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RENDERED: DECEMBER 15, 2016
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2015-SC-000292-MR

CHARLES OWENS — APPELLANT

V.

ON APPEAL FROM BELL CIRCUIT COURT
HONORABLE ROBERT COSTANZO, JUDGE
CASE NOS. 14-CR-00357 AND 14-CR-00375

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

REVERSING AND REMANDING

The Appellant, Charles Owens, was convicted of first-degree trafficking in a controlled substance, first offense; first-degree trafficking in a controlled substance, second offense; and three counts of second-degree trafficking in a controlled substance. He was sentenced to twenty years in prison. On appeal, he claims that (1) the trial court compromised his right to a fair and impartial jury by failing to advise defense counsel of a prospective juror's ex parte communication; (2) the trial court violated his right to present a defense by barring him from cross-examining the Commonwealth's confidential informant about specific charges then pending against him; (3) the Commonwealth improperly bolstered its confidential informant, resulting in palpable error; and (4) the four-year sentence for one of his second-degree trafficking convictions exceeded the permissible sentencing range because the jury did not find an essential element required for the enhanced sentence (the amount trafficked).

This Court concludes that the failure to inform counsel of the prospective juror's ex parte statement and to allow follow-up questioning requires that Owens's convictions be reversed and the case be remanded.

I. Background

Randy Miller was a paid confidential informant for the Kentucky State Police. In this capacity, on November 27, 2013, he met with state troopers who affixed a hidden audio-recording device (a wire) to his person and gave him money to purchase narcotics in a controlled buy outside a pool hall in Pineville. Miller then contacted a man referred to on the recording as "Charlie" to purchase drugs. After a few minutes, the seller arrived and sold Miller oxycodone and hydrocodone pills. Police and Miller both identified the seller as the Appellant, Charles Owens.

Almost the same circumstances transpired again on December 9, when the audio recording captured Miller purchasing hydrocodone pills, and again on December 19, when Miller was recorded purchasing oxycodone and hydrocodone pills. Owens was identified as the seller on both of these occasions as well.

Based on this evidence, Owens was indicted on one count of second-degree trafficking in a controlled substance, first offense (hydrocodone, a Schedule III narcotic), and one count of first-degree trafficking, second or greater offense (oxycodone, a Schedule II narcotic), related to the November 27 buy; and on one count of second-degree trafficking, first offense (hydrocodone), and one count of first-degree trafficking, second or greater offense (oxycodone), related to the December 19 buy. Separately, he was indicted on another count

of second-degree trafficking, first offense (hydrocodone, twenty or more dosage units), related to the buy on December 9.

The indictments were consolidated for trial, and the jury found Owens guilty of all three counts of second-degree trafficking and both counts of first-degree trafficking (one of which was enhanced as a second offense). The jury recommended consecutive prison sentences of two years for each of the November 27 and December 19 second-degree trafficking convictions, four years for the December 9 second-degree trafficking conviction, four years for the November 27 first-degree trafficking conviction, and nine years for the December 19 first-degree trafficking conviction (second offense), for a total of 21 years. To comply with the statutory maximum sentence, the trial court slightly modified the recommended sentence (changing the nine-year sentence for the December 19 first-degree conviction to an eight-year sentence) and otherwise sentenced Owens in accordance with the jury's recommendation to a total of 20 years' imprisonment.

Owens now appeals to this Court as a matter of right. *See* Ky. Const. § 110(2)(b).

II. Analysis

A. The trial court's failure to advise counsel of Juror 13's ex parte comment following voir dire requires reversal.

Owens claims that the trial court's failure to disclose to defense counsel information it received from a prospective juror after voir dire had ended, which related to a question defense counsel asked during voir dire, compromised the impartiality of the jury and requires reversal and a new trial. This Court agrees.

After the trial court excused the venire for a short break following the conclusion of voir dire, and while the members of the panel were filing out of the courtroom, Juror 13 approached the bench and the following brief exchange ensued:

> Juror 13: [inaudible] ask a question?
>
> Judge: Yes, ma'am.
>
> Juror 13: Um, when [defense counsel[1]] asked did [inaudible] family members. I have in-laws in Tennessee—
>
> Judge: You're fine. That's good.
>
> Juror 13: —involved in drugs.
>
> Judge: That's good. Thank you.

This exchange happened outside the presence or awareness of defense counsel. And there is no indication anywhere in the record that the judge ever informed defense counsel of Juror 13's remarks. The ex parte exchange between prospective juror and judge was apparently first discovered by Owens's appellate counsel in reviewing the video record for this appeal.

The question posed by defense counsel that Juror 13 was belatedly responding to in speaking to the judge was: "Has anyone had a family member charged with a drug charge or trafficking charge before? Family member or friend?" Ultimately, three members of the venire responded to this question when it was asked. Juror 13 was not one of them. Juror 13 eventually sat on the jury that convicted Owens.

