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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001991-MR

J.T. COLLINS — APPELLANT

v.

APPEAL FROM WARREN CIRCUIT COURT
HONORABLE JOHN D. MINTON, JR., JUDGE
ACTION NO. 01-CR-00423

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION

AFFIRMING

** ** ** ** **

BEFORE: McANULTY, AND SCHRODER, JUDGES; AND MILLER, SENIOR JUDGE.[1]

McANULTY, JUDGE. J.T. Collins (hereinafter appellant) appeals the judgment of the Warren Circuit Court, following a bench trial, adjudging him guilty of attempted murder, resisting

[1] Senior Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

arrest and disorderly conduct. Appellant alleges that there was insufficient evidence to convict him of attempted murder; that his behavior did not rise to the level of disorderly conduct and his arrest for that charge was unlawful; that convictions for both attempted murder and resisting arrest constituted double jeopardy; and that the court erred in failing to inform him whether it considered lesser included offenses. Finally, appellant argues that the trial court erred in not granting a motion for new trial based on the foregoing claims of error. After reviewing these issues and the record in this case, we affirm the order of the Warren Circuit Court.

Appellant's first claim is that his warrantless arrest for disorderly conduct was unlawful because the conduct did not meet the statutory definition of disorderly conduct. The applicable portion of the disorderly conduct statute is the offense of making unreasonable noise. KRS 525.060(1)(b). Appellant cites the Commentary to the statute which advises that the offense is not meant to provide an offense when only the police are annoyed:

> KRS 525.060 requires "public" alarm. Public is defined in KRS 525.010(2) as that which affects or is likely to affect a substantial group of persons. . . . For example, a person may not be arrested for disorderly conduct as a result of activity which annoys only the police. The statute is not intended to cover the situation in which a private citizen engages in argument with the

> police so long as the argument proceeds without offensively coarse language or conduct which intentionally or wantonly creates a risk of public disturbance.

While the commentary to the Penal Code is not binding, pursuant to KRS 500.100 it may be used as an aid in construing statutes. Williams v. Commonwealth, Ky. App., 639 S.W.2d 786, 788 (1982).

In finding appellant guilty of disorderly conduct, the court cited the following facts to support the charge: after calling the police, appellant demanded that his girlfriend be removed from his trailer. While the officer and appellant's girlfriend stood outside the trailer waiting for the girlfriend's friend to take her home, appellant came out of the trailer and yelled and cursed at his girlfriend to leave the premises. The officer twice ordered appellant inside and warned him that if he came back outside yelling and cursing, he would be arrested for disorderly conduct. When appellant emerged a third time, the officer informed him he was under arrest.

Appellant alleges that he was charged with disorderly conduct solely because he aroused the annoyance of the officer. We do not agree that the evidence supports appellant's take on the encounter that night. As the Commonwealth points out, the Commentary also advises that when KRS 525.060(1)(b) prohibits unreasonable noise, "'Reasonable' in this context depends upon the time, place, nature and purpose of the noise." According to

the evidence, the hour was 2:39 a.m. when the officer arrived, the place was a residential trailer park, the nature of the utterances was "offensively coarse language," and there was no reasonable purpose for the noise. We agree that the trial court correctly found unreasonable noise in a public place which created at the very least a wanton risk of public annoyance or inconvenience. The trial court did not err in finding appellant guilty of disorderly conduct.

Along with that issue, appellant alleges that his arrest for disorderly conduct was unlawful since the officer had to reach into the doorway of appellant's trailer to effect the arrest. The doorway of one's home is considered a public place where one has no reasonable expectation of privacy and is thus subject to a warrantless arrest. Talbot v. Commonwealth, Ky., 968 S.W.2d 76, 81 (1998). The trial court found that when appellant was being warned about being arrested, appellant was "standing on the doorstep shouting obscenities." When the officer informed him he was under arrest, appellant "stepped backward into the doorway of the trailer," where the officer reached for him and grabbed him by the left shoulder.

The trial court's findings, supported by substantial evidence, show that appellant was still in the doorway, a public place, when the officer attempted to arrest him. But even if we accept appellant's account that the officer had to reach farther

than appellant's doorway to arrest him, we still conclude that appellant's act of retreating into his trailer did not thwart an otherwise proper arrest. United States v. Santana, 427 U.S. 38, 96 S. Ct. 2406, 49 L. Ed. 2d 300 (1976). Finally, we find it significant that an unlawful arrest would not invalidate the prosecution and conviction for this offense. Howell v. Commonwealth, Ky., 445 S.W.2d 123, 123 (1969). Appellant is entitled to no relief on this claim of error.

