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Commonwealth Of Kentucky

Court Of Appeals

NO. 2004-CA-001732-MR

ALBERT BURNICE — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE BARRY WILLETT, JUDGE
ACTION NO. 03-CR-000616

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DYCHE, KNOPF, AND TACKETT, JUDGES.

KNOPF, JUDGE: Albert Burnice appeals from a judgment of the Jefferson Circuit Court, entered June 14, 2004, convicting him of theft by unlawful taking, over $300.00,[1] and giving a peace officer a false name or address.[2] He was sentenced as a first-

[1] KRS 514.030(2).

[2] KRS 523.110.

degree persistent felon[3] to twelve years in prison. Burnice contends that the trial court erred by refusing to suppress evidence derived from his unlawful arrest, by admitting incompetent evidence as to the value of the stolen property, by refusing to direct a verdict to the effect that the stolen property was worth less than $300.00, by refusing to declare a mistrial, and by incorrectly resolving the jury's inconsistent verdict. Having determined that Burnice is not entitled to relief on any of these grounds, we affirm the trial court's judgment.

Shortly after noon on January 27, 2003, an administrator at Jewish Hospital encountered a black male emerging from the president's office on the fifteenth floor of the Rudd Heart & Lung Center, one of the buildings in the Jewish Hospital complex in downtown Louisville. Dissatisfied with the man's account of his presence in the private, administrative portion of the hospital (the man claimed to be looking for a telephone), the administrator notified security personnel of a possible intrusion. A few minutes later, a security guard apprehended Burnice on the ninth floor attempting to board a staff elevator far removed from the elevators available to the public. Other security guards soon arrived, and one of them removed a credit card from Burnice's pants pocket. Burnice

[3] KRS 532.080.

claimed that his girlfriend had given him the card, but when asked his girlfriend's name he said, "Valerie Johnson," whereas the name on the card was Maria Doyle. Thereupon the guards notified the Louisville Metro Police.

Two police officers arrived twenty to thirty minutes later. One of them testified at the suppression hearing that he reported a possibly stolen card to the credit-card company and obtained Ms. Doyle's phone number. He then called Ms. Doyle and learned that earlier that day she had discovered that her wallet, in which she carried the card, was missing. Having confirmed a likely theft, the officer placed Burnice under arrest, transported him to police headquarters, and delivered him to the custody of the detective assigned to investigate the case. The detective testified that after first claiming that his name was Robertson and that he lived in Louisville, Burnice later acknowledged his real name and that he was from Rochester, New York. He also admitted that that morning he had stolen a wallet from a woman's purse while riding with the woman on the elevator in another building in downtown Louisville.

Burnice moved to suppress all the evidence derived from his arrest at Jewish Hospital on the ground that the arrest was illegal. As Burnice notes, under KRS 431.005

> [a] peace officer may make an arrest: . . .
> (c) Without a warrant when he has probable

> cause to believe that the person being arrested has committed a felony; or
> (d) Without a warrant when a misdemeanor, as defined in KRS 431.060, has been committed in his presence.

Burnice contends that the arresting officer did not have probable cause to believe that he (Burnice) had committed a felony, because both the theft of a credit card and the theft of property worth less than $300.00 are misdemeanors.[4] Nor, Burnice further contends, had he committed a misdemeanor in the arresting officer's presence, for the hospital security guard had already taken the card from his possession before the officer arrived.

With this much of Burnice's argument, we agree. Although it is a felony to charge more than $100.00 to a stolen credit card within a six-month period[5] or to steal property worth more than $300.00,[6] the arresting officer apparently made no attempt to ascertain whether Burnice may have used the card or whether Ms. Doyle's wallet contained other property the value of which may have exceeded the felony threshold. The facts before the officer indicated only that Burnice may have been guilty of a misdemeanor committed outside the officer's presence. We

[4] KRS 434.580; KRS 514.030.

[5] KRS 434.650(1).

[6] KRS 514.030.

agree with Burnice, accordingly, that his arrest violated KRS 431.005.

