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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-001546-MR

SAMANTHA E. DEATON BARNES — APPELLANT

v.

APPEAL FROM McLEAN CIRCUIT COURT
HONORABLE DAVID H. JERNIGAN, JUDGE
INDICTMENT NO. 01-CR-00032

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: BARBER, DYCHE, TACKETT, JUDGES.

DYCHE, JUDGE: Samantha E. Deaton Barnes[1] brings this appeal pursuant to a conditional guilty plea to the offense of criminal facilitation to tamper with anhydrous ammonia equipment. Barnes contends that the statute criminalizing tampering with anhydrous ammonia equipment is unconstitutional; that consent to a search of her vehicle conducted the night of her arrest was not freely given; and that the indictment should have been dismissed or referred back to the Grand Jury because false or misleading

[1] At the time of her indictment in this case, Barnes was known as Samantha E. Deaton.

testimony was presented to the Grand Jury in obtaining the initial indictment. Having reviewed the arguments of appellant and finding no error, we affirm.

On April 11, 2001, members of the Kentucky National Guard were on duty as part of a covert surveillance team working with local law enforcement personnel in McLean County. The Guard team was surveilling Miles Supply, a farm supply store located in McLean County. Miles Supply stocks anhydrous ammonia, which it stores in tanks. Anhydrous ammonia is used by farmers as a fertilizer, but it is also used to manufacture methamphetamine. Prior to April 11, 2001, McLean County police had received numerous reports of anhydrous ammonia thefts in the area, including thefts from Miles Supply.

At approximately 2:30 a.m., using night-vision technology, one of the Guard members, Jody Harris, observed a car stop. An individual, later identified as Donnie Ray Durham, exited the vehicle and approached to within approximately 15 yards of the Miles Supply anhydrous ammonia tanks. After two or three minutes, Durham turned around and started back toward the highway. The Guard members then approached and detained Durham. Durham was found to be in possession of a gas can and a cut bicycle inner tube, devices commonly used to steal anhydrous ammonia from storage tanks. One of the guard members asked Durham why he had turned around and whether he had seen the guards, to which Durham responded he had been there to steal anhydrous ammonia but got scared and turned around. Shortly

thereafter, McLean County Deputy Sheriff Terry Wetzel arrived and took Durham into custody.

When apprehended, Durham was wearing a toboggan. One of the Guard members put on the toboggan and stood by the road to wait for the car to return. Approximately twenty minutes later, a vehicle did return and stop. The Guard members detained the vehicle and its driver, who was later identified as Barnes. Deputy Wetzel returned to the scene and asked Barnes if he could search her vehicle. Barnes gave Wetzel permission to search the vehicle. In the course of the search, Wetzel seized a bicycle inner tube box and a can of starter fluid.

On April 18, 2001, Barnes was indicted for criminal facilitation to tampering with anhydrous ammonia equipment, KRS[2] 250.4892 and KRS 506.080, and second-degree persistent felony offender. KRS 532.080. On May 3, 2001, Barnes filed a motion to suppress the items seized in the search of her vehicle. Following a suppression hearing, the trial court denied the motion on the basis that Barnes had consented to the vehicle search.

On May 21, 2001, Barnes filed a motion to dismiss the indictment. The motion alleged that the indictment was obtained based upon false and misleading testimony presented to the grand jury, and that KRS 250.4892 was unconstitutionally vague and/or overbroad. Following a hearing the trial court ruled that KRS

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[2]Kentucky Revised Statutes.

250.4892 was constitutional, and that while misleading testimony was presented to the grand jury, the testimony was not intentionally misleading, and absent the misleading testimony, there was still sufficient evidence to support the indictment.

On June 21, 2001, Barnes and the Commonwealth entered into a conditional guilty plea agreement pursuant to RCr 8.09. Barnes agreed to plead guilty to criminal facilitation to tampering with anhydrous ammonia and, in return, the Commonwealth agreed to drop the second-degree persistent felony offender charge and recommend a two-year sentence. Under the conditional plea, Barnes reserved her right to appeal the suppression issue, the grand jury testimony issue, and whether KRS 250.4892 was constitutional. On July 17, 2001, the trial court entered final judgment and sentencing in accordance with the conditional plea agreement. This appeal followed.

