

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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED."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THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE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UNPUBLISHED KENTUCKY APPELLATE DECISIONS,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BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED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.

Supreme Court of Kentucky

2013-SC-000477-MR

BRIAN T. JOHNSON

APPELLANT

V. ON APPEAL FROM BOONE CIRCUIT COURT
HONORABLE JAMES ROGER SCHRAND, II, JUDGE
NO. 13-CR-00108

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING IN PART, VACATING IN PART, AND REMANDING

In December of 2012, Appellant, Brian T. Johnson, was the target of multiple controlled drug buys in Florence, Kentucky. Ricardo Colin participated in the drug buys as a confidential informant ("CI"). Colin's involvement was a result of his arrest on May 11, 2012 for trafficking in heroin and possession of drug paraphernalia. Incident to those charges, Colin accepted a plea agreement where he would work with the Northern Kentucky Drug Strike Force ("Strike Force") as a CI in exchange for an amended charge of attempted trafficking in a controlled substance. It appears that the Strike Force agents chose Colin because of his intense heroin habit and connections with local dealers. Colin testified at Johnson's trial that he was supporting a three-gram/\$400 per day heroin habit.

On December 17, 2012, Colin was scheduled to meet Johnson at the Travelodge motel in Florence to purchase heroin. Strike Force agent Shannon Taylor and other officers set up visual surveillance equipment to monitor the exchange. Agent Taylor met Colin at a gas station where he first searched Colin for contraband, then equipped him with an audio transmitter and recorder. Agent Taylor then gave him the money necessary to complete the transaction.

Strike Force Agent Matt Meyer dropped Colin off in the parking lot of the Travelodge and then watched him enter the enclosed motel stairwell. The drug buy was scheduled to take place on the motel's second floor. Colin emerged from the motel about a minute later, reunited with Meyer, and handed him a plastic baggie containing heroin. Agent Meyer drove Colin back to the gas station where he was searched. No officer or agent actually observed the drug buy and Agent Taylor could not hear the transaction in real time or from the audio recording.

The very next day, December 18, 2012, a second controlled drug buy was executed in a manner nearly identical to the previous exchange. Again, Strike Force agents saw Colin enter the Travelodge and then exit shortly thereafter, but did not actually witness the exchange. Colin returned to the agents with another plastic baggie of heroin.

Unlike the first transaction, however, the audio recording from the second buy contained a female voice. Agent Taylor testified at trial that the voice said something like, "Merry Christmas, Ricardo." Colin also testified that

he observed a woman exit the hotel room with Johnson. Colin further testified that she walked down the stairwell, got in a car, and then drove away.

Although someone from the Strike Force recorded the license plate number from the woman's vehicle, no one followed her or investigated this lead.

Based on these two controlled drug buys, Johnson was arrested at the Travelodge on December 20, 2012. Although Johnson consented to a search of his motel room on that day, the search was not conducted until after the search warrant was issued the next day. On December 21, 2012, Strike Force agents searched Johnson's motel room and discovered a "bundle" of brown powder labeled "20" contained in a metal tin. The powder was subsequently identified as heroin weighing 0.073 grams. Agent Taylor testified at trial that a bundle is a homemade paper envelope used to store contraband, and that "20" means the bundle was valued at \$20. The agents also discovered a second bundle containing residual brown powder labeled "20." This bundle was found inside a tissue box wrapped in a portion of a sheet torn from a Steak and Shake restaurant order pad.

Further, the agents discovered evidence, including makeup, panty liners, a driver's license, and a purple bag containing women's clothing, indicating that a female may have been staying in the room. The license belonged to Carolyn Hudson, who was Johnson's girlfriend at the time. It appears that Hudson's name was also on the motel registry. The agents additionally discovered another bundle containing three pills also wrapped in a portion of a sheet torn from a Steak and Shake order pad. The agents testified at trial that

they were aware that Hudson worked at Steak and Shake. However, the agents never located Hudson. Lastly, the agents found a tourniquet, a cotton tip from the end of a cigarette butt, and a plastic bottle cap—all items typically used when injecting heroin.

Johnson was indicted by a Boone County grand jury on three counts of first-degree trafficking in a controlled substance; one count of third-degree possession of a controlled substance; possession of drug paraphernalia (a misdemeanor); and for being a first-degree persistent felony offender (“PFO”). At trial, the court directed a verdict on the count of third-degree possession of a controlled substance. The jury acquitted Johnson of two counts of first-degree trafficking for the drug buys occurring on December 17th and 18th. However, the jury convicted Johnson of first-degree trafficking for the heroin discovered in his hotel room, as well as possession of drug paraphernalia and for being a PFO. For the trafficking conviction, Johnson received a sentence of incarceration for a term of five years. The trial court also ordered him to pay a fine of \$5,000 and court costs. For the possession of drug paraphernalia conviction, Johnson received a sentence of twelve months imprisonment and was also ordered to pay a \$500 fine and court costs. The PFO conviction enhanced Johnson’s felony trafficking sentence to twenty years imprisonment. The trial court ordered Johnson’s misdemeanor and felony sentences to be served concurrently. His misdemeanor and felony fines totaled \$5,500. Johnson now appeals his judgment and sentence as a matter of right pursuant

to § 110(2)(b) of the Kentucky Constitution. Three issues are raised and addressed as follows.