We do not agree, however, that the violation entitles Burnice to the exclusionary remedy he seeks. That remedy was fashioned to vindicate constitutional rights, but is not implicated by violations of statutes.[7] Burnice assumes that an arrest contrary to Kentucky's presence rule--that an officer may not make a warrantless arrest for a misdemeanor committed outside his or her presence--amounts to a constitutional violation. In Atwater v. City of Lago Vista,[8] however, the United States Supreme Court expressly declined to address that issue, thus leaving in place decisions by other courts that the presence rule is not a constitutional requirement.[9] According to these courts, the Constitution requires only that warrantless misdemeanor arrests, like warrantless felony arrests, be based on probable cause. We agree. Both the United States and the Kentucky Constitutions require that warrantless seizures be reasonable. If probable cause renders warrantless felony arrests reasonable for constitutional purposes, we fail to see

[7] Brock v. Commonwealth, 947 S.W.2d 24 (Ky. 1997); State v. Eubanks, 196 S.E.2d 706 (N.C. 1973).

[8] 532 U.S. 318, 121 S.Ct. 1536, 149 L.Ed.2d 549 (2001).

[9] Street v. Surdyka, 492 F.2d 368 (4th Cir. 1974); Wilcox v. Elliott, 39 F.Supp.2d 682 (S.D.W.Va. 1999); People v. Burdo, 223 N.W.2d 358 (Mich.App. 1974); State v. Eubanks, *supra.*

why, at least as a general rule, it does not do likewise for warrantless arrests for misdemeanors, most of which, as in this case, are far from trivial offenses involving important public interests in peace and security. While the General Assembly is free to accord Kentucky citizens greater protection against unfounded arrests than the Constitutions provide, we agree with the Fourth Circuit that we should be "reluctant to adopt a constitutional interpretation that would impede reform in this area."[10]

Here, the arresting officer had probable cause to believe that Burnice had committed the misdemeanor either of taking a credit card, of receiving a credit card someone else had taken, or of taking property worth less than $300.00. Because Burnice's arrest thus involved a statutory but not a constitutional violation, the exclusionary remedy he seeks is not available.[11]

Burnice next contends that he was improperly convicted of a felony theft as opposed to a misdemeanor. As noted, the more serious conviction required the Commonwealth to prove that the value of the stolen property was at least $300.00. Ms. Doyle testified that the wallet Burnice took from her was worth

[10] Street v. Surdyka, 492 F.2d at 372.

[11] Burnice was not completely without a remedy, however; he may have had a claim for false arrest or false imprisonment.

between $20.00 and $50.00 and that it contained a restaurant gift card worth $150.00 and her husband's college class ring, which, at the time of trial, it would have cost about $480.00 to replace. Mr. Doyle testified that he purchased the ten-carat gold ring for about $200.00 in 1987, that he wore it every day, and that it was still in good condition. Burnice maintains that Ms. Doyle's testimony about the replacement cost of the ring was not competent because it concerned the cost not at the time of the theft, in January 2003, but at the time of trial in May 2004. He further maintains that Mr. Doyle's testimony was not sufficient because of the long period between the purchase and the theft.

As Burnice correctly notes, for the purposes of the theft statutes, the general rule is that the value of stolen property is the market value at the time of the theft.[12] Where there is no standard market for the item, however, "the value must be arrived at from the facts and circumstances and the uses and purposes which the article was intended to serve."[13] In that case, the original cost; the scrap or pawn value, if any; and

[12] Commonwealth v. Reed, 57 S.W.3d 269 (Ky. 2001).

[13] Beasley v. Commonwealth, 339 S.W.2d 179, 181 (Ky. 1960).

the replacement cost are all admissible as evidence tending to establish the value.[14]

Because there is no standard market for used, personalized class rings, the trial court did not err by admitting the Doyles' evidence concerning original price and replacement cost. The fact that that evidence did not coincide with the time of the theft bore on its weight, not its admissibility. That evidence, furthermore, was sufficient to permit a rational juror to infer that the ring, which was not much subject to depreciation and was still in good condition for its intended use, was worth substantially more than its scrap value as gold and at least as much a $150.00. There was sufficient evidence, therefore, to permit the finding that Burnice's theft exceeded the $300.00 felony threshold.

Burnice next contends that he was entitled to a mistrial when, during her closing argument, the prosecutor both referred to his prior crimes and misstated the law. Commenting on Burnice's interview with the detective during which he admitted having stolen the wallet, the prosecutor asserted that Burnice had been polite and respectful because he "knew how to play the game." Defense counsel objected that the remark implied prior contact with the police and asked for an admonition. The trial court overruled the objection but

[14] *Id.*

cautioned the prosecutor not to make any reference to Burnice's prior crimes. When the prosecutor nevertheless immediately repeated her "knows how to play the game," comment, the court sustained defense counsel's objection and admonished the jury to disregard the comment.

