not warrant the confusion and uncertainty that would inevitably attend a case-by-case approach" to the voir dire examination. *Id.* The Court further opined that KRS 532.055, which applies to sentencing and not voir dire, is "advanced," not undermined, by *Lawson*. *Id* at 607 fn.1 ("A primary purpose of KRS 532.055 is to ensure that information about the defendant relevant only to sentencing, such as his prior criminal history, be excluded for the most part from the guilt phase of trial and introduced only after guilt has been determined.")

While courts outside of the Commonwealth may employ other means to avoid the pitfalls of voir dire regarding the full range of potential penalties, this Court is bound by its own precedent. *See Saleba v. Schrand*, 300 S.W.3d 177 (Ky. 2009) (*citing Hilen v. Hays*, 673 S.W.2d 713 (Ky. 1984) ("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.")). The arguments set forth by Simpson do not support abandoning the principles established by *Lawson* and we, therefore, decline to overrule *Lawson*[2].

[2] As noted above, Simpson claims the *Lawson* approach denies due process and fair trial rights under the U.S. and Kentucky Constitutions. He makes no effort to articulate a constitutional argument but instead offers the Texas approach as preferable to *Lawson*. We have declined to adopt that approach and we decline to address constitutional "arguments" that are nothing more than a passing reference to a particular right or provision.

CONCLUSION

Simpson concedes that the trial court correctly applied the principles of *Lawson* in denying his request, and we agree. Accordingly, we affirm the Judgment of Kenton Circuit Court.

Minton, C.J.; Abramson, Cunningham, Noble, Scott, and Venters, JJ., sitting. All concur.

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