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NOVEMBER 16, 2005 (2004-SC-0648-D)

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2003-CA-002284-MR

TRESSIE TURNER

APPELLANT

v.

APPEAL FROM HARLAN CIRCUIT COURT  
HONORABLE RON JOHNSON, JUDGE  
INDICTMENT NO. 02-CR-00007

COMMONWEALTH OF KENTUCKY

APPELLEE

### OPINION

### REVERSING AND REMANDING

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BEFORE: MINTON AND TACKETT, JUDGES; HUDDLESTON, SENIOR JUDGE.<sup>1</sup>

HUDDLESTON, SENIOR JUDGE: Tressie Turner appeals from a Harlan Circuit Court judgment based on a jury verdict finding her guilty of theft by failure to make required disposition of

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<sup>1</sup> Senior Judge Joseph R. Huddleston sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

property.<sup>2</sup> Turner had signed a document that assigned \$7,000.00 in proceeds from a workers' compensation settlement to Richard Davis in payment for a used Lincoln Town Car. When she received the workers' compensation settlement benefits, Turner did not turn the money over to Davis, and she kept the car. Upon conviction, Turner was sentenced to serve one year in prison. Her sentence was probated for five years, and she was ordered to pay \$7,000.00 in restitution to Davis.

Turner's primary argument on appeal is that her conduct did not establish the offense of theft by failure to make required disposition of property and that her constitutional rights were thereby violated. Because the document Turner signed was not a valid assignment, an element of the offense of failure to make a required disposition of property was not met. Furthermore, the instructions given to the jury were so misleading as to constitute palpable error. On these two grounds, we reverse the judgment and remand this case to Harlan Circuit Court with directions to dismiss the indictment.

Tressie Turner was born in 1957. She is mentally retarded, illiterate and receives social security disability payments. Several years ago, her eighteen-year-old son was killed while working at a job site in North Carolina. Turner

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<sup>2</sup> Ky. Rev. Stat. (KRS) 514.070.

and her remaining children were notified that they would receive a monetary settlement from the North Carolina state workers' compensation fund. Dan Partin, an attorney, was hired by one of the deceased son's siblings to assist in obtaining an award and to distribute the settlement in Kentucky. The bulk of the work on the workers' compensation claim was performed by a law firm in North Carolina.

In 2000, Turner and her husband, Jimmy, bought a Toyota truck from a used car salesman, Richard Davis. At that time, Turner also saw a 1991 Lincoln Town Car with over 150,000 miles on it that belonged to Mr. Davis' wife. Turner claims that Davis pressured her to buy the car; Davis insists that Turner was "wild" to buy the vehicle. In any event, Turner ultimately decided to purchase the car. She claims that she agreed to pay \$2,500.00 for the car; Davis claims the agreed-upon price was \$7,000.00. Turner told Davis that, although she did not currently have the money to pay for the car, she would soon be receiving a share of a workers' compensation settlement from North Carolina. She also informed Davis that Dan Partin was the local attorney handling the matter. Davis knew Partin, and told Turner that he would call him to determine if what Turner had told him about the forthcoming settlement was correct.

Partin confirmed to Davis that Turner was receiving a portion of the workers' compensation settlement, and told Davis he could draft an assignment that would give him the money "straight off the top." Davis directed Partin to prepare an assignment in the amount of \$7,000.00. On June 28, 2000, Turner, her husband Jimmy, and Davis' wife all went to Partin's office. Jimmy was told to wait in the reception area while Turner and Davis' wife went into Partin's office where Turner signed the assignment. On the same day, the Davises transferred title to the Lincoln Town Car to Turner. The price listed on the title was \$2,500.00.

At some point after this episode, Partin was notified by the law firm in North Carolina handling the workers' compensation claim that under the law of that state, the assignment was not enforceable and would not be honored.<sup>3</sup> Meanwhile, Davis began pressing Turner to pay him \$7,000.00. His attorney eventually sent a letter to Partin stating that he expected Turner to pay Davis out of the proceeds of the settlement, and he threatened her with criminal charges if she did not comply.

Turner's share of the workers' compensation settlement (\$8,437.55) was paid directly to her by the North Carolina law firm, in the form of a check dated November 28, 2001. She

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<sup>3</sup> See infra note 6.

claims that she then tried to pay Davis \$2,500.00 for the car, but that he refused to accept that sum, demanding \$7,000.00 instead.

Meanwhile, the Lincoln Town Car required repairs costing about \$400.00. Turner used the vehicle as collateral to borrow money to repair it. When she was unable to repay the loan, the Lincoln was repossessed. Davis thereafter initiated criminal charges against Turner.

A grand jury indicted Turner on one count of Theft by Failure to Make Required Disposition of Property. The indictment charged "[t]hat the Defendant received, and converted to her own use, the sum of \$7,000.00 plus, knowing she had legal obligation to deliver same to Richard Davis of Harlan County, Kentucky."

Kentucky Revised Statutes (KRS) 514.070 provides, in relevant part, that:

(1) A person is guilty of theft by failure to make required disposition of property received when:

(a) **He obtains property upon agreement or subject to a known legal obligation to make specified payment** or other disposition whether from such property or its proceeds or from his own property to be reserved in equivalent amount; and

(b) He intentionally deals with the property as his own and fails to make the required payment or disposition.

