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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-000636-MR

MARTY POWELL — APPELLANT

v.

APPEAL FROM CASEY CIRCUIT COURT
HONORABLE WILLIAM M. HALL, JUDGE
ACTION NO. 98-CR-00117

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION

AFFIRMING

** ** ** ** **

BEFORE: EMBERTON, CHIEF JUDGE; BUCKINGHAM AND PAISLEY, JUDGES.

PAISLEY, JUDGE. This is an appeal from a judgment entered by the Casey Circuit Court following a jury verdict. Appellant, Marty Powell, claims that the circuit court lacked jurisdiction because it proceeded against him without a proper indictment, and that even if the indictment was valid, there was insufficient evidence to convict him. Finding no merit in these alleged errors, we affirm.

On or about November 20, 1996, Tom Weddle noticed that his father's livestock trailer was missing. He did not know how long the trailer had been gone, and he called his father to inquire if he had loaned it out to someone. At that time they realized that the trailer had been stolen, and they contacted the sheriff's office. The authorities were unsuccessful in their attempts to locate the trailer, and there was no sign of it again until August 24, 1998, when Weddle spotted the trailer hooked to a vehicle traveling down the highway. He was certain that this was the same trailer because his father had built it many years earlier, and it had been extensively remodeled shortly before it was stolen.

After the trailer was finally recovered, the authorities began tracing its chain of ownership back to the time when it was stolen. They adduced that there had been six subsequent owners, beginning with appellant. When questioned by authorities, appellant initially denied any knowledge of the trailer, but later conceded that while he was at an auto auction in late November 1996, a man from Casey County asked him if he was interested in buying a trailer. Since the man did not have the trailer with him, appellant met him at a gas station that night and purchased the trailer for approximately $300.00. Appellant sold the trailer just a few days later.

Appellant was subsequently indicted on September 14, 1998, for one count of receiving stolen property valued at over $300. The pre-trial phase of the case continued for quite some time, and during a hearing on February 26, 2001, the judge realized that the original indictment was not in the court's record. Though this discovery caused some confusion, the court determined that the case could not proceed upon a copy of the indictment. Since appellant refused to waive his right to an indictment and to continue upon information, the judge ordered the case to be resubmitted to the next grand jury. However, during the interim between the judge's order to resubmit and the next grand jury session, the original indictment was located and placed back into the record. Thereafter, the case proceeded to trial without further objection to the indictment, and the jury found appellant guilty. He was sentenced to serve three years in the penitentiary.

Appellant first alleges that his conviction should be reversed because the circuit court lacked jurisdiction over this matter due to an improper indictment. We disagree. Appellant does not allege that the original indictment was inherently defective or invalid in any respect. Instead he argues that, "the previous Circuit Court ordered the case to be re-presented to a grand jury, there is no evidence the case was re-presented to a grand jury, and thus, the Circuit Court was without

personal jurisdiction over Mr. Powell." We believe this argument is wholly without merit. It is clear that the original indictment was valid, and the judge ordered the case to be resubmitted to the grand jury solely because the original indictment could not be located. Thus, once the original document was found, there was no longer a need to re-indict appellant. Further, RCr 6.12 states:

> An indictment, information, complaint or citation shall not be deemed invalid, nor shall the trial, judgment or other proceedings thereon be stayed, arrested or in any manner affected by reason of a defect or imperfection that does not tend to prejudice the substantial rights of the defendant on the merits.

While we do not believe that the indictment in this case was invalid, defective, or imperfect, appellant has also failed to allege that he suffered any prejudice as a result of this case proceeding under the original indictment, and our review of the record fails to show that any such prejudice occurred. The original indictment was clearly legitimate, and the circuit court proceeded upon that document most appropriately.

Appellant also argues that the court erred by denying his motion for a directed verdict. We disagree.

It is well established that "[o]n appellate review, the test of a directed verdict is, if 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, 187 (1991), citing Commonwealth v. Sawhill, Ky., 660 S.W.2d 3 (1983). “For the purpose of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but reserving to the jury questions as to the credibility and weight to be given to such testimony.” Benham, 816 S.W.2d at 187.

The offense of receiving stolen property is outlined in KRS 514.110, which states in pertinent part:

> (1) A person is guilty of receiving stolen property when he receives, retains, or disposes of movable property of another knowing that it has been stolen, or having reason to believe that it has been stolen, unless the property is received, retained, or disposed of with intent to restore it to the owner.
>
> (2) The possession by any person of any recently stolen movable property shall be prima facie evidence that such person knew such property was stolen.

Appellant asserts that the evidence was insufficient to establish venue or to prove that he either possessed or knowingly received the stolen trailer. However, a significant amount of proof was offered by the prosecution to support an affirmative finding as to each of these elements. Specifically, a witness testified that he bought the trailer from appellant, and he substantiated his testimony by producing a cancelled check which was written to appellant and dated just a few days

after the trailer was reported stolen. This testimony, which supported a finding that appellant possessed the trailer shortly after it was taken, constituted prima facie evidence that appellant knew the trailer was stolen. KRS 514.110(2). In addition, venue was established by the sheriff's testimony that appellant told him that he had purchased the trailer at a gas station in Casey County. Contrary to appellant's contention, this testimony was not rendered insufficient by virtue of RCr 9.60 which provides:

> A confession of a defendant, unless made in open court, will not warrant a conviction unless accompanied by other proof that such an offense was committed.

Clearly, RCr 9.60 is not applicable. Instead, it was well within the province of the jury to believe the sheriff's testimony rather than that of appellant. Bowling v. Commonwealth, Ky., 318 S.W.2d 53, 55 (1958). Clearly, the trial court received adequate evidence concerning all of the issues about which appellant claims there were deficiencies, and he is not entitled to relief on these grounds.

The judgment is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Brenda Popplewell
Somerset, Kentucky

BRIEF FOR APPELLEE:

Albert B. Chandler III
Attorney General

Nyra Shields
Assistant Attorney
General
Frankfort, Kentucky