

Commonwealth Of Kentucky

Court of Appeals

NO. 2001-CA-001730-MR

RAYMOND WILLIAMS

APPELLANT

v. APPEAL FROM PERRY CIRCUIT COURT
HONORABLE DOUGLAS COMBS, JR., JUDGE
ACTION NO. 01-CR-00049

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

** ** * * *

BEFORE: BAKER, BARBER, AND JOHNSON, JUDGES.

BAKER, JUDGE. Raymond Williams brings this appeal from an August 3, 2001, judgment of the Perry Circuit Court. We affirm.

The facts are these: Appellant's family doctor, Roy Varghese, began to prescribe appellant the narcotic oxycontin for various ailments. Dr. Varghese referred appellant to a neurosurgeon, Dr. Jason Williams, because he believed appellant's back problems required specialized care. Dr. Williams prescribed oxycontin for appellant and required

appellant to read and sign a narcotics agreement. The agreement stated that appellant would not seek prescriptions for narcotics from any other physician, that he would use only the pharmacy agreed upon in the contract in filling his prescriptions from Dr. Williams, and that he had a duty to disclose any subsequent narcotics prescriptions obtained from another physician. After signing the contract, appellant continued to obtain oxycontin from Dr. Varghese without informing Dr. Williams.

An investigation by the state attorney general's office uncovered that appellant was filling oxycontin prescriptions from both Dr. Williams and Dr. Varghese. Appellant was convicted by a Perry County jury on twelve counts of obtaining a controlled substance by fraud, in violation of KRS 218A.140(1)(a). The trial court sentenced appellant to a total of five years' imprisonment. This appeal follows.

Appellant raises seven issues. First, appellant argues that his conviction should be reversed and his case remanded for a new trial because the Commonwealth violated the trial court's discovery order. A discovery violation justifies setting aside a conviction only where there exists a reasonable probability that had the evidence been disclosed the result at trial would have been different. Weaver v. Commonwealth, Ky., 955 S.W.2d 722, 725-26 (1997).

The Commonwealth failed to produce an oral statement made by appellant to Bob Jones, a special investigator from the attorney general's office. In the statement, appellant acknowledged that he was "doubling up" on his oxycontin prescription and that he "didn't know he couldn't [double up]." During trial, appellant never denied that he received oxycontin prescriptions from both doctors. The crux of his defense was that he never knew he was not supposed to receive prescriptions from both doctors. In other words, his defense at trial was exactly the same as the statement made to the special investigator. Thus, we are of the opinion that if appellant's statement had been disclosed it would not have affected the result of the trial.

Second, appellant argues his conviction should be reversed because the trial court denied his motion to suppress "all KASPER information and data." KASPER is the Kentucky all schedules prescription electronic reporting system. Appellant asserts that Bob Jones, a special investigator from the attorney general's office, violated KRS 218A.202(f) by sharing the KASPER report concerning appellant with Dr. Varghese. In Thacker v. Commonwealth, Ky. App., 80 S.W.3d 451, 456 (2002), this Court held that a detective's use of KASPER information in directing his investigation did not constitute a violation of KRS 218A.202(f). However, in Thacker, the detective did not share

the report with the doctor but merely asked the doctor questions based on information in the report. Here, it is undisputed that Jones showed the report to Dr. Varghese.

While we assert no opinion as to whether Jones violated the statute, we do believe that introduction of information in the KASPER report constituted harmless error. The determination of harmless error rests on "whether there is any reasonable possibility that absent the error the verdict would have been different." Renfro v. Commonwealth, Ky., 893 S.W.2d 795, 797 (1995), quoting Crane v. Commonwealth, Ky., 726 S.W.2d 302, 307 (1987).

The KASPER report was not introduced into evidence, and information from the report was used during trial only as part of a summary chart created by the Commonwealth, which also integrated pharmacy and police reports. The summary chart indicated when Williams received narcotics, how much he received, what doctor prescribed the narcotic, and what pharmacy filled the prescription. The chart was not introduced into evidence. Also, the jury did not know what information from the chart came from the KASPER report and what came from another source. Furthermore, any information that might have been gleaned by the jury from the passing use of the KASPER report information in the summary chart was repeated through pharmacy records, medical records, and the testimony of witnesses, all of

which became evidence in the trial. For these reasons, we believe any use of information in the KASPER report was harmless error.

Third, appellant argues that KRS 218A.140(1)(a), the statute under which he was convicted, is both facially overbroad and void for vagueness. We shall address the issues separately.

To successfully challenge a statute as facially overbroad, appellant must prove that the plain language of the statute extends beyond prohibition of unprotected activities to include conduct and speech that is protected by the First Amendment. See Commonwealth v. Ashcraft, Ky. App., 678 S.W.2d 229, 232 (1985).

