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Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-002247-MR

THOMAS L. WILSON APPELLANT

APPEAL FROM BRECKINRIDGE CIRCUIT COURT
v. HONORABLE SAM H. MONARCH, JUDGE
ACTION NO. 04-CR-00108

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
AFFIRMING IN PART
AND
REVERSING IN PART

** ** ** ** **

BEFORE: JOHNSON[1] AND TAYLOR, JUDGES; BUCKINGHAM,[2] SENIOR JUDGE.

JOHNSON, JUDGE: Thomas L. Wilson has appealed from a final judgment and sentence of the Breckinridge Circuit Court entered on October 6, 2005, following a jury verdict finding him guilty and recommending a sentence of one year and six months in

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[1] Judge Rick A. Johnson completed this opinion prior to the expiration of his term of office on December 31, 2006. Release of the opinion was delayed by administrative handling.

[2] Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

prison. Having concluded that it was not error for the trial court to deny Wilson's motion for a directed verdict of acquittal on two counts of receiving stolen property over $300.00,[3] we affirm in part. Having further concluded that there was insufficient evidence to convict Wilson on the third count of receiving stolen property as related to the Combs property, and that the trial court erred in denying Wilson's motion for a directed verdict of acquittal as to that charge, we reverse in part.

On November 4, 2004, Wilson was indicted by a Breckinridge County grand jury on several counts, including three counts of receiving stolen property valued at $300.00 or more.[4] The indictment charged that Wilson "received, retained or disposed of" (1) a Lone Wolf, ten foot utility trailer and a Cub Kadet log splitter belonging to Henry Fredricks, (2) a Yamaha all-terrain vehicle (ATV) belonging to Gary Sears, and (3) a John Deere lawn tractor belonging to Carol Combs.

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[3] Kentucky Revised Statutes (KRS) 514.110.

[4] The Kentucky State Police had received information from an informant who stated that he had stolen several items for Wilson in exchange for money and drugs. In addition to the three counts of receiving stolen property, Wilson was also charged with trafficking in marijuana enhanced by possession of a firearm, KRS 218A.1421 and KRS 218A.992, possession of drug paraphernalia enhanced by possession of a firearm, KRS 218A.500 and KRS 218A.992, possession of a firearm by a convicted felon, KRS 527.040, and being a persistent felony offender in the first degree, KRS 532.080(3). At the jury trial, Wilson was found guilty of two lesser-included offenses, possession of marijuana, KRS 218A.1422, and possession of drug paraphernalia, KRS 218A.500. He was sentenced to 12 months for possession of marijuana, and 12 months for possession of drug paraphernalia, with both sentences to run concurrently to his conviction and sentence on the three counts of receiving stolen property, for a total sentence of one year and six months.

Each of the property owners testified during the jury trial held on September 15 and 16, 2005. Fredricks testified that the utility trailer and the log splitter were stolen from his backyard in July 2004. Fredricks stated that he had purchased the utility trailer new and had only owned it a few months. He also stated that he could sell the utility trailer for $700.00, which was the original purchase price. Fredricks further stated that his sons had given him the log splitter as a gift and for insurance purposes he had searched the Internet and discovered that the list price for the log splitter was $1,749.00. When questioned, he stated that both items were worth over $300.00 when they were returned to him and were in the same condition as when stolen, except the serial number had been removed from the utility trailer.

Sears testified that the ATV was stolen in February 2004 from a garage he owned. He stated that he had purchased the ATV four months before it was stolen and had paid approximately $7,842.00 for the ATV. He noted that when the ATV was returned to him, it was obvious that it had been ridden "quite a bit" and it was covered in mud.

Combs testified that the lawn tractor had been stolen from her in July 2004. She identified the lawn tractor in court from photographs that were taken in a garage owned by Wilson. She stated that the lawn tractor was never returned to her, but

instead was given to her homeowner's insurance company because it had already paid her for the lawn tractor. She stated that the lawn tractor's value was over $300.00 at the time it was returned to the insurance company.

When Wilson moved for a directed verdict of acquittal on the three counts of receiving stolen property, he cited Tussey v. Commonwealth,[5] and claimed the Commonwealth had failed to establish the value of any of the property at the time it came into Wilson's possession. The trial court denied the motion, stating:

> I assume the first question becomes: Does the Defendant receive it when it first comes into his hands? If that is the situation that is the date of the indictment.[6] Then the Commonwealth not only has to prove that it is stolen property they have to prove that the Defendant took possession of it on a certain date. That is an inordinate burden of proof on the Commonwealth.

The trial court stated that the jury could determine the value of the stolen items.

The jury returned a guilty verdict on each count of receiving stolen property, and recommended a total sentence on each of the three convictions of one year and six months in prison, with the sentences to run concurrently. The trial court

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[5] 589 S.W.2d 215 (Ky. 1979).

[6] All of the stolen property was recovered from Wilson on October 25, 2004, and that is the date shown on the indictment.

sentenced Wilson on October 6, 2005, in accordance with the jury's recommendation. This appeal followed.

On appeal Wilson contends the trial court erred by denying his motion for a directed verdict of acquittal on the three counts of receiving stolen property based on the Commonwealth's failure to meet its burden to establish the value of the property when it first came into Wilson's possession. Because this issue was dealt with by the denial of Wilson's motion for a directed verdict of acquittal, we will review this case based upon the law as summarized in Commonwealth v. Benham:[7]

> On motion for 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.
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> On appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal.[8]

We agree with the Commonwealth that Wilson's firm reliance on Tussey is somewhat misplaced. Although Tussey does

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[7] 816 S.W.2d 186 (Ky. 1991).

