Kentucky Law Journal

Volume 66 | Issue 3 Article 7

1978

Kentucky Law Survey: Criminal Procedure

Albert T. Quick
University of Louisville

CRIMINAL PROCEDURE

BY ALBERT T. QUICK*

INTRODUCTION

The most notable feature of this survey period[1] was the number of decisions on criminal procedure handed down by the Supreme Court of Kentucky. During the one-year period, 216 cases were decided, either by memorandum or formal opinion.[2] In addition the Court of Appeals of Kentucky decided twenty-two cases, making a total of 238 cases. This figure is in contrast to fifty-eight decisions handed down by the Court during the prior survey period.[3] This increase indicates that criminal procedure continues to be one of the major areas of conflict facing both the bar and the bench.[4]

The decisions, though numerous, broke very little new ground in the area of constitutional criminal procedure.[5] How-

* Associate Professor of Law, University of Louisville. B.A. 1962, University of Arizona; M.A. 1964, Central Michigan University; J.D. 1967, Wayne State University; LL.M. 1974, Tulane University.

[1] July 1, 1976 through June 30, 1977.

[2] The 216 Supreme Court cases included 39 full opinions and 177 memorandum per curiam decisions.

[3] Quick, *Kentucky Law Survey—Criminal Procedure,* 65 KY. L.J. 447 (1977).

[4] Some may have supposed that criminal procedure issues would have faded into the background of appellate practice with the end of the Warren Court and its emphasis on individual rights.

[5] In addition to the decisions discussed in the text, six other decisions deserve notice. In Romans v. Commonwealth, 547 S.W.2d 128 (Ky. 1977) the Court held that a defendant who voluntarily introduced evidence of his own prior conviction of a felony is entitled to have the jury admonished as to the limited consideration which should be given this information. In this regard Shockley v. Commonwealth, 415 S.W.2d 866 (Ky. 1967) was overruled.

In Huff v. Commonwealth, No. 76-103 (Dec. 3, 1976) (mem. per curiam) the Court spoke to one of the remaining issues concerning a plain view seizure. The Court found in this case that the investigator did not find the evidence in plain view because the seizure was not inadvertent. The investigator had determined prior to the seizure that heroin was present in the mobile home. When he returned to the mobile home it was for the specific purpose of seizing the heroin. This holding appears to stand for the proposition that it is not *inadvertent* when a law enforcement official expects to find and seize contraband.

In Kennedy v. Commonwealth, 544 S.W.2d 219 (Ky. 1977) the Court upheld Merritt v. Commonwealth, 386 S.W.2d 727 (Ky. 1965) in defining a "deadly weapon." The ruling stated that any object can be a deadly weapon if intended by its user to convince a victim that it is deadly and if the victim is in fact convinced.

ever, certain areas that deserve review do reflect the Court's present direction and philosophy.[6]

I. PRESERVATION OF ALLEGED ERROR

"Speak now or forever hold your peace"[7] is the message being delivered to trial counsel by the Kentucky appellate courts and the United States Supreme Court regarding the preservation of error for appellate review. The consequences of that message as set forth in the appendix[8] reflect that a signifi-

---

In Jewell v. Commonwealth, 549 S.W.2d 807 (Ky. 1977) the Court reviewed a trial court's refusal to instruct on the defense of intoxication under KY. REV. STAT. § 501.080(1) (1975) [hereinafter cited as KRS]. The Court held that an instruction in this matter is required only when the defense is raised. A defense is raised by:

> [P]resentation of evidence that could justify a reasonable doubt of the defendant's guilt. The sufficiency of the evidence to accomplish that purpose is a question of law for the courts to determine on a case-by-case basis. . . . There must be something in the evidence reasonably sufficient to support a doubt that the defendant knew what he was doing.

Id. at 812.

An apparent conflict between the Supreme Court of Kentucky and the Court of Appeals of Kentucky exists as to the necessity of holding a suppression hearing on photographic identification. In Summitt v. Commonwealth, 550 S.W.2d 548 (Ky. 1977) the Court held that it was not error for the trial court to refuse a motion to conduct a pretrial hearing to suppress the in-court identification of defendant. In Cane v. Commonwealth, 556 S.W.2d 902 (Ky. App. 1977) the Court of Appeals held that:

> If it is claimed that a photographic identification was so suggestive that misidentification was likely, that question should be determined by the trial court in a hearing outside of the presence of the jury following the procedures outlined in Bradley v. Commonwealth, 439 S.W.2d 61 (Ky. 1969) and Britt v. Commonwealth, 512 S.W.2d 496 (Ky. 1974).

Id. at 907.

The court noted that if an evidentiary hearing had been requested and the trial court failed to conduct such a hearing it would be grounds for vacating the judgment and remanding the case for a hearing.

[6] The general direction is away from the philosophy underlying the Warren Court's decisions involving criminal procedure. Presently, the focus of decision is on the value of procedural rules, which if not complied with will diminish the defendant's opportunity to litigate substantive issues. This focus is contrasted with the Warren Court philosophy that maximized the defendant's opportunity to resolve substantive issues.

[7] The author acknowledges that these words are most often associated with the consummation of marriage; however, they indicate the legal concept of making and preserving the record.

[8] The Supreme Court of Kentucky accounted for 216 of the total number of decisions surveyed. Of these 216 cases, 78 of them (or 33.08%) involved at least one area of waiver. The Court of Appeals of Kentucky accounted for 22 of the total number of decisions surveyed. Of these 22 cases, 9 of them (40.91%) involved at least one area of waiver.

cant number of alleged errors were disposed of on the basis that review had been waived at the trial stage. In order to ensure proper review of these errors, trial counsel must be aware of and comply with certain rules of criminal procedure. Failure in this regard appears to have an impact in three areas. First, given the United States Supreme Court's position limiting redress in federal courts, defendants may soon find themselves without a judicial forum in which to seek correction of certain errors. Second, since the error is not subject to a decision on the merits, it retards the development of appellate decisional law, which serves as a guide to attorneys and lower courts. Third, inadmissible evidence will be accorded legitimate status at the trial and can form the basis of conviction *(e.g.,* unconstitutionally seized contraband drugs).

Because of this impact, it is appropriate to survey and comment upon those areas in which there was a failure to comply with the rules of criminal procedure. It should be noted that this is not intended to be an exhaustive analysis; only those areas that were in issue during the survey period will be examined. The format will be an examination of the issues in the order in which they would generally arise in the prosecution of a criminal case.

A. *Suppression Hearings*

One of the most important and significant methods to test the admissibility of evidence is a suppression hearing.[9] This hearing usually focuses upon evidence allegedly taken in contravention of the fourth[10] (search and seizure); fifth[11] (confessions and admissions); sixth[12] (right to counsel); and fourteenth[13] (shocking the conscience of the court) amendments. At this hearing the defense and prosecution may introduce evi-

[9] Some courts prefer to call this hearing an evidentiary hearing instead of a suppression hearing. The designation, however, does not change the stated purposes of the hearing.

