

Commonwealth of Kentucky
Court of Appeals

NO. 2012-CA-000046-MR

LESLIE MICHAEL LOWE

APPELLANT

v. APPEAL FROM CARTER CIRCUIT COURT
HONORABLE REBECCA K. PHILLIPS, JUDGE
ACTION NO. 10-CR-00153

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING IN PART AND
REVERSING IN PART AND REMANDING

** ** *

BEFORE: CLAYTON, LAMBERT, AND MOORE, JUDGES.

MOORE, JUDGE: Leslie Michael Lowe appeals from the judgment and sentence of the Carter Circuit Court finding him guilty of manslaughter in the first degree and contempt of court. Lowe received a twelve-year sentence for the manslaughter conviction to run consecutive to a six-month sentence for the contempt charge. Upon review, we reverse regarding the contempt finding and remand for further

proceedings concerning it. The remainder of the Carter Circuit Court's judgment is affirmed.

The basic events giving rise to this case are not disputed by either party, although some eyewitness testimony at trial did conflict with other eyewitness testimony, and ultimately Lowe argues that he was not the instigator of the altercation. Lowe left his house at approximately 9:00 p.m. on August 1, 2010, to drive to Speedway to purchase cigarettes. According to his statement to the police, as he was driving through town by Olive Hill Elementary School, two men yelled at him and laughed. In his statement to the police, Lowe stated that he drove by them without other incident and purchased the cigarettes. On the way home, he stated that the same two individuals yelled at him again, and this time he yelled back at the men. He told police that as he drove by a third time, a blond-haired man jumped off the steps and kicked the back of his vehicle.

After kicking the back of his car, Lowe stated that this man (later determined to be the deceased victim, Danny Taynor) ran around the back of the car toward the driver side door. Lowe stated that he stopped the car and got out. Mr. Taynor put his hands on Lowe, and another man (later identified to be Austin Dummitt) rushed to Mr. Taynor's aid. At this point, Lowe testified that he drew his gun and pointed it at Mr. Taynor's face. At the sight of the gun, Mr. Dummitt backed off. Lowe yelled again at Mr. Taynor, who attempted to wrestle the gun away from Lowe. Lowe alleges that Mr. Taynor kept putting his hands on him.

Mr. Taynor would not back off, and Lowe eventually pulled the trigger. Mr.

Taynor dropped to the ground.

At trial, Mr. Dummit chose to testify, despite the fact that he was in jail for a drug trafficking charge. He testified that on the evening of the shooting, he was hanging out with Mr. Taynor and that the two of them were simply sitting on the school steps talking. According to Mr. Dummit, as Lowe initially drove past, it was Lowe who started calling them names. At this point, Mr. Taynor went down the sidewalk and asked Lowe what his problem was. Mr. Dummit testified that Lowe then drove off without further incident. However, about ten to fifteen minutes later, Lowe drove back by the two men and Mr. Taynor jumped up and yelled towards Lowe, "What's your . . . problem?"

When Mr. Taynor yelled, Lowe stopped the car, and Mr. Taynor ran around to the driver side of the car. Again, Mr. Taynor asked Lowe what his problem was. Mr. Dummit denied seeing Mr. Taynor kick Lowe's car, but he did see Lowe get out of his car with a gun. Mr. Dummit testified that Lowe held the gun up to Mr. Taynor's head and asked him six times if he wanted to die. Shortly thereafter, Mr. Dummit heard a gunshot and saw Mr. Taynor crumple to the ground.

Mr. Taynor was rushed to the hospital, where he was declared brain dead and maintained on life support for a few hours for organ donation purposes. Lowe was apprehended the next day and admitted to shooting Mr. Taynor, but stated that it was in self-defense.

Lowe was indicted for first-degree murder but the jury found him guilty of first-degree manslaughter. He was also found in contempt of court for cursing twice on his way out of the courtroom while the jury was deliberating during the sentencing phase. He was sentenced to twelve years' imprisonment for the manslaughter conviction and given a consecutive sentence of six months' imprisonment for the contempt. He now appeals as a matter of right.