[8] Id. at 187 (citing Commonwealth v. Sawhill, 660 S.W.2d 3 (Ky. 1983)).

stand for the proposition that "the value of the stolen property on the date the offender receives it is the proper date for determining the severity of the violation[,]" it is factually distinguishable from this case because the value of the stolen property in Tussey had already "substantially depreciated" when it came into the defendant's possession. In the case before us, the Commonwealth clearly established that the value of Fredricks's property and Sears's property had not been substantially depreciated at the times the various property came into Wilson's possession. In fact, both victims testified that when the items were returned to them, the items were in the same general condition as at the time they were stolen. Thus, the jury could reasonably infer from this testimony that when Wilson came into possession of the items they were not so substantially depreciated that their value was below $300.00.[9] Accordingly, a directed verdict of acquittal would have been improper as it related to the property of Fredricks and Sears, and the trial court did not err in denying Wilson's motion as to these two counts.

However, we conclude that the evidence relating to the Combs property was not sufficient for the jury to make an

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[9] See Phillips v. Commonwealth, 679 S.W.2d 235, 237 (Ky. 1984) (noting that sufficient descriptive testimony will enable a jury to reach an informed conclusions regarding the value of a stolen item); and Brewer v. Commonwealth, 632 S.W.2d 456, 457 (Ky.App. 1982) (noting that testimony by the owner as to value of stolen property was not unreasonable).

informed decision as to its value. Combs testified that after her lawn tractor was recovered, it was not returned to her, but instead was returned to her homeowner's insurance carrier. Combs's entire testimony as to the value of the lawn tractor was as follows:

> Q: Did the police recover your John Deere lawn tractor?
>
> A: Yes.
>
> Q: And is [the lawn tractor in the photograph][10] the one they recovered?
>
> A: Yes.
>
> Q: And was that the one that had been stolen from you?
>
> A: Correct.
>
> Q: When the property was returned to you, from your knowledge, do you know whether it had a value of $300.00 or more?
>
> Q: Objection.
>
> Court: If she knows, she can answer. Did it have a fair market value of $300.00 or more at the time it was returned to you, that's the question.
>
> A: It was returned to the insurance company, but, yes, it was over $300.00.

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[10] Photographs of the lawn tractor taken on October 25, 2004, were presented to the jury. Although the photographic evidence was permissible, the pictures introduced reveal little about the actual condition of the lawn tractor. <u>See</u> <u>Lee v. Commonwealth</u>, 547 S.W.2d 792 (Ky.App. 1977).

The Commonwealth in its brief summarized this evidence as follows:

> In July 2004, Carol Combs had stolen from her a John Deere law tractor.
>
> The lawn tractor was not returned to her. It was returned to her homeowner's insurance carrier.
>
> Combs testified the lawn tractor exceeded $300.00 in value.
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> Photographic evidence showing the condition of the tractor was introduced [citations to record omitted].

Thus, Combs did not testify as to when she purchased the lawn tractor, to its original purchase price, or to the amount she received from her insurance company. At no time was the jury told whether the lawn tractor was in working order, nor was the jury furnished with sufficient descriptive testimony or exhibits which would have enabled it to make a reasonable inference as to its value at anytime. While the stolen lawn tractor may very well have been worth more than $300.00, there was insufficient evidence that when the lawn tractor came into Wilson's possession it was worth at least $300.00. Further, while a property owner is qualified to give their opinion as to the value of their own personal property, a factual basis must be established for that opinion.[11] There simply was no basis for

[11] Brewer v. Commonwealth, 632 S.W.2d 456 (Ky.App. 1982).

Combs's testimony that the lawn tractor "was worth over $300.00."

Accordingly, we affirm the judgment of the Breckinridge Circuit Court as it relates to Wilson's convictions and sentences for receiving stolen property owned by Fredricks and Sears, but reverse the judgment as it pertains to Wilson's conviction and sentence for receiving stolen property owned by Combs.

TAYLOR, JUDGE, CONCURS.

BUCKINGHAM, SENIOR JUDGE, CONCURS IN PART, DISSENTS IN PART, AND FILES SEPARATE OPINION.

BUCKINGHAM, SENIOR JUDGE, CONCURRING IN PART AND DISSENTING IN PART: I concur in part and dissent in part. I respectfully dissent from the portion of the majority opinion that reverses the count of the offense of knowingly receiving stolen property dealing with the Combs property.

The majority acknowledges that a property owner is qualified to give an opinion as to the value of his or her own personal property. However, the majority further states that a factual basis must be established for that opinion in order that the evidence is sufficient to overcome a directed verdict motion. I disagree. In my opinion, the testimony of the property owner by itself is sufficient, especially where, as here, there was no evidence rebutting that testimony.

The Lee case is distinguishable since there was no direct proof whatsoever of the value of the stolen property. The Brewer case, relied on by the majority, cites the Lee case and acknowledges that the owner of stolen property may testify as to its value.

If the law is as stated by the majority, then the testimony of the property owner should not be admissible at all unless accompanied by a factual basis to support the opinion. Since case law allows the testimony to be admitted without a factual basis, I believe that testimony is sufficient to overcome a directed verdict motion, especially where, as here, the testimony was not rebutted by any other evidence.

BRIEF FOR APPELLANT:

Brett Butler
Louisville, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General

David W. Barr
Assistant Attorney General
Frankfort, Kentucky