

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-000208-MR

GEORGE LEE MCGRANAHAN

APPELLANT

v.

APPEAL FROM BOYD CIRCUIT COURT
HONORABLE GEORGE DAVIS III, JUDGE
ACTION NO. 11-CR-00121

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING AND REMANDING

** ** *

BEFORE: CLAYTON, LAMBERT, AND VANMETER, JUDGES.

LAMBERT, JUDGE: George McGranahan appeals from a judgment and conviction for failure to comply with sex offender registration requirements, second offense, for which he was sentenced to seven and one-half years' imprisonment. After careful review, we reverse and remand.

The facts in this case are not largely in dispute. On March 3, 2011, Kentucky State Police Trooper Zach Thompson was updating the Kentucky Sex Offender Registry when he went to McGranahan's last known address to take an updated picture. Trooper Thompson found no one at home at that address, an apartment on Johnsons' Fork in Boyd County, Kentucky. Trooper Johnson returned on March 4, 2011, to check again. Trooper Thompson observed that no one appeared to be living at the residence, so he went to an occupied apartment next door and spoke with Gary Malone, who resided there. Mr. Malone told him that he was the only person living in any of the three dwellings at the complex. Mr. Malone told Trooper Thompson that McGranahan used to live there with his girlfriend, but that it had been about two or three months since he remembered McGranahan living there.

The following day, after again confirming that McGranahan's address had not been updated, Trooper Thompson obtained a warrant and began trying to locate him. A few days later, McGranahan updated his address and spoke with Trooper Thompson on the telephone, after which he was arrested. McGranahan was indicted for failure to comply with sex offender registration requirements, second offense.

At trial, Sergeant Timothy Mullins of the Kentucky State Police criminal identification branch testified that he was in charge of the sex offender registry (SOR). Sgt. Mullins testified that certain sexual offenses committed in

Kentucky require registration and that for offenses that occur in other states, registration may be required if the offender moves into Kentucky.

Sgt. Mullins testified that McGranahan was required to register because of a conviction he had obtained in Ohio. While Sgt. Mullins was unclear about this offense, testimony at McGranahan's arraignment on June 17, 2011, indicated that this offense occurred in 1984, and was a conviction for "gross sexual imposition." Sgt. Mullins' other testimony indicated that McGranahan's conviction for attempted rape in the first degree in Kentucky occurred in 1989. Both convictions occurred before the registration requirements were enacted. During sentencing, McGranahan testified that he served six years and six months for the 1989 conviction in Kentucky.

According to Sgt. Mullins, the Ohio conviction, coupled with the Kentucky conviction for attempted rape, made McGranahan a lifetime registrant. A condition of being a lifetime registrant is that McGranahan would have to notify the SOR of any change of address before or on the day the address changes. As a lifetime registrant, McGranahan was required to complete a verification form every quarter. Sgt. Mullins did testify that originally McGranahan was listed as a ten-year registrant, and he confirmed on cross examination that the paperwork prior to 2005 indicated that McGranahan's requirement to register any address changes ended on June 13, 2010. However, Sgt. Mullins stated that "something happened" between 2004 and 2005 which apparently led to a change on the registry to require McGranahan to register for life. Sgt. Mullins testified that attorneys with the SOR

conduct periodic reviews and that it is not uncommon for an offender's status to change to lifetime offender. Sgt. Mullins was not able to give any specific testimony about why McGranahan was now a lifetime registrant, or why he was required to register at all for convictions that happened over twenty years ago.

The jury found McGranahan guilty as indicted and sentenced him to seven and one-half years' imprisonment. This appeal as a matter of right now follows.

On appeal, McGranahan argues that he was denied due process of law when the trial court denied his motion for directed verdict. In support of his position, McGranahan argues that the Commonwealth failed to meet its burden of proof beyond a reasonable doubt for the offense charged. Specifically, McGranahan argues that the Commonwealth failed to prove that he was required to register as a sex offender at all, given the previous expiration date of June 2010. McGranahan urges this Court to conclude that the Commonwealth did not meet its burden of proof beyond a reasonable doubt.

