

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001219-MR

STEWART OLIVER

APPELLANT

v. APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE CRAIG Z. CLYMER, JUDGE
INDICTMENT NO. 03-CR-00100

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * * * * *

BEFORE: COMBS, CHIEF JUDGE; McANULTY, JUDGE; PAISLEY, SENIOR JUDGE.¹

PAISLEY, SENIOR JUDGE: In this action, Stewart Oliver appeals from a judgment of the McCracken Circuit Court entered on June 1, 2004, in which he was convicted on one count of theft by deception over \$300.00 and one count of criminal possession of a forged instrument. The trial court sentenced Stewart to two years in prison. Concluding that the trial court erred in

¹ Senior Judge Lewis G. Paisley sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

failing to instruct the jury on lesser included offenses, we reverse and remand for new trial.

In November 1999, Stewart and Beverly Oliver obtained a loan for \$4,500.00 in the name of their eighteen year old son, Shane Oliver, from Beneficial Financial. Payments were made on the loan from 1999 until January 2002. The loan went into default and both Stewart and Beverly were indicted, on April 4, 2003, by the McCracken County Grand Jury for one count of felony theft by deception and one count of criminal possession of a forged instrument in the second degree. Stewart and Beverly were tried together, and the following testimony was given.

Jim Carter, who worked at Beneficial Financial in 1999 and was the one who handled the loan, testified that Beverly approached him about Shane obtaining a loan. Carter told her that that it was possible for Shane to obtain a loan if Beverly co-signed for him. Carter testified that he never met with Shane or spoke with him during the loan application process. Carter testified that, even though it was against Beneficial Financial's policy, he allowed the loan documents to be taken from his office and signed without a witness. Carter first testified that Stewart had picked up the documents and returned them purportedly signed by Shane. Upon cross-examination, he admitted that he was confused and that it was possible that Beverly had picked up the loan documents.

Shane testified at trial as well. According to Shane, he had been unaware of the 1999 loan until he approached Beneficial Financial sometime later to obtain a loan for himself. At that time, he was told about the existence of the 1999 loan. Shane testified that he confronted his parents regarding the loan and that Stewart told him that they had obtained the loan to establish Shane's credit. In addition, Shane claimed Beverly told him she had forged his name on the loan documents.

Detective Brian Kreuger of the Paducah Police Department investigated the loan deception and testified that as part of his investigation he had interviewed Stewart, who admitted that he and Beverly had obtained the loan in order to establish Shane's credit. At trial, Stewart denied making this statement.

Beverly testified on her own behalf and admitted forging Shane's name on the loan documents but claimed that it was Stewart's idea to obtain the loan. Beverly testified that it was Stewart, not her, who had picked up the loan documents. Furthermore, she testified that once the loan had been approved, Stewart had picked up the check for the loan proceeds and brought it to her so she could endorse it.

Stewart testified in his own defense as well. According to Stewart, Beverly had repeatedly asked him to co-

sign a loan for Shane and he had repeatedly refused. He claimed he had known nothing about the loan, but he did admit that he had driven Beverly to Beneficial Financial's offices. According to Stewart, he did not learn about the loan until sometime later when Beverly told him about it.

Prior to submitting the case to the jury, Stewart tendered facilitation instructions on both the theft charge and the criminal possession of a forged instrument charge. Since those charges were Class D felonies, the facilitation instructions were for Class A misdemeanors. The prosecutor objected to the facilitation instructions, but the trial court stated that there was sufficient evidence to support them. The prosecutor then pointed out that more than one year had passed from commission of the crimes to the issuance of the indictments. He argued that the jury could not be instructed on facilitation since, as Class A misdemeanors, those offenses were time-barred. Stewart argued that he was entitled to the misdemeanor instructions and should not be punished for the Commonwealth's delay in charging him. He also argued that if the jury found him guilty of the misdemeanors, then the trial court could apply the statute of limitations and refuse to convict him. Stewart argued that the jury could believe that he was guilty of facilitation but would understand that he could not be convicted because of the statute of limitations.

