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Commonwealth Of Kentucky

Court of Appeals

NO. 2001-CA-000900-MR

TIMOTHY JOE WOODARD — APPELLANT

v.

APPEAL FROM WARREN CIRCUIT COURT
HONORABLE JOHN D. MINTON, JR., JUDGE
ACTION NO. 00-CR-00071

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION

AFFIRMING

** ** ** ** **

BEFORE: BARBER, McANULTY, AND SCHRODER, JUDGES.

McANULTY, JUDGE. Timothy Joe Woodard was convicted by a Warren County jury of one count of conspiracy to traffic in a controlled substance and one count of being a persistent felony offender in the first degree. Appellant raises four claims of error on appeal. Appellant argues that the Commonwealth's amendment of his indictment on the morning of trial was prejudicial; that the Commonwealth violated KRE 609 by asking him the substance of his prior felony conviction; that the jury

should have been instructed on facilitation as a lesser included offense to conspiracy to trafficking; and that there was insufficient evidence to support the conviction. We affirm.

Appellant first argues that he was prejudiced when the trial court allowed the Commonwealth to amend the indictment on the morning of trial. The Commonwealth moved to amend the charge of persistent felony offender (PFO) in the second degree to first degree. RCr 6.16 states: “The court may permit an indictment, information, complaint or citation to be amended any time before verdict or finding if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced.” Appellant alleges that his substantial rights were prejudiced because defense counsel asserted that he would have advised appellant differently during plea bargaining if he had been charged with PFO I rather than PFO II.

The purpose of the indictment is to "fairly inform . . . the defendant of the nature of the crime with which he is charged[.]" Howard v. Commonwealth, Ky., 554 S.W.2d 375, 377 (1977), citing Finch v. Commonwealth, Ky., 419 S.W.2d 146, 147 (1967). We do not agree that defendant’s opportunity to productively plea bargain was a substantial right prejudiced by the amendment. We observe that if we reversed, appellant would have no right to make any particular deal with the Commonwealth, since plea bargaining is engaged in at the sole discretion of

the Commonwealth. Commonwealth v. Reyes, Ky., 764 S.W.2d 62, 64 (1989). Moreover, no defendant has a constitutional right to plea bargain. Id. We are left with the conclusion that appellant was not ensured any plea offer once he was charged with PFO I, rather than PFO II. The Commonwealth could have refused to bargain with him at all at that point. Therefore, we find no prejudice to appellant's substantial rights. Moreover, although appellant notes that this court in Luna v. Commonwealth, Ky. App., 571 S.W.2d 88 (1977), considered the effect that amendment of the indictment would have had on plea bargaining, we find nothing in that opinion which is contrary to our holding that appellant's substantial rights were not prejudiced.

Next, appellant argues that the Commonwealth violated KRE 609 when the Commonwealth introduced evidence of the substance of appellant's prior conviction. Appellant took the stand in his defense. During his testimony appellant stated,

> I'm 40 years old. I worked all my life. I work construction. I work hard. I took care of my kids. I'm not no drug dealer. Never have been one. Been accused once before. Never have been one.

During cross-examination, the Commonwealth asked appellant numerous questions about crack cocaine and its effects, how it is used and how it is packaged. Appellant acknowledged some familiarity with crack cocaine, but denied any personal

involvement with it. The Commonwealth asked appellant if he had ever been convicted of a felony. Appellant asked his counsel if he should answer and his counsel advised him to "just answer it yes or no." Appellant responded affirmatively. The Commonwealth asked, "And if I recall your testimony correct, Mr. Woodard, you said you'd never been a drug dealer before, is that correct?" Appellant answered, "That's right. Never been a drug dealer before." The Commonwealth asked, "Mr. Woodard, do you recall back in 1992 that you plead guilty to trafficking in a controlled substance?" Appellant asked to explain to the jury, and defense counsel objected to the Commonwealth's question. The trial court ruled that the Commonwealth was entitled to ask the question if appellant indicated that he'd never dealt with drugs before.

Appellant argues that this was improper under KRE 609(a), which states:

> For the purpose of reflecting upon the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record if denied by the witness, but only if the crime was punishable by death or imprisonment for one (1) year or more under the law under which the witness was convicted. The identity of the crime upon which conviction was based may not be disclosed upon cross-examination unless the witness has denied the existence of the conviction. However, a witness against whom a conviction is admitted under this provision may choose to disclose the

> identity of the crime upon which the conviction is based.

Appellant argues that the evidence should have been excluded because the identity of the crime upon which the conviction was based may not be disclosed once the witness denies the conviction. Commonwealth v. Richardson, Ky., 674 S.W.2d 515, (1984). The Commonwealth first responds that the error was unpreserved by appellant's failure to ask for an admonition. We disagree, given that appellant's objection was overruled. Appellant did not need to do anything more to preserve the objection. The Commonwealth next argues it was entitled to cross-examine appellant about his conviction for purposes of reflecting on his credibility once he opened the subject of his prior record.