[10] Mapp v. Ohio, 367 U.S. 643 (1961).

[11] Miranda v. Arizona, 384 U.S. 436 (1966); Malloy v. Hogan, 378 U.S. 1 (1964).

[12] Brewer v. Williams, 430 U.S. 387 (1977); United States v. Wade, 388 U.S. 218 (1967).

[13] Rochin v. California, 342 U.S. 165 (1952).

dence[14] which will initially determine the issue of admissibility.[15]

In order for a hearing to be held, trial counsel must make a timely motion,[16] and failure to do so will result in a waiver of objection to the introduction and appellate review of the evidence.[17] In Kentucky it is important to note that this motion[18] will be considered timely only if it is made prior to trial or if an objection is made to the introduction of evidence at trial.[19]

The current practice which allows counsel to make a motion to suppress at the trial stage is in contrast to many jurisdictions which require that the motion be made prior to trial.[20] It would seem that the mandatory pre-trial motion practice[21] has certain advantages over the Kentucky rule. These advantages include the assurance of the orderly presentation of evidence without the interruption of the trial by a suppression hearing;[22] the disposition of cases prior to trial that are depen-

---

[14] *See* Lego v. Twomey, 404 U.S. 477 (1972), wherein the Supreme Court held that the prosecutor has the burden of proving by a preponderance of evidence the voluntary nature of a confession. *See also* Simmons v. United States, 390 U.S. 377 (1968), in which the Supreme Court held that testimony given by a defendant at a suppression hearing may not be used against him at his trial on the question of guilt or innocence.

[15] *See* Bradley v. Commonwealth, 439 S.W.2d 61 (Ky. 1969), and Britt v. Commonwealth, 512 S.W.2d 496 (Ky. 1974) which provided additional protection to the defendant by allowing him to carry the admissibility of a confession to the jury. The jury then has the responsibility not to consider the confession unless it believes it was made voluntarily and free of coercion. This protection, however, is not included within KY. R. CRIM. P. 9.78 (Confessions and searches; suppression of evidence) (Effective January, 1978). This new rule provides that the factual findings of the trial court shall be conclusive.

[16] *See* KRS § 422.110(2) (1972), which provides that a hearing must be held to determine the competency and admissibility of a confession which may have been obtained by "sweating."

[17] By the use of the phrase "proper appellate review," the author recognizes that substantial error may be reviewed even though insufficiently raised. *See infra* notes 64-90 for a further discussion of this point.

[18] As to the sufficiency of the motion, see KY. R. CRIM. P. 8.14; Stiltz v. Commonwealth, 390 S.W.2d 642 (Ky. 1965).

[19] *See* Freeman v. Commonwealth, 425 S.W.2d 575 (Ky. 1967); Relford v. Commonwealth, 558 S.W.2d 175 (Ky. App. 1977).

[20] *See* FED. R. CRIM. P. 12(b)(3); CAL. PENAL CODE § 1538.5 (West Supp. 1976); ILL. ANN. STAT. Ch. 38, § 114-11(g) (Smith-Hurd 1977); MAINE RULES OF CRIM. PROC. 41(e) (Supp. 1975); and N.Y. CRIM. PROC. LAW ANN. § 710.40 (McKinney Supp. 1976).

[21] Certain exceptions to the mandatory requirement are recognized and generally fall into these categories: (1) defendant was unaware of the grounds for a motion; and (2) defendant did not have a reasonable opportunity to make a motion.

[22] *See* Jones v. United States, 362 U.S. 257 (1960).

dent for prosecution on the suppressed evidence;[23] the knowledge by both parties concerning what evidence could be admitted, thereby facilitating the preparation of the case; and finally, a decision before jeopardy attaches that would allow the prosecution to appeal.[24] Although trial tactics may in some instances dictate otherwise,[25] it is suggested for the sake of judicial effectiveness that trial counsel request a pre-trial hearing rather than wait until trial.[26]

In addition to the issue of timeliness, it appears that a separate[27] hearing of record[28] is required before proper review can be undertaken by the appellate courts. In *Relford v. Commonwealth,*[29] the appellant assigned as error the warrantless search of a vehicle. The court of appeals noted that there was no "suppression hearing held prior to trial or during trial outside the hearing of the jury."[30] The failure to have a hearing meant that the record on appeal did not reflect all the facts and circumstances surrounding the warrantless search. Thus the court concluded that without these facts it could not determine which legal principles of search and seizure should apply.[31] This decision points out the need for trial counsel to establish a complete record of facts that would provide the basis for the proper application of the law.

After a hearing has been held, it is incumbent upon the judge to make findings of fact and law. The court of appeals in *Lee v. Commonwealth*[32] held that a trial court ruling which stated, "This was a reasonable search,"[33] was not sufficient for

---

[23] An example would be a prosecution for the possession of a controlled substance, wherein the substance which forms the basis for prosecution is ruled inadmissible.

[24] *See* Commonwealth v. Shobe, ___ S.W.2d ___ (Ky. App. 1977) for an interesting decision concerning the Commonwealth's right to seek review prior to trial.

[25] Defense counsel may want to delay his motion until jeopardy has attached in hopes that this will bar further prosecution.

[26] In Taulbee v. Commonwealth, 465 S.W.2d 51, 52 (Ky. 1971) the Court also made this suggestion.

[27] *See* Jackson v. Denno, 378 U.S. 368 (1964); Relford v. Commonwealth, 558 S.W.2d 175 (Ky. App. 1977).

[28] The requirement of a hearing would seem to preclude, as insufficient, unrecorded arguments at the bench.

[29] 558 S.W.2d 175 (Ky. App. 1977).

[30] *Id.* at 177.

[31] *Id.*

[32] 547 S.W.2d 792 (Ky. App. 1977).

[33] *Id.* at 794.

purposes of review. This conclusionary statement concerning the legality of the search was insufficient because "[w]e [the court of appeals] are thus left in the dark as to whether the trial judge applied the proper standards under Section 10 of our Constitution and the Fourth Amendment to the United States Constitution."[34]

It should be noted that a failure to make findings of fact does not require reversal, but instead the case is remanded to the trial court to make the required findings.

B. *Trial Stage*

1. *Contemporaneous Objection Rule*

A contemporaneous objection is required by Kentucky Rule of Criminal Procedure 9.22[35] (hereinafter cited as Cr.R.).

The theory behind this rule is to place on the trial counsel the initial burden of shielding the jury from incompetent evidence[36] and to allow the judge an opportunity to remedy any errors in the proceedings.[37] Thus, failure of counsel to make a timely and sufficient objection will result in the evidence being received[38] and considered and any error in its reception being waived for purposes of proper appellate review.[39]

During the survey period noncompliance with Cr.R. 9.22 occurred in three ways: (1) complete failure to object, (2) an untimely objection, and (3) an insufficient objection. The most

---

[34] *Id.*

[35] KY. R. CRIM. P. 9.22 provides:

> Formal exceptions to rulings or orders of the court are unnecessary; but for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court, and on request of the court, his grounds therefore; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice him.

