

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001798-MR

RICHARD SAMUEL SWAN

APPELLANT

v. APPEAL FROM OWEN CIRCUIT COURT
HONORABLE STEPHEN L. BATES, JUDGE
ACTION NO. 04-CR-00024

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING IN PART
AND
AFFIRMING IN PART

** ** *

BEFORE: ABRAMSON AND VANMETER, JUDGES; KNOPF,¹ SENIOR JUDGE.

VANMETER, JUDGE: Richard Swan appeals from a judgment entered by the Owen Circuit Court after he and numerous codefendants were found guilty of multiple drug-related offenses including, in his case, engaging in organized crime, and trafficking in five or more pounds of marijuana as a principal or accomplice.

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

For the reasons stated hereafter, we reverse as to the trafficking charge but affirm in all other respects.

Briefly, this matter arose from the operations of an alleged criminal drug syndicate in Owen County between January and April 25, 2004. Swan and the woman with whom he cohabited, Linda Chadwell, were indicted on multiple charges. Also indicted were Chadwell's parents, her sister and brother-in-law, and several others. Some of the codefendants entered guilty pleas to the charges against them, while Swan and Chadwell were tried jointly with Chadwell's parents and sister. According to the detailed testimony, members of the alleged syndicate imported massive quantities of marijuana from Mexico into the United States and then to Owen County for distribution. The jury found Swan guilty of engaging in organized crime and trafficking in five or more pounds of marijuana, first offense, as a principal or accomplice. He was sentenced to concurrent terms of imprisonment which totaled fifteen years. This appeal followed.

First, Swan asserts that the trial court erred by denying his motion for a directed verdict as to the charge of trafficking in five or more pounds of marijuana as a principal or accomplice. We agree.

The Kentucky Supreme Court succinctly stated that when a party makes a motion for a directed verdict,

the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given. For the purpose of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but reserving to the jury questions as to the credibility and weight to be given to such testimony.

Commonwealth v. Benham, 816 S.W.2d 186, 187 (Ky. 1991). See CR 50.01. The test on appellate review is whether, “under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt[.]” *Benham*, 816 S.W.2d at 187 (citing *Commonwealth v. Sawhill*, 660 S.W.2d 3 (Ky. 1983)). Although issues raised in a motion for a directed verdict may be unpreserved where, as here, the grounds were no more specific than that the evidence was insufficient to support the charges against the defendant, the issues nevertheless may be reviewed for palpable error affecting the defendant’s substantial rights, and relief may be granted in order to prevent manifest injustice. RCr 10.26. See, e.g., *Potts v. Commonwealth*, 172 S.W.3d 345, 347-48 (Ky. 2005); *Pate v. Commonwealth*, 134 S.W.3d 593 (Ky. 2004).

Swan was indicted for trafficking pursuant to KRS 218A.1421 and KRS 502.020(1). Under KRS 218A.1421(4), a first offense of trafficking in five or more pounds of marijuana is a

Class C felony. "Traffic" is defined by KRS 218A.010(34)² as meaning "to manufacture, distribute, dispense, sell, transfer, or possess with intent to manufacture, distribute, dispense, or sell a controlled substance." KRS 502.020(1) addresses issues of complicity, stating:

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:

- (a) Solicits, commands, or engages in a conspiracy with such other person to commit the offense; or
- (b) Aids, counsels, or attempts to aid such person in planning or committing the offense; or
- (c) Having a legal duty to prevent the commission of the offense, fails to make a proper effort to do so.

Here, as summarized in the jury instructions, the Commonwealth claimed that the jurors could find that Swan was guilty of marijuana trafficking under any one of three different scenarios. First, the jurors could find that Swan trafficked in five or more pounds of marijuana on a day or days between April 3 and April 25, 2004. Second, they could find Swan guilty of complicity to trafficking in five or more pounds of marijuana based on findings that his codefendant, Norman Dale Masden, knowingly possessed five or more pounds of marijuana on a day or

² Formerly numbered as KRS 218A.010(28).

days between April 3 and April 25, 2004, with the intent of selling or distributing it to another, that Swan "aided, assisted or attempted to aid Norman Dale Masden in so doing by among other things buying, selling and distributing said marijuana," and that Swan thereby intended that Masden would "possess the marijuana with the intent of selling or distributing it to another person." The jurors chose the third option of "Trafficking in Marijuana - Five Pounds or More, First Offense, Principal or Accomplice," whereby they found that Swan was guilty of one of the first two options without determining whether he acted as a principal under the first option, or as an accomplice to Masden under the second option.

