

SUPREME COURT OF KENTUCKY

Commonwealth v. Philpott

75 S.W.3d 209 (Ky. 2002) · Decided May 16, 2002

OPINION

COOPER, J.

COOPER, Justice. Gregory Ross Philpott was indicted by a Jefferson County grand jury on a charge of burglary in the first degree, a Class B felony, KRS 511.020, for which the maximum penalty is twenty years in prison and a \$10,000.00 fine. KRS 532.060(2)(b); KRS 534.030(1). Following a trial by jury, Philpott was convicted of assault in the fourth degree under extreme emotional disturbance, a Class B misdemeanor, KRS 508.030 and KRS 508.040, and sentenced to the maximum penalty for that offense, ninety days in jail and a \$250.00 fine.

KRS 532.090; KRS 534.040(2)(b). The factual premise for the indictment was that Philpott, with the intent to commit a crime, knowingly entered or remained unlawfully in a residence and, while in the residence, assaulted and physically injured Mary Malone who was not a participant in the crime. KRS 511.020(1)(b).

The trial judge instructed the jury on the principal offense, burglary in the first degree, and on three possible lesser included offenses: (1) criminal trespass in the first degree; (2) assault in the fourth degree; and (3) assault in the fourth degree under extreme emotional disturbance.

The latter three offenses are misdemeanors. KRS 511.060(2); KRS 508.030(2); KRS 508.040(2)(b). The guilt phase instructions directed the jury as follows upon a finding of guilt of one of the four possible offenses: Instruction No. 1: If guilty of burglary in the first degree, “[y]ou shall say so by your verdict and no more.” Instruction Nos. 2 and 3: If guilty of criminal trespass in the first degree or assault in the fourth degree, “[y]ou shall fix his punishment at confinement in the *211County Jail for a period not to exceed twelve (12) months, at a fine not to exceed \$500.00, or at both confinement and fine, in your discretion.” Instruction No. 4: If guilty of assault in the fourth degree under extreme emotional disturbance, “[y]ou shall fix his punishment at confinement in the County Jail for a period not to exceed ninety (90) days, at a fine not to exceed \$250.00, or at both confinement and fine, in your discretion.” Thus, the instructions directed the jury not to set a penalty if Philpott was found guilty of the principal felony offense but to set a penalty if he was found guilty of one of the lesser included misdemeanor offenses.

As noted above, the jury found Philpott guilty of assault in the fourth degree under extreme emotional disturbance and sentenced him to confinement for ninety days and a \$250.00 fine. Since

the jury returned its penalty verdict concurrently with its guilty verdict, there was no penalty phase of the trial.

We granted the Commonwealth's motion to certify the law with respect to the following issue: WHETHER THE "TRUTH-IN-SENTENCING" STATUTE, KRS 532.055(1) MANDATES THAT A JURY CANNOT BE ADVISED OF MISDEMEANOR SENTENCING INFORMATION DURING THE GUILT PHASE OF A FELONY TRIAL? Ky. Const. § 115; CR 76.37. KRS 532.055(1) provides: In all felony cases, the jury in its initial verdict will make a determination of not guilty, guilty, guilty but mentally ill, or not guilty by virtue of insanity, and no more.

Prior to January 1, 1975, there were no bifurcated criminal trials in Kentucky and all verdicts were rendered pursuant to RCr 9.84(1): When the jury returns a verdict of guilty it shall fix the degree of the offense and the penalty.... See e.g., *Ingram v. Commonwealth*, Ky., 427 S.W.2d 815, 818 (1968), and *Wilson v. Commonwealth*, Ky., 403 S.W.2d 705, 708-09, (1966), rejecting arguments that introduction during the trial of the primary offense of evidence of prior convictions supporting an enhanced penalty under the Habitual Criminal Act, KRS 431.190 (repealed 1974 Ky. Acts, ch. 406, § 336, eff.

January 1, 1975), denied a defendant his/ her Fifth Amendment right to Due Process of Law and Sixth Amendment right to trial by an impartial jury. The original version of the Kentucky Penal Code retained this practice for trials of accused persistent felony offenders. 1972 Ky. Acts, ch. 385, § 267.

