

RENDERED: APRIL 22, 2016; 10:00 A.M.  
NOT TO BE PUBLISHED

# Commonwealth of Kentucky

## Court of Appeals

NO. 2011-CA-000724-MR  
AND  
NO. 2012-CA-001900-MR

JOE TAYLOR

APPELLANT

ON REMAND FROM SUPREME COURT OF KENTUCKY  
NO. 2014-SC-000211-DG

v. APPEALS FROM FULTON CIRCUIT COURT  
HONORABLE TIMOTHY A. LANGFORD, JUDGE  
ACTION NO. 10-CR-00063

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: CLAYTON, MAZE, AND NICKELL, JUDGES.

CLAYTON, JUDGE: This appeal is before our Court pursuant to the Opinion of the Kentucky Supreme Court that reversed and remanded this case for consideration of the issues that were not addressed in our original decision. After

consideration of the arguments and review of the record, we affirm the decision of the Fulton Circuit Court.

### **Background**

The Appellant, Joe Taylor, appealed the 2011 decisions of the Fulton Circuit Court arising out of his conviction for possession of a handgun by a convicted felon and possession of a controlled substance (cocaine) with intent to traffic. A separate jury trial was held on each charge. We initially affirmed the decision of the trial court as it related to the conviction of possession of a handgun by a convicted felon. However, we reversed the trial court regarding the conviction for trafficking cocaine. Our reversal was based upon the testimony of Detective Steve Hensley of the Pennyriple Narcotics Task Force, who testified about statements Taylor made during the suppression hearing.

Taylor's attorney did not object to this testimony during the trial, but Taylor argued on appeal that Hensley's testimony violated his constitutional right not to incriminate himself and violated his due process right not to have to forego one constitutional right in order to exercise another. Taylor sought relief under Kentucky Rules of Criminal Procedure (RCr) 10.26 arguing that the error was palpable and affected his substantial rights resulting in manifest injustice. We granted palpable error review and cited *Shull v. Commonwealth*, 475 S.W.2d 469 (Ky. 1971). The majority determined that there was a violation of a constitutional right. The dissent did not agree that there was palpable error. The Kentucky Supreme Court granted discretionary review.

The U.S. Supreme Court stated that both *Simmons v. United States*, 390 U.S. 377, 88 S.Ct. 967, 19 Ed.2d 1247 (1968), and *Shull* hold that a criminal defendant's testimony at a suppression hearing may not be used as evidence of guilt at trial without violating his Fifth Amendment privilege against self-incrimination if he objects to its use. The Supreme Court held that the constitutional rule as laid out in *Simmons* and *Shull* specifically incorporates an objection requirement. Therefore the objection is part of the substantive law, and "not a mere procedural requirement for preserving errors for appellate review." *Commonwealth v. Taylor*, 477 S.W.3d 592, 596 (Ky. 2015). The failure to object does not result in an error but in a waiver. Palpable review should not have been conducted because there was no error. Our decision was reversed and the case was remanded to our Court to address the remaining issues that we held were moot.

### **Analysis**

The remaining issues argued by Taylor on his trafficking charge are: whether his right to a fair trial was violated when one prosecution witness violated the court's order when he testified as to why they were at the Taylor home, and another officer told the jury "he had five cases on Joe"; whether his right to a fair and impartial jury was denied when two jurors were not excused for cause after they said they would want Taylor to present evidence; and, whether the court erred in assessing \$175 in court costs. We address each argument separately.

Taylor argues that Fulton County Police Sgt. James Buckingham violated the trial court's earlier order when he testified that he was at the Taylor

residence to serve an indictment. At the conclusion of the Commonwealth's examination of Buckingham, Taylor's counsel objected to his testimony and moved for a mistrial. In response to the motion for mistrial, the Commonwealth argued that they did not think that the jury heard what was said and that even if they did, Buckingham did not say "warrant for an indictment." The judge determined that the error was harmless because Buckingham did not reference the defendant as the individual who had an indictment. The jury was aware that Taylor lived in the house with several other people. There was no request for an admonition.

In order to declare a mistrial, there must appear in the record "a manifest necessity" for such an action or "an urgent and real necessity." Wiley v. Commonwealth, 575 S.W.2d 166, 168 (Ky. App. 1979). The trial court has broad discretion in determining whether to grant a mistrial, and that decision will not be disturbed absent an abuse of discretion. Matthews v. Commonwealth, 163 S.W.3d 11, 17 (Ky. 2005). In the case at bar, Sgt. Buckingham's comment was not directed to any particular individual living in the house.

The jury was already aware that Probation and Parole was present to conduct a home visit of Diane Taylor at the same time of Sgt. Buckingham's visit. Diane Taylor gave the officers consent to search the home. If the jury heard the statement, it is not certain whom they believed it concerned. The reference to an indictment was not directed to any one person, and therefore, did not result in any

prejudice to Taylor. We do not believe that there is any manifest necessity or injustice demonstrated in this case that would result in a mistrial.

