

RENDERED: February 4, 2005; 10:00 a.m.

NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001402-MR

RICHARD BAKER

APPELLANT

v.

APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE WILLIAM J. WEHR, JUDGE
ACTION NO. 02-CR-00452

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: TACKETT, TAYLOR, AND VANMETER, JUDGES.

TACKETT, JUDGE: Richard Baker appeals from the judgment of the Campbell Circuit Court finding him guilty of Trafficking in Marijuana (Over Five Pounds) and sentencing him to nine years' imprisonment. He claims that the jury instructions deprived him of a unanimous verdict by including two definitions of "traffic" and also that he was entitled to lesser included instructions on possession and facilitation. Because the evidence supported

either theory of trafficking and neither lesser included instruction, we affirm the trial court.

On August 22, 2002, officers picked up Marcus Lee Cave in Evansville, Indiana, and transported him to Kentucky. Cave had been arrested by agents of the Drug Enforcement Agency (DEA) while in possession of more than one hundred pounds of marijuana. He agreed to cooperate with the authorities and gave a statement implicating Baker. According to Cave, Baker had given him \$65,000.00 to purchase the marijuana in Arizona, and he was to deliver it to Baker upon his return. DEA agents investigated and concluded that Baker, and possibly Cave, had pre-sold the marijuana to other drug dealers in order to raise the cash needed to purchase such a large quantity. They arranged for Cave to make a controlled delivery of the drugs to Baker. While in route to Campbell County, Cave and Baker spoke via cell phone three times to discuss the marijuana delivery, and the calls were recorded.

That evening, officers set up surveillance at Baker's apartment. Cave delivered the marijuana to Baker and, when Baker went outside to stow the drugs in his car, he was arrested. Baker waived his rights and agreed to give police a statement. He said that he was supposed to hold the marijuana overnight and then deliver it to someone else. In return, Baker would receive five pounds on consignment and one pound for free.

After selling his share, Baker was to pay \$650.00 per pound for the five pounds. The largest amount of marijuana, some twenty pounds, was supposed to be delivered to a drug dealer called E. Baker agreed to make a controlled delivery to E, but there was not enough time to set it up.

Baker was indicted by the Campbell County Grand Jury and charged with Trafficking Marijuana and Conspiracy to Traffic Marijuana. After a jury trial, he was found guilty on both charges. He waived jury sentencing and agreed to accept the Commonwealth's recommended sentence of nine years' imprisonment for trafficking with the conspiracy charge to be dismissed. The trial court sentenced Baker according to the agreement, and this appeal followed.

On appeal Baker argues that the jury instructions deprived him of a unanimous verdict and that he was entitled to instructions on lesser included charges. His counsel tendered proposed instructions which the trial court declined to read. The Commonwealth's original jury instructions included the language found in Kentucky Revised Statute (KRS) 218A.010(28) which defines trafficking as "to manufacture, distribute, dispense, sell, transfer, or possess with intent to manufacture, distribute, dispense, or sell a controlled substance." After hearing the arguments of Baker's counsel, the Commonwealth

agreed to amend the instructions to reflect two methods of trafficking: possession with intent to distribute or sell.

Baker argues that the evidence did not support both theories of guilt and, alternatively, that the jury should have received separate instructions regarding distribution and sale. The Kentucky Supreme Court analyzed this argument in Burnett v. Commonwealth, 31 S.W.3d 878 (Ky. 2000), and determined as follows:

when presented with alternate theories of guilt in an instruction, the Commonwealth does not have to show that each juror adhered to the same theory. Rather, the Commonwealth has to show that it has met its burden of proof under all of the alternate theories presented in the instruction. Once that is shown, it becomes irrelevant which theory each individual juror believed. This result ensures that a defendant is convicted on proof beyond a reasonable doubt by all twelve jurors.

Burnett at 883. The evidence presented to the jury included Baker's statement to police that he intended to transfer all but six pounds of the marijuana and sell at least five pounds for which he would then pay \$650.00. Thus, there was evidence which would allow conviction under either theory, and Baker was not deprived of his right to a unanimous verdict.

Baker next argues that he was entitled to have the trial court instruct the jury on the lesser included offenses of possession and facilitation. Instructions on lesser included offenses are only appropriate when the evidence presented would

allow jurors to have a reasonable doubt regarding the greater offense while believing, beyond a reasonable doubt, that a defendant is guilty of the lesser offenses. Jacobs v. Commonwealth, 58 S.W.3d 435 (Ky.App. 2001). Baker testified at trial that he intended only to hold the marijuana overnight for Cave after Cave offered him five pounds at a reduced price and one pound free. Thus, he argues that he was entitled to instructions on possession and facilitation. We disagree. Baker told police that he intended to sell the marijuana he would receive and distribute the remainder to other drug dealers. Thus, the jury could not have a reasonable doubt that he intended to transfer or sell the bulk of the marijuana while finding him guilty of possession or facilitation.

For the forgoing reasons, the judgment of the Campbell Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Michael L. Schulkens
Newport, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

William Robert Long, Jr.
Assistant Attorney General
Frankfort, Kentucky