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Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000883-MR

LARRY R. ORDWAY — APPELLANT

V.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JAMES M. SHAKE, JUDGE
CIVIL ACTION NO. 01-CR-002889

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: HENRY, McANULTY, AND MINTON, JUDGES.

MINTON, JUDGE:

I. INTRODUCTION.

A Jefferson Circuit Court jury convicted Larry Ordway of receiving stolen property valued over $300, and his punishment was enhanced to eight years' imprisonment as a second-degree persistent felony offender. On appeal from the judgment, Ordway contends that the trial court erred by failing to suppress evidence of the car keys found in his pocket when he

was arrested, by improperly instructing the jury, and by refusing to inform the jury in the penalty phase of the trial that his sentence would run consecutively to a previously imposed felony sentence. He further contends that the trial impermissibly subjected him to double jeopardy because an earlier trial of the same indictment ended in a mistrial that was necessitated by the Commonwealth's misconduct. We find no merit in Ordway's arguments; therefore, we affirm.

II. FACTUAL SUMMARY.

Terry Brewer came home from work to find his 1988 Chevrolet Caprice Classic missing from the parking lot behind his apartment building. He called his uncle, Joe Loar, and told him about the missing vehicle. Loar soon found the vehicle behind another apartment complex and watched two men stripping it of its parts. Loar then called Brewer on his two-way radio phone and described what he saw, which included the fact that two males were removing parts from the stolen vehicle and placing them into a white Cadillac. While Loar described the crime in progress, Brewer called 911 on another phone. Brewer related to the operator the information he was receiving from his uncle and relayed the operator's questions back to his uncle. The conversation with the dispatcher continued in this "play-by-play" manner until the police arrived at the scene.

Upon arrival, the officers, Officer James Clark and Officer James Dentinger, concealed themselves behind a parked van and watched the activities around the stolen vehicle. The officers saw that one individual, Thomas, was seated in the driver's seat of the stolen vehicle, while another man, Ordway, was standing between the stolen vehicle and the white Cadillac. The officers then approached the men, at which time Thomas and Ordway both moved away from the stolen vehicle. The men were ordered to the ground and arrested. Officer Clark searched Ordway after arresting him and found a key to the white Cadillac in his pocket.

Ordway's girlfriend, Elizabeth Wren, was also present in the parking lot at the time of the arrest.[1] Officer Clark wrote in his investigative report that Wren told him that Ordway was taking items from the stolen vehicle and that "she was tired of him dragging her into everything."

III. PROCEDURAL BACKGROUND.

Ordway was indicted on charges of theft by unlawful taking of property valued over $300 and of receiving stolen property valued over $300. Ordway's first trial on these charges ended in a mistrial after two days. In the second

[1] Ordway and Wren married before trial. Elizabeth Wren became Elizabeth Wren Ordway, and she may be referred to by either name in this opinion.

trial, the jury returned a verdict of not guilty on the theft charge and guilty on the charges of receiving stolen property and PFO II. The jury fixed punishment at eight years' imprisonment. Because Ordway was also on parole at the time he was arrested, his parole was revoked; and his previous thirteen-year sentence was reinstated. The circuit court rendered final judgment that imposed a maximum term of eight years' imprisonment. This appeal follows.

Ordway makes four main arguments: first that the court's denial of his motion to suppress was in error, second that the jury instructions resulted in prejudice, third that he was deprived of his right to a fair sentencing hearing, and fourth that his retrial was a violation of double jeopardy. On all points, we disagree.

IV. ANALYSIS.

A. Suppression of Car Keys.

Before the first trial, Ordway moved to suppress the car keys seized from him at his arrest. This motion was based on his assertion that the police had conducted an unconstitutional search and seizure. Specifically, Ordway argued that the police lacked reasonable suspicion or probable cause to arrest and search him. The circuit court denied the motion, stating that the police had probable cause to perform both a lawful

search incident to arrest and a search under the automobile exception, which allows an exception to the prohibition on warrantless searches of automobiles under certain circumstances.

Our standard of review on a motion to suppress is twofold. "First, the factual findings of the court are conclusive if they are supported by substantial evidence. The second prong involves a *de novo* review to determine whether the court's decision is correct as a matter of law."[2]

The terms "reasonable suspicion" and "probable cause" are not easily defined; rather, "[t]hey are commonsense, nontechnical conceptions that deal with 'the factual and practical considerations of everyday life on which reasonable and prudent [persons], not legal technicians, act.'"[3] The United States Supreme Court has described reasonable suspicion as "'a particularized and objective basis' for suspecting the person stopped of criminal activity," while probable cause to search is described as existing "where the known facts and circumstances are sufficient to warrant a [person] of reasonable prudence in the belief that contraband or evidence of a crime will be found."[4]

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[2] Stewart v. Commonwealth, 44 S.W.3d 376 (Ky.App. 2000); *see also*, Ornelas v. United States, 517 U.S. 690, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996).