[36] R. LAWSON, KENTUCKY EVIDENCE LAW HANDBOOK 7 (1976) [hereinafter cited as R. LAWSON].

[37] Salisbury v. Commonwealth, 556 S.W.2d 922 (Ky. App. 1977).

[38] It should be noted that in addition to evidence being received, closing arguments by counsel must be objected to in a proper manner or they will also be received.

[39] Again, by the use of the phrase "proper appellate review" the author recognizes that substantial error may be the subject of review even if insufficiently preserved. *See infra* notes 64-90 for a further discussion of this point.

glaring examples of noncompliance occurred at the closing argument stage of the trial. In the trial of a criminal case to a jury one of the most critical stages can be the closing argument.[40] Perhaps for this reason it is "generally considered a matter of courtesy verging on obligation for opposing counsel not to interrupt one another's arguments to the jury."[41] This "obligation," however, should not inhibit trial counsel from interposing an objection in order to interrupt an erroneous argument. The consequences flowing from a failure to object properly were reflected in the following decisions handed down by the appellate courts.

In *Patterson v. Commonwealth*[42] the appellant assigned as error the prosecutor's closing remarks that "[i]t's hard for me to tell people of the Negro race apart" and that rape was not conduct befitting a member of the human race.[43] The court of appeals easily dispensed with the issue by noting that "[t]he issue of prejudicial argument has not been preserved for review through lack of objection."[44] This failure to make an objection deprived the court of an opportunity to pass on the bounds of legitimate argument, which could serve as a guide in future prosecutions.[45]

The Supreme Court, in *Bowers v. Commonwealth,*[46] recognized the impropriety of the Commonwealth's Attorney's closing statement which referred to evidence that was not in the record. In this prosecution for murder[47] the attorney argued that the blood type found in the defendant's car was the same type as that of the victim. In fact, the Commonwealth's Attorney had never put into evidence the victim's blood type.[48] In

---

[40] The importance of this stage may lie in the fact that it is trial counsel's opportunity to have personal contact with the jury and to reinforce and bring together in one package the key evidence that has been introduced at various times throughout the trial.

[41] AMSTERDAM, 3 TRIAL MANUAL FOR THE DEFENSE OF CRIMINAL CASES 1-435 (1975) [hereinafter cited as TRIAL MANUAL].

[42] 555 S.W.2d 607 (Ky. App. 1977).

[43] *Id.* at 610.

[44] *Id.*

[45] The court did hold that the closing argument was not prejudicial; however, this is not to say that it was without error.

[46] 555 S.W.2d 241 (Ky. 1977).

[47] *See* KRS § 507.020(1) and (2) (Supp. 1976).

[48] 555 S.W.2d at 243.

this case, an objection to the closing argument was made, but only after the case was submitted to the jury and the jurors were on their way to the jury room. Here, the timeliness of a motion made pursuant to Cr.R. 9.22 was the issue. The Court held in this regard that "[a]n objection, to be timely, must be promptly interposed. . . . The objection was untimely, and is not preserved for appellate review."[49] The clear impact of this decision is that if the prosecutor goes beyond the bounds of legitimate argument, counsel should immediately interpose an objection.

It would appear that even if the objection is timely, defense counsel must be concerned with the sufficiency of the objection. This was the issue in *Newell v. Commonwealth*[50] wherein an objection was properly interposed but was not deemed sufficient to require consideration of whether a new trial should be granted. In this case the closing statement assigned as error was: "We didn't commit Anthony Newell to the life of crime that he has obviously undertaken."[51] The trial court sustained an objection to this line of argument. However, because defense counsel did not ask for an admonition or move for a mistrial, the court did not feel compelled to consider whether the statement was so prejudicial as to require a new trial.[52] Thus, it appears that if the appellant seeks a new trial he must base this on a request for an admonition or mistrial which is then denied by the trial court.[53]

Examples of other cases dealing with the contemporaneous objection rule included a failure to object to the prosecutor's methods of impeachment of a defendant[54] and the untimely objection for removal of a trial judge.[55]

2. *Instructions*

Failure to make a proper objection to the jury instructions accounted for a significant number of waivers.[56] It was not ab-

---

[49] *Id.*

[50] 549 S.W.2d 89 (Ky. 1977).

[51] *Id.* at 90.

[52] *Id.*

[53] If the motion is granted it is assumed that this would dispel the prejudice.

[54] Vanhook v. Commonwealth, No. 75-907 (Ky. Nov. 12, 1976) (mem. per curiam).

[55] Salisbury v. Commonwealth, 556 S.W.2d 922 (Ky. App. 1977).

[56] As reflected in Appendix A, there were 12 instances wherein there was a failure

solutely clear from a reading of the cases why this was such a frequent area of waiver. However, one reason may be that the rule setting forth the procedures by which to object, Cr.R. 9.54(2),[57] is relatively new.

This rule became effective March 1, 1974, and significantly changed the time frame in which to make an objection. Under the prior rule an objection would be timely for purposes of appellate review if made during trial or no later than a motion for a new trial.[58] The new rule, however, provides that to be considered timely an objection must be made before the court instructs the jury.[59] In addition, the rule provides that the defendant may present his position by an offered instruction or by motion.[60] It is implicit that the offer of an instruction or motion be made no later than the giving of the instructions.[61] Finally, it should be pointed out that the offered instruction can be written or oral and that an objection must be specific and state the grounds upon which it is based.[62] Presumably, with the passage of time trial counsel will become familiar with the new rule, thereby reducing the number of waivers in this area.[63]

---

to object properly to jury instructions.

[57] KY. R. CRIM. P. 9.54(2) states:

> No party may assign as error the giving or the failure to give an instruction unless he has fairly and adequately presented his position by an offered instruction or by motion, or unless he makes objection before the court instructs the jury, stating specifically the matter to which he objects and the ground or grounds of his objection.

[58] The prior KY. R. CRIM. P. 9.54(2) provided that "[i]t shall not be necessary in order to preserve error that objections to instructions be made during the trial, but unless so made they must be presented in a motion for new trial. No objection shall be sufficient unless the specific grounds are stated." *See* Bradley v. Commonwealth, 439 S.W.2d 61 (Ky. 1969); Arnold v. Commonwealth, 433 S.W.2d 355 (Ky. 1968); Piper v. Commonwealth, 387 S.W.2d 13 (Ky. 1965); Hartsock v. Commonwealth, 382 S.W.2d 861 (Ky. 1964).

[59] KY. R. CRIM. P. 9.54(2) states, "No party may assign as error the giving or the failure to give an instruction . . . unless he makes *objection* before the court instructs the jury. . . ." (emphasis added).

[60] According to the rule, "No party may assign as error the giving or the failure to give an instruction unless he has fairly and adequately presented his position by an offered instruction or by motion. . . ."

[61] *See* Hopper v. Commonwealth, 516 S.W.2d 855 (Ky. 1974); D. MURRELL, KENTUCKY CRIMINAL PRACTICE § 19.10 (1975) [hereinafter cited as D. MURRELL].