KRS 218A.140(1)(a) reads as follows: "[n]o person shall obtain or attempt to obtain a prescription for a controlled substance by knowingly misrepresenting to, or knowingly withholding information from, a practitioner." Appellant argues that the terms "misrepresenting," "withholding," and "information" are particularly overbroad, and that under this statute, the terms "could include anything." Brief for Appellant at 18. Appellant additionally argues overbreadth because one could be found to be in violation of the statute for "withholding or misrepresenting information such as a patient's sexual orientation, marital status, or place of employment." Brief for Appellant at 18.

It is well established that a court is bound to "construe the statute to avoid constitutional problems, if the statute is subject to such a limiting construction." New York v. Ferber, 458 U.S. 747, 769 n. 24, 102 S. Ct. 3348, 73 L. Ed. 2d 1113 (1982); accord Martin v. Commonwealth, Ky., 96 S.W.3d 38 (2003)¹. The Supreme Court has further commented that facial overbreadth should not be "invoked when a limiting construction has been or could be placed on the challenged statute." Broadrick v. Oklahoma, 413 U.S. 601, 613, 93 S. Ct. 2908, 37 L. Ed. 2d 830 (1973).

Although the plain language of KRS 218A.140(1)(a) may support appellant's argument with regards to the overbreadth challenge, we hold that a limiting construction is the proper measure to be taken in this case. We think a limiting construction can be used to avoid invalidating KRS 218A.140(1)(a) based upon overbreadth grounds. We would narrowly construe the terms "knowingly misrepresenting to" and "knowingly withholding information from" as relevant only to the procurement of prescriptions. Thus, the language of the statute in question may be limited to "[n]o person shall obtain or attempt to obtain a prescription for a controlled substance by knowingly misrepresenting to, or knowingly withholding

¹ We observe that Martin v. Commonwealth, Ky., 96 S.W.3d 38, 56 (2003) specifically overrules Commonwealth v. Foley, 798 S.W.2d 947 (1990) to the extent that a limiting construction should not be used to avoid the unconstitutionality of an overbroad statute.

information [relevant to the procurement of that prescription] from, a practitioner.”

As discussed by the Court in Martin, appellant has fair warning of a narrowing construction when the legislature’s goal is “obvious from the face of the statute,” and when the appellant’s behavior is such that he would “not be surprised to learn that [his conduct] . . . constituted a crime.” Id. at 55, quoting Osborne v. Ohio, 495 U.S. 103, 116, 110 S. Ct. 1691, 109 L. Ed. 2d 98 (1990). It is obvious from the plain language of KRS 218A.140 that this statute is intended to prohibit an individual from obtaining a controlled substance through knowingly giving fraudulent information relevant to the procurement of a prescription or knowingly withholding such information from a practitioner. Therefore, we hold that KRS 218A.140(1)(a) is not facially overbroad.

Next, we shall address appellant’s argument that KRS 218A.140(1)(a) is unconstitutionally vague. Appellant specifically claims that the statute in question is void because it “fails to provide definitions” for the words “misrepresenting,” “withholding,” and “information.” Brief for Appellant at 19. Appellant further challenges KRS 218A.140 as a “blank ‘don’t lie to your doctor’ prohibition.” Brief for Appellant at 19.

A statute is deemed void for vagueness and, therefore, in violation of the Due Process Clause when it is lacking in clarity. "Vagueness involves a 'man on the street' approach. The challenged statute must provide 'fair warning' to the public and 'explicit standards' for those who apply it in order to pass constitutional muster." Commonwealth v. Kash, Ky., 967 S.W.2d 37, 43 (1998), quoting Hardin v. Commonwealth, Ky., 573 S.W.2d 657, 660 (1978).

The proper analysis to determine if a statute is void for vagueness is "whether a person disposed to obey the law could determine with reasonable certainty from the language used whether contemplated conduct would amount to a violation." Commonwealth v. Foley, Ky., 798 S.W.2d 947, 951 (1990). We think that KRS 218A.140(1)(a) is not lacking in precision or clarity.

The specific terms about which appellant complains - "misrepresenting," "withholding," and "information" - may all be clearly defined in the context of the statute. The intent of the legislature in enacting KRS 218A.140(1)(a) was to curb the ability of individuals to procure controlled substances fraudulently. We think that use of the terms "misrepresenting," "withholding," and "information" confers adequate notice to a person of ordinary intelligence that providing false information or failing to give information in order to procure a controlled

substance is prohibited under the statute. Simply put, we think that a common sense reading of KRS 218A.140(1)(a) would put a person disposed to obey the law on fair notice that his conduct was prohibited under the statute. Upon the whole, we are of the opinion that KRS 218A.140(1)(a) is not unconstitutionally vague.

Fourth, appellant argues that the trial court erred by denying his motion for a new trial or judgment notwithstanding the verdict. The trial court, opines appellant, should have granted a new trial based on a medical report discovered in Dr. Varghese's files after the trial ended. The medical report, alleges appellant, was not in the file during trial. The report is a May 1999 letter from a doctor at the University of Kentucky Chandler Medical Center recommending appellant's dosage of oxycontin be increased.

