

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2003-CA-001102-MR

RANDALL CLAY WALLACE

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE REBECCA M. OVERSTREET, JUDGE  
INDICTMENT NO. 02-CR-00891

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

\*\* \*\* \* \* \*

BEFORE: BUCKINGHAM, DYCHE, AND SCHRODER, JUDGES.

DYCHE, JUDGE: Appellant, Randall Clay Wallace, and three others<sup>1</sup> were charged in a seventeen-count indictment under a scheme to forge prescriptions for controlled substances and for trafficking in controlled substances. After a jury trial, appellant was found guilty of Count One (obtaining a controlled substance-Methadose-by fraud) and Count Sixteen (trafficking in a controlled substance-Lortab). Upon review, we hereby affirm.

---

<sup>1</sup> The other three defendants were Steven Allen Harn, Jennifer Lynn Burton, and DamiAn K. Isaacs.

Appellant was arrested after having a forged prescription<sup>2</sup> filled at a pharmacy in Lexington, Kentucky.<sup>3</sup> Police officers also found a bottle of Lortabs prescribed to Damian Isaacs in the car. Through testimony at trial, it was established that appellant had given Harn a Lortab tablet while driving to the pharmacy.

Appellant brings three issues on appeal. The first is a claimed error by the circuit court for allowing hearsay evidence regarding appellant's obtaining a controlled substance from a forged prescription earlier on the same day he was arrested. Appellant was not, however, indicted for this.

The alleged error came from testimony given by Amanda Simpson after appellant's counsel asked if she had personal knowledge of the account. Simpson answered that "Travis said something about it when they got back . . . ." Before Simpson finished her answer, defense counsel interrupted her. Thereafter, the prosecution asked that Simpson be allowed to finish her answer. When defense counsel could not remember the exact wording of the question, she asked the prosecutor to state the question. He stated, "What did Travis Becknell tell you when he got back?" Defense counsel objected based on hearsay. While the circuit court and defense counsel were discussing the

---

<sup>2</sup> The prescription was for Methadose, a generic drug for methadone.

<sup>3</sup> Three others were in the car. Steven Allen Harn, Amanda Simpson, and Travis Becknell. Harn was also arrested and charged in the indictment.

hearsay issue, the witness actually stated, without being asked, "Not of my own knowledge, yes, but hearing it from Travis."

Immediately after this, the discussion between the court and defense counsel ended. Defense counsel did not ask for an admonition or that Simpson's answer be struck. Further, defense counsel did not request a ruling on the hearsay objection.

Instead, after Simpson's response, defense counsel continued asking several questions regarding what Travis had told Simpson.

Clearly, this alleged error was not properly preserved. Defense counsel should have secured a ruling from the circuit court on her objection. Wilcher v. Commonwealth, Ky. App., 566 S.W.2d 812, 813 (1978). Further, defense counsel waived the objection by not seeking an admonition or asking that the statement be struck. Tamme v. Commonwealth, Ky., 973 S.W.2d 13, 35 (1998); Hayes v. Commonwealth, Ky., 698 S.W.2d 827, 829 (1985). Defense counsel's conduct of simply continuing questioning the witness regarding the hearsay statement was also a clear waiver. Accordingly, we find no error on this issue.

Appellant's second alleged error is that he was entitled to a directed verdict on Count Sixteen. Appellant maintains that he could not have been found guilty for trafficking in Lortab where the drug was simply distributed to his co-defendant. Appellant cites no caselaw and asks this

Court to rely on his "common sense" theory that it is not trafficking in drugs "when the bad guys divvy up the loot."

Appellant's common sense theory is, however, trumped by statutory language. "Trafficking" is defined pursuant to KRS 218A.010(28) as "to manufacture, distribute, dispense, sell, transfer, or possess with intent to manufacture, distribute, dispense, or sell a controlled substance." Nothing in the definition of trafficking or the terms as defined therein exclude the type of activity involved in the present matter. Thus, appellant's conduct fits within the description of trafficking regardless of who the recipient was. Thus, we find no error.

The final error on appeal is that the circuit court erred in overruling appellant's request for an instruction on facilitation as a lesser-included offense under Count One. Pursuant to KRS 506.080(1),

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.

Count One of the indictment charged appellant with obtaining a controlled substance by fraud. The foundation for this count was that it was undisputed that appellant was present

when the prescription was dropped off and picked up, and that he supplied the money for the transaction. Appellant was charged as a principal in the case, not an accomplice.

Criminal facilitation is generally designated as a lesser-included offense to a charged offense only where the defendant is charged with being an accomplice, not a principal offender. See Commonwealth v. Day, Ky., 983 S.W.2d 505, 509 (1999). Furthermore, the Kentucky Supreme Court has 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, as is the case at hand. Houston v. Commonwealth, Ky., 975 S.W.2d 925 (1998). Thus, the circuit court committed no error in denying appellant's request for an instruction on criminal facilitation.

For the reasons stated, we hereby affirm.

ALL CONCUR.

BRIEF FOR APPELLANT:

Gene Lewter  
Lexington, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo  
Attorney General of Kentucky

Perry T. Ryan  
Assistant Attorney General  
Frankfort, Kentucky