On appeal, Lowe presents two central arguments to this Court. First, he argues the trial court erred in denying the defense's motion for a directed verdict. Second, Lowe argues the trial court erred in not holding a hearing before holding him in contempt of court.

The Kentucky Supreme Court explained the trial court's role in evaluating a motion for directed verdict in *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991):

On motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given. For the purpose of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but reserving to the jury questions as to the credibility and weight to be given to such testimony.

(Internal quotation marks and citations omitted).

For appellate purposes, "the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then [is] the

defendant . . . entitled to a directed verdict of acquittal.” *Id.* (citing *Commonwealth v. Sawhill*, 660 S.W.2d 3 (Ky. 1983)).

Lowe contends that the trial court committed reversible error when it denied his motion for a directed verdict based on the Commonwealth’s failure to present what he calls competent medical testimony about Mr. Taynor’s cause of death. Julie Anne Maynard is a County Medical Examiner for the state of West Virginia. She testified at trial that Mr. Taynor’s cause of death was a gunshot wound to the head, which she personally wrote on the death certificate. An autopsy was not performed in this case. Ms. Maynard testified that in West Virginia, an autopsy is always performed. In Kentucky, in cases where the cause of death is clear, an autopsy can be waived.

In Kentucky, the cause of death is typically proven by competent medical testimony, with one “layman’s” exception. “The established rule is that the cause of a death may be proved only by medical testimony, except where the facts proved are such that any layman of average intelligence would know from his own knowledge and experience that the injuries described are sufficient to produce death.” *White v. Commonwealth*, 360 S.W.2d 198, 201 (Ky. 1962) (internal citations omitted).

In the instant case, the cause of death was very clearly a gunshot wound to the head, as the police observed brain matter at the scene, and all witnesses testified that Mr. Taynor was shot in the head at close range. A review of the record in this case reveals pictures of the gunshot wound and brain matter at or

near the wound site. We agree with the trial court and the Commonwealth that the evidence in this case falls under the exception detailed above, such that a person with average intelligence is capable of determining that a gunshot to the head at very close range was capable of causing, and in fact did cause, Mr. Taynor's death. Thus, the trial court properly denied Lowe's motion for a directed verdict, and we will not disturb that ruling on appeal.

Regarding his argument that the trial court failed to hold a hearing before finding him in contempt, Lowe concedes that the issue is not preserved and urges this court to review for palpable error under Kentucky Rule(s) of Criminal Procedure (RCr) 10.26. That rule provides:

A palpable error which affects the substantial rights of a party may be considered ... by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error.

"That means that if, upon consideration of the whole case, a substantial possibility does not exist that the result would have been different, the error will be deemed non-prejudicial." *Graves v. Commonwealth*, 17 S.W.3d 858, 864 (Ky. 2000).

After the jury found Lowe guilty of first-degree manslaughter, it retired to deliberate during the sentencing phase. After the jury had left to deliberate, Lowe cussed twice. Initially the trial court instructed Lowe to settle down. The jury returned from deliberations and sentenced Lowe to twelve years. After the jury was dismissed, the trial court stated that Lowe cussed twice on his way out of the

courtroom and was therefore being found in contempt of court. The trial court then sentenced Lowe to the additional six months to run consecutively to the other sentence.

Lowe argues that he was denied the right to be heard on the contempt charge because the trial court waited until after the jury was dismissed to find him in contempt and sentence him accordingly. He argues that this goes against the U.S. Supreme Court's holding in *Taylor v. Hayes*, 418 U.S. 488, 497-98, 94 S.Ct. 2697, 2702-03, 41 L.Ed. 2d 897 (1974).

