

**Commonwealth Of Kentucky**

**Court Of Appeals**

No. 1997-CA-000801-MR

KENNETH SETTLES

APPELLANT

v. APPEAL FROM McCracken Circuit Court  
HONORABLE RON DANIELS, JUDGE  
ACTION NO. 95-CR-00129

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: ABRAMSON, GARDNER, and GUIDUGLI, Judges.

ABRAMSON, JUDGE: Kenneth Settles appeals from a March 25, 1997, judgment of McCracken Circuit Court sentencing him to five years in prison for having flagrantly failed to support his son (KRS 530.050(2)). Settles maintains that his trial was rendered unfair by the court's refusal to grant a continuance, by its exclusion of evidence, and by its denial of Settles's motions for

a directed verdict. Convinced that Settles's trial was fundamentally fair, we affirm.

Settles married Laura Wagner in April 1988. The next year the couple had a child. By late 1991, however, the relationship had deteriorated; Settles and Wagner separated, and in the spring of 1993 they divorced. Incorporated in the divorce decree was Settles's agreement to pay \$500 per month, beginning as of April 1, 1993, for child support. Shortly after the agreement went into effect, Settles's support payments lapsed.

In 1994 Wagner instituted a civil action against Settles, who was then living in West Virginia, to enforce their separation agreement. In that action Settles's support obligation was reduced, as of November 1, 1994, to \$225 per month. Still, only one reduced payment was forthcoming. On April 5, 1995, the McCracken County grand jury indicted Settles, charging that from June 1993 to the date of the indictment he had fallen more than \$1,000 behind on his support payments and/or had failed during that period to make payments for each of six consecutive months. The Commonwealth's first Bill of Particulars alleged that at the time of the indictment Settles was approximately \$9,000 in arrears. The grand jury issued a superseding indictment on June 14, 1995, amending the charges to include the period from April 5 through June 14. At that point activity in the case abated, apparently to allow for settlement negotiations.

No settlement could be reached, so the case was reopened in April 1996. A pretrial conference was scheduled for June 28, 1996, but for reasons not appearing in the record was continued until October. Another continuance, this one owing to the trial court's busy docket, ultimately delayed trial until February 27, 1997. On February 26, 1997, the Commonwealth moved to amend the indictment to include the period from June 14, 1995 through February 27, 1997. Claiming that he was unprepared to defend against the expanded charges, Settles objected to this last minute amendment of the indictment and, alternatively, sought a continuance to reassess his defense and to adjust. The trial court concluded that Settles's defense would not be prejudiced by the amendment and so granted the Commonwealth's motion to amend and denied a continuance. The trial took place as scheduled on February 27, 1997.

At trial Settles conceded that from the commencement of his child support obligation in April 1993 he had made cash payments of only about \$1,300 toward a total obligation, as of June 1995, of more than \$10,000. He claimed, however, to have given Wagner, in lieu of cash, antique furniture he had inherited from relatives. He also claimed that business setbacks had prevented him from doing more. Settles explained that during the marriage he had organized a business for refurbishing large industrial storage tanks. This business had required extensive capital investment and had involved large start-up costs. After a promising first year, the business had failed. In 1994,

Settles underwent both personal and corporate bankruptcies. Since then he had worked briefly as a truck driver and had pursued storage tank jobs, although the tank jobs, he maintained, had been on too small a scale to be profitable. He persisted in them, he said, because he anticipated a pronounced change in the market for storage tank maintenance within a year or two and planned to keep himself in a position to capitalize.

In sum, although he claimed to have provided more child support in the form of antique furniture than Wagner acknowledged, Settles's defense essentially was that he had done the best he could and was pursuing a business opportunity which was promising enough for the future to justify the present cessation of support payments for his son. The jury was not persuaded, and now Settles has appealed.

Two of the issues Settles raises require little discussion. First, he claims that the trial court erred by denying his motions for a directed verdict because the Commonwealth failed to prove that he was capable of providing more child support than he did provide. He bases this contention on KRS 530.050(2) which provides in part as follows:

(2) A person is guilty of flagrant nonsupport when he persistently fails to provide support which he can reasonably provide and which he knows he has a duty to provide by virtue of a court or administrative order to a minor or to a child adjudged mentally disabled, indigent spouse or indigent parent and the failure results in:

(a) An arrearage of not less than one thousand dollars (\$1,000); or

(b) Six (6) consecutive months without payment of support; . . .

Settles contends that, because this statute makes the defendant's ability to provide support an element of the offense, the Commonwealth must prove that ability beyond a reasonable doubt. He claims that the Commonwealth failed to prove that his financial situation, both his setbacks and his business venture, had not genuinely and reasonably prevented him from meeting his support obligation. The Commonwealth's alleged failure, Settles insists, entitled him to a directed verdict.

We believe that Settles has overstated the Commonwealth's burden under KRS 530.050(2). That statute requires initial proof only of a defendant's financial resources or of his ability to