Impeachment is not a sufficient reason to inquire into the identity of the prior conviction if it is a matter collateral to the issues at trial. Rowe v. Commonwealth, Ky. App., 50 S.W.3d 216, 224 (2001). In this case, however, we find that the substance of the conviction was not a collateral matter. Appellant took the stand and denied having ever been a drug dealer. He claimed that he had only once been accused of being one. The Commonwealth was entitled to put on the evidence of the basis for appellant's conviction in order to impeach his testimony. Thus, the evidence was not just to reflect on his

credibility as a witness as a convicted felon under Rule 609, but served to directly impeach his credibility by informing the jury of the whole truth behind his statements. Moreover, we do not believe that it would be just to allow convicted offenders to misrepresent their conviction record and use Rule 609 as a shield against the Commonwealth's ability to impeach. Therefore, we do not find a violation of Rule 609.

Next, appellant argues he was entitled to a jury instruction on facilitation as a lesser included offense. On appeal, there is much discussion among the Commonwealth and appellant as to whether it is possible for facilitation to be a lesser-included offense for conspiracy to traffic. The Commonwealth cites Houston v. Commonwealth, Ky., 975 S.W.2d 925 (1998), in which the Kentucky Supreme Court held that facilitation is not a lesser included offense when the defendant is charged with committing either of the object offenses of trafficking in or possession of a controlled substance. However, in this case, appellant was charged with conspiracy to traffic in a controlled substance. In general, criminal facilitation is a lesser-included offense when the defendant is charged with being an accomplice to an offense, not the principal offender. Commonwealth v. Day, Ky., 983 S.W.2d 505, 509 n.2 (1999). See also Thompkins v. Commonwealth, Ky., 54 S.W.3d 147 (2001). Therefore, we believe the Commonwealth is

incorrect in arguing that facilitation may not be a lesser-included offense of conspiracy to traffic.

Nevertheless, we do not believe that appellant was entitled to a facilitation instruction under the evidence presented. There is no need to instruct on a theory of the case that has no evidentiary support. Houston, supra, at 929. A person is guilty of facilitation when, acting with knowledge that another person is committing or intends to commit a crime, he engages in conduct which knowingly provides such person with means or opportunity for the commission of the crime and which in fact aids such person. KRS 506.080. Criminal facilitation occurs when a defendant, with no intent to promote or commit the crime himself, provides the means or opportunity for another to do so. KRS 506.080; Day, supra at 509. "Facilitation reflects the mental state of one who is 'wholly indifferent' to the actual completion of the crime." Perdue v. Commonwealth, Ky., 916 S.W.2d 148, 160 (1995).

The Commonwealth introduced testimony that appellant approached two undercover police officers and asked what they needed. An officer stated that he wanted "two twenty pieces," meaning two rocks of crack cocaine. They stated that appellant told them to follow him to Garden Apartments, and when they declined due to their previous dealings there, appellant told them to follow him to his residence. The officers waited and

appellant returned with two men. One man, Tony Clark, had several rocks of crack cocaine, and sold the officer two pieces. Appellant then left with the two men. Other officers standing by arrested appellant and Clark.

Appellant testified that he left home in order to pick up his wife from work, and observed two men walking down the sidewalk. Appellant testified that he knew that one of the men, Clark, had just been released from jail and so he pulled over to tell Clark that he should go home. Then he decided to give them a ride. He said that moments later police officers surrounded the vehicle, and he was informed that Clark had just sold police some drugs. Appellant denied all involvement in the drug deal.

The evidence in this case did not support the appellant's argument that he could have been found guilty of the lesser-included offense of facilitation. Under appellant's theory of the case he could not have been found guilty of any offense. Appellant claimed he was only giving the actual offenders a ride in his car when they were arrested. Mere presence at the scene does not support a conviction for facilitation, or conspiracy to traffic. Houston, supra, at 929. Appellant argued below that a facilitation instruction was appropriate since the jury could have believed from the Commonwealth's evidence that appellant just set up the deal and brought together a buyer and seller without being a party

himself. We do not agree that from the evidence the jury could believe that appellant had no intention to promote or commit the crime himself. Appellant asked the undercover officers what they wanted and, in effect, took their order. Then appellant notified Clark. Clark testified that he counted on appellant to verify to him that he could trust the purchasers. Appellant did more than just provide others with the means to commit a crime themselves. The Commonwealth's evidence that he was the one to solicit the officers and to put the parties to the transaction together did not show appellant as someone wholly indifferent to the commission of the offense. The jury is to decide the case on the evidence presented or what may be reasonable deduced therefrom, not on what may be imagined. Thompkins, supra, at 150. Therefore, we do not believe a facilitation instruction was warranted under the facts of the case.

Finally, appellant argues that the evidence was insufficient to support his conviction for conspiracy because the Commonwealth did not present evidence of an agreement between appellant and Clark. We believe that sufficient evidence was presented for the jury to infer that there was an implied agreement between them. A conspiracy may be proven by inference. Brown v. Commonwealth, Ky., 555 S.W.2d 252 (1977). The Commonwealth showed that appellant initiated the transaction, and contacted Clark to sell the drugs. Clark

testified that they had not decided on any amount of money but that he would have given appellant a share of the $40 Clark would have made on the deal, if asked. The jury could properly infer that appellant was not bringing the parties together altruistically, and that there was a tacit understanding that appellant would be paid something even if there was not a specific agreement as to amount of remuneration. Therefore, we agree that there was sufficient evidence to support the verdict of the jury.

For the foregoing reasons, we affirm appellant's conviction for conspiracy to trafficking in cocaine.

ALL CONCUR.

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