(2) The provisions of subsection (1) apply notwithstanding that it may be impossible to identify particular property as belonging to the victim at the time of the actor's failure to make the required payment or disposition.<sup>4</sup>

Turner makes numerous arguments on appeal, but we need not address them all because we agree that the statute is not applicable to the circumstances of this case. The assignment was legally void and therefore could not constitute the "agreement" or "legal obligation" required under the statute.

The document Turner signed is set forth below:

The undersigned, TRESSIE TURNER, of P.O. Box 156, Big Laurel, Kentucky, 40808, do hereby assign to RICHARD DAVIS, of 106 Frazier Street, P.O. Box 386, Cumberland, Kentucky, 40823, the sum of Seven Thousand Dollars (\$7,000.00) plus Twenty-Six Percent (26%) interest,<sup>5</sup> for a 1991 Lincoln Town Car, out of a settlement from an estate case involving

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<sup>4</sup> Emphasis supplied.

<sup>5</sup> Although the issue was not raised at trial, the 26% interest rate specified in the document constitutes a potential violation of KRS 360.010, Kentucky's usury statute. That statute provides that the legal rate of interest is 8%. Where the amount of principal is less than \$15,000, as it was in this case, "parties may agree, in writing, for the payment of interest in excess of that rate as follows: (a) at a per annum rate not to exceed four percent (4%) in excess of the discount rate on ninety (90) day commercial paper in effect at the Federal Reserve Bank in the Federal Reserve District where the transaction is consummated or nineteen percent (19%), whichever is less[.]" On June 28, 2000, the day Turner signed the document, the discount rate on ninety day commercial paper was 6.61%. Therefore, the maximum rate of interest permissible under the statute would have been 18.61%.

Larry Harris, which I have with Dan F. Partin, Attorney at Law, Harlan, Kentucky. This assignment relates only to Tressie Turner's share of her proceeds, her share being 1/7 interest. At such time as the first settlement is received, Tressie Turner shall then pay to Richard Davis said amount of Seven Thousand Dollars (\$7,000.00), plus interest of Twenty-Six Percent (26%). Tressie Harris [sic] hereby authorizes the Honorable Dan F. Partin, of Harlan, Kentucky, to withhold for Richard Davis said sum at the time of settlement of the estate case.

Under North Carolina law, proceeds from a workers' compensation settlement may not be assigned. According to the relevant statute,

[n]o claim for compensation under [the Workers' Compensation Act] shall be assignable, and all compensation and claims therefor shall be exempt from all claims of creditors and from taxes.<sup>6</sup>

Even if the view is taken that the settlement was covered by Kentucky law, the same rule prevails:

No claim for compensation under [the Workers' Compensation] chapter shall be assignable, except court or administratively-ordered child support pursuant to KRS 403.212. All compensation and claims therefor, except

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<sup>6</sup> North Carolina General Statutes § 97-21.

child support obligations, shall be exempt from all claims of creditors.<sup>7</sup>

Turner was therefore under no legal obligation to turn over the proceeds from the settlement. The required "legal obligation" under KRS 514.070(1)(a) did not exist. At trial, it was assumed that the assignment was valid, but it clearly was not. This Court will not lend itself to enforcing (with criminal penalties) a contract that is invalid under both North Carolina and Kentucky law.

Further supporting our decision to reverse the judgment in this case are the confusing and misleading instructions that were given to the jury.

The jury was instructed as follows:

You will find the Defendant guilty under this Instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:

A. That in this county on or about the first or second Friday of December, 2001, and before the finding of the Indictment herein, she intentionally received and converted to her own use the sum of \$7,000.00;

B. That the \$7,000.00 was owed and specifically assigned from a workers' compensation settlement to Richard Davis in

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<sup>7</sup> KRS 342.180.

exchange for an automobile purchased by the Defendant from Mr. Davis;

C. That the Defendant knew the automobile was owned by Richard Davis;

D. That the Defendant thereafter failed to turn over to Richard Davis **the proceeds of the sale**;

E. That in so doing, **she intended to deprive Richard Davis of said \$7,000.00 in proceeds** [and was not acting under a claim of right to the proceeds];

AND

F. That **said automobile, when so sold, had a value of \$300.00 or more.**<sup>8</sup>

The highlighted portions of the jury instructions required the jury to find that Turner failed to turn over the proceeds from the sale of the car, and to determine that the value of the car, rather than the legal obligation, was more than \$300.00. This is nonsensical and does not reflect even the Commonwealth's theory of the case.

The rule is that generally an erroneous instruction is presumed to be prejudicial to appellant, and the burden is upon [the Commonwealth] to show affirmatively from the record that no prejudice resulted; and when the appellate court cannot determine from the record that the verdict was

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<sup>8</sup> Emphasis supplied.

not influenced by the erroneous instruction, the judgment will be reversed.<sup>9</sup>

The Commonwealth has argued that it is speculative to state that the jury may have been confused by the instructions, and that the instructions on the whole correctly reflect the law and the evidence. We disagree. It certainly cannot be said that the erroneous language in the instructions did not affect the ultimate verdict in this case. Although the error was not properly preserved for review, we agree with the appellant that it was palpable error to so instruct the jury.

For the foregoing reasons, the judgment is reversed and this case is remanded to Harlan Circuit Court with directions to dismiss the indictment.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Astrida L. Lemkins  
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo  
Attorney General of Kentucky

Clint Watson  
Assistant Attorney General  
Frankfort, Kentucky

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<sup>9</sup> Drury v. Spalding, 812 S.W.2d 713, 717 (Ky. 1991), quoting Prichard v. Kitchen, 242 S.W.2d 988, 992 (Ky. 1951).