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[1] Juror 13 actually said "he," but considering the Commonwealth's Attorney here is a woman and defense counsel is a man, it is clear to whom she was referring.

Owens now contends that the trial court erred by not calling a bench conference to inform defense counsel of Juror 13's belated answer and to allow further questioning to flesh out that information and what influence, if any, it might have had on her and on her ability to be impartial. Further questioning, Owens maintains, might have revealed grounds for striking the juror for cause or otherwise have convinced defense counsel to use a peremptory strike on her.

The Commonwealth counters by arguing that the trial court's action (or failure to act) cannot be reversible error because Owens has not shown that he suffered any prejudice as a result. The Commonwealth first contends that Juror 13's statement to the judge was not actually responsive to the question asked during voir dire, emphasizing that a person being "involved in" drugs does not mean that person was "charged with" or "convicted of" a drug offense. Thus, according to the Commonwealth, there is nothing in the record demonstrating that Juror 13 was in any way untruthful or failed to truthfully respond to the question asked during voir dire.

And, the Commonwealth continues, there is nothing about Juror 13's having drug-involved in-laws in Tennessee that on its face demonstrates any sort of bias, implied or otherwise, that would provide for-cause grounds for excusing her from the panel. Thus, because Owens cannot demonstrate definitively that further questioning would have led to Juror 13's removal for-cause or through use of a peremptory strike, and there is no evidence that Juror 13 deliberately failed to truthfully answer a question asked during voir dire, the Commonwealth maintains that the trial court's failure to inform counsel of the ex parte statement cannot constitute reversible error.

This Court concludes, however, that the trial court erred in not advising defense counsel of Juror 13's statement to allow follow-up questioning. The Commonwealth is correct that Juror 13's statement to the judge was not responsive to the question asked by defense counsel during voir dire, but this is true only in the most technical sense. It is clear that Juror 13 herself believed she was responding to the question—she prefaced the statement with "when he asked." (There was no doubt that "he" referred to defense counsel, the only male attorney other than the judge to have asked the venire questions.) And the vague phrase "involved in drugs" could have been shorthand for a whole host of drug-related activities, including being charged with or convicted of drug crimes, which was the information defense counsel sought, and would have followed-up on, by asking the question.

Although the Commonwealth is correct that we can only speculate about what such questioning would have revealed, this does not defeat Owens's claim here. This is not a case where the appellant shoulders the blame for failing to ask appropriate questions that would have led to the disclosure of the allegedly withheld information. *See, e.g., Moss v. Commonwealth*, 949 S.W.2d 579, 581 (Ky. 1997). Instead, the incompleteness of the record here is a consequence of the trial court's error. This is not a ground for excusing that error. It is precisely because the trial court did not act on the information he was given that Owens (and we) are unable to know the extent of Juror 13's familial experience with drugs and whether she had become biased in any way due to that experience.

The statement that Juror 13 had relatives involved in drugs, whatever that meant, was enough to raise the specter of implied bias. Of course, further questioning may have revealed, for example, that Juror 13 had barely any relations with her in-laws and that their drug involvement did not in any way color her impression of drug users or traffickers, or those charged with or convicted of drug offenses. But the opposite, too, is at least equally likely—further questioning may have instead revealed that Juror 13's experience with her drug-involved in-laws had bred in her a heightened degree of disdain or contempt for drug users or traffickers. Follow-up questioning may have thus revealed feelings about drug involvement which fueled a subconscious, if not conscious, partiality against those charged with committing drug-related offenses, like Owens was here.

And there is a second reason why Owens's inability to show definitively that further exploring Juror 13's in-law's involvement with drugs would have revealed grounds for striking her for cause is not fatal to his claim. This Court's predecessor long ago recognized that reversal may also be warranted when a juror "g[ives] a false answer, or no answer, to a pertinent question" asked at voir dire and thereby impedes a party's intelligent exercise of their peremptory challenges. *Drury v. Franke*, 57 S.W.2d 969, 984–85 (Ky. 1933). This Court has made clear:

> The right of challenge includes the incidental right that the information elicited on the voir dire examination shall be true; the right to challenge implies its fair exercise, and, if a party is misled by erroneous information, the right of rejection is impaired; a verdict is illegal when a peremptory challenge is not exercised by reason of false information.

Anderson v. Commonwealth, 864 S.W.2d 909, 912 (Ky. 1993) (quoting *Olympic Realty Co. v. Kamer*, 141 S.W.2d 293, 297 (Ky. 1940)). And this is true despite the record containing nothing to suggest that Juror 13 intentionally withheld the information during voir dire. "[W]hile willful falsehood may intensify the wrong done, it is not essential to constitute the wrong." *Sizemore v. Commonwealth*, 306 S.W.2d 832, 834 (Ky. 1957).