However, the effective date of the 1972 version of the Code was July 1, 1974, *id.*, § 307, and the 1974 General Assembly amended that provision so that what is now KRS 532.080(1) provides for a bifurcated procedure at which sentencing and evidence of prior convictions are reserved to a second, penalty phase of the trial. 1974 Ky. Acts, ch. 406, § 280, eff. January 1, 1975.

Likewise, when the General Assembly reinstated the death penalty in Kentucky, it provided for a bifurcated trial in which sentencing information was reserved to a second, penalty phase of the trial. KRS 532.025(1) (1976 Ky. Acts (ex. sess.), ch. 15, § 2). Despite the fact that Section 116 of the Kentucky Constitution vests the Supreme Court with all power over rules of practice and procedure and that Section 28 forbids the exercise by one branch of government of powers belonging to either of the other branches, neither KRS 532.080(1) nor KRS 532.025(1) was subjected to a Constitutional challenge on that basis.

The so-called "truth-in-sentencing" statute, KRS 532.055, was literally drafted overnight and enacted the next day in response to a public outcry over the failure of a petit jury to sentence George Wade to death for the robberies and murders of two Jefferson County teenagers.¹ 1986 Ky. Acts, ch. 358, § 2. Like KRS 532.080(1) and KRS 532.025(1), KRS 532.055(2) provides for a bifurcated trial in which the jury determines the appropriate penalty within the ranges specified by

law after being furnished with previously inadmissible evidence regarding the number and nature of the defendant's prior criminal convictions and parole eligibility information.

In *Commonwealth v. Reneer*, Ky., 734 S.W.2d 794 (1987), the statute was deemed to be legislation concerning practice and procedure and, thus, a violation of Section 28. *Id.* at 796. However, we decided to accept the provisions of the statute as a matter of comity, subject to the Court's right under Section 116 to preempt its provisions by promulgation of different rules of procedure when and if necessary.

Id. at 798. Philpott argues that KRS 532.055(1) has no application to the trial of a misdemeanor, and, thus, it was proper to apply RCr 9.84(1) to the instructions on the lesser included misdemeanor offenses. We disagree. There are three circumstances in which a defendant can be convicted of a misdemeanor: (1) in district court when the defendant is charged only with one or more misdemeanor offenses, KRS 24A.110(2); (2) in circuit court when a misdemeanor charge is joined in an indictment with a felony, *id.*, RCr 6.18, *Keller v. Commonwealth*, Ky., 594 S.W.2d 589 (1980); and (3) in circuit court when the defendant is indicted for a felony offense but convicted, as here, of a lesser included misdemeanor offense.

Cf. Commonwealth v. Adkins, Ky., 29 S.W.3d 793 (2000). KRS 532.055(1) applies to "all felony cases" in circuit court. Instructing the jury on a lesser included misdemeanor offense does not transform a felony case into a misdemeanor case. That does not occur until and unless a verdict is returned convicting the defendant of the misdemeanor offense and thereby acquitting him/her of the felony offense.

Ergo, the trial is still a felony case at the time the guilt phase instructions are read to the jury. KRS 532.055 does not purport to limit the type of evidence admissible during the guilt phase of a criminal trial. Nevertheless, such has been the subject of most of the post-Reneer litigation with respect to that statute. *Clay v. Commonwealth*, Ky., 818 S.W.2d 264 (1991), cert. denied, 503 U.S. 923, 112 S.Ct.

1304, 117 L.Ed.2d 525 (1992), held that because KRS 532.055 now permits bifurcated trials of felony cases, evidence of prior convictions introduced for the purpose of enhancing an underlying felony offense to an offense of a higher degree is no longer admissible during the guilt phase of the trial but must be reserved for the penalty phase. That principle has subsequently been extended to any case in which the prosecution seeks to introduce a prior conviction for the purpose of imposing an enhanced sentence, even if the enhancement would result only in a more severe misdemeanor sentence, thus requiring bifurcation of some misdemeanor trials.

Dedic v. Commonwealth, Ky., 920 S.W.2d 878 (1996); *O'Bryan v. Commonwealth*, Ky., 920 S.W.2d 529 (1996); *Commonwealth v. Ramsey*, Ky., 920 S.W.2d 526 (1996). In *Carter v. Commonwealth*, Ky., 782 S.W.2d 597 (1990), cert. denied, 497 U.S. 1029, 110 S.Ct. 3282, 111

L.Ed.2d 791 (1990), the jury initially returned inconsistent verdicts finding the defendant guilty of both the primary offense of trafficking in a controlled substance and the lesser included offense of possession of a controlled substance.