In order for newly discovered evidence to support a motion for a new trial in a criminal case, the newly discovered evidence must be of such decisive value or force that it would, with reasonable certainty, have changed the verdict. Anderson v. Commonwealth, Ky., 63 S.W.3d 135, 141 (2002). Appellant was convicted under KRS 218A.140(1)(a) which states that "no person shall obtain or attempt to obtain a prescription for a controlled substance by knowingly misrepresenting to, or knowingly withholding information from, a practitioner." Evidence during trial demonstrated that appellant withheld

information from Dr. Williams in order to obtain a prescription for oxycontin. We are unable to fathom how evidence that another doctor recommended appellant's dosage of oxycontin be increased would have changed the verdict. A trial court's decision regarding a motion for a new trial or for judgment notwithstanding the verdict will not be reversed on appeal absent a showing of abuse of discretion. Carwile v. Commonwealth, Ky. App., 694 S.W.2d 469, 470 (1985). We are of the opinion that there was no abuse of discretion by the trial court.

Fifth, appellant claims the trial court erred by denying his motion for a directed verdict. The standard of review for a directed verdict is whether under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt. Commonwealth v. Benham, Ky., 816 S.W.2d 186 (1991).

Appellant argues that the Commonwealth failed to produce any evidence that he misrepresented or concealed any fact from a "practitioner," as defined by the statute. Appellant asserts that he dealt only with Dr. Williams' office manager with whom he reviewed (and subsequently signed) a narcotics contract. Furthermore, appellant claims that at no time did Dr. Williams himself ask appellant if he was receiving narcotics from any other source. Appellant argues that "office manager" is not included in the definition of "practitioner" as

defined by the statute. Thus, he did not knowingly misrepresent or withhold information from a "practitioner."

While "office manager" is not included in the definition of "practitioner," Dr. Williams' office manager can be construed as an agent of Dr. Williams. We further think the knowledge of a physician's office staff is imputed to the physician. Therefore, any information the patient provides to staff is tantamount to providing such information directly to the physician.

Additionally, appellant argues that the statute required an affirmative statement on his part to the doctor. The statute plainly states that the "withholding" of information from a practitioner is sufficient. Thus, the trial court did not err in denying a directed verdict.

Sixth, appellant claims that the trial court did not comply with the requirements of RCr 9.70, when it failed to properly admonish the jury at breaks in trial. Appellant failed to preserve this issue. Error on appeal cannot be considered in the absence of a proper objection to preserve that error for appellate review. Todd v. Commonwealth, Ky., 716 S.W.2d 242, 248 (1986). Because appellant failed to preserve this issue, we look to see if a palpable error has occurred which affected Williams' "substantial rights" and resulted in "manifest

injustice." RCr 10.26; Commonwealth v. McIntosh, Ky., 646 S.W.2d 43, 45 (1983).

Appellant argues that the court erred by not informing the jurors that they had an obligation to report any attempt to communicate with them on any subject connected with the trial. Appellant admits that the record is devoid of any proof or allegation of inappropriate communication with the jurors. Since no such evidence exists, we are of the opinion that no manifest injustice occurred.

Seventh, appellant contends that the trial court erred by denying his motion to dismiss. Appellant brought a motion to dismiss based on the Commonwealth's failure to produce a bill of particulars seven days before trial as ordered by the trial court. The trial court on June 11, 2001, entered an order for the Commonwealth to respond within seven days before trial by producing a bill of particulars. The trial was set to begin on June 18, 2001. The Commonwealth produced the bill of particulars on June 15, 2001, four days before the trial, which had been moved from June 18 to June 19.

The function of a bill of particulars in criminal cases is to provide information fairly necessary to enable the accused to understand and prepare his defense against charges without prejudicial surprise at trial. Abbott v. Commonwealth, Ky., 822 S.W.2d 417, 419 (1992). The Court in Abbott found that

there was no error in the Commonwealth's failure to file a bill of particulars where the Commonwealth maintained an "open file discovery" policy and where the theory under which the Commonwealth would proceed was readily apparent. Id. at 418-19.

Here, the Commonwealth maintained an "open file discovery," and the Commonwealth in the indictment provided appellant with information fairly necessary to enable him to understand and prepare his defense without prejudicial surprise at trial. The indictment listed the offense appellant was charged with committing, the date the offense was to have occurred, and the name of the practitioner to whom appellant was to have knowingly withheld or knowingly misrepresented information. Furthermore, appellant did have four days before trial to use the information included in the bill of particulars. We cannot say that the trial court erred by denying appellant's motion to dismiss.

For the foregoing reasons, the judgment of the circuit court is affirmed.

ALL CONCUR.

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