[62] KY. R. CRIM. P. 9.54(2).

[63] The rule itself does not appear to present any difficulty in interpretation or application.

C. *Palpable Error Doctrine*[64]

A number of jurisdictions provide that an obvious error affecting substantial rights of a party may be considered for decision by the appellate courts even though insufficiently raised or preserved for review.[65] In Kentucky this doctrine is embodied in Kentucky Rule of Civil Procedure 61.02,[66] which also applies to criminal procedure.[67]

It is apparent from a reading of the rule that not all errors constitute palpable errors and that this doctrine only applies to errors that encroach upon substantial rights and cause manifest injustice.[68] Thus, the Court has found palpable error requiring reversal when information seriously eroded the credibility of the prosecution's key witness[69] and when the jury disregarded a defense that was almost conclusively established.[70]

This doctrine, which in effect broadens the appellate courts' inquiry, rests on the principle that every court should administer justice. In *Davis v. Commonwealth,*[71] the Court articulated this principle in these words:

> An appellate court ought to be sensitive to the realities, and if it believes there may have been a miscarriage of justice it should use its extraordinary power and reverse a judgment that there may be a fuller development of the facts so that

---

[64] This doctrine is also referred to as plain error, substantial error, and fundamental error.

[65] *See, e.g.,* CAL. PENAL CODE § 1258 (West 1970); IND. CODE ANN. § 35-1-47-9 (Burns 1975); MAINE RULES OF CRIM. PROC. 52; N.Y. CRIM. PROC. LAW ANN. § 470.05(2) (McKinney 1971); OHIO REV. CODE ANN. Rule 52 (Anderson 1975); TENN. SUP. CT. R. 14 (6).

[66] KY. R. CIV. P. 61.02 provides:

> A palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or 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.

[67] Incorporation is provided for by KY. R. CRIM. P. 13.04.

[68] KY. R. CIV. P. 61.02 should be read together with KY. R. CRIM. P. 9.26, which provides: "A conviction shall be set aside on motion in the trial court, or the judgment reversed on appeal, for any error or defect when, upon consideration of the whole case, the court is satisfied that the substantial rights of the defendant have been prejudiced."

[69] Stone v. Commonwealth, 456 S.W.2d 43 (Ky. 1970).

[70] Davis v. Commonwealth, 162 S.W.2d 778 (Ky. 1942).

[71] *Id.*

> the guilt of the accused, if he is guilty, may be more certainly determined.[72]

Against this background, it is interesting to note that during the survey period the appellate courts refused to apply the doctrine to questions involving an unreasonable search and seizure;[73] sufficiency of the *Miranda* warnings;[74] and the failure of the Commonwealth to approve a case under the persistent felony offender statute.[75] However, of more than passing interest is the decision of *Salisbury v. Commonwealth.*[76] The importance of this decision is not necessarily in the substantive nature of the error, but rather in the method employed by the court to determine that there was no palpable error. In *Salisbury,* the Commonwealth's Attorney used the defendant's silence, after he had been advised of his *Miranda* rights, for purposes of impeachment. Trial counsel made no objection to these tactics.[77] On appeal, counsel urged the court of appeals to set aside the verdict under the "palpable error" rule.[78]

The court found that the Commonwealth's comment on defendant's silence did involve his substantial rights. But the court said, "It does not necessarily follow that there was palpable error."[79] To determine this issue, the court felt compelled to isolate the reason why trial counsel failed to object. The record on appeal, however, did not reflect the reason for this failure. In commenting on this fact, Judge Park concluded:

> This court cannot determine whether the defendant's trial counsel failed to object as a matter of trial tactics, whether he deliberately withheld making an objection in the hopes that reversible error would slip into the record, or whether he was unaware that there was a possible objection. Consequently, Salisbury has not demonstrated that there was palpable error.[80]

---

[72] *Id.* at 780.

[73] Relford v. Commonwealth, 558 S.W.2d 175 (Ky. App. 1977).

[74] McClain v. Commonwealth, No. 75-1123 (Ky. Feb. 18, 1977) (mem. per curiam).

[75] Newell v. Commonwealth, 549 S.W.2d 89 (Ky. 1977).

[76] 556 S.W.2d 922 (Ky. App. 1977).

[77] In order to preserve the error, compliance was required with KY. R. CRIM. P. 9.22, the contemporaneous objection rule.

[78] Salisbury v. Commonwealth, 556 S.W.2d 922 (Ky. App. 1977).

[79] *Id.* at 926.

[80] *Id.* at 928.

The court was operating under the apparent theory that if it was a deliberate trial tactic of counsel, then the defendant would be "estopped" from having the error form the basis of reversal.[81] This theory was reflected in part by the court's statements that the burden to raise constitutional issues is placed on defense counsel[82] and the defendant is bound by counsel's failure to object, absent exceptional circumstances.[83]

The implication of *Salisbury* is that the strategic blunders of trial counsel in failing to preserve error will foreclose a decision of reversal under the palpable error rule. In that light the decision appears somewhat contrary to prior Kentucky decisions and the spirit embodied in the rule. The spirit of the rule is to cure manifest injustice no matter how or by whom the situation is caused. In *Stone v. Commonwealth,*[84] the Court determined there was manifest injustice created by the failure to bring to the attention of the court and jury a key fact exculpating the defendant. It also should be noted that counsel com-

[81] On petition for rehearing the court stated that its original opinion was supported by the subsequent decision in Wainwright v. Sykes, 433 U.S. 72 (1977).

The *Wainwright* decision narrowed the availability of a state defendant to seek federal habeas corpus relief. Part of the Court's decision dealt with the effects of a failure by the federal habeas court to require compliance with a state contemporaneous objection rule. The effects of this failure were said to be: (1) sand-bagging by defense lawyers who chance a verdict of not guilty in the trial court and intend to raise the constitutional claim in a federal habeas court if their initial gamble did not pay off; (2) state courts being less stringent in their enforcement of the rule, because they know that a constitutional issue, although not properly preserved for review, may be decided by a federal habeas court without their view of the issue, and (3) a weakening of the perception that a criminal trial in a state court is decisive of the issue.

The reason these effects are undesirable from the standpoint of a federal court is based on considerations of federalism. Federalism demands a minimization of friction between federal and state systems of justice and that federal courts give effect to the state interests in enforcing its criminal procedure. However, considerations and effects based on notions of federalism which restrict federal review are not present and should not be considered in determining the scope of state appellate review. The focus in the applications of a state palpable error rule should be twofold: (1) did the error affect the substantial rights of the defendant and (2) did the error result in manifest injustice? *See infra* notes 125-131 and accompanying text for further discussion of *Wainwright.*

[82] 556 S.W.2d at 926. *See* Estelle v. Williams, 425 U.S. 501 (1976).

[83] The exception noted by the court would involve a question "[o]f waiver . . . in a non trial context. In this situation] the trial judge may have much greater responsibilities to insure that there has been a knowing waiver of constitutional rights by the defendant himself, *e.g.* Boykin v. Alabama, 395 U.S. 238 (1969) (guilty pleas)." Salisbury v. Commonwealth, 556 S.W.2d 922, 927 (Ky. App. 1977).

