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Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-000085-MR

ANTHONY D. JOHNSON — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE GEOFFREY P. MORRIS, JUDGE
ACTION NO. 01-CR-001119

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, DYCHE, and JOHNSON, Judges.

COMBS, JUDGE. Anthony Johnson appeals his conviction of two drug-related offenses and of being a persistent felony offender in the second degree. We affirm.

On February 23, 2001, Jefferson County Police Officer Bobby Coomer took a trained narcotics dog to a storage unit rental facility on Cane Run Road in Louisville. The manager of the facility, Leslie Calhoun, permitted Coomer to walk the drug-sniffing dog between and among the individually rented storage

units. The dog alerted Officer Coomer to the presence of narcotics at unit number 580. Calhoun reported that the appellant, Anthony Johnson, had leased the individual storage unit and provided Coomer with Johnson's home address. Following a records check, Coomer obtained a warrant to search the storage unit numbered 580. Once inside the storage unit, police officers found approximately fifty-one pounds of marijuana and assorted air fresheners commonly used to mask the odor of marijuana.

The following day, the police arrived at Johnson's residence on Neblett Avenue in Louisville. Johnson gave the officers written consent to search the house. In the garage, officers found a tub containing bags of marijuana, numerous plastic storage bags, digital scales, and air fresheners. In Johnson's bedroom, they found a key to the pad lock that secured the rented storage unit on Cane Run Road along with a substantial sum of money.[1]

Johnson was arrested and charged. He was indicted on May 8, 2001, by a Jefferson County grand jury; he was tried in December 2002. Following its deliberations, the jury found Johnson guilty of possession of drug paraphernalia, trafficking in marijuana, and of being a persistent felony offender in the

[1] The officers also recovered a handgun and twelve thousand dollars from a residence formerly shared by Johnson and his sister. Johnson was tried on the charge of possession of a firearm by a convicted felon in a separate proceeding.

second degree. He was sentenced to ten-years' imprisonment. This appeal followed.

Johnson asserts three allegations of error. First, he contends that the trial court failed to instruct the jury properly; second, he contends that the trial court failed to suppress evidence recovered as a result of the illegal search of his storage unit; and third, he contends that the trial court erred by refusing to permit him to call a material witness. We are not persuaded by any of these contentions.

Johnson contends that he was entitled to an instruction on the offense of criminal facilitation and that the trial court erred by refusing to give such an instruction. We disagree. Johnson describes his tendered instruction as an instruction on a lesser-included offense. However, criminal facilitation is generally designated as a lesser-included offense to a charged offense only where the defendant is charged with being an accomplice to an offense -- not the principal offender. See Commonwealth v. Day, Ky., 983 S.W.2d 505 (1999). In Houston v. Commonwealth, Ky., 975 S.W.2d 925 (1998), the Kentucky Supreme Court clearly indicated that criminal facilitation is not a lesser-included offense where the defendant is charged with trafficking in or possession of a controlled substance.

Johnson testified on his own behalf at trial. He indicated that Rausheik Granison, an old acquaintance, contacted him by telephone in December 2000. According to Johnson, Granison, a musician, wanted to establish a working relationship with Johnson's home-based production studio. During this telephone conversation, Granison also related to Johnson that his relationship with his girlfriend had deteriorated and that, therefore, Granison needed a place to store personal items. Johnson testified that he told Granison that he could use his (Johnson's) rented storage unit on Cane Run Road. Johnson met Granison at the facility and provided him with a key and a security code with which to access the storage unit. According to Johnson, Gransion paid the rental fees for the storage unit two months in advance. Johnson indicated that he continued to talk with Granison frequently. Johnson testified that when the two met face-to-face at a record-release party, Johnson provided Granison with the name of a reliable narcotics supplier. In light of this testimony, Johnson contends that the trial court erred by refusing to instruct the jury on criminal facilitation.

While a trial judge has a duty to prepare and give instructions on the whole law of the case, that duty does not require him to instruct on a theory having no evidentiary foundation. Houston v. Commonwealth, Ky., 975 S.W.2d 925 (1998). Even if accepted as true, the testimony as related

above would not support a criminal conviction of any sort -- including facilitation.

Facilitation is defined by Kentucky Revised Statutes (KRS) 506.080, which provides in subsection (1) that:

> A person is guilty of criminal 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 to commit the crime.