Next, appellant argues that his convictions for attempted murder and resisting arrest violated the constitutional prohibition against double jeopardy. Double jeopardy issues are analyzed in accordance with the principles set forth in Blockburger v. United States, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932), and KRS 505.020. Grundy v. Commonwealth, Ky., 25 S.W.3d 76, 85 (2000). In order to determine whether two offenses are the same for double jeopardy purposes, the test to be applied is whether each provision requires proof of an additional fact which the other does not. Id.

In this case, the attempted murder charge required proof that with intent to kill, appellant stabbed or attempted to stab the officer, and this action was a substantial step in a course of conduct planned to culminate in the death of the officer. KRS 506.010, 507.020. The resisting arrest charge

required proof that appellant recognized the peace officer as acting under color of official authority, that he intentionally prevented or attempted to prevent the officer from effecting his arrest, by the use of threat of physical force against the peace officer or another. KRS 520.090. It is quite apparent that the offenses each contain elements not required by the other. Appellant's conviction for these two offenses did not violate the double jeopardy clause.

Next, appellant attacks the sufficiency of the evidence on the attempted murder charge. The appellate standard of review for a directed verdict is if under the evidence as a whole it would not be clearly unreasonable to find the defendant guilty, he is not entitled to a directed verdict of acquittal. Commonwealth v. Sawhill, Ky., 660 S.W.2d 3, 5 (1983). Appellant complains that the facts found by the court were not established by a witness or by forensic evidence.

Appellant argues the prosecution identified no relationship between the cuts in the officer's shirt and the butcher knife later found at the scene, alleged to have been used by appellant. He believes it was inconsistent to conclude that the holes in the officer's shirt were made by jabbing blows from appellant when there were no puncture marks or piercing marks in the officer's bullet-resistant vest. He notes that all the officers present stated that they did not observe appellant

holding a knife at any time. Appellant argues that the knife was found some distance away from the struggle between the officer and himself. From the foregoing, appellant argues that the trial court was without a basis to conclude beyond a reasonable doubt that appellant used a knife in an attempt to kill the officer.

We disagree since there was other evidence, and the evidence as a whole supported the conviction. The officer testified that the holes in his shirt and the nick on his radio were not there before the struggle with appellant. The officer testified that while he was struggling with appellant he felt some poking sensations. The shirt the officer wore that night was introduced at trial.

Appellant's girlfriend identified the knife found in the yard as one of hers. The officer who found the knife testified that he and appellant's girlfriend went inside the trailer to look at the knives, and she said that one was missing. He noted that the one found outside had the same type of handle as the knives in the residence. The officer involved in the struggle testified that a picture of the knife from the scene showed that it was in the same area in which they had been. The backup officer who found the knife stated that it was found in the general area of the struggle, as determined by scuffs and marks in the dirt on the concrete in that area.

The trial court concluded appellant used the knife and intent to kill was shown by the number and placement of the holes in the shirt. We do not believe that it would be clearly unreasonable to find appellant guilty. Therefore, we do not agree that the evidence was insufficient or that appellant should have been given a directed verdict on this charge.

Next, appellant declares that it was error for the trial court to fail to apprise him of "whether or which lesser included offenses would be considered in deciding his case." He alleges that the court thus denied his right to present a defense. At the close of the evidence, the trial court entered into an extended discussion with counsel regarding which lesser included offenses were available under the facts. Nowhere in the record of the trial do we find where appellant asked the court to state which lesser included offenses were or would be considered during the court's deliberations. Appellant did not raise this precise issue until his motion for a new trial.

First, appellant does not identify any authority for the proposition that the court in a bench trial is required to inform the parties of the lesser included offenses under consideration. More importantly, appellant does not identify any harm or prejudice from the court's not having done so. Appellant does not even assert that his actions were more consistent with any lesser included offenses than the offenses

for which he was convicted. We believe that since appellant was properly convicted of the offenses, no error or prejudice has been shown. In a bench trial, the parties may assume that if the court does not state that an offense is not a proper lesser included offense under the circumstances of the case, the court will consider it.

Finally, appellant argues that the trial court erred in not granting his motion for a new trial. We agree that the trial court did not abuse its discretion in determining that appellant failed to establish a basis for a new trial.

For the foregoing reasons, we affirm appellant's conviction in the Warren Circuit Court.

ALL CONCUR.

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