[3] Ornelas, 517 U.S. at 695.

[4] *Id.* at 696.

Generally, police may not search a suspect without a warrant.[5] But a warrantless search may be upheld if it falls within one of four exceptions to the warrant requirement: (1) a consent search, (2) a plain view search, (3) a search incident to a lawful arrest, or (4) a probable cause search.[6]

In denying Ordway's motion to suppress, the circuit court concluded that both the search incident to arrest and the automobile exceptions applied. The court stated that based on the totality of the circumstances, including "the information relayed to the officer through dispatch, the discovery of the Defendant next to the stolen vehicle, [and] the items in plain view in the Cadillac," probable cause existed to search Ordway and seize the keys in his pocket.

We agree with the result reached by the trial court. While we question the applicability of the automobile exception, the facts support a finding of probable cause for Officer Clark to search Ordway incident to his arrest. The scenario leading up to Ordway's arrest provided more than "a particularized and objective basis' for suspecting [Ordway] of criminal activity."[7] In fact, the "known facts and circumstances [were] sufficient to

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[5] Stewart, 44 S.W.3d at 380.

[6] Richardson v. Commonwealth, 975 S.W.2d 932 (Ky.App. 1998).

[7] Ornelas, 517 U.S. at 696.

warrant a [person] of reasonable prudence in the belief that contraband or evidence of a crime [would] be found."[8]

The facts precipitating Ordway's arrest are, admittedly, unique. Because Loar was at the scene of the crime, he was able to relay information directly to Brewer and the 911 dispatcher; thus, the police received real-time information while the felony was in progress. Not only did Loar witness the stripping of the stolen vehicle, but he was also able to accurately describe the men whom he saw stripping the vehicle. Based upon that information, the police were dispatched; and the police were able to see for themselves the scene Loar was describing. When the officers arrived at the parking lot, they watched Ordway and Thomas for ten to fifteen seconds before approaching them and arresting them.

We believe that based upon these facts, an objectively reasonable police officer would have believed there was probable cause to arrest Ordway. And upon review of the facts as a whole, we agree that the search and eventual seizure of the car keys from Ordway's pocket was a valid search incident to his arrest. Therefore, we affirm the denial of the motion to suppress.

B. The Jury Instructions.

[8] *Id.*

Ordway next contends that the jury instructions were erroneous and misleading. He specifically claims that the instructions deprived him of "a unanimous verdict, his right to present a defense, and the protection of the burden of proof beyond a reasonable doubt and the presumption of innocence." We disagree with Ordway.

In Kentucky, "[o]ur approach to instructions is that they should provide only the bare bones, which can be fleshed out by counsel in their closing arguments if they so desire."[9] "The propriety of the instructions must always be determined by facts in the particular case."[10] Erroneous instructions are presumed to be prejudicial.[11]

1. Defining Complicity.

Ordway first argues that he was deprived of a unanimous verdict because the definition of "complicity" contained within the jury instructions allowed the jury to find guilt on "theories that were not supported by the evidence." We disagree.

Section 7 of the Kentucky Constitution and RCr[12] 9.28(1) both guarantee a defendant the right to a unanimous

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[9] Cox v. Cooper, 510 S.W.2d 530, 535 (Ky. 1974).

[10] Snell v. Commonwealth, 420 S.W.2d 127, 129 (Ky. 1967).

[11] Commonwealth v. Hager, 35 S.W.3d 377, 379 (Ky.App. 2000).

[12] Kentucky Rules of Criminal Procedure.

verdict, while the Due Process Clause of the United States Constitution[13] requires "that the Commonwealth must prove beyond a reasonable doubt every fact necessary to constitute the crime with which a defendant is charged . . . ."[14] Taken together, "these constitutional provisions require that each juror's verdict be based on a theory of guilt in which the Commonwealth has proven each and every element beyond a reasonable doubt."[15]

In Finney v. Commonwealth,[16] we confronted an argument regarding a jury instruction on complicity similar to the assertion made here by Ordway. In Finney, the defendant was charged with theft by unlawful taking over $100, enhanced by his status as a PFO II. At trial, the jury was instructed on a definition for complicity to which the defendant objected. The defendant argued, "inasmuch as the evidence could have supported only a finding that he aided in the commission of the theft, the definition [of complicity] submitted to the jury was prejudicially overbroad."[17] We disagreed, holding:

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[13] U.S. CONST., amend. XIV.

[14] Burnett v. Commonwealth, 31 S.W.3d 878, 883 (Ky. 2000).

[15] *Id.* at 884.

[16] 638 S.W.2d 709 (Ky.App. 1982), *overruled on other grounds by* Hibbard v. Commonwealth, 661 S.W.2d 473 (Ky. 1983).