Thus, criminal facilitation occurs when a defendant, having no intent to promote or commit a crime himself, provides the means or opportunity for another to do so. Commonwealth v. Day, Ky., 983 S.W.2d 505 (1999).

In this case, the trial testimony did not support or require a facilitation instruction. According to Johnson, he had no reason to suspect that Granison planned to keep marijuana in the rented storage unit when Johnson made the space available to him. Nor did Johnson's identification of a known narcotics source on a separate occasion amount to furnishing Granison with the means of committing a crime -- even if Johnson had known that Granison might use it to commit a crime. There was simply no evidence to indicate that Johnson engaged in conduct that knowingly provided Granison with the means or opportunity for the commission of the crime. Therefore, the trial court did not

err by refusing to charge the jury with respect to criminal facilitation.[2]

Next, Johnson contends that the trial court erred by failing to suppress the evidence seized as a result of the illegal search (the dog-sniff) of his rented storage unit. Following an evidentiary hearing, the trial court concluded that the search did not violate either the provisions of the Fourth Amendment to the United States Constitution or of Section Ten of the Kentucky Constitution. The decision of the circuit court is supported by substantial evidence and applicable law.

Johnson acknowledges the legality of Officer Coomer's presence on the commercial storage facility premises when the narcotics dog alerted to his individual storage unit. However, Johnson argues that he maintained a "legitimate, reasonable expectation of privacy not only in the rental unit itself, but in the common areas of the facility as well." Brief at 6. He attempts to distinguish the facts of this case from those in which courts have held that a dog sniff is not a "search" in the constitutional context of the Fourth Amendment. See United States v. Place, 462 U.S. 696, 77 L.Ed.2d 110, 103 S.Ct. 2637 (1983).

In Place, the United States Supreme Court held that exposing an individual's luggage to a dog sniff in an airport

[2] Johnson denied complicity in the drug-related crimes and did not request an instruction with respect to that offense.

did not amount to a "search" under the Fourth Amendment. Id. at 462 U.S. 707. The Court's holding appears to rest on two unique aspects of a canine investigation. First, while acknowledging that a person "possesses a protected privacy interest in the contents of personal luggage that is protected by the Fourth Amendment," the Court noted that a "canine sniff" does not require opening the luggage. Id. Thus, the manner in which information is obtained is much less intrusive than a typical search. Second, the sniff discloses only the presence or absence of narcotics, a contraband item. "Thus, despite the fact that the sniff tells the authorities something about the contents of the luggage, the information obtained is limited." Id. The Court concluded as follows:

> In these respects, the canine sniff is sui generis. We are aware of no other investigative procedure that is so limited both in the manner in which the information is obtained and in the content of the information revealed by the procedure. Therefore, we conclude that the particular course of investigation that the agents intended to pursue here – exposure of respondent's luggage, which was located in a public place, to a trained canine – did not constitute a "search" within the meaning of the Fourth Amendment.

Id.

Johnson ignores these unique features of a canine-induced investigation and instead directs his argument to an analysis of the nature of the area investigated. He argues that

the commercial storage facility at issue here is more akin to a residence than to a public space and that, therefore, by analogy, the area immediately surrounding the individual rental units should be treated as if it were the curtilage of a home. As we are not persuaded by the analogy, we disagree with Johnson's argument that his privacy interests in the contraband stored in the unit were worthy of Fourth Amendment protection.

Johnson's individual storage unit was located among numerous others at the Cane Run Road facility. The facility was open to the public for business, and the areas in front of the units were at least semi-public in nature. Officer Coomer brought the narcotics dog onto the premises with the consent of the manager of the storage facility. The dog was permitted merely to walk outside between the rows of individual units and to sniff the air for contraband. The dog's response at Johnson's rented unit was completely unintrusive, alerting Coomer alone that narcotics were likely present. Therefore, it interfered with no legitimate expectation of privacy.

We also disagree with Johnson's contention that the rented storage unit is analogous to a private home (and its curtilage). He bases this argument on the reasoning of the Supreme Court in Kyllo v. United States, 533 U.S. 27, 150 L.Ed.2d 94, 121 S.Ct. 2038 (2001). In Kyllo, the Court took special notice of the heightened expectation of privacy involved

in the interior of a private home and the area immediately adjacent to it. In the context of this heightened expectation of privacy, the Court concluded that the use of highly sophisticated police technology (thermal imaging) to detect relative heat throughout various areas of the home did constitute a "search" of the premises.