[84] 456 S.W.2d 43 (Ky. 1970).

pounded this original failure by not raising the key fact on appeal. The decision in *Stone* and other cases[85] turned on the nature[86] and effect[87] of the error, and not on the way in which it was allowed to go into the record. An appellant then should be able to have recourse under the doctrine even if the error were created by a deliberate act of trial counsel.[88] The purpose of the rule is to work justice, as noted by the Pennsylvania Supreme Court:

> A man is not to be deprived of his liberty and reputation because of the inadvertence of a trial judge or the carelessness of his counsel in failing to call the attention of the trial court to palpable error which offends against the fundamentals of a fair and impartial trial.[89]

One other point about this decision that will also call for clarification is the court's indication that appellant had the burden to show palpable error. This fact, if correct, certainly is not true in all cases. In this regard the Supreme Court, upon its own initiative and review, found evidence establishing palpable error in *Stone v. Commonwealth.*[90]

D. *Foreclosure of Statutory Right to Appeal*[91]

The foreclosure of the statutory right to appeal by the defendant was the focus of certain decisions during the survey

---

[85] *See* Ferguson v. Commonwealth, 512 S.W.2d 501 (Ky. 1974); Davis v. Commonwealth, 162 S.W.2d 778 (Ky. 1942).

[86] The inquiry is whether the nature of the error was such as to impinge upon a substantial right of the defendant.

[87] The inquiry is whether the effect of the error was to cause manifest injustice.

[88] *See* C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 856 (1969). In the civil context it appears that some inconsistency of approach exists. *See, e.g.*, Fortune, *Kentucky Law Survey—Civil Procedure,* 63 KY. L.J. 713 (1975), wherein the author states: "Under what circumstances can the appellate court overlook the failure of counsel to properly raise and argue the matters? Only when an error by the court can be described as 'fundamental' can the failure of counsel to make timely objection be excused." *Id.* at 717 (footnote omitted).

However, for an apparently contrary view, see Cobb v. Hoskins, 554 S.W.2d 886 (Ky. App. 1977), where the court held that "[i]n applying this rule, the palpable error must result from action taken by the court rather than an act or omission by the attorneys or the litigants." *Id.* at 888.

[89] Commonwealth v. O'Brien, 168 A. 244, 245 (1933).

[90] 456 S.W.2d 43, 44 (Ky. 1970).

[91] KY. CONST. § 115 sets forth a constitutional right to appeal.

period.[92] Two of the decisions surveyed were styled "Memorandum Opinion Per Curiam" and therefore lack value as precedents. Nevertheless, these decisions are important in reflecting current judicial attitudes and the emphasis accorded to precedent.

The loss of the statutory right to appeal generally involves two issues: (1) Did the defendant waive his right? and (2) Was the defendant denied effective assistance of counsel by the failure to perfect an appeal? The Kentucky Supreme Court has not consistently determined which of these issues will control its decision concerning the defendant's forfeiture of direct appeal.[93] In some cases, the Court has focused on the acts of counsel and has held that counsel's failure binds the defendant; in other cases, the Court has recognized that waiver by the defendant should be the controlling issue. For example, in *Thompson v. Commonwealth,*[94] the record indicated that defendant requested and was granted an appeal. However, no appeal was taken because of either negligence or misunderstanding by counsel.[95] The Court, in deciding the issue, focused on the acts of counsel and held that "[i]f hired counsel, due to error, negligence, or any other reason, fails to perfect an appeal, defendant has lost his statutory rights to appeal. Indigent defendants with appointed counsel run the same risks."[96] The Court then determined that negligence or misunderstanding on the part of counsel did not amount to inadequate representation.

In short, the failure of the attorney to perfect the appeal was binding on the defendant. This was the controlling factor in the Court's decision. No inquiry was made to determine whether the defendant himself waived his right to appeal.

A contrasting focus was found in *Nalley v. Commonwealth.*[97] Here, no appeal was taken due to counsel's

---

[92] This issue was heard by the appellate courts by a motion made pursuant to KY. R. CRIM. P. 11.42 which allows the defendant to attack directly the validity of the sentence imposed on him.

[93] The reason for this lack of consistency may be that only one of the two issues was raised on appeal and therefore the opportunity to decide was not presented.

[94] No. 75-855 (Ky. Oct. 1, 1976) (mem. per curiam).

[95] The defendant based his argument on ineffective assistance of counsel.

[96] Thompson v. Commonwealth, No. 75-855 (Ky. Oct. 1, 1976) (mem. per curiam).

[97] No. 75-1015 ½ (Ky. Oct. 29, 1976) (mem. per curiam).

belief that the appeal would be frivolous and unwarranted. The defendant subsequently requested a belated appeal contending that appointed counsel's assistance was inadequate. The record of the post-conviction hearing reflected that the defendant was not initially aware of proper appellate procedures but had expressed his desire to appeal. The Court, relying on *Brown v. Commonwealth*,[98] concluded that "[a]bsent an intelligent waiver by appellant of his right to appeal, the court-appointed counsel was under a duty to take the necessary precautions to protect his client's right of appeal. . . ."[99]

The Court did not find an intelligent waiver and therefore granted the request for a belated appeal. In deciding as it did, the Court implied that an intelligent waiver by a defendant would be controlling even if counsel were inadequate. Therefore, it would logically follow that the issue of waiver would control when counsel is deemed adequate although acting negligently. The focus of the Court's decision in *Nalley*, therefore, was on the issue of waiver.

The Court of Appeals of Kentucky also dealt with these issues in *Adams v. Commonwealth*.[100] In this decision the court addressed both the issues of waiver by defendant and ineffective counsel. The facts established that the defendant was informed of his right to appeal by the trial court and his appointed counsel. Counsel also informed the defendant that he would not institute an appeal because it would be groundless and frivolous. The court found that the defendant had waived the right to appeal because he took no steps to perfect an appeal after being informed of his rights.[101] The court also determined that counsel had met his responsibility by informing his client of the right to appeal and how to exercise that right along with notice that he would not assist.[102] It is implicit that if the defendant had made a good faith effort to perfect an appeal, his failure to do so would not have constituted a waiver. Thus, the controlling issue was whether a waiver had occurred.

---

[98] 465 S.W.2d 270 (Ky. 1971).

[99] Nalley v. Commonwealth, No. 75-1015 ½ (Ky. Oct. 29, 1976) (mem. per curiam).

[100] 551 S.W.2d 249 (Ky. App. 1977).

[101] *Id.* at 251.

[102] *Id.*

The diversity of treatment concerning this issue has the potential for creating confusion and calls for clarification by the appellate courts. In light of the newly established constitutional right to appeal,[103] the courts should be mindful that constitutional rights are considered personal.[104] Therefore, with few exceptions, they can be forfeited by the individual himself only in a voluntary and intelligent manner.[105]

E. *Federal Habeas Corpus Relief*[106]

Congress has provided for a writ of habeas corpus through the enactment of 28 U.S.C. § 2254(a) (1970) which provides review "[i]n behalf of a person in custody pursuant to the judgment of the state court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." This remedy has furnished numerous defendants[107] a judicial forum to seek redress for constitutional violations which have not been properly preserved for state review and decision.