As in Lowe's case, in *Schroering v. Hickman*, 229 S.W.3d 591, 593-95 (Ky. App. 2007), there was also a break between the contemptuous conduct and the sanction imposed. This Court explained therein contempt in detail as follows:

The power of the court to punish for contempt is inherent. *Newsome v. Commonwealth*, 35 S.W.3d 836, 839 (Ky. App. 2001); *Arnett v. Meade*, 462 S.W.2d 940, 947 (Ky. 1971); *Underhill v. Murphy*, 117 Ky. 640, 78 S.W. 482, 484 (1904). Contempt has been defined in Kentucky as "the willful disobedience of-or open disrespect for-the rules or orders of a court." *Commonwealth v. Bailey*, 970 S.W.2d 818, 820 (Ky. App. 1998) (citing *Commonwealth v. Burge*, 947 S.W.2d 805, 808 (Ky. 1996)).

Contempt may be either criminal or civil. Criminal contempt is conduct which amounts to obstruction of justice, and which tends to bring the court into disrepute. *Id.* at 808. Civil contempt consists of failure of one to do something under order of the court, generally for the benefit of a party. *Id.* at 808; *Campbell v. Schroering*, 763 S.W.2d 145, 148 (Ky. App. 1988). The difference between the two is in the court's purpose in imposing its sentence. If the purpose is to punish, the sanction is for criminal contempt. *Burge* at 808. ...

Next, once it has been determined that the contempt is criminal in nature, the type must be examined. Criminal contempt can be either direct or indirect. Direct contempt is a type that occurs in the presence of the court and is seen as an affront to the dignity of the court. *In re Terry*, 128 U.S. 289, 9 S.Ct. 77, 32 L.Ed. 405 (1888). Indirect contempt is committed out of the court's presence. *Burge*, 947 S.W.2d at 808. . . [Direct] contempt may be punished summarily by the court, and requires no fact-finding function since all the elements of the offense are matters within the personal knowledge of the judge. *In re Terry, supra*. There is no issue of due process in this type of proceeding as the court would be well within its power to summarily sanction ... for [contemptuous] courtroom behavior. ...

The idea behind this summary proceeding is that an emergency of sorts exists and needs to be dealt with immediately in order to maintain control of the courtroom. Consequently, due process considerations take a back seat to the court's urgent need to deal with any "affront to its dignity." However, when sanctions are delayed, the compelling need for summary proceedings disappears, as does the argument for the need to forego due process requirements.

This case is somewhat similar to the Kentucky case of *Taylor v. Hayes*, 418 U.S. 488, 94 S.Ct. 2697, 41 L.Ed.2d 897 (1974). In *Taylor*, a trial judge summarily punished an attorney for direct contempt for actions committed during trial without giving the attorney an opportunity to be heard in defense or mitigation. The Supreme Court held that because no sentence was imposed during the trial at the time of the alleged offenses and there appeared to be no final adjudication of contempt until after the verdict was rendered, the summary contempt determination violated the attorney's right to due process. *Id.* at 497, 94 S.Ct. at 2702. In so concluding, the Court stated,

This procedure does not square with the Due Process Clause of the Fourteenth Amendment. We are not concerned here with the trial judge's power, for the purpose of maintaining order in the courtroom, to

punish summarily and without notice or hearing contemptuous conduct committed in his presence and observed by him. *Ex parte Terry*, 128 U.S. 289, 9 S.Ct. 77, 32 L.Ed. 405 (1888). The usual justification of necessity, *see Offutt v. United States*, 348 U.S. 11, 14, 75 S.Ct. 11, 13, 99 L.Ed. 11 (1954), is not nearly so cogent when final adjudication and sentence are postponed until after trial.

Taylor at 497–498, 94 S.Ct. at 2702–2703.

. . . [It] is clear . . . that under *Taylor*, once the court continued the matter for further proceedings, Schroering’s due process rights were violated when she was not allowed to be heard. . . . [O]nce the trial court continued the proceedings, the emergency issue created in the courtroom no longer existed and Schroering was entitled to exercise her due process rights, especially before a judge who had not been present at the time of Schroering’s alleged contempt.

