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Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-002361-MR

CLIFFORD DEWAYNE JOHNSON — APPELLANT

v.

APPEAL FROM BUTLER CIRCUIT COURT
HONORABLE RONNIE C. DORTCH, JUDGE
ACTION NOS. 04-CR-00030 & 04-CR-00031

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: HENRY[1] AND WINE, JUDGES; BUCKINGHAM,[2] SENIOR JUDGE.

WINE, JUDGE: Clifford Dewayne Johnson appeals a judgment following a jury trial in the Butler Circuit Court convicting him of one count of receiving stolen property over $300. The jury recommended a one-year sentence which was imposed by the trial court. The appellant's motion for probation was denied

[1] Judge Michael L. Henry concurred in 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 KRS 21.580.

and the court sentenced him on November 10, 2005, to serve the one-year sentence. Johnson timely filed this appeal alleging prosecutorial misconduct and errors while instructing the jury.

The facts are simple and straightforward. On October 21, 2003, Paul Karch, operator of an auto parts business in Bloomington, Indiana, discovered an enclosed trailer filled with auto parts and an engine had been stolen from his place of business.

Karch suspected two men seen earlier on October 20, 2003, and driving a white pickup truck with Kentucky license plates may have been involved.

Subsequently in late October 2003, Kevin Anderson, later identified by Karch as one of the two men he suspected, swapped items stolen from the Bloomington business for car parts belonging to the appellant Johnson. Johnson and an employee retrieved the parts from Anderson's girlfriend's home.

On November 1, 2003, Anderson sold some tools to Johnson. Johnson wrote a check for $400, the asking price. Shortly thereafter, Anderson offered to sell an enclosed trailer to Johnson, but Johnson declined the offer.

Johnson then offered the auto parts for sale. One intended customer was the dispatcher at the Butler County Sheriff's Office. Johnson sold the engine to a buyer from Tennessee.

Karch contacted the Butler County Sheriff's Office to inquire about the possible sale of some of his stolen items. The dispatcher contacted Johnson who in turn called Karch. The next day, November 15, 2003, Johnson voluntarily turned over the remaining stolen auto parts, gave Karch directions to Anderson's girlfriend's house as well as the address of the Tennessee buyer. Although Karch wrote a check to Johnson in the amount of $500 for the remaining parts, he later stopped payment on the check. Later, the stolen trailer was found near the home of Anderson's girlfriend.

Johnson then recovered from Anderson the parts he had exchanged for the items stolen from Karch.

On January 27, 2004, Johnson was subpoenaed to the Butler County Grand Jury. Johnson presumed he had been called to testify as a witness against Anderson. Prior to testifying on February 2, 2004, Johnson was presented with a two-part form. The top of the form, signed by Johnson, outlines the rights typically associated with the case of *Arizona v. Miranda*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). The portion of the form with the waiver of the delineated rights was not signed. Neither prior to nor during the grand jury appearance was Johnson told he was a suspect or that he would be indicted.

During the grand jury testimony, Johnson made a full disclosure of his involvement with the auto parts and engine.

Subsequently, the Butler County Grand Jury returned an indictment on February 12, 2004, charging Johnson with one count of receiving stolen property over $300 as to the stolen auto parts and one count of theft by unlawful taking over $300 as to the check written by the Tennessee buyer.

On March 3, 2004, Karch received a phone call from an individual who advised some of his tools were still at Johnson's place of business. Karch in turn called Det. David West of the Kentucky State Police with this information. Det. West spoke with the unknown individual on March 5, 2004. Det. West then prepared an affidavit, and a search warrant was signed by the Butler District Court Judge on March 8, 2004. A search conducted on the same date resulted in the recovery of various tools later identified as belonging to Karch.

On March 30, 2004, a second indictment was returned by the Butler County Grand Jury charging Johnson with receiving stolen property over $300 as to items recovered on March 8, 2004, and tampering with physical evidence.

Between the dates of the two indictments, a "press release" was published in "The Banner," a local newspaper published in Morgantown, Butler County, Kentucky. The press release was authored by the local Commonwealth Attorney, charged with the responsibility of prosecuting Johnson. While the prosecutor tries to avoid any direct comment about the

indictment, he clearly accuses the local sheriff of failing to fully investigate the case involving his friend, the appellant.

Appellant's counsel moved to quash the indictments and to recuse the local prosecutor for prosecutorial misconduct alleging the commonwealth attorney had improperly tried to influence the local population and potential venirepersons. The commonwealth attorney moved for a change of venue alleging that the local sheriff would sway the jurors against the commonwealth attorney and that pre-trial publicity would make it difficult for the Commonwealth to receive a fair trial. After a hearing, to which opposing counsel objected to the respective motions, the trial court denied both motions.

The two indictments were consolidated and a trial was held on October 21, 2005. Johnson was found guilty of the charge of receiving stolen property over $300 contained in the second indictment. The trial court directed a verdict on the charge of theft by unlawful taking over $300 as contained in the first indictment. The jury acquitted the appellant on the other two charges. The appellant challenged both the form and substance of various questions asked by the prosecutor during the trial. The appellant claimed prosecutorial misconduct on several grounds.

The appellant raises the prejudicial effect of the statements contained in the press release of February 18, 2004.

However, the appellant was tried more than 20 months after the press release was issued. Counsel had the right to and did question jurors about any potentially damaging pre-trial publicity about the charges against Johnson. Another appropriate remedy would be a change of venue pursuant to KRS 452.210. However, the appellant objected to this very motion when made by the commonwealth attorney. The action of the commonwealth attorney in providing the press release was motivated by his dissatisfaction with the local sheriff. Unfortunately, such action had the potential of depriving the appellant of his right to a fair and impartial jury. However, the appellant can point to no actual prejudice, no juror on the final panel had advised they were aware of or influenced by the story, and finally the story was not part of the evidence presented at trial. *United States v. Andrews*, 347 F.2d 207 (6th Cir. 1965).