However, in a series of cases beginning in 1976[108] the United States Supreme Court has significantly reduced the availability of this writ when there is a failure to comply with state procedural law. The Court has accomplished this by narrowing the applicability of the deliberate by-pass rule which was enunciated in *Fay v. Noia.*[109]

In *Fay,* the Court determined that a failure to comply with

---

[103] KY. CONST. § 115.

[104] *See* Alderman v. United States, 394 U.S. 165 (1968), where the Supreme Court stated, "We adhere to these cases and to the general rule that Fourth Amendment rights are *personal rights. . . .*" *Id.* at 174 (emphasis added).

[105] One of the foremost exceptions, where a third party can waive a constitutional right of another, is the so-called third-party consent area. Here, certain third parties may waive or assert the constitutional protection of another party. *See* Butler v. Commonwealth, 536 S.W.2d 139 (Ky. 1976), where a babysitter consented to a search of a "visitor" located on the premises.

[106] This is not to be considered a complete examination of the requirements for obtaining federal habeas corpus relief. For a review of the requirements, see D. MURRELL, *supra* note 61, at § 23.10.

[107] There were 7,883 habeas corpus petitions by state prisoners out of a total of 19,809 petitions for the year ending June 1976. ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 189 (1976).

[108] Stone v. Powell, 428 U.S. 465 (1976); Francis v. Henderson, 425 U.S. 536 (1976); Estelle v. Williams, 425 U.S. 501 (1976).

[109] 372 U.S. 391 (1963).

state procedural rules would not bar relief unless there had been a deliberate by-pass of the state procedures. In deciding what was meant by a "deliberate by-pass" the Court stated:

> If a habeas applicant, after consultation with competent counsel or otherwise, understandingly and knowingly forewent the privilege of seeking to vindicate his federal claims in the state courts, whether for strategic, tactical, or any other reasons that can fairly be described as the deliberate bypassing of state procedures, then it is open to the federal court on habeas to deny him all relief. . . .[110]

The focus in determining whether this limitation should apply was on the knowing[111] and deliberate nature of petitioner's action. Thus, inadvertence or neglect on the part of counsel in the preservation of error at the state level was not necessarily considered a deliberate by-pass. For example, review was granted when counsel inadvertently failed to make timely objection to comments on the defendant's pretrial silence;[112] when counsel neglected to request an instruction on causation when the trial strategy was based on the fact that defendant did not cause death;[113] when petitioner failed to perfect an appeal because of the lack of funds and knowledge;[114] when counsel failed to challenge properly an affidavit for a search warrant;[115] and finally, when counsel failed to develop properly his jury exclusion contention.[116]

Starting with *Francis v. Henderson*[117] the Burger Court has pursued a path leading to the restrictive application of 28 U.S.C. § 2254(a), the habeas corpus statute.[118] The petitioner in *Francis* sought state collateral relief in order to challenge the racial composition of the grand jury. Relief was denied because trial counsel did not raise the claim prior to trial as required

---

[110] *Id.* at 439.

[111] *See* Johnson v. Zerbst, 304 U.S. 458 (1938).

[112] Minor v. Black, 527 F.2d 1 (6th Cir. 1975).

[113] Kibbe v. Henderson, 534 F.2d 493 (2d Cir. 1976).

[114] Wade v. California, 450 F.2d 726 (9th Cir. 1971).

[115] Patterson v. Brown, 393 F.2d 733 (10th Cir. 1968).

[116] Moore v. Dutton, 432 F.2d 1281 (5th Cir. 1970).

[117] 425 U.S. 536 (1976).

[118] *See* Note, *Stone v. Powell and The New Federalism: A Challenge To Congress*, 14 HARV. J. LEGIS. 152 (1976), where the author notes that the Court's restriction in the application of 28 U.S.C. § 2254(a) may constitute an interference with the power of Congress to define the jurisdiction of the federal courts.

by Louisiana law.[119] The defendant was granted habeas corpus relief by the federal district court[120] but the Court of Appeals for the Fifth Circuit reversed.[121] The Supreme Court affirmed even though the defendant did not participate in the waiver and trial counsel, because of bad health and lack of experience, did not deliberately by-pass state procedures. The majority, apparently ignoring *Fay v. Noia,*[122] fashioned a different test to determine the applicability of the habeas corpus proceeding involving a challenge to the composition of a state grand jury. The Court stated the test this way: "In a collateral attack upon a conviction that rule requires, . . . not only a showing of 'cause' for the defendant's failure to challenge the composition of the grand jury before trial, but also a showing of actual prejudice."[123]

This "cause" and "prejudice" rule has since been reinforced[124] and expanded to cover a defendant's contention that he did not understand his "*Miranda* rights."[125] The decision to extend the application of the rule was announced in *Wainwright v. Sykes.*[126] In that case, the defendant was tried and convicted of murder in the third degree. At the trial, the

---

[119] At the time of the *Francis* trial, Article 202 of the Louisiana Code of Criminal Procedure stated:

> All objections to the manner of selecting or drawing any juror or jury or to any defect or irregularity that can be pleaded against any array or venire must be filed, pleaded, heard or urged before the expiration of the third judicial day of the term for which said jury shall have been drawn, or before entering upon the trial of the case if it be begun sooner; otherwise, all such objections shall be considered as waived and shall not afterwards be urged or heard.

Francis v. Henderson, 496 F.2d 896, 897 (5th Cir. 1974).

[120] Francis v. Henderson, No. 73-3670 (E.D.La. Sept. 20, 1973).

[121] Francis v. Henderson, 496 F.2d 896 (5th Cir. 1974).

[122] 372 U.S. 391 (1963).

[123] Francis v. Henderson, 425 U.S. 536, 542 (1976) (Footnote omitted).

[124] *See* Gates v. Henderson, No. 76-2065 (2d Cir. Aug. 19, 1977).

[125] Miranda v. Arizona, 384 U.S. 436 (1966). The "*Miranda* rights" generally include the following:

1. The defendant has the right to remain silent.
2. Anything the defendant says will be used against him in a court of law.
3. The defendant has the right to consult with an attorney before any questioning and the defendant has the right to the presence of an attorney during questioning.
4. If the defendant cannot afford an attorney, the court will appoint one for him.