Taylor also argues that his right to a fair trial was denied when Detective Steve Henley made a reference to five cases that involved Taylor. This issue is not preserved, but he urges us to review it pursuant to RCr 10.26 for palpable error. He argues that the statement was irrelevant, prejudicial, and the continuation of the admission of bad character evidence. Palpable error review is permissible to provide appropriate relief upon a determination that manifest injustice has resulted from the error. During the cross-examination of Detective Henley, Taylor's counsel asked if he had prepared a report on this case. The Detective responded that he had "five cases on it right here, which part are you talking about?" Counsel then said that he was talking about the alcohol found in the couch. The Detective stated the alcohol was found by Probation and Parole.

As stated in *Phillips v. Commonwealth*, 679 S.W.2d 235, 237-38 (Ky. 1984), "[w]here, as here, evidence of other crimes is introduced into evidence through the non-responsive answer of a witness, this court must look at all of the evidence and determine whether the defendant has been unduly prejudiced by that isolated statement." (Quoting *Meadows v. Commonwealth*, 551 S.W.2d 253 (Ky. 1977)). In the case at bar, the witness did not answer the question because he did not understand the question. The Detective did say that he had five cases but he also asked what "part" counsel meant. Counsel then clarified that he meant the location of the alcohol. The Detective's answer was an isolated

statement. However, the explanation of the question by counsel and the answer by Henley both directed the jury to the events that had transpired that day. If there was any error it was harmless, and therefore, palpable review is not warranted. Thus, we affirm the trial court on these two evidentiary issues.

Taylor next argues that he was denied a fair and impartial trial when two jurors were not excused for cause. Both jurors had indicated that they would want Taylor to testify and that they would be concerned or suspicious if he did not testify. Taylor made a motion to strike both jurors for cause. The motion was denied. Taylor used his peremptory strikes to remove the two jurors from the panel. He exhausted all of his peremptory strikes. Although Taylor properly made his motion to strike, he did not designate which jurors he would have struck had he not had to use his strikes for these two jurors.

In *Gabbard v. Commonwealth*, 297 S.W.3d 844, 854 (Ky. 2009), the Kentucky Supreme Court held:

Thus, this Court concludes that in order to complain on appeal that he was denied a peremptory challenge by a trial judge's erroneous failure to grant a for-cause strike, the defendant must identify on his strike sheet any additional jurors he would have struck.

*Gabbard* explains that a failure to grant the “for-cause” strike may be reversible error unless it can be shown to be non-prejudicial. It is non-prejudicial if the other jurors the defendant would have used his peremptory strikes on do not actually sit on the jury. The court presumes that the defendant got the jury he wanted. In the case at bar, we do not know which, if any, additional jurors Taylor may have

struck. Without that identification, the record reflects that the jury was acceptable to Taylor as constituted. Under the *Gabbard* analysis, he has not demonstrated any prejudice. We affirm the trial court on this issue.

Taylor's final argument is that court erroneously imposed costs of \$175. Taylor seeks review of this issue pursuant to *Travis v. Commonwealth*, 327 S.W.3d 456 (Ky. 2010). *Travis* held that sentencing issues are jurisdictional and cannot be waived by the failure to object. *Id.* at 459. Fines and costs are a part of sentencing and may be addressed for the first time on appeal. *Id.* Taylor also cites *Maynes v. Commonwealth*, 361 S.W.3d 922 (Ky. 2012). *Maynes* held that “[u]pon a defendant's conviction, however, [KRS 23A.205](#)<sup>1</sup> requires imposition of court costs unless the defendant qualifies as a ‘poor person’ and thus is unable to pay the costs presently or within the foreseeable future without depriving himself and his dependents of the basic necessities of life.” *Id.* at 933. Taylor states the court did not hear evidence at the sentencing hearing on the handgun conviction held on December 11, 2010. Taylor argues that the court had to determine if he was a “poor person” as defined by KRS 23A.205. The Commonwealth argues that Taylor said he paid the bills where he lived and a large amount of cash was found in his room; therefore, the court reasonably concluded that Taylor had funds to pay the costs and fees.

In our review of the record, we did not locate a transcript of the December 10, 2010 sentencing. Similarly, no transcript was found for March 10,

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<sup>1</sup> Kentucky Revised Statutes.

2011, the sentencing date on the trafficking charge. However, in an order signed on March 10, 2011, and entered on March 15, 2011, the court wrote, "...having heard testimony in regard to the Defendant's financial status at the time of sentencing, the Court having reviewed the file and being otherwise sufficiently advised; ...that the Defendant has assets in his commissary account and or other assets which would render [him] not to be indigent at this time..."

The order reflects that the court did consider his ability to pay. The order on December 10, 2010, requires Taylor to pay the cost within six months of his release. No additional costs were imposed on March 10, 2011, on the trafficking conviction. The court's order stated that a hearing was held. The court heard testimony and determined that Taylor had sufficient assets to pay the costs which he had the ability to pay at the time, but ordered him to pay within six months of his release. He was not a "poor person" pursuant to KRS 23A.205. Therefore, there was no error by the trial court on the imposition of the court costs.

### **Conclusion**

For the reasons set out above, we affirm the decision of the Fulton Circuit Court.

ALL CONCUR.



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