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Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-001095-MR

BILLY REED CAUDILL

APPELLANT

v. APPEAL FROM WOLFE CIRCUIT COURT
HONORABLE FRANK ALLEN FLETCHER, JUDGE
ACTION NO. 13-CR-00004

COMMONWEALTH OF KENTUCKY

APPELLEES

OPINION VACATING AND REMANDING

** ** * * * * *

BEFORE: JONES, J. LAMBERT, AND MAZE, JUDGES.

J. LAMBERT, JUDGE: Billy Caudill appeals from the Wolfe Circuit Court's judgment of conviction on three counts of first-degree wanton endangerment.

Caudill was sentenced to five years on each count, with the time to run consecutively for a total of fifteen years' imprisonment. Because the jury instructions were erroneous, we vacate and remand for proceedings consistent with this opinion.

This case arises out of a dispute between the appellant, Caudill, and Randall Carpenter that resulted in Carpenter's death from a gunshot wound. Carpenter and Caudill were neighbors and by all accounts had an ongoing feud between them arising out of a property dispute. During the course of the day in question, August 21, 2009, the two had engaged in multiple arguments.

Just prior to the shooting, Caudill was removing debris from a ditch on his property next to his driveway. Carpenter parked his tractor next to the home of Shirley Hudson, who lived close by. Carpenter walked a distance through Ms. Hudson's yard, the yard of Willena White, and crossed Kentucky Highway 30, coming toward the foot of Caudill's driveway. Carpenter began cursing at and talking to Caudill.

Because there was a history of violence between the two parties, Caudill backed away toward his car. He testified at trial that he believed Carpenter was going to kill him. Caudill repeatedly warned Carpenter to stay away from him and not come any closer.

Despite Caudill's admonitions, the altercation escalated and gunfire was exchanged. Carpenter was still at the foot of Caudill's driveway. Carpenter opened fire and shot his 9mm handgun at Caudill. Caudill was hit twice, once in the arm and once in the abdomen. Caudill returned fire, ultimately shooting Carpenter in the head as he was crouched down in a ditch. Caudill told police that he believed Carpenter was trying to reload his gun when he was in the ditch.

Ms. Hudson and Ms. White were standing in front of Ms. Hudson's garage when the fight between Caudill and Carpenter escalated. Michael Hudson, Ms. Hudson's son, was inside the garage. When the shots started, Michael grabbed the women and pulled them inside the garage. Mr. Hudson testified that as he pulled the women inside, he could feel gravel hitting the back of his legs, and he presumed that it was ricocheting from the dirt. After the shooting stopped, Caudill crawled to his car and drove back up to his trailer. Caudill realized he had been wounded in the shooting, and he sat down on the porch with his gun allegedly still pointed at Ms. White, Ms. Hudson, and Mr. Hudson.

Kentucky State Police Trooper James Gross arrived at the scene and found Carpenter crouched over in the ditch line with a gunshot wound to the head. Trooper Gross observed that Carpenter was deceased. Jackson City Police Officer John Marshall arrived a few minutes after Trooper Gross. Trooper Gross walked to Caudill's trailer and instructed him to come outside and put his hands up. Trooper Gross began to secure the scene, and during this process, he observed an assault rifle in Caudill's kitchen. He also observed that Caudill had been wounded in his stomach and had been shot in the arm.

Caudill informed Officer Marshall that he had a recording of the incident, stating "I've got it on audio and video." Caudill then handed Officer Marshall a recorder that he had in his pocket during the incident. Caudill also had video recording equipment installed around his home. Caudill told Officer Marshall that Carpenter started shooting first and that he fired back. Another

officer, Sgt. Sandlin, recovered a VHS tape from Caudill's video system. The VHS tape was not of sufficient quality to have evidentiary value; however, the audio recording of the incident was ultimately played for the jury.