The Commonwealth argues that the trial court properly denied McGranahan's motion for a directed verdict, and that the motion did not state with specificity the grounds which are being argued on appeal. Thus, the Commonwealth contends that under *Gibbs v. Commonwealth*, 208 S.W.3d 848 (Ky. 2006), *overruled on other grounds by Padgett v. Commonwealth*, 312 S.W.3d 336 (Ky. 2010), McGranahan's arguments are not properly before this Court.

Initially, we agree with the Commonwealth that under *Gibbs*, McGranahan's motion for directed verdict was likely insufficient, as it was a generic motion and did not state with specificity the arguments being made on appeal. There, the Supreme Court of Kentucky stated:

Appellant made only a general motion for a directed verdict, which is insufficient to preserve this issue for appeal. This Court has recently reaffirmed that failure to state specific grounds for a motion for directed verdict will foreclose appellate review of the trial court's denial of that motion. [Footnote omitted.] In the motion, no specific mention was made of a lack of evidence as to any particular element of the charges; Appellant merely asserted that there was insufficient evidence as to each and every charge pending against him. Without a specific objection, '[t]he trial court was never given an opportunity to address the question of whether there was lack of evidence on this particular element of the offense.' [Footnote omitted.]

Gibbs, 208 S.W.3d at 857.

Accordingly, we review for manifest error under Kentucky Rule 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.

In *Martin v. Commonwealth*, 207 S.W.3d 1 (Ky. 2006), the Supreme Court of Kentucky set forth the most recent expression of the palpable error standard of review:

This Court reviews unpreserved claims of error on direct appeal only for palpable error. To prevail, one must show that the error resulted in “manifest injustice.”

This Court has stated:

Under [RCr 10.26], 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.

[*Graves v. Commonwealth*, 17 S.W.3d 858, 864 (Ky. 2000) (*quoting Jackson v. Commonwealth*, 717 S.W.2d 511, 513 (Ky. App. 1986)).] 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.

In *United States v. Cotton*, [535 U.S. 625, 122 S.Ct. 1781, 152 L.Ed.2d 860 (2002),] the Supreme Court analyzed the plain error test of Federal Rule of Criminal Procedure 52(b), the federal counterpart of RCr 10.26. At issue was an indictment that failed to meet the requirements of *Apprendi v. New Jersey*, [530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000),] but where the respondents had failed to raise the *Apprendi* claim before the trial court. Despite failure of preservation, the United States Court of Appeals for the Fourth Circuit vacated the sentences on grounds that failure of the indictment to set forth all necessary elements of the offense violated both mandatory and jurisdictional requirements. Rejecting the

holding with respect to jurisdiction, the Supreme Court proceeded to the plain error test of Federal Rule of Criminal Procedure 52(b). The Court reviewed the plain error components from its precedents, but focused primarily on an element from *Johnson v. United States* [520 U.S. 461, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997),] as follows: “an appellate court may then exercise its discretion to notice a forfeited error but only if . . . the error seriously affects the fairness, integrity or public reputation of judicial proceedings.” [*Cotton*, at 631, 122 S.Ct. 1781; *see also Ernst v. Comm.*, 160 S.W.3d 744, 758 (Ky. 2005)](properly applying this standard to an evidentiary error under KRE 103(e)). Reversing the Fourth Circuit, the Supreme Court remanded for reinstatement of the sentences on grounds that the unpreserved *Apprendi* error did not meet the requirements for plain error.]

While the language of RCr 10.26 and Federal Rule of Criminal Procedure 52(b) differ substantially, and recognizing that this Court is not obligated to follow *Cotton*, we nevertheless believe it to be a valuable guide in the application of our palpable error rule. To discover manifest injustice, a reviewing court must plumb the depths of the proceeding, as was done in *Cotton*, to determine whether the defect in the proceeding was shocking or jurisprudentially intolerable.