The trial judge explained to the jury the difference between the two offenses and “presumably” informed them that the offense of trafficking carried a more severe penalty than the offense of possession. After further deliberations, the jury returned a verdict convicting the defendant of the more serious trafficking offense. Though finding the error harmless, the Court in *Carter* agreed with the defendant’s assertion “that telling the jury sentencing information during the guilt/innocence phase of the trial violated the statutory process of a bifurcated trial as set forth in the new truth-in-sentencing statute, KRS 582.055, and thereby denied him due process of law.” *Id.* at 601.

The issue then became whether *Carter* precluded the introduction of any sentencing information during the guilt phase of a trial and, if so, how the parties could conduct a meaningful voir dire so as to ascertain whether individual prospective jurors could consider the full range of penalties. *Shields v. Commonwealth, Ky.*, 812 S.W.2d 152 (1991), cert. denied, 502 U.S. 1065, 112 S.Ct.

953, 117 L.Ed.2d 121 (1992). We recently surveyed the evolution of our case law on this subject in both *Norton v. Commonwealth, Ky.*, 37 S.W.3d 750 (2001), and *Lawson v. Commonwealth, Ky.*, 53 S.W.3d 534 (2001). Without repeating the issues and holdings of all of the relevant cases, suffice it to say that the principle stated in *Carter* has been modified to permit meaningful voir dire, *Lawson*, and the introduction of relevant evidence, *Norton*, during the guilt phase of a criminal trial, but otherwise remains intact.

Lawson holds that meaningful voir dire requires that the jury be informed of the penalty range of the indicted offense(s) but not of enhanced or lesser included offenses. Thus, the penalty range information furnished to the jury by the instructions in this case would not be cumulative to information furnished during voir dire. Nor does *Philpott* suggest how evidence of the penalty ranges of lesser included misdemeanors, but not of the primary felony offense, would be relevant to his guilt or innocence.

In fact, such would more likely confuse the jury into believing that a penalty would be imposed only upon conviction of a misdemeanor offense. Regardless, in addition to authorizing the jury to render a verdict contrary to the mandate of KRS 532.055(1), the instructions in this case furnished sentencing information to the jury during the guilt phase of the trial contrary to the principle stated in *Carter*, *supra*.

We hold now that in the trial of a “felony case,” i.e., any trial in which a jury could return a verdict of guilty of a felony offense, the jury shall not be instructed on the penalty ranges of any offense, whether the primary or a lesser included offense. If, upon the conclusion of such a trial, the jury

returns a verdict of guilty of a lesser included misdemeanor offense, no additional evidence shall be admitted, the jury shall immediately be instructed on the penalty range for that offense, and the attorneys shall be allowed additional argument only on the issue of punishment, following which the jury shall retire to deliberate its verdict on that issue.

If, upon the conclusion of the trial of a multi-count indictment, the jury returns verdicts finding the defendant guilty of both felony and misdemeanor offenses, and if either of the parties intends to offer evidence pursuant to KRS 532.055(2), the procedure described in the preceding sentence shall first be followed with respect to the misdemeanor convictions, after which the procedure described in KRS 532.055(2) and (3) shall be followed with respect to the felony *214convictions.

Newton v. Commonwealth, Ky.App., 760 S.W.2d 100 (1988); cf. *Francis v. Commonwealth*, Ky., 752 S.W.2d 309 (1988); Cooper, 1 Kentucky Instructions to Juries (Criminal) § 12.01A — 12.03 (Comment) (4th ed. Anderson 1993).

The law is so certified. GRAVES, JOHNSTONE, STUMBO and WINTERSHEIMER, JJ., concur. KELLER, J., concurs by separate opinion, with LAMBERT, C.J., joining that concurring opinion.. For factual details, see *Taylor v. Commonwealth*, Ky., 821 S.W.2d 72 (1990), cert. denied, 502 U.S. 1100, 112 S.Ct. 1185, 117 L.Ed.2d 428 (1992).