Directed Verdict

Johnson asserts that the trial court erred in denying his motion for a directed verdict of acquittal for the offense of first-degree trafficking in a controlled substance. We will reverse the trial court's denial of a motion for directed verdict "if under the evidence as a whole, it would be *clearly unreasonable* for a jury to find guilt[.]" *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991) (citing *Commonwealth v. Sawhill*, 660 S.W.2d 3 (Ky. 1983) (emphasis added)). Our review is confined to the proof at trial and the statutory elements of the alleged offense. *Lawton v. Commonwealth*, 354 S.W.3d 565, 575 (Ky. 2011):

KRS 218A.1412 states that "[a] person is guilty of trafficking in a controlled substance in the first degree when he or she knowingly and unlawfully traffics in . . . [a]ny quantity of [heroin]" KRS 218A.1412. Traffic means to "manufacture, distribute, dispense, sell, transfer, or possess with intent to manufacture, distribute, dispense, or sell a controlled substance[.]" KRS 218A.010. The record demonstrates that the Commonwealth presented sufficient evidence that would allow a reasonable jury to convict Johnson.

At trial, Agents Taylor and Meyer testified extensively concerning the events surrounding the two controlled drug buys occurring on December 17th and 18th. Agent Meyer specifically testified that, on December 17th, he

dropped Colin off at the Travelodge and then observed him enter the motel and return shortly thereafter with a bindle of heroin. Agent Taylor testified that he witnessed Colin enter the motel on December 18th and also return with a bindle of heroin. Additionally, Colin testified that he purchased heroin from Johnson during the two controlled drug buys. Colin further testified concerning the details of the exchanges, including the price and quantity of each purchase.

Regarding the December 18th exchange, Colin testified that the original purchase price was \$170 for one gram of heroin. However, while Colin was en route to the Travelodge, Johnson contacted Colin on his cell phone and increased the price to \$180. Johnson informed Colin that, if he could not pay \$180, then he would “part it out.” Colin explained at trial that Johnson did not want to sell that large of an amount of heroin because he could make more money selling the contraband in amounts less than one gram.

We have held that “the credibility of witnesses and the weight to be given to sworn testimony are for the jury to decide.” *Roark v. Commonwealth*, 90 S.W.3d 24, 38 (Ky. 2002). Although this case may have turned on the credibility of witnesses, we cannot say that it was clearly unreasonable for the jury to convict Johnson of the offense charged.

Johnson specifically contends that it was unreasonable for the jury to find him guilty of trafficking in heroin when the evidence revealed only a small amount of heroin consistent with personal use. One bindle contained 0.073 grams of the drug and the other contained residual brown powder. Although

these are relatively minimal amounts of heroin, it was not clearly unreasonable for the jury to find Johnson guilty of trafficking, especially in light of the testimony of the Commonwealth's trial witnesses. When ruling on a directed verdict motion, "the trial court must assume that the evidence of the Commonwealth is true." *Benham*, 816 S.W.2d at 187. Accordingly, the trial court did not err in denying Johnson's motion for a directed verdict of acquittal.

Sentencing Phase Error

Johnson further asserts that the trial court erred in admitting improper evidence of prior charges and prior convictions during the penalty phase of trial. Although this issue is unpreserved, we will review for palpable error. *Travis v. Commonwealth*, 327 S.W.3d 456, 463 (Ky. 2010); *Wiley v. Commonwealth*, 348 S.W.3d 570, 574 (Ky. 2010). "In order to demonstrate an error rises to the level of a palpable error, the party claiming palpable error must show a 'probability of a different result or [an] error so fundamental as to threaten a defendant's entitlement to due process of law.'" *Allen v. Commonwealth*, 286 S.W.3d 221, 226 (Ky. 2009) (quoting *Martin v. Commonwealth*, 207 S.W.3d 1, 3 (Ky. 2006)); RCr 10.26.

The trial court admitted Commonwealth's Exhibit 35, which included a judgment, indictment, and final sentence from a 2006 Boone Circuit Court case. The indictment charged that Johnson damaged property in a sheriff's department in excess of \$1,000 and threatened multiple deputies. Most disconcerting is that the indictment included a second-degree PFO charge.

This charge was dismissed as shown in the judgment. However, the jury received evidence through the indictment that Johnson had been convicted in 1996 in the Grant Circuit Court for first-degree possession of a controlled substance, and that he had received a five-year probated sentence for that offense. Further, the wording in the second-degree PFO charge reflected that Johnson's probation was later revoked.

The trial court also admitted Commonwealth's Exhibit 36, which included the judgment, indictment, and plea agreement from a 2009 Campbell Circuit Court case. The judgment disclosed that Johnson was initially charged with first-degree promoting contraband, which was subsequently dismissed. The judgment further revealed that a possession of drug paraphernalia charge, second offense, was amended to possession of drug paraphernalia, first offense. Lastly, the plea agreement stated that Johnson had an extensive criminal history, including prior felonies and multiple violations of an emergency protective order. Both exhibits were provided to the jury during the penalty phase deliberations.

We have repeatedly held that amended charges cannot be presented to a jury. *Blane v. Commonwealth*, 364 S.W.3d 140, 152 (Ky. 2012); *see also Mullikan v. Commonwealth*, 341 S.W.3d 99, 107-08 (Ky. 2011) (reversing and remanding for new sentencing proceedings when information provided to jury was beyond the scope of the "nature of prior offenses"); *Webb v. Commonwealth*, 387 S.W.3d 319, 330 (Ky. 2012) (holding that introduction of

improper evidence of prior crimes during penalty phase of trial “resulted in manifest injustice”).

The information concerning Johnson’s prior crimes was not presented to the jury through live testimony. *See Mullikan*, 341 S.W.3d at 107-08.

However, the jury had direct access to Exhibits 35 and 36 during deliberations. In the two exhibits introduced at sentencing, the jury was provided extraneous information about prior convictions and extensive misconduct which were neither duly authenticated nor admissible. Moreover, Johnson received the maximum sentence for his conviction, thus presuming prejudice. *Blane*, 364 S.W.3d at 152. Accordingly, we find that allowing the jury to access the information contained in Exhibits 35 and 36 constituted palpable error. Therefore, Johnson is entitled to a new sentencing trial.

Fines and Court Costs

Lastly, Johnson contends that the fines and court costs should be vacated because he is indigent and serving a twenty-year sentence. Johnson’s objection to the imposition of the felony fine is properly preserved. However, his objection to the misdemeanor fine and court costs is unpreserved. We will review the trial court’s imposition of fines for clear error. *Travis v. Commonwealth*, 327 S.W.3d 456, 459 (Ky. 2010) (applying clear error standard to unpreserved allegation of improper imposition of fines); *see also Roberts v. Commonwealth*, 410 S.W.3d. 606, 611 (Ky. 2013).

The final judgment required Johnson to pay a \$5,000 fine and \$156 in court costs for the felony trafficking conviction. The judgment also imposed a \$500 fine and \$156 in court costs for the misdemeanor possession conviction. It is undisputed that Johnson was indigent. He completed an affidavit of indigency and was represented by the Department of Public Advocacy throughout the entire trial court proceedings. Accordingly, felony and misdemeanor fines required by statute “shall not be imposed upon any person determined by the court to be indigent pursuant to KRS Chapter 31.” KRS 534.030(4); KRS 534.040(4). *See also Travis*, 327 S.W.3d at 459; *Simpson v. Commonwealth*, 889 S.W.2d 781, 784 (Ky. 1994); *Roberts*, 410 S.W.3d at 611. In addition, the Commonwealth does not contest that the fines were imposed in error. We hold that the trial court's imposition of fines was clearly erroneous.

Further, trial courts may impose court costs on an indigent defendant in a judgment of conviction so long as the court properly considers the appropriate statutory directives. *Maynes v. Commonwealth*, 361 S.W.3d 922, 929 (Ky. 2012) (holding that the trial court's decision to impose costs on an indigent defendant was not clearly erroneous); *see also Galloway v. Commonwealth* 424 S.W.3d 921 929-30 (Ky. 2014). In the present case, the trial court failed to conduct a hearing to determine whether Johnson was considered a “poor person” pursuant to *Maynes*. In light of Johnson's twenty-year conviction and the Commonwealth's concession of error, we see no need to remand this case to the trial court for further consideration of whether Johnson is a “poor person” under KRS 453.190(2) and KRS 23A.205.

Conclusion

For the foregoing reasons, we hereby affirm Johnson's conviction of first-degree trafficking in a controlled substance, but vacate his sentence of twenty years imprisonment and remand this case to the trial court for a new sentencing trial. Further, we also vacate that portion of the final judgment imposing fines and court costs.

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

COUNSEL FOR APPELLANT:

Robert Chung-Hua Yang
Assistant Public Advocate

COUNSEL FOR APPELLEE:

Jack Conway
Attorney General

James Hays Lawson
Assistant Attorney General