Martin, 207 S.W.3d at 3-4. *See also Jones v. Commonwealth*, 283 S.W.3d 665, 668 (Ky. 2009) (holding that palpable error relief is not available unless three conditions are present: 1) the error was clear or plain under existing law; 2) it was more likely than ordinary error to have affected the judgment; and 3) it so seriously affected the fairness, integrity, or public reputation of the proceeding to have been jurisprudentially intolerable).

With the above palpable error standard in mind, we now turn to the merits of McGranahan’s arguments. The standard of appellate review for when a directed

verdict should have been granted is whether, 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, 187-88 (Ky. 1991). If so, then the defendant is entitled to a directed verdict. *Id.*

Thus, the question is whether under the evidence as a whole, it was clearly unreasonable for the jury to find McGranahan guilty of failure to register as a sexual offender. In this regard, we find the Supreme Court's analysis in *Commonwealth v. Nash*, 338 S.W.3d 264 (Ky. 2011), to be on point. There, the Court recognized that mistakes can be made in the maintenance of the sexual offender registration list. In *Nash*, the defendant had been charged three times for failure to comply with the sexual offender registration. His last guilty plea was a guilty plea conditioned on his right to appeal the denial of his motion to amend the indictment based on the fact that the 2006 amendments to the sex offender registration requirements were not applicable to him, or had been applied in an *ex post facto* basis. The Court explained:

To fully understand this case we need to look at the original requirement for certain sex offenders to register, and the amendments thereto, to date. [Kentucky Revised Statutes (KRS)] 17.500 et seq. is commonly referred to as Kentucky's version of "Megan's Law," or the "Sex Offender Registration Act" (SORA). The first version was adopted by the General Assembly in 1994. Under this version, persons convicted of certain sex crimes after the effective date of the Act, July 15, 1994, were required to register for a period of ten years after their final release from prison, parole, probation, etc. Failure to register, or providing false, misleading or incomplete information was deemed a Class A misdemeanor. The Act only

applied to those convicted of a qualifying sex crime after the effective date of the Act, July 15, 1994, regardless of the release date. Appellee was convicted of the sex crimes at issue on December 14, 1993. Under the clear wording of the 1994 Act, he was not required to register upon conviction or release.

(Footnotes omitted). Similarly, in the instant case, McGranahan was convicted of a sex-crime in Ohio in 1984. His conviction in Kentucky was in 1989. Thus, like the defendant in *Nash*, McGranahan was clearly not required to register under the clear wording of the 1994 Act.

The *Nash* Court went on to explain the subsequent amendments to SORA.

In 1998, SORA was amended. ‘The principal change . . . was the creation of a classification as to the potential for recidivism. The law also provided for a risk assessment.’ The 1998 Act provided the registration requirements ‘shall apply to persons individually sentenced or incarcerated after the effective date of this Act [July 15, 1998].’ Appellee had served out on his qualifying sex crimes on October 1, 1997. Under the 1998 amendments to SORA, Appellee was not required to register.

Similarly, McGranahan testified during the sentencing portion of his trial that he served six years and six months for his Kentucky 1989 conviction. Thus, he had served out his sentence prior to the 1998 amendments to SORA, just as the defendant in *Nash*. While the Supreme Court went on to detail how the subsequent amendments to SORA were not applicable to *Nash*, we do not find it necessary to do so here, as a review indicates they are not applicable to McGranahan either.

The testimony by Sgt. Mullins in this case was that originally McGranahan was a ten-year registrant but that “something happened” between 2004 and 2005 to

change his status to that of a lifetime registrant. Simply put, we cannot identify any evidence in the record to support this testimony, and absent the testimony, there is nothing that would indicate that in March 2011, McGranahan had any obligation to register as a sexual offender. The record does not indicate that at the time of the original enactment of SORA, McGranahan was even required to register at all. Thus, it was unreasonable for a jury to find guilt, and it was palpable error for the trial court not to enter a directed verdict in McGranahan's favor.

For the foregoing reasons, the judgment and conviction of the Boyd Circuit Court is reversed, and this matter is remanded for dismissal of the indictment.

ALL CONCUR.

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