However, the trial court ruled that the evidence could not support a conviction for facilitation since the Commonwealth could not prove that less than a year had passed between the time the crimes were committed and the time Stewart was charged. Thus, the trial court refused to instruct the jury on facilitation.

The jury convicted both Stewart and Beverly, and it recommended that Stewart be sentenced to a total of two years in prison but to be granted probation after ninety days. The trial court sentenced Stewart to two years to serve in prison but denied probation. Stewart now appeals from his conviction.

Stewart argues that the trial court erred when it refused to instruct the jury on the lesser included offenses of facilitation. Stewart argues that a trial court has a duty to instruct a jury on the whole law of a case. Holland v. Commonwealth, 114 S.W.3d 792, 802 (Ky. 2003); Taylor v. Commonwealth, 995 S.W.2d 355, 360 (Ky. 1999). Based on this general proposition, Stewart argues that the statute of limitations for misdemeanors set forth in KRS 500.050(2) simply does not apply. KRS 500.050(2) reads:

Except as otherwise expressly provided, the prosecution of an offense other than a felony must be commenced within one (1) year after it is committed.

Since the Commonwealth indicted Stewart for felonies and sought to prosecute him solely for felonies, he asserts that KRS 500.202(2) does not apply and does not preclude a jury instruction on a lesser included misdemeanor offense even though over one year has passed from the time the crime was committed and the time the defendant was charged.

To support this proposition, Stewart relies on Reed v. Commonwealth, 738 S.W.2d 818 (Ky. 1987). In Reed, the defendant was indicted in 1985 for five counts of rape in the first degree, which is a felony. The alleged offenses occurred in either 1977 or 1978. At trial, evidence was adduced that could support a conviction of sexual abuse in the second degree, a Class A misdemeanor. Based on this evidence, the defendant asked for an instruction on sexual abuse in the second degree as a lesser included offense of rape, which the trial court declined to give. The Supreme Court reversed the trial court's judgment for failing to give the lesser included misdemeanor offense instruction and remanded for a new trial. Id. at 823. Stewart concedes that the Supreme Court did not discuss the statute of limitations even though over one year had passed from the time the defendant in Reed had committed the crimes and the time he had been charged. However, Stewart believes that the Supreme Court implicitly decided that in such situations the statute of limitations simply does not apply. Thus, Stewart

reasons the trial court erred when it refused to give him the lesser included offense instructions.

It is well settled in the Commonwealth that the trial court in a criminal case has the duty to instruct the jury on the whole law of the case including "instructions applicable to every state of the case deducible or supported to any extent by the [evidence]." Taylor v. Commonwealth, 995 S.W.2d 355, 360 (Ky. 1999); See Also Kentucky Rules of Criminal Procedure (RCr) 9.54. A criminal defendant is entitled to have every issue of fact, which has been revealed by the evidence and is relevant to his defense, submitted to the jury through a proper instruction. Id. Despite this, we will not reverse a judgment on the basis of errors in the instructions unless, based on the whole record, the defendant's substantial rights have been prejudiced. Id. at 361.

We agree with Stewart that Reed is controlling in this situation. In Reed, the charges were brought some seven or eight years after the crimes had allegedly occurred. Nevertheless, our Supreme Court held that the defendant was entitled to a lesser included misdemeanor instruction. Although there is no discussion of the statute of limitations, the Court was obviously aware that the instruction in question would allow the jury to convict the defendant of a misdemeanor which would normally be time-barred. The Court emphasized that the

defendant was entitled to an instruction on any lesser included offense which could have been inferred from the evidence. Under Reed, the statute of limitations for misdemeanors simply does not apply when a criminal defendant who is being tried for a felony offense requests a lesser included misdemeanor instruction. If the evidence supports such an instruction, the trial court must give it.

The judgment of the McCracken Circuit Court is reversed and this matter is remanded for a new trial.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT FOR
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