The record shows that there was overwhelming evidence that some of Swan's codefendants engaged in a drug trafficking conspiracy. However, a search of Swan and Chadwell's residence revealed no evidence of drug trafficking, and the investigating law enforcement officers indicated at trial that Swan's codefendants never implicated him during questioning. Indeed, the record shows that the statements made against Swan at trial were limited to the following:

- Codefendant Scott Sizemore replied "yes" when he was asked by the Commonwealth whether Swan and Chadwell sold marijuana for Chadwell's father, Lee Roy Brewer. Although Sizemore and Swan had smoked

marijuana together, and they had discussed the smoking and selling of marijuana, Sizemore had never seen Swan sell marijuana. Swan had called Lee Roy from Sizemore's phone, allegedly when he wanted to pick up additional marijuana.

- Masden testified that he worked with Lee Roy, who would tell him when Swan and Chadwell, or some other person(s), needed marijuana. He had delivered marijuana to Swan at Chadwell's home, but he had never received any payment from Swan. While the drug investigation was underway, Masden called Lee Roy's home and was told by Swan to "stay away." At trial Masden viewed a notebook that allegedly recorded deliveries of marijuana, and he claimed that certain initials identified Swan and Chadwell. Masden stated that he had personally delivered marijuana to Swan at Chadwell's residence perhaps three times, and he had left marijuana outside the residence once. He delivered one pound each time except for once when he took two pounds. Masden denied that he had dropped off six pounds of marijuana to Swan during a certain period of time. Masden confirmed that Swan was never involved in transporting marijuana from Mexico, in removing it

from gas tanks in which it was transported, or in counting money used to purchase it in Mexico.

It certainly could be inferred from the evidence that Swan was aware that his codefendants were involved in organized crime and in the trafficking of large amounts of marijuana. Moreover, there was evidence that Swan obtained marijuana from Lee Roy, that on several occasions one or two pounds of marijuana were delivered to Swan and Chadwell's home by Masden at Lee Roy's direction, and that the couple's initials were on a list of alleged marijuana deliveries. However, there was no evidence to show that Swan ever possessed or exercised control over five or more pounds of marijuana at any one time, and there certainly was no evidence that he possessed or exercised control over such a quantity of marijuana at any time between April 3 and April 25, 2004. Further, there was no evidence that Swan obtained any marijuana from Masden between April 3 and April 25, or that he otherwise took any action during that time to aid, assist or attempt to aid Masden in the trafficking of marijuana. It follows, therefore, that it was clearly unreasonable for the jury to find that Swan was guilty of the trafficking charge against him. *Benham*, 816 S.W.2d at 187.

Even if Swan's motion for a directed verdict was insufficient, his trafficking conviction must be reversed in order to avoid manifest injustice because the Commonwealth

failed to prove the elements of the charge against him. RCr 10.26. See *Potts*, 172 S.W.3d at 347-48. Given this outcome, we need not address Swan's arguments on appeal regarding the court's marijuana trafficking instruction, or regarding its failure to instruct the jury on a lesser-included offense.

Next, Swan contends that the trial court erred by denying his motion for a directed verdict as to the charge of engaging in organized crime. Even if we assume without deciding that this issue was properly preserved for review, we must conclude that Swan is not entitled to relief.

KRS 506.120(1) prohibits "engaging in organized crime," which occurs when "[a] person, with the purpose to establish or maintain a criminal syndicate or to facilitate any of its activities," engages in certain activities including:

- (a) Organize or participate in organizing a criminal syndicate or any of its activities;
- (b) Provide material aid to a criminal syndicate or any of its activities, whether such aid is in the form of money or other property, or credit;
- (c) Manage, supervise, or direct any of the activities of a criminal syndicate, at any level of responsibility;
- . . . ;
- (e) Commit, or conspire to commit, or act as an accomplice in the commission of, any offense of a type in which a

criminal syndicate engages on a
continuing basis[.]