In Lowe’s case, he cussed two times after the jury left the courtroom for deliberations on sentencing and while he was exiting the courtroom.¹ However, the trial court waited until the jury returned with its verdict on sentencing and the jury’s dismissal from the courtroom before making a finding of contempt and imposing a sanction for the contempt of six months imprisonment. Regarding the finding of contempt and punishment imposed, the trial court did not offer Lowe an opportunity to be heard. It is accurate that after the trial court found Lowe to be in contempt and imposed its sentence for contempt that it inquired of both Lowe and

¹ We have listened to the recording of the proceedings a number of times but are unable to hear anything Lowe said while exiting the courtroom. However, it appears the court heard him and in response said “Mr. Lowe” and gave him a bit of a stern look. Thereafter, the court stated “Let’s go off the record please.” Accordingly, we do not know what transpired at that time. Nonetheless, neither Lowe nor the Commonwealth contend that the trial court used this recess as an opportunity to allow Lowe to be heard.

the Commonwealth whether either had anything “else” they wanted to address. However, there is no indication that this opportunity was in regard to the prior contempt finding and punishment, which had already been imposed.

Following the guidance of *Taylor* and *Schroering*, the trial court’s failure to allow Lowe the benefit of due process was in error. Had the trial court believed that the honor of the court had been affronted by Lowe to the degree that it was necessary to maintain control in the courtroom, the trial court had the opportunity to immediately find Lowe in contempt and to punish him to thwart any further offending conduct. But this did not occur. As in both *Taylor and Schroering*, there was a break in the proceedings between the contemptuous conduct and action by the court regarding such. “The usual justification of necessity [for a summary proceeding] is not nearly so cogent when final adjudication and sentence are postponed until after trial.” *Taylor*, 418 U.S. at 497, 94 S.Ct. at 2703. Accordingly, due process rights attached once the ruling was delayed.

Furthermore, the fact that this error was not preserved is not fatal under a palpable error review. Pursuant to *Martin v. Commonwealth*, 207 S.W.3d 1, 3 (Ky. 2006), to prevail under a palpable error review:

one must show that the error resulted in “manifest injustice.” [Kentucky(s) Rule of Criminal Procedure (RCr)] 10.26 provides:

A palpable error which affects the substantial rights of a party may be considered ... by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief

may be granted upon a determination that manifest injustice has resulted from the error. (Emphasis added). . . .

Under this rule, an error is reversible only if a manifest injustice has resulted from the error. That means that if, upon consideration of the whole case, a substantial possibility does not exist that the result would have been different, the error will be deemed nonprejudicial.

While this statement is not inaccurate, it fails to adequately describe the necessary degree of prejudice associated with the unpreserved question in the context of the whole case. The language “[a] substantial possibility does not exist that the result would have been different” is at best confusing, and it falls short of the required standard. A better understanding is gained from an examination of RCr 10.26 with emphasis on the concept of “manifest injustice.” While the language used is clear enough, we further explain that the required showing is probability of a different result or error so fundamental as to threaten a defendant’s entitlement to due process of law.

(Internal quotation marks and citation omitted).

Lowe’s disrespect for the court cannot be condoned but neither can a denial of due process under the facts of this case. An additional six months imprisonment to be served consecutively is a harsh punishment that deserves the due process of law. Pursuant to *Martin*, an “error so fundamental as to threaten a defendant’s entitlement to due process of law” meets the requirement of palpable error.

Accordingly, the Carter Circuit Court’s contempt finding and punishment are reversed and that portion of the case is remanded for additional proceedings that comport with the due process of law. The remainder of the Carter Circuit Court’s judgment and sentence are affirmed.

CLAYTON, JUDGE, CONCURS IN RESULT ONLY AND DOES
NOT FILE SEPARATE OPINION.

LAMBERT, JUDGE, DISSENTS.

BRIEF FOR APPELLANT:

Robert C. Yang
Assistant Public Advocate
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Gregory C. Fuchs
Assistant Attorney General
Frankfort, Kentucky