First, Barnes contends that KRS 250.4892, the statute criminalizing tampering with anhydrous ammonia equipment, is unconstitutionally vague and overbroad. KRS 250.4892 provides as follows:

> (1) It shall be unlawful for any person to tamper with equipment, containers, or facilities used for the storage, handling, transporting, or application of anhydrous ammonia.
>
> (2) Tampering occurs when any person who, having no right to do so, or any reasonable ground to believe that he has the right for a legitimate or legal purpose, transfers or attempts to transfer anhydrous ammonia to another container, or intentionally or wantonly defaces, destroys, or damages the

> equipment, container, or facility containing anhydrous ammonia.

AA [penal] statute must be drafted with >sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.=@ Cornette v. Commonwealth, Ky. App., 899 S.W.2d 502, 508 (1995) (quoting Kolender v. Lawson, 461 U.S. 352, 357 [1983] and Musselman v. Commonwealth, Ky., 705 S.W.2d 476, 478 [1986]). AA statute is impermissibly vague when a person disposed to obey the law could not determine with reasonable certainty from the language used that a contemplated conduct would amount to a violation.@ Commonwealth v. Louisville Atlantis Community/Adapt, Inc., Ky. App., 971 S.W.2d 810, 816 (1997) (citing Commonwealth v. Foley, Ky., 798 S.W.2d 947, 951 [1990]). AA statute is vague if >men of common intelligence must necessarily guess at its meaning.=" State Bd. for Elementary and Secondary Educ. v. Howard, Ky., 834 S.W.2d 657, 662 (1992) (quoting Broadrick v. Oklahoma, 413 U.S. 601 [1973]). "In deciding whether an act of the General Assembly of Kentucky is unconstitutional we necessarily begin with the strong presumption in favor of constitutionality and should so hold if possible." Brooks v. Island Creek Coal Company, Ky. App., 678 S.W.2d 791, 792 (1984) (citing United Dry Forces v. Lewis, Ky., 619 S.W.2d 489 [1981], and Sims v. Board of Education of Jefferson County, Ky., 290 S.W.2d 491 [1956]).

A review of KRS 250.4892 discloses that there is nothing vague or ambiguous about the statute. Section (1) unambiguously makes it unlawful for any person to tamper with equipment, containers, or facilities used for the storage, handling, transporting, or application of anhydrous ammonia. While it may be argued that, standing alone, the term Atamper@ may be ambiguous, Section (2) provides a concise definition of that term. Taken as a whole, the language of the statute is clear and unambiguous. Any reasonable person reading the statute is put on reasonable notice as to the proscribed conduct, and a person of reasonable intelligence need not guess at its meaning. There is no evidence to show that the statute is arbitrary or does not provide fair notice to any reasonable person. We fail to see how the statute is so vague that Barnes could not know what behavior was prohibited by the statute.

Similarly, the statute is not overbroad. A statute is overly broad only when, "in an effort to control impermissible conduct, the statute also prohibits conduct which is constitutionally permissible." Cornette v. Commonwealth, 899 S.W.2d at 507 (citing Commonwealth v. Ashcraft, Ky. App., 691 S.W.2d 229, 232 [1985]). The statute does not prohibit any constitutionally permissible conduct.

Barnes alleges that it is possible that law enforcement officials could apply the statute to reach such innocent activities as carrying a gas can, hunting, frog gigging, and camping if these activities are conducted in the vicinity of

anhydrous ammonia tanks. She also alleges that the statute may constrain legitimate sellers of anhydrous ammonia on the basis that they may not have a Aright to transfer@ to a customer with increased demands because the customer may be engaged in manufacturing methamphetamine.

Barnes=s creative list of possibilities, however, is obtainable only by a perverse and distorted interpretation of the statute. Most importantly, Barnes=s interpretation ignores the limitations imposed under Section (2) of the statute. To qualify as a tamperer, the individual must have no right to meddle with the anhydrous ammonia equipment or have no reasonable grounds for believing that he does have such a right. There is not a reasonable plausibility that individuals would be prosecuted under the statute for the conduct identified by appellant. The statute is not overbroad.