KRS 506.120(3) defines a "criminal syndicate" as "five (5) or more persons collaborating to promote or engage" in certain named activities "on a continuing basis," including the illegal trafficking of controlled substances in violation of KRS Chapter 218A.

Here, there was evidence to show that Lee Roy was a principal organizer and manager of a criminal syndicate, and that Swan obtained marijuana from Lee Roy on several occasions in order to traffic it. Given our review of the evidence as a whole, we cannot say that it was clearly unreasonable for the jury to find that Swan engaged in organized crime, in violation of KRS 506.120(1)(e), by acting as an accomplice in the trafficking of marijuana and thereby facilitating the activities of the criminal syndicate. Hence, Swan was not entitled to a directed verdict as to this charge. *Benham*, 816 S.W.2d at 187.

Swan alternatively contends that even if the evidence was sufficient to support a conviction pursuant to KRS 506.120(1)(e), he is entitled to relief because the court improperly instructed the jury as to the organized crime charge. Again, this issue was not preserved for appellate review.

Although the record shows and the Commonwealth admitted during closing argument that there was no evidence that

Swan violated KRS 506.120(1)(a) or (c) by organizing, managing, supervising or directing the criminal syndicate, the jury was instructed on those alternate theories of the case, as well as pursuant to KRS 506.120(1)(b) and (e). However, even if the instruction was erroneous in that "it cannot be ascertained from the verdict form or otherwise from the record that all of the jurors voted to convict" Swan "on a theory supported by the evidence[,]" *Burnett v. Commonwealth*, 31 S.W.3d 878, 883 (Ky. 2000), after consideration of the record as a whole we cannot say that Swan's rights were substantially affected or that there is any likely possibility that the result would have been different absent the error. RCr 9.54 and 10.26. Hence, he is not entitled to relief.

Next, Swan contends that the trial court erred by failing to conduct a more extensive inquiry and by failing to appoint new counsel after Swan refused to sign an attorney conflict of interest waiver form. We disagree.

Shortly before trial, Swan announced that he would not sign a form waiving a possible conflict of interest between his attorney and Chadwell's attorney. During the hearing which was conducted on this issue a week before trial, Swan's attorney testified that he rented office space from Chadwell's attorney, that they shared a copying machine and a phone system, and that they recently had taken out a yellow pages phone ad together.

They had shared some pretrial discovery materials in this matter in order to save costs, but they kept separate files and separate bank accounts. The attorney confirmed that he and Chadwell's attorney had never discussed their clients' cases "beyond those things that co-counsel normally discuss." Chadwell's attorney subsequently testified in a similar manner. The court declined to find that there was any conflict which required waiver.

Contrary to Swan's contention, we cannot say that the trial court erred by finding that there was no conflict of interest between the two attorneys who shared office space and a telephone ad. Both attorneys testified regarding their separate practices, and there was nothing to indicate that they impermissibly shared information or that any conflict arose between the parties beyond that which necessarily related to their sometimes antagonistic defenses at trial. As in *Kirkland v. Commonwealth*, 53 S.W.3d 71, 75 (Ky. 2001), Swan has not demonstrated that there was any actual conflict of interest or that any prejudice occurred. He is not entitled to relief on this ground.

Finally, Swan contends that the trial court erred by admitting certain alleged hearsay statements against him, as well as by admitting the calendar and the notebook which were kept by Masden and Sims. However, Swan admits that he did not

object to the admission of the calendar below, and our review of the record fails to show that any palpable error resulted from its admission. RCr 10.26. Moreover, even if Swan objected on hearsay grounds, it does not appear that he timely and specifically objected to the admission of the statements and the notebook under the hearsay exception for statements made "by a coconspirator of a party during the course and in furtherance of the conspiracy." KRE 801A(b)(5). In any event, given the extensive evidence of a drug conspiracy involving multiple parties including Swan, Masden, Sims and Lee Roy, as well as the testimony regarding the notebook's use during and in furtherance of the conspiracy, we cannot say that the court erred by admitting evidence of either the statements or the notebook.

The court's judgment is reversed as to the trafficking charge. It is affirmed in all other respects.

ALL CONCUR.

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