In this case, the trial court did not err by concluding that the area surrounding a rented storage unit at a commercial storage facility does not equate with sanctity of a home for purposes of Fourth Amendment analysis. Consequently, the trial court did not err by refusing to grant Johnson's motion to suppress.

Finally, Johnson contends that the trial court erred by excluding the testimony of Rausheik Granison. We disagree. In a pre-trial motion filed by Johnson, the defense sought assurance from the trial court that Granison, who was under subpoena, would be permitted to take the stand.

The Commonwealth argued that the witness should be barred from taking the stand since Granison's attorney reported to the court and to the Commonwealth that Granison had been advised to assert his Fifth Amendment privilege with respect to any matter pertaining to Johnson's case. The Commonwealth cited black-letter law holding that "neither the prosecution nor the defense may call a witness knowing that the witness will assert

his Fifth Amendment privilege against self-incrimination." Clayton v. Commonwealth, Ky., 786 S.W.2d 866, 868 (1990).

The trial court tentatively denied the defense's motion while assuring Johnson that he would be given an opportunity to make an additional offer of proof. Johnson agreed that he would re-visit the issue during the course of trial by presenting Granison's proposed testimony by way of avowal.

Johnson contends that the exclusion of Granison's testimony constitutes reversible error. Citing Combs v. Commonwealth, 74 S.W.3d 738 (2002), he argues that the trial court erred by failing to anticipate that Granison would assert the privilege against self-incrimination selectively rather than throughout the entire course of his testimony. Johnson intimates in his brief that Granison would not have asserted the privilege throughout the entirety of his testimony, electing instead to answer at least some of the substantive questions. According to Johnson, the trial court's failure to weigh this possibility rendered erroneous the exclusion of all of Granison's testimony and resulted in a fundamentally unfair trial.

In Combs, the court reiterated that a defendant's Sixth Amendment right to "have compulsory process for obtaining witnesses in his favor" is not absolute "does not transcend the

adversarial system"; it re-affirmed that defense witnesses must be subject to the prosecution's cross-examination. Id. at 743. However, the court also noted as follows:

> [T]he federal courts have recognized the necessity of accommodating valid assertions of privilege by defense witnesses, and have found the 'drastic remedy' of precluding testimony appropriate only where a witness's invocation of the privilege frustrates cross-examination on issues material to the witness's testimony. . . .

Id. at 744. Consequently, the trial court's discretion to exclude a witness's testimony is highly limited. Where the prosecution's cross-examination as to material issues raised during direct-examination could be curtailed or frustrated because a witness asserts a valid claim of privilege, a trial court may legitimately exclude such testimony.

In Combs, resolution of the issue of contested opportunity to cross-examine *versus* assertion of privilege by a witness depended upon a consideration of a preliminary inquiry ("a dry run") by the defense into the proposed testimony outside the presence of the jury. Id. As the Kentucky Supreme Court observed:

> Of course, the purpose of the "dry run" of Williams's testimony was to preview the questions and responses and to allow the trial court to determine whether it could accommodate Williams's valid assertions of privilege without impairing the Commonwealth's ability to test the

> truthfulness of the testimony through cross-examination. A "dry run" also allows meaningful appellate review by creating a record of the questions that the witness will answer as well as those questions as to which the witness intends to invoke her privilege against self-incrimination. . . . While a defendant's Sixth Amendment right to compulsory process must yield to *legitimate* demands of the adversarial process, a witness should not be precluded from testifying based on speculation about whether he or she would invoke a privilege.

Id. at 745.

In this case, the trial court had expressly provided the defense with an opportunity to preview Granison's testimony. However, the defense made no attempt at a "dry run" of that testimony. On the other hand, the Commonwealth represented to the court that Granison's attorney had advised him to rely entirely upon on his Fifth Amendment privilege and not to offer substantive testimony of any kind. The defense never contradicted this representation. Even now, it offers only vague speculation concerning what Granison's testimony might have been at trial. Without a meaningful offer of proof, we cannot conduct a more thorough review at this juncture and are wholly reduced to speculation. Consequently, we must conclude that the trial court did not err in its evidentiary ruling precluding Granison's testimony. We also disagree with Johnson's contention that the trial court was required to

instruct the jury regarding the inability of the defense to call Granison to the witness stand.

The judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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