[17] *Id.* at 710.

> The operative fact was that the jury believed that Mr. Finney took over $100. The complicity definition merely presented to the jury a variety of duplicitous ways by which he may have done it. Each possibility, however, is not to be viewed as a separate or alternative theory. "Complicity" was definitional, not substantive. The evidence supported the jury's finding that he took over $100; his manner of operation was essentially irrelevant.[18]

The holding in Finney applies to the present case. Jury Instruction No. 3 defined complicity as meaning "that a person is guilty of an offense committed by another person when, with the intention of promoting or facilitating the commission of the offense, he engages in a conspiracy with such other person to commit the offense, or aids, or attempts to aid such person in committing the offense." Ordway posits that this definition is prejudicial because there was no evidence to convict him under theories of "promoting," "aiding," or "attempting to aid." This argument is misplaced. As in Finney, the "operative fact" here was that the jury believed Ordway received stolen property over $300. The fact that possibly duplicative theories were presented to the jury is inconsequential. The complicity definition used in this case was solely definitional and, therefore, did not offer the jury "a separate or alternative theory" under which it could find

[18] *Id.*

Ordway guilty. Therefore, we disagree with Ordway's claim that the definition of complicity in Jury Instruction No. 3 was prejudicial.

2. No Adverse Inference Instruction.

Ordway next argues he was precluded from presenting a defense by the court's use of the word "should," as opposed to the word "shall," in the "no adverse inference" instruction. Ordway claims his proposed instruction was "more accurate and more correct" than the court's instruction and, therefore, should have been presented to the jury. We disagree.

Kentucky adheres to the rule that a "trial judge has the constitutional obligation, upon proper request, to minimize the danger that the jury will give evidentiary weight to a defendant's failure to testify."[19] No exact wording is required so long as the instruction properly minimizes any risk of an adverse inference.[20]

During the guilt/innocence phase of the trial, the jury was instructed that "[t]he Defendant is not compelled to testify, and the fact that he does not cannot be used as an inference of guilt and **shall** not prejudice him in any way." But

[19] Carter v. Kentucky, 450 U.S. 288, 101 S.Ct. 1112, 67 L.Ed.2d 241 (1981).

[20] U.S. v. Ladd, 877 F.2d 1083, 1088-1089 (1st Cir. 1989); *see also*, James v. Kentucky, 466 U.S. 341, 344, 104 S.Ct. 1830, 1833, 80 L.Ed.2d 346 (1984).

during the sentencing phase, the instruction read, "[t]he Defendant is not compelled to testify, and the fact that he does not cannot be used as an inference of guilt and **should** not prejudice him in any way." Ordway argues that the court's substitution of the word "should" for the word "shall" in these instructions used during the sentencing phase resulted in prejudice.

As already stated, although a trial judge must admonish the jury upon a defendant's decision not to testify, no exact wording is required. We do not believe the court's use of the word "should," rather than "shall," in the sentencing phase instructions resulted in any prejudice. The instruction tendered by the court mirrors the instruction proposed by Justice Cooper in his KENTUCKY INSTRUCTIONS TO JURIES[21] and sufficiently minimizes the risk of an adverse inference. So we find no error with this instruction.

3. Presumption of Innocence Instruction.

Ordway's third argument is that he was prejudiced by the court's failure to use his proposed instruction regarding the presumption of innocence. We disagree.

RCr 9.56 (1) states that the jury must be instructed substantially as follows: "You shall find the defendant not

[21] 1 WILLIAM S. COOPER, KENTUCKY INSTRUCTIONS TO JURIES § 2.04A (4th ed. 1999).

guilty unless you are satisfied from the evidence alone, and beyond a reasonable doubt, that he or she is guilty. If upon the whole case you have a reasonable doubt that he or she is guilty, you shall find him or her not guilty."

The instructions proposed by Ordway paralleled the example quoted in RCr 9.56. In contrast, the instruction proffered by the court stated, "You will find the Defendant, Larry Rocita Ordway, guilty under this Instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following . . . ."

Ordway argues that the court's instruction confused the jury regarding the presumption of innocence and burden of proof. He claims his proposed instructions were "more correct and consistent in every respect with the RCr 9.56 instruction."

The court's instruction did not precisely track the wording of RCr 9.56. But we believe it adequately complied. And because RCr 9.56 only requires that the jury be instructed "substantially" according to the example cited in the rule, we do not find error in this instruction.

4. No Burden of Proof Instruction.

Finally, Ordway contends he was unduly prejudiced by the court's failure to include a jury instruction highlighting the prosecution's burden of proof. But it is well settled that a specific instruction delineating the burden of proof is not

required.[22] The presumption is that the jury is equipped with sufficient reasoning abilities to understand the prosecution's responsibility.[23] So the court's decision not to instruct specifically on the burden of proof was proper.