The appellant also challenges the form and substance of questions asked by the commonwealth attorney during the trial. Further, the appellant challenges the cross-examination between the commonwealth attorney and himself. Although not required, the video of the examination was reviewed by this Court. It is readily apparent both examinations bordered on a school ground exchange *vis-à-vis* the prosecutor and the witness.

On several occasions the appellant's answers were non-responsive and the prosecutor's questions were more like editorials.

When objections were made, the trial court ruled. Great deference is given to the trial court when it exercises its discretion in ruling on objections. KRE 611. This Court can find no abuse of that discretion.

The appellant challenges the procedure of two separate indictments, two charges of receiving stolen property over $300 as well as instructions for two separate counts of receiving stolen property over $300. From the facts presented, the appellant clearly possessed or retained (KRS 514.110(1)) stolen property on two separate occasions. The jury acquitted the appellant on the first count when he voluntarily returned the stolen property to the owner and cooperated in assisting with the recovery of other stolen property on November 15, 2003.

Once the appellant was aware some of the property was stolen, the jury obviously questioned any defense that he was not aware the tools were stolen or that he had forgotten he purchased said tools.

Finally, the appellant challenges the practice of issuing a subpoena to an individual to require him to testify before the grand jury without advising him he is the target of an investigation.

The grand jury may use *subpoena ad testificandum* to obtain testimony. A refusal to appear subjects an individual to the contempt power of the court. If an individual is a defendant or otherwise the focal point of a criminal investigation, the witness's testimony should be taken only after he is fully advised of his rights and then makes a knowing and intelligent waiver. *Lofkowitz v. Cunningham*, 431 U.S. 801, 97 S. Ct. 2132, 53 L. Ed. 2d 1 (1977).

However a grand jury's authority to investigate does not include compelling a person to testify against himself. *Fletcher v. Graham*, 192 S.W.3d 350 (Ky. 2006); *Taylor v. Commonwealth*, 274 Ky. 51, 118 S.W.2d 140 (1938). *See also* Kentucky Constitution § 11. Had all the charges and subsequent conviction been contained in the first indictment, the appropriate remedy under *Taylor* would have been to grant the appellant immunity pursuant to *Taylor*. However, because the second indictment arose from an independent source, to wit the search warrant and was obtained without the appellant's grand jury testimony, to grant immunity or to quash the second indictment is not appropriate.

Clearly from the press release, the commonwealth attorney believed Johnson should have been charged with receiving stolen property over $300. The prosecutor believed

the investigation was thwarted by the friendship between the appellant and the sheriff.

While Johnson was advised of his rights, there is no evidence he voluntarily waived those rights. The record shows he had minimal prior contact with the criminal justice system (in fact, the prosecutor tried to raise an issue of a dishonorable discharge from the military 30 years earlier to challenge his credibility). Johnson obviously cooperated with the victim and willingly returned most of the stolen car parts. Once the grand jury testimony was introduced at trial, Johnson was forced to testify to explain his actions. Absent the grand jury testimony, there was no evidence as to the appellant's intent, a critical element of receiving stolen property over $300. This opened the door to challenge his credibility before the jury. Because the witness's credibility is always crucial at trial, this Court cannot find the error or admitting the grand jury testimony to be harmless error.

Therefore, the conviction for the remaining charge is reversed and this matter is remanded back to the trial court for a new trial.

HENRY, JUDGE, CONCURS.

BUCKINGHAM, SENIOR JUDGE, CONCURS IN PART AND 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. Based on *Taylor v. Commonwealth*, 118 S.W.2d 140 (Ky. 1938), I conclude that Johnson became immune from prosecution when he testified before the grand jury after having been subpoenaed.[3] Johnson was clearly suspected by the prosecutor as being criminally involved in the case. Thus, rather than reversing and remanding for a new trial, I believe we should reverse and remand for dismissal of the indictment because Johnson was immune from prosecution.

The majority acknowledges that Johnson would have immunity from prosecution as to the first count of knowingly receiving stolen property. However, it states that he would only be entitled to a new trial as to the second count. The majority reasons that because that count was not based on Johnson's grand jury testimony but was based on the fruits of a search pursuant to a search warrant, Johnson is only entitled to a new trial.

In my opinion, Johnson was entitled to immunity as to the second count as well. The majority has agreed with the Commonwealth that there were two separate offenses. I disagree. The mere fact that Johnson may have still had stolen property in

[3] In Taylor, the court held that "appearing and testifying before a grand jury in obedience to a subpoena is sufficient to entitle an accused person to immunity." Id. at 142.

his possession when the officers returned to search for additional stolen property does not create a second offense. If there was only one offense, then dismissal is required.

Furthermore, even if there were two separate chargeable offenses, I do not believe the evidence could be separated to such an extent as to hold that Johnson would have immunity as to the first count but not as to the second count. It is entirely possible that the jury may have relied on a portion of Johnson's grand jury testimony when it convicted him of the second count. In short, for the aforementioned reasons, I believe Johnson is entitled to immunity on the second count as well.

In addition, I believe it is clear that the prosecutor violated SCR 3.130, Rule 3.6, when he issued a press release implicating Johnson that was published in the local newspaper. *See Bush v. Commonwealth*, 839 S.W.2d 550, 554 (Ky. 1992).

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