

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-002379-MR

KENNETH GREG JACKSON

APPELLANT

v. APPEAL FROM CALLOWAY CIRCUIT COURT
HONORABLE DENNIS R. FOUST, JUDGE
ACTION NO. 02-CR-00053

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: BARBER, JOHNSON, AND HENRY, JUDGES.

BARBER, JUDGE: Appellant, Kenneth Jackson (Jackson), directly appeals his Calloway Circuit Court conviction for one count of first degree trafficking in a controlled substance, a violation of KRS 218A.1412. We affirm the conviction.

Informant Reed, a cousin of Appellant Jackson, told Jackson he was trying to obtain some crack cocaine. Reed did not request that Jackson buy him crack. Jackson informed Reed that he could get some crack cocaine for him. Reed provided

Jackson with money, and Jackson returned with a "rock" of crack. Reed told Jackson to keep a portion of the "rock" and took the rest to the police. Both parties admit to this version of the facts. Reed had struck a deal with the police whereby if he managed a certain number of drug buys, the sentence for the charges against him would be reduced to ninety days' service.

Jackson contends that the court erroneously failed to instruct the jury on the lesser-included offense of possession of a controlled substance. Kentucky law holds that "possession of a controlled substance is a lesser offense included within the trafficking charge." Jackson v. Commonwealth, 633 S.W.2d 61, 62 (Ky. 1982). Where the defendant transfers possession of the controlled substance to a third party, however, possession is not a lesser-included offense, and must be separately charged. Commonwealth v. Day, 983 S.W.2d 505 (Ky. 1999). Where, as here, the possession charge would require different factual proof than the trafficking charge, possession is an uncharged offense, rather than a lesser-included offense. Colwell v. Commonwealth, 37 S.W.3d 721, 726 (Ky. 2000).

During discussion of jury instructions at trial, defense counsel asserted that he believed the law prohibited a lesser-included offense instruction under the facts in this case. Jackson claims error in the court's failure to give such an instruction. Jackson argues that pursuant to Taylor v.

Commonwealth, 995 S.W.2d 355 (Ky. 1999), a defendant is entitled to "instructions applicable to every state of the case deducible or supported to any extent by the testimony." Id., at 360. Jackson asserts that the court failed to instruct on a charge supported by the evidence.

Jackson claims that he obtained the crack for Reed only because he, Jackson, wanted to smoke some of it. He asserts that for this reason a possession instruction was warranted. Jackson asserts that his intent was to possess the controlled substance, and not to traffic in it. This claim is refuted by the evidence showing that he transferred a portion of the substance to Reed. That evidence supported the trafficking instruction. Where no state of the facts as given support a conviction for possession but not for trafficking, then no lesser-included offense instruction for possession should be given. Clifford v. Commonwealth, 7 S.W.3d 371, 376 (Ky. 1999). The trial court was correct by refusing to allow a possession of controlled substance instruction.

At trial the Commonwealth asserted that possession was an uncharged offense, as Jackson had procured the controlled substance for Reed, and transferred the majority of the substance to Reed. The trial court concurred, and held that Commonwealth v. Day, supra, prohibited a lesser-included offense instruction as the possession claim was an uncharged offense.

The Commonwealth argues before this Court that as defense counsel did not object to the court's ruling, objection to the failure to give the instruction was waived. The Commonwealth claims that appellate review is precluded due to such waiver. Jackson contends that failure to give the instruction was a violation of his right to a fair trial and that the issue should be reviewed on such grounds.

We choose to review the claim that improper instruction was given, but find no merit to Jackson's argument that reversible error occurred. McKinney v. Commonwealth, 60 S.W.3d 499, 507 (Ky. 2001). The conviction is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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