Next, Barnes contends that the April 11, 2001, search of her vehicle by Deputy Wetzel was an illegal search on the basis that her consent to search was not voluntary.[3] On May 14, 2001, a suppression hearing was held on the issue.[4] Deputy

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[3]The Commonwealth contends that this issue is not preserved for appeal because the argument was not raised before the trial court. However, the trial court=s suppression ruling was specifically reserved for appeal in the conditional guilty plea, and in its order denying Barnes=s suppression motion, the trial court specifically ruled that Barnes gave a Avalid and voluntary consent to search her vehicle[.]@ Consequently, the issue is preserved.

[4]In conjunction with Barnes=s motion, the trial court also heard Durham=s motion to suppress his statement to the National Guard members to the effect that he had been there to steal

Wetzel testified that, after the National Guard members had detained Barnes, he returned to the scene, placed Barnes under arrest, and asked for permission to search the vehicle. Wetzel testified that Barnes gave him permission to search the vehicle.

A warrantless search is presumed to be both unreasonable and unlawful, and the prosecution has the burden of proving the warrantless search was justifiable under a recognized exception to the warrant requirement. Cook v. Commonwealth, Ky., 826 S.W.2d 329, 331 (1992); Gallman v. Commonwealth, Ky., 578 S.W.2d 47, 48 (1979); Howard v. Commonwealth, Ky. App., 558 S.W.2d 643, 644 (1977). A consent search is one of the exceptions to the search warrant requirement. Farmer v. Commonwealth, Ky. App., 6 S.W.3d 144, 146 (1999). The Commonwealth has the burden of proving voluntary consent, and the trial court must look to the circumstances of the case in determining the voluntariness of the consent. Anderson v. Commonwealth, Ky. App., 902 S.W.2d 269, 272 (1995). Consent to a search must be free and voluntary; it cannot be obtained through threat or coercion -- express or implied. United States v. Watson, 423 U.S. 411 (1976). The issue of whether the consent was indeed voluntary must be determined from the specific circumstances of a case. Schneckloth v. Bustamonte, 412 U.S. 218 (1973).

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anhydrous ammonia but got scared and turned around. The trial court ruled that the statement should be suppressed pursuant to Miranda v. Arizona, 384 U.S. 436 (1966).

In its order of May 15, 2001, denying Barnes=s motion to suppress, the trial court stated as follows:

> As a part of the investigation, the officers had the right to stop Barnes= vehicle. One of the exceptions to a search warrant requirement is a valid consent to search. Barnes gave such valid and voluntary consent to search her vehicle and therefore, all items seized from the vehicle were lawfully obtained. Additionally, Deputy Wetzel observed in plain view the inner tube box in the floorboard.

Findings of fact made by the trial court following a pretrial suppression hearing are conclusive if supported by substantial evidence. RCr 9.78. "In the absence of any showing to the contrary, we assume the correctness of the ruling by the trial court." Harper v. Commonwealth, Ky., 694 S.W.2d 665, 668 (1985); Davis v. Commonwealth, Ky., 795 S.W.2d 942, 949 (1990); Eldridge v. Commonwealth, Ky. App., 68 S.W.3d 388, 390 (2001).

The trial court=s finding that Barnes gave valid and voluntary consent to search her vehicle was supported by substantial evidence C Deputy Wetzel=s testimony C and is conclusive insofar as our review of the argument is concerned.

Barnes presented no evidence of threats or coercion by Deputy Wetzel in obtaining her consent. Under the totality of the circumstances, we conclude the trial court's finding that appellant’s consent was voluntary to be supported by substantial evidence. RCr 9.78; Talbott v. Commonwealth, Ky., 968 S.W.2d 76, 82 (1998). Hence, the warrantless search of appellant's car was

proper as a consensual search, and, accordingly, the trial court did not err in denying appellant's motion to suppress.

Finally, Barnes contends that the indictment obtained against her was based upon inaccurate testimony provided by law enforcement. Barnes alleges that the indictment was therefore defective, and that the indictment should be dismissed or the case referred back to the Grand Jury for further deliberation.