[126] 97 S. Ct. 2497 (1977).

defendant's inculpatory statements were admitted into evidence. Trial counsel did not object to these admissions, nor did the trial judge question their admissibility. The defendant subsequently challenged the admissibility of the statements in state court. Relief was denied and he then petitioned the federal district court which granted relief pursuant to the federal habeas corpus statute.[127] This decision was affirmed by the Court of Appeals for the Fifth Circuit.[128] The Supreme Court accepted the state's determination that defense counsel had not made a timely objection to the admission of the evidence. Thus, the Court stated the main issue as being whether "the rule of *Francis v. Henderson,* barring federal habeas review absent a showing of 'cause' and 'prejudice' attendant to a state procedural waiver, [should] be applied to a waived objection to the admission of a confession at trial."[129]

A majority of the Court answered this question in the affirmative. The deliberate by-pass rule established in *Fay* was held inapplicable to this type of situation.[130] Mr. Justice Rehnquist, who delivered the opinion, left the definition of the "cause" and "prejudice" standard for future cases. He did, however, indicate that the standard was narrower than the deliberate by-pass rule.[131]

For defense counsel these decisions will increase the difficulty in redressing constitutional violations under the federal habeas corpus statute when the violation has not been preserved at trial.[132] In addition, even if an objection is made in a timely fashion, review will apparently be denied when the constitutional claim is based on the fourth amendment exclusionary rule. In *Stone v. Powell,*[133] the Court held that "[w]here the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evi-

---

[127] Wainwright v. Sykes, No. 75-1781 (M.D. Fla. 1975).

[128] Wainwright v. Sykes, 528 F.2d 522 (5th Cir. 1976).

[129] Wainwright v. Sykes, 433 U.S. 72, 82 (1977).

[130] *Id.* at 81.

[131] *Id.* at 83.

[132] Although *Wainwright* dealt with an apparent fifth amendment violation, the "cause" and "prejudice" rule can easily be expanded to other constitutional violations.

[133] 428 U.S. 465 (1976).

dence obtained in an unconstitutional search or seizure was introduced at his trial."[134]

When these decisions are read together they make an important impact in two directions: first, the restrictions being placed on the federal forum[135] and second, reinforcement of the finality of state court judgments. In the field of criminal jurisprudence one of the problems felt by state appellate judges[136] is that their decisions lack finality and can be altered by the federal courts. This feeling should no longer be as persistent and state courts will increasingly carry the heavy burden as the final arbitrators of justice.

II. THE PERSISTENT FELONY OFFENDER STATUTE

The new Kentucky Penal Code contains some dramatic changes concerning the purpose for and application of the statute enhancing punishment for recidivists. These changes as embodied in the new persistent felony offender statute[137] are most apparent when contrasted with the prior law. The now superseded statute provided:

> Any person convicted a second time of felony shall be confined in the penitentiary not less than double the time of the sentence under the first conviction; if convicted a third time of felony, he shall be confined in the penitentiary during his life. Judgment in such cases shall not be given for the increased penalty unless the jury finds, from the record and other competent evidence, the fact of former convictions for felony committed by the prisoner, in or out of this state.[138]

The apparent purpose of this statute was to deter a first offender from further criminal activity,[139] and "the double penalty is held in terrorem over the criminal, for the purpose of affecting his reformation. . . ."[140] However, this dual purpose of deterrence and reformation was not carried over into the new

---

[134] *Id.* at 494 (footnotes omitted).

[135] *See* SOCIETY OF AMERICAN LAW TEACHERS, *Supreme Court Denial of Citizen Access to Federal Courts to Challenge Unconstitutional and Other Unlawful Actions: The Record of the Burger Court* 2-3, 18-21 (October 1976).

[136] *See* Salisbury v. Commonwealth, 556 S.W.2d 922 (Ky. App. 1977).

[137] KRS § 532.080 (Supp. 1976).

[138] KRS § 431.190 (repealed).

[139] Cobb v. Commonwealth, 101 S.W.2d 418 (Ky. 1936).

[140] *Id.* at 420, quoting Brown v. Commonwealth, 37 S.W. 496, 496 (Ky. 1896).

provision. Designed "principally for individuals who have demonstrated lack of capacity for rehabilitation, the provision as a whole contains a change of direction in sentencing objectives, i.e., from rehabilitation of individual offenders to protection of the public by incapacitation of dangerous individuals."[141]

With this shift in purpose, from deterrence and reformation to protecting the public from the incorrigible and dangerous nature of the individual, came a corresponding shift in application. This shift is reflected by an expansion in the nature of proof necessary to establish a persistent felon.[142] For example, the prosecuting authority must establish that: (1) the offender is more than twenty-one years of age;[143] (2) the offender stands convicted of a felony after having previously been convicted of at least one prior felony;[144] (3) he was over the age of eighteen at the time the offenses were committed;[145] (4) he was sentenced to imprisonment for one year or more or was sentenced to death;[146] and (5) the defendant:

> 1. Completed service of the sentence imposed on the previous felony conviction within five (5) years prior to the date of commission of the felony for which he now stands convicted; or
> 2. Was on probation or parole from the previous felony conviction at the time of commission of the felony for which he now stands convicted; or
> 3. Was discharged from probation or parole on the previous felony conviction within five (5) years prior to the date of commission of the felony for which he now stands convicted.[147]

The creation of this burden is to help ensure that only those who have achieved relative maturity and have failed to respond reasonably to rehabilitation are subject to sentence as persistent felony offenders.

---

[141] KY. PENAL CODE, Final Draft (1971), Commentary to § 3445 at 347 [hereinafter cited as Final Draft].

[142] *See* KRS § 532.080 (Supp. 1976).

[143] KRS § 532.080(2) (Supp. 1976) for second degree; KRS § 532.080(3) (Supp. 1976) for first degree.

[144] KRS § 532.080(2) and (3) (Supp. 1976).

[145] KRS § 532.080(2)(b) (Supp. 1976) for second degree; KRS § 532.080(3)(b) (Supp. 1976) for first degree.

[146] KRS § 532.080(2)(a) for second degree; KRS § 532.080(3)(a) for first degree.

[147] KRS § 532.080(2)(c)(1), (2), (3).

During the survey period a number of cases were decided which relate to the application of the statute or its constitutionality. Those decisions dealing with application will be examined first, followed by a discussion of the constitutional issues.

In *Newell v. Commonwealth,*[148] the prosecution failed to establish Newell's age on the date that he committed the first of his prior offenses. This failure was in clear derogation of the statutory requirement defining a persistent felony offender.[149] The Court recognized this fact when it held that "[p]roof that a defendant was over the age of eighteen at the time of the commission of the prior felony offense is an essential element of the persistent felony offender statute. . . ."[150] However, because defense counsel failed to preserve properly this error for appellate review, proof of such essential element was deemed waived.[151] There was no indication on the part of the Court that it would invoke the palpable error doctrine.[152] It appears that a consideration of this sort would have been well-founded because a substantial right of the defendant was affected (*i.e.*, greater deprivation of liberty, and manifest injustice did exist). A finding of injustice could have been based on the purpose of the age requirement which is to "restrict application of this section to persons who have gained maturity but are still bent on criminality."[153] Thus, without proper proof of age, there appears a greater likelihood that the statute will be applied to persons for whom it was not intended.

The Court did, however, take an opportunity to deal with the merits of this issue in *Adams v. Commonwealth.*[154] Again the Commonwealth failed to meet the burden of showing that the defendant was above age eighteen on the date when one of

---

[148] 549 S.W.2d 89 (Ky. 1977).