A few minutes later, while discussing the elements of theft by unlawful taking and arguing that Burnice should be found guilty of a felony theft, the prosecutor urged the jury to disregard the ring's fair market value because that was "the thief's way" of valuing stolen property. Defense counsel again objected and moved for a mistrial because the prosecutor's characterization grossly misstated the law, which, as noted above, is that the pertinent value of stolen property is its market value. The trial court denied the motion for a mistrial, but did admonish the jury to disregard the "thief's way" comment. The prosecutor then argued that in this case, where there was no ready market value, the jury could and should give greater weight to the prosecution's evidence of replacement value than to the defense's evidence of scrap or pawn value.

Burnice maintains that the prosecutor's improper remarks denied him a fair trial and that his request for a mistrial should have been granted. A mistrial, however, is an extreme remedy that is not to be granted absent an urgent and

real necessity for it.[15] A mistrial or reversal for prosecutorial misconduct in a closing argument is necessary

> only if the misconduct is "flagrant" *or* if each of the following three conditions is satisfied: (1) Proof of defendant's guilt is not overwhelming; (2) Defense counsel objected; and (3) The trial court failed to cure the error with a sufficient admonishment to the jury.[16]

Misconduct is "flagrant" in this context not merely if it is openly or defiantly improper, but only if it is "so prejudicial, under the circumstances of the case, that an admonition could not cure it."[17]

Here the prosecutor's improprieties were not flagrant. Her "knows how to play the game" remark was not likely without more to alert the jury to Burnice's criminal record, and the trial court's admonition ensured that that suggestion went no further. Similarly, "the thief's way" remark was isolated by a prompt objection and admonition, following which the prosecutor made it clear that she was not urging the jury to disregard the stolen property's market value, but only the defendant's definition of market value as the scrap or pawn value. Because the prosecutor's improprieties were thus not unduly prejudicial

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[15] Matthews v. Commonwealth, 163 S.W.3d 11 (Ky. 2005).

[16] Barnes v. Commonwealth, 91 S.W.3d 564, 568 (Ky. 2002) (citations omitted; emphasis in original).

[17] Price v. Commonwealth, 59 S.W.3d 878, 881 (Ky. 2001).

and were cured by sufficient admonitions, Burnice is not entitled to relief on this ground.

Finally, Burnice contends that he is entitled to the lesser of two inconsistent jury verdicts. The jury initially returned a guilty verdict on the felony-theft verdict form, but left the misdemeanor-theft verdict form blank. The jury foreman explained to the court that, having found Burnice guilty of a felony, the jury had deemed the misdemeanor question moot. The court accepted this explanation, but for formality's sake asked the jury to return to the jury room and complete the misdemeanor verdict form, fully expecting them to find Burnice not guilty of the misdemeanor. Instead, however, the jury returned the second time with both verdict forms marked guilty. Arguing that an inconsistent verdict must be resolved in the defendant's favor, Burnice then moved for judgment on the lesser offense. The trial court, however, again questioned the foreman, who explained that because the jury had found Burnice guilty of the greater offense, they believed that he was necessarily guilty of the lesser included offense as well. The court then polled the jury, and each member stated that it was his or her verdict that Burnice had stolen property worth more than $300.00. The court entered judgment accordingly. Burnice maintains that once the jury returned with the apparently inconsistent verdicts the

court should have, as a matter of law, given effect to the lesser.

In Beaty v. Commonwealth,[18] however, our Supreme Court noted that in most circumstances the trial court is authorized "to order the jury to make its verdict clear and consistent. . . either by informal poll or direction to reconvene and reconstitute the verdict." Here, when the direction to reconvene did not have the desired effect, the court was authorized to have the jury make its verdict clear and consistent by informal poll. The poll dispelled the apparent inconsistency and left no doubt that the jury believed Burnice guilty of a felony theft. The trial court did not err by entering judgment accordingly.

In sum, although Burnice was arrested in violation of KRS 431.005 on probable cause of a misdemeanor that the arresting officer did not observe, the arrest was not unconstitutional and the statutory violation did not entitle Burnice to an exclusionary remedy. Otherwise, the Commonwealth presented sufficient evidence of the value of the property Burnice stole to support his conviction for a felony theft, and the trial was not rendered unfair either by the prosecutor's improper remarks or the jury's confusion over the verdict forms.

[18] 125 S.W.3d 196, 215-16 (Ky. 2003).

Accordingly, we affirm the June 14, 2004, judgment of the Jefferson Circuit Court.

ALL CONCUR.

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