At the Grand Jury proceedings, Deputy Sheriff Terry Wetzel was the only witness called by the Commonwealth. Wetzel testified that after Durham exited Barnes=s vehicle he

> went along the ditch, down to the back row of anhydrous tanks. He had a gallon gas can, empty gallon gas can. He had an inner tube from a bicycle and he went up to one of the tanks and he - - he was messing around and I=m not sure he might have heard or saw one of the National Guard Troops or just didn=t know how to operate the tank, but he started back.

(Emphasis added.)

At the suppression hearing, the Commonwealth=s principal witness to the events of April 11, 2001, National Guard Member Jody Harris, contradicted Wetzel=s testimony insofar as Wetzel testified that Durham Awent up to one of the tanks@ and was Amessing around.@ Harris testified that Durham had only approached to within 15 yards of the tanks, stood there for two or three minutes, and then returned to the road. When Deputy Wetzel was questioned at the suppression hearing regarding the contradiction, Wetzel stated that he had learned the information

by overhearing a conversation of the National Guard members. Following the June 4, 2001, hearing on the issue, the trial court determined that, while Wetzel=s Grand Jury testimony was misleading, the misleading testimony was unintentional and, absent the testimony, there was sufficient testimony to indict Barnes.

Courts are extremely reluctant to scrutinize grand jury proceedings as there is a strong presumption of regularity that attaches to such proceedings. Commonwealth v. Baker, Ky. App., 11 S.W.3d 585, 588 (2000) (citing Tarrence v. Commonwealth, Ky., 265 S.W.2d 40 [1953], and United States v. Jones, 766 F.2d 994 [6th Cir. 1985]). Ordinarily, courts should not attempt to scrutinize the quality or sufficiency of the evidence presented to the grand jury. Id. (citations omitted). "An indictment returned by a legally constituted and unbiased grand jury. . . if valid on its face, is enough to call for trial of the charge on the merits." Id. (quoting Costello v. United States, 350 U.S. 359, 363 [1956]). An indictment cannot be successfully attacked on the grounds of insufficient evidence. King v. Venters, supra at 715.

However, courts have inherent supervisory authority to dismiss an indictment based on nonconstitutional irregularities occurring before a grand jury. Bank of Nova Scotia v. United States, 487 U.S. 250 (1988). "Under this standard, dismissal of the indictment is appropriate only 'if it is established that the violation substantially influenced the grand jury's decision to

indict,' or if there is 'grave doubt' that the decision to indict was free from the substantial influence of such violations." Baker at 588 (quoting Bank of Nova Scotia, 487 U.S. at 256, and United States v. Mechanik, 475 U.S. 66, 78 [1986] [O'Connor, J., concurring]). Generally, a defendant must demonstrate a flagrant abuse of the grand jury process that resulted in both actual prejudice and deprived the grand jury of autonomous and unbiased judgment. Id. (citing Bank of Nova Scotia, 487 U.S. at 257-60, and United States v. Larrazolo, 869 F.2d 1354, 1360 (9th Cir. [1989]).

Following the hearing on this issue, the trial court determined as follows:

> Oh, I don=t find that what happened at the grand jury at all takes away the basis for the indictment, but I=m just saying the testimony obviously wasn=t accurate, but I don=t find it to be intentionally misleading.
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> . . . .
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> [T]here=s sufficient evidence before this grand jury that they could go ahead and indict without even the officer saying that he saw him messing around, whatever that means, so your motion is denied.

We agree with the trial court=s assessment of the consequences of Deputy Wetzel=s misleading testimony. We are not persuaded that Wetzel=s relatively insignificant misstatement of the facts substantially influenced the Grand Jury=s decision to indict. The Grand Jury nevertheless heard testimony that Barnes dropped off Durham at 2:30 in the morning adjacent to the Miles

Supply anhydrous ammonia tanks, that Durham was equipped with the devices necessary to steal anhydrous ammonia, and that Barnes returned to pick up Durham. There is little to indicate that the Grand Jury=s decision to indict was substantially influenced by Wetzel=s misstatement, and it was not error for the trial court to deny Barnes=s motion to dismiss the indictment or, alternatively, to refer the case back to the Grand Jury.

The judgment of the McLean Circuit Court is affirmed.

ALL CONCUR.

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