Deputy Coroner Jeff Carter and Coroner George Griffith then arrived at the scene. They also testified that they observed Carpenter slumped down in the ditch. Deputy Carter testified that when he inspected Carpenter's body, he observed a bullet entry wound above the right eye and a bullet exit wound behind the right ear. Upon examination at the Kentucky State Medical Examiner's Office, Dr. John Hunsaker determined that Carpenter had died of a single gunshot wound to the head, and that the wound caused extensive damage to the right side of his brain. Dr. Hunsaker testified that the wound would have caused almost immediate unconsciousness. This supported the conclusion that Carpenter shot the rounds in his gun prior to being hit in the head by the shot Caudill fired.

The Breathitt County grand jury indicted Caudill in September 2009, charging him with murder and with three counts of wanton endangerment in the first degree with respect to Ms. Hudson, Ms. White, and Mr. Hudson. In January 2010, Caudill was tried before a jury and was convicted of all four counts. The jury recommended consecutive sentences of imprisonment totaling thirty-five years. On February 24, 2011, the trial court sentenced Caudill to imprisonment for a total of thirty-five years.

Caudill appealed his convictions to the Kentucky Supreme Court. On August 23, 2012, that Court vacated and remanded Caudill's convictions, finding

that the prosecutor's cross-examination of Caudill could be classified as "abuse."

Caudill v. Commonwealth, 374 S.W.3d 301, 309 (Ky. 2012). The Court stated:

The prosecutor's repeated questions to the Appellant demanding "Why not just go on, get in the car, and drive home?" could certainly have suggested to the jury that the Appellant had a duty to retreat. Moreover, the trial judge overruled Appellant's objections, allowing this line of questioning to continue for *over fifteen minutes*, permitting the prosecution's suggestion that the Appellant should have retreated to his home to be strengthened by implicit judicial approval. The prosecution's line of questioning stands in stark contrast to the law.

Id. at 310. (Emphasis in original).

In May 2014, Caudill was retried before a jury in Wolfe Circuit Court. At the conclusion of the Commonwealth's evidence, Caudill moved for a directed verdict, which was denied, and Caudill renewed this motion at the conclusion of all the evidence. The Wolfe County jury acquitted Caudill of Carpenter's murder but convicted him of three counts of wanton endangerment in the first degree. Caudill then filed a Kentucky Rules of Criminal Procedure (RCr) 10.24 motion requesting the court to set aside the conviction and enter a judgment of acquittal. Caudill argued the motion prior to sentencing, but the motion was denied. On June 10, 2014, the trial judge entered a new judgment of conviction, sentencing Caudill to fifteen years' imprisonment. Caudill now directly appeals from this judgment of conviction.

On appeal, Caudill argues that the trial court erred by failing to set aside the first-degree wanton endangerment convictions and enter a judgment of acquittal.

Caudill argues that the jury's finding that he was acting in his own self-defense precludes the convictions for wanton endangerment.

A motion under RCr 10.24 is the equivalent of a motion for judgment notwithstanding the verdict (JNOV) because it constitutes an acquittal of the charge that would leave nothing to be decided at a subsequent trial under the indictment. *See Commonwealth v. Bailey*, 71 S.W.3d 73, 75 (Ky. 2002). Motions for JNOV are reviewed under the same standard as those for directed verdicts. *Commonwealth v. Nourse*, 177 S.W.3d 691, 699 (Ky. 2005). The standard of review as to the denial of a motion for directed verdict is to examine the evidence as a whole to determine if the jury's finding of guilt was clearly unreasonable. *Id.*

In support of his argument that the jury's finding that he was acting in self-defense precluded the convictions for wanton endangerment, Caudill cites to *Justice v. Commonwealth*, 608 S.W.2d 74 (Ky. 1980). The facts of *Justice* are similar to the facts of the instant case. In *Justice*, Smith and Justice had an ongoing dispute, and there was evidence that Smith had threatened Justice previously. *Id.* at 74.

The last encounter between the two occurred while they were in vehicles headed in opposite directions on the same road. Appellant was alone and driving his own car. Smith was a passenger in Dotson's small pickup truck. Both vehicles stopped, placing the drivers side by side. Smith made a sudden downward move to the floor of the cab. Appellant, thinking Smith was reaching for a gun, shot twice into the cab of the truck past Dotson striking Smith. Smith was dead on arrival at the hospital.