[149] KRS § 532.080(3)(b).

[150] Newell v. Commonwealth, 549 S.W.2d 89, 91 (Ky. 1977).

[151] The Supreme Court of Kentucky noted in Kimbrough v. Commonwealth, 550 S.W.2d 525 (Ky. 1977), that "[w]hen the evidence is insufficient to sustain the burden of proof on one or more, *but less than all,* of the issues presented by the case, the correct procedure is to object to the giving of instructions on those particular issues." *Id.* at 529 (emphasis in original).

[152] *See supra* notes 64-90 and accompanying text for a discussion of the palpable error doctrine.

[153] Final Draft, *supra* note 141, at 348.

[154] 551 S.W.2d 561 (Ky. 1977).

the prior felonies was committed. The Commonwealth attempted to prove the defendant's age through indirect proof. The prosecution contended that since defendant was nineteen or twenty when he was convicted, it could reasonably be inferred that he was over the age of eighteen when he committed the offense. The Court rejected this contention and stated that "such an inference would be entirely too tenuous and cannot be drawn."[155] The failure to prove the age element meant reversal of the persistent felony offender conviction and resentencing on the principal offense. Thus, the Court has given some indication concerning the nature and quality of proof necessary to establish that one is a persistent felony offender.

Two final points should be made concerning the necessary proof to establish the criteria set forth in the statute. First, in satisfying the requirement of prior offenses, the prosecution in *Brown v. Commonwealth*[156] introduced copies of the indictments. The Court noted that this practice was not necessary; however, it declined to determine whether it was error since the issue was not preserved for review.[157] Secondly, the Court is holding to the principle that sentencing is not a critical stage of the proceedings. Therefore, the Commonwealth is not required to show that counsel was present at defendant's prior sentencings.[158]

The new persistent felony offender provision represents a decided improvement over the prior law in eliminating potential constitutional objections.[159] There were, however, two constitutional attacks on the 1974 provision. In *Hardin v. Commonwealth,*[160] the appellant argued that the separate proceeding, wherein his status as a persistent felony offender was determined, put him twice in jeopardy.[161] The Court did not find a violation of the pertinent sections of the United States

---

[155] *Id.* at 564.

[156] 551 S.W.2d 557 (Ky. 1977).

[157] For a case involving a determination of this issue under the prior law, see Hardin v. Commonwealth, No. CA-336-MR (Ky. App. May 13, 1977).

[158] *See* Burgett v. Texas, 389 U.S. 109 (1967) for the requirement of counsel at trial if the prior conviction is to be used to enhance punishment.

[159] One of the issues most often raised is the fact that at one trial both the "principal" offense and habitual criminal status is decided. *See* Murray v. Commonwealth, 474 S.W.2d 359, 360 (Ky. 1971).

[160] No. CA-336-MR (Ky. App. May 13, 1977).

[161] *Id.*

or Kentucky constitutions.[162] Its decision was premised on the fact that the sentence imposed under the persistent felony offender statute supplanted the sentence imposed for the "principal"[163] offense. The Court thus concluded that "[t]he substituted sentence comes with the newly acquired status. KRS 532.060 does not punish twice for the same offense and therefore it is constitutional."[164]

A more intriguing constitutional attack was presented in *Brown v. Commonwealth.*[165] Here, the appellant moved that the principal count and the persistent felony offender count be tried before different juries.[166] This motion was denied, apparently based on that portion of the statute which states: "Such proceeding [second stage] shall be conducted before the court sitting with the jury that found the defendant guilty of his most recent offense unless the court for good cause discharges that jury and impanels a new jury for that purpose."[167]

The appellant based his argument on the application of the statute wherein the same jury could determine both counts. It was his contention that this condition would necessarily diminish his right to testify in the first stage of the trial; and that through cross-examination to impeach his credibility, he would be forced to admit his prior felonies[168] to the same jury who would subsequently determine the question of whether those convictions had been adjudicated against him. To guard against this fact, he argued that he should be afforded separate juries and an order prohibiting the use of testimony concerning previous convictions at the second stage of the trial.

The Court rejected this attack by reference to the constitutionality of the prior law when the jury in one stage rendered a verdict on the "principal" offense and the habitual offender charge. The relevance of this frame of reference was that "[u]nless that procedure [prior law] is currently held uncon-

---

[162] U.S. CONST. amend. V; KY. CONST. § 13.

[163] This term is used to denote the felony for which he was last convicted.

[164] Hardin v. Commonwealth, ___ S.W.2d ___ (Ky. App. 1977).

[165] 551 S.W.2d 557 (Ky. 1977).

[166] The law provides for a bifurcated trial; however, the same jury can sit at both stages.

[167] KRS § 532.080(1) (Supp. 1976).

[168] *See* R. LAWSON, *supra* note 36, at 57 for the rules regarding the admission of prior felony convictions for purposes of impeachment.

stitutional, neither can the procedure followed in this case be unconstitutional, because certainly it was more favorable to the defendant than the old one-stage trial would have been."[169]

The Court noted that the bifurcated trial does not eliminate the Hobson's choice of either remaining silent or risking impeachment. Justice Palmore concluded:

> If the defendant in a criminal case wants to be a witness, he just has to do it under the same terms and conditions and undertake the same risks and burdens as any other witness. The Constitution cloaks him in a multitude of special favors and protections, but not yet does it crown him king.[170]

The constitutionality of the present statute appears to be on relatively solid ground. However, constitutional questions may still remain concerning the selection of those to be prosecuted under the statute;[171] the notion that punishment is based on a "status";[172] and, in an individual case, the possible imposition of excessive punishment.[173]

---

[169] 551 S.W.2d at 560.

[170] *Id.* at 560-561. It is interesting to note the theory set forth in the last sentence of this quotation, because this author is of the opinion that the Constitution serves as a limitation on governmental action through the fourteenth amendment and does not grant special favors.

[171] This argument would be one cast in terms of equal protection in the application of this statute.

[172] *See* Robinson v. California, 370 U.S. 660 (1962).

[173] Note, *Recidivist Statutes and the Eighth Amendment: A Disproportionality Analysis*, 1974 WASH. U. LAW Q. 147.

APPENDIX*

Survey Period July 1, 1976, to June 30, 1977

	Court of Appeals	Supreme Court	Total Cases Surveyed
Number of Cases Involving Criminal Procedure Issues	22	216	238
Number and Percent of Cases Involving Waiver	9 (40.91%)	73 (33.80%)	82 (34.45%)

Areas of Waiver

1. Suppression Hearing	2
2. Trial	
a. Counsel	1
b. Contemporaneous objection	34
c. Sufficiency of objection	4
d. Instruction	12
e. Ineffective counsel	5
3. 11.42 matters	14
4. Appeal	3
5. Miscellaneous	16
Total Number of Waivers	91

Note: The total number of waivers is greater than the total number of cases because some cases contained waivers in more than one area.

* This appendix was prepared with the able assistance of Barbara Gunther, my research assistant and a second-year law student at the University of Louisville.