C. Jury's Question During Sentencing Deliberations.

Ordway next argues that he was deprived of the right to a fair sentencing hearing. Ordway had been convicted of several misdemeanors and felonies before his conviction in the present case. In fact, he was on parole at the time he committed the crimes charged in the present case.

During sentencing deliberations, the jury sent a question to the judge asking if Ordway would be required to serve the balance of his earlier sentence before serving the new sentence. The judge refused to answer the jury's question.

Ordway argues that the judge's refusal to answer the question resulted in a violation of his rights. He cites to Neal v. Commonwealth for the proposition that a trial judge may properly instruct a jury about the law relating to concurrent and consecutive sentences.[24] In Neal, the defendant was convicted of murder, second-degree robbery, and as a PFO II. The jury was instructed that "any sentence imposed for the

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[22] Patterson v. Commonwealth, 630 S.W.2d 73 (Ky.App. 1981).

[23] *Id.*

[24] 95 S.W.3d 843, 854 (Ky. 2003).

robbery and the PFO would run concurrent with Neal's life sentence for murder."[25]

We believe Ordway's contentions are misplaced. First, the holding in Neal is not obligatory; the court merely stated that a trial judge **may** instruct a jury on the concurrent or consecutive nature of sentences. Second, the jury in Neal was instructed on the crimes for which the defendant was currently being sentenced. But in the present case, the jury posed a question about the status of Ordway's previously imposed sentence. Ordway contends that the jury should have been instructed on whether his previous, 1996 sentence would run concurrently or consecutively with the sentence imposed for his current conviction. We do not believe such an instruction was necessary. The jury was charged with sentencing Ordway solely on the receiving stolen property and PFO II charges; the relationship between his current sentence and his previous sentence was irrelevant. Therefore, we find no fault with the court's decision to refrain from answering the jury's question.

[25] *Id*.

D. DOUBLE JEOPARDY.

Finally, Ordway argues that his retrial violated his constitutional right against double jeopardy. We disagree.

If an accused makes a motion for a mistrial, he "is deemed to have waived his double jeopardy claim."[26] This presumption of waiver can only be overcome "upon showing that 'the conduct giving rise to the order of mistrial was precipitated by bad faith, overreaching or some other fundamentally unfair action of the prosecutor or the court.'"[27]

In support of his argument, Ordway cites four specific instances in his first trial that he claims amount to misconduct and bad faith on the part of the Commonwealth: first, the Commonwealth's decision to call his wife, Elizabeth Wren Ordway, as a witness; second, the court's ruling that a certain line of prosecutorial questioning was too prejudicial; third, Officer Clark's comments about his "previous encounter" with Ordway; and, fourth, the Commonwealth's comment that Officer Clark may have recognized Ordway from a "wanted" poster.

Upon review of the record, we do not believe there is merit to any of Ordway's arguments. First, we find no fault with the Commonwealth's decision to call Wren Ordway as a

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[26] Couch v. Maricle, 998 S.W.2d 469, 470 (Ky. 1999); *see also*, Clift v. Commonwealth, 105 S.W.3d 467 (Ky.App. 2003).

[27] *Id.* at 470, 471.

witness. According to the post-arrest investigative report filed by Officer Clark, Wren Ordway told the officers that Ordway was taking parts from the stolen vehicle and that "she was tired of him dragging her into everything." Based on these statements, we believe the Commonwealth was justified in calling Wren Ordway as a witness.

Second, the fact that the court deemed a line of prosecutorial questioning "too prejudicial" does not indicate any misconduct or bad faith on the part of the Commonwealth.

Third, there is nothing to indicate that Officer Clark's comments were precipitated by the Commonwealth or were made in bad faith. The prosecution asked Officer Clark "what did you order Mr. Ordway to do?" In his response, Officer Clark referred to Ordway as "Larry," then noted that he knew Ordway from a previous encounter. Though we agree that the officer's comment was prejudicial and a proper basis for mistrial, we do not believe it constituted misconduct.

Finally, the Commonwealth's comment that Clark may have recognized Ordway from a wanted poster was made to the court after the jury was excused for a recess. It had no effect on the jury, on Ordway's request for a mistrial, or on the court's decision to grant that request. So we do not believe the comment amounted in any way to prosecutorial overreaching.

Ordway asserts that these incidents in combination show the prosecution's desire "to end the trial prematurely." He claims the Commonwealth's "plan was to let the jury know that Mr. Ordway was a suspect in a murder investigation." But after viewing the videotapes from the trial and reviewing the written record in this case, we do not believe there is any evidence to support this contention. So we hold that the retrial of Ordway's case did not subject him to double jeopardy.

V. CONCLUSION.

In sum, the arguments presented by Ordway in this appeal are without merit. Therefore, we affirm the judgment of the Jefferson Circuit Court.

ALL CONCUR.

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