Id. The jury found that Justice acted in his own self-protection when he shot and killed Smith, and acquitted him of murder. *Id.* The jury convicted Justice of wanton endangerment of the third party driver. The Kentucky Supreme Court held that the jury's finding that the defendant acted in his own self-protection precluded a conviction for wanton endangerment with regard to the third party defendant and reversed Justice's conviction for wanton endangerment. *Id.* at 75.

Caudill argues in his brief to this Court that in the present case, the trial court instructed the jury on self-protection with regard to all charges. Caudill contends that the jury found that he was not guilty of murder because he was acting in his own self-protection when he shot and killed Carpenter. As a result, Caudill contends that the convictions for wanton endangerment were also precluded under *Justice*.

A review of *Justice* indicates that Caudill's argument is correct, however, we conclude that *Justice* is superseded by Kentucky Revised Statutes (KRS) 503.120(2). That statute states:

When the defendant is justified under KRS 503.050 to 503.110 in using force upon or toward the person of another, but he wantonly or recklessly injures or creates a risk of injury to innocent persons, the justification afforded by those sections is ***unavailable in a prosecution for an offense involving wantonness or recklessness toward innocent persons.***

Id. (emphasis added). The Comments to this section explain its purpose as follows:

Subsection (2) deals with the situation where a defendant is justified in using force against one person but is reckless or wanton toward others in the use of that force. For example: D sees X committing an offense that would justify the use of deadly force for its prevention. D fires several shots at X while X is in a large crowd. Along with X, two innocent persons are killed. While justified in killing X to prevent the dangerous felony, D can be convicted of homicide for the other deaths if shown to have acted wantonly or recklessly.

KRS 503.120(2) (commentary).

While Caudill is correct that *Justice* has not been overturned, our Supreme Court has recognized that KRS 503.120(2) fundamentally changed the common law with respect to the privilege of self-defense where innocent bystanders are injured or placed in danger. *See Phillips v. Commonwealth*, 17 S.W.3d 870, 875 (Ky. 2000). Citing *Minix v. Commonwealth*, 100 S.W.2d 825, 826 (Ky. 1937), the Court pointed out that under the common law, a defendant who accidentally killed an innocent bystander would be entitled to an acquittal if the jury determined that the defendant acted under circumstances that would have made the shooting and killing of a third party excusable on the ground of self-defense, and if the deceased was accidentally and unintentionally shot and killed by a bullet intended for the third party. *Id.* Effective January 1, 1975, "the penal code [KRS 503.120(2)] changed the law in that respect." *Phillips*, 17 S.W.3d at 875. After the adoption of KRS 503.120(2), justification is no longer grounds for

acquittal where the defendant is charged with an offense involving wantonness or recklessness toward innocent persons. *Id.*

Under our current Penal Code, Caudill remains able to be convicted for offenses "involving wantonness or recklessness toward innocent persons." Because he was charged with first-degree wanton endangerment of Shirley Hudson, Michael Hudson, and Willena White, a separate jury instruction was given with regard to each of these people respectively. Those jury instructions, instructions number four through six, read as follows:

You will find the Defendant guilty of First-Degree Wanton Endangerment under this Instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:

A. That in Breathitt County on or about August 21, 2009, and before the finding of the Indictment herein, he fired a gun in the direction of [innocent bystander];

AND

B. That he thereby wantonly created a substantial danger of death or serious physical injury to [innocent bystander];

AND

C. That under the circumstances, such conduct manifested extreme indifference to the value of human life.

AND

D. That in so doing, he was not privileged to act in self-protection.

As stated above, KRS 503.120(2) provides that when acting wantonly or recklessly toward an innocent bystander, Caudill was not entitled to act in self-protection. The instructions as presented to the jury were erroneous under KRS 503.120(2). Because the jury was deliberating with improper jury instructions, we cannot say that the error was harmless.

Accordingly, we vacate the judgment of the trial court and remand for a new trial with proper jury instructions.

ALL CONCUR.

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