In the end, because Owens's counsel was not told of Juror 13's statement and given an opportunity to flesh out what she meant by her in-laws being involved in drugs and how that might have affected her impartiality, a cloud of doubt remains as to whether Owens received the unbiased and impartial jury to which he was constitutionally guaranteed. To remove that cloud, this matter must be remanded for a new trial.

We recognize the difficult situation the trial judge found himself in upon being approached by Juror 13 outside the presence of counsel; we cannot fault the judge for endeavoring to avoid having such an ex parte conversation with a member of the venire. That being said, the proper course was to remove the ex parte stain from those communications by including counsel in them, not to treat them as though they had not occurred at all.

Because we are reversing and remanding for this reason, we will address Owens's remaining claims of error only to the extent they are likely to recur on retrial.

B. Limitations on the cross-examination of the confidential informant should be cautiously applied.

Owens also contends that the trial court impermissibly constrained his right to present a defense by limiting cross-examination of the confidential informant, Randy Miller, about criminal charges that were pending against him at the time of trial.

Kentucky has long adhered to the so-called "wide open" rule of cross-examination, which "permit[s] inquiry ... to extend to the outer limits of the dispute, without reference to the subject matter of direct examination of the witness being tested on cross." *Derossett v. Commonwealth*, 867 S.W.2d 195, 198 (Ky. 1993) (quoting Robert G. Lawson, *Kentucky Evidence Law Handbook* § 3.20, at 159 (3d ed. 1993)). Trial courts nevertheless retain "authority to impose reasonable limits on the interrogation of witnesses during cross-examination." *Id.* To be sure, courts may limit cross-examination "when ... necessary to further the search for truth, avoid a waste of time, or protect witnesses against unfair and unnecessary attack." *Id.* (quoting Lawson, *supra*, § 3.20, at 159).

That being said, the trial court's exercise of such discretion must comport with the defendant's Sixth Amendment right "to be confronted with the witnesses against him."[2] That right includes "the right to conduct reasonable cross-examination." *Olden v. Kentucky*, 488 U.S. 227, 231 (1988).

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[2] The confrontation rights guaranteed by the Sixth Amendment were incorporated into the Fourteenth Amendment and thus apply in state as well as federal proceedings. *Pointer v. Texas*, 380 U.S. 400 (1965).

And "the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." *Davis v. Alaska*, 415 U.S. 308, 316–17 (1974). Accordingly, a Confrontation Clause violation occurs if the defendant is "prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby 'to expose to the jury the facts from which jurors ... could appropriately draw inferences relating to the reliability of the witness.'" *Delaware v. Van Arsdall*, 475 U.S. 673, 680 (1986) (quoting *Davis*, 415 U.S. at 318).

Recognizing this constitutional right, this Court has emphasized that "limitations on the right of cross-examination ... should be cautiously applied." *Commonwealth v. Maddox*, 955 S.W.2d 718, 720 (Ky. 1997). The trial court may impose appropriate boundaries that do not impede the development of "a reasonably complete picture of the witness' veracity, bias and motivation." *Id.* at 721 (quoting *United States v. Boylan*, 898 F.2d 230, 245 (1st Cir. 1990)). Indeed,

> once the essential facts constituting bias have been admitted, a trial court "may, of course, impose reasonable limits on defense counsel's inquiry into the potential bias of a prosecution witness, to take account of such factors as 'harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that [would be] repetitive or only marginally relevant.'"

Weaver v. Commonwealth, 955 S.W.2d 722, 726 (Ky. 1997) (brackets in original) (quoting *Olden*, 488 U.S. at 232).

That a state's witness may hope to curry favor with the prosecutor on very serious charges that could land him in jail for most or all of the remainder

of his life are undoubtedly "facts from which jurors ... could appropriately draw inferences relating to the reliability of the witness." *Van Arsdall*, 475 U.S. at 680 (quoting *Davis*, 415 U.S. at 318). But how necessary or "essential" such facts may be to developing "a reasonably complete picture of the witness' veracity, bias and motivation," *Maddox*, 955 S.W.2d at 721 (quoting *Boylan*, 898 F.2d at 245), turns on the seriousness of the charges faced and the severity of the punishment that conviction could entail.[3] If the pending charges involve only minor offenses, one would be hard pressed to argue that the witness's credibility and motivation to testify could not be fully developed absent inquiry into the nature of those low-level offenses. In that case, there would be little doubt that a ruling barring such questioning would be "a reasonable limitation on this exploration into [the witness's] motive or bias." *Weaver*, 955 S.W.2d at 726.

Should this issue arise on retrial, the trial court should take the foregoing into consideration.

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[3] Owens is on solid footing in proposing that "[t]he difference between facing three years for possession [of a controlled substance], at 15% parole eligibility for presumptive probation, and a charge that could carry violent time, or decades in prison, is a huge difference in the extent of motivation [to testify for the Commonwealth] that Randy Miller could have had." This proposition was speculative, however, because no offer was made at trial of what Miller's then-pending charges actually were (and the record did not otherwise contain that information elsewhere). Should this issue come up again, Owens would be wise to ensure such information makes it into the record on remand. *See Baze v. Commonwealth*, 965 S.W.2d 817, 824 (Ky. 1994) ("Prejudice will not be presumed from a silent record."); *Commonwealth v. Ferrell*, 17 S.W.3d 520, 525 n.10 (Ky. 2000) ("Without an avowal, or a crystal ball, reviewing courts can never know with any certainty what a given witness's response to a question would have been if the trial court had allowed them to answer. Appellate courts review records; they do not have crystal balls.")

C. Improper bolstering of the confidential informant should be avoided.

Owens also complains that the Commonwealth improperly bolstered the credibility and reliability of Randy Miller, the Commonwealth's confidential informant. There are two aspects to this complaint: (1) that the Commonwealth improperly bolstered Miller's credibility in its case-in-chief before it had first been attacked by Owens, *see* KRE 608(a)(2), and also proved his reliability as a confidential informant by evidence of specific past acts, *see* KRS 405; and (2) that the prosecutor committed misconduct throughout the trial by asserting personal opinions to bolster Miller's credibility and reliability.

Because the Commonwealth conceded error here (and, instead, responded by arguing that it did not amount to palpable error), we trust that these issues are unlikely to arise again on retrial and, accordingly, do not address them further.

D. Owens can be sentenced under KRS 218A.1413(2)(a) only if the jury first finds that he trafficked in the quantity specified in KRS 218A.1413(1)(a).

Finally, Owens last claims that he was sentenced outside the applicable statutory range on his conviction for second-degree trafficking related to the transaction on December 9.

Owens was indicted for trafficking in 20 dosage units of hydrocodone (and, indeed, the evidence demonstrated that was the case), which constitutes second-degree trafficking in a controlled substance under KRS 218A.1413(1)(a)2. Subsection (2)(a) of KRS 218A.1413 makes that offense a Class D felony for which the applicable sentencing range is one to five years.

See KRS 532.020(1)(a). But KRS 218A.1413(2)(b)1 provides an exception when the conviction is based instead on subsection(1)(c), which governs trafficking "in any quantity of a controlled substance specified in [subsection (1)(a)] in an amount less than the amounts specified in that paragraph." In other words, the exception applies when the defendant is found to have trafficked in less than 20 dosage units of hydrocodone. In that case, the maximum sentence to be imposed can be no greater than three years. KRS 218A.1413(2)(b)1.

Although the "exception" is expressed in such a way that the default conviction appears to be for an ordinary class D version of the offense, our penal and drug offenses do not work that way. A jury is not required to find expressly that the defendant sold fewer than 20 dosage units before the lesser one-to-three year sentence is imposed. Under the Constitution, "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi v. New Jersey,* 530 U.S. 466, 490 (2000). This includes the amount of a drug that a defendant is alleged to have possessed if the amount elevates the penalty. *See United States v. Booker,* 543 U.S. 220 (2005).

Thus, rather than a low quantity of drugs reducing the sentence, it is the higher quantity that increases it. Were it otherwise, the statute would require the jury to find an additional fact to *reduce* the maximum sentence. Although perhaps drafted inelegantly, the statute must be read such that the additional fact—20 or more dosage units—increases the possible sentence. The Constitution requires this reading.

Thus, the most basic version of trafficking under this statute is subject to a sentence of only one to three years in prison. To find a defendant guilty of that offense, the jury must find that the person unlawfully trafficked in a quantity of hydrocodone.[4] To find the defendant guilty of the more-punishable version of the offense, or at least to impose the higher punishment, the jury must first find that the defendant trafficked in 20 or more dosage units.

III. Conclusion

For the reasons stated above, the judgment of the Bell Circuit Court is reversed and this matter is remanded for further proceedings consistent with this opinion.

All sitting. All concur.

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[4] The statute also applies to other drugs, such as anabolic steroids, for which there is no quantity limit, KRS 218A.1413(1)(b), and to drugs, such as those listed on Schedules I and II, for which a lesser amount of dosage units results in the enhanced sentence, KRS 218A.1413(1)(a)1. And the 20-dosage-unit limit applies to more than hydrocodone. *See* KRS 218A.1413(1)(a)1 (applying this limit to all Schedule III controlled substances). Although the text above discusses hydrocodone and the 20-dosage-unit limit in particular, the same reasoning would apply to any situation in which KRS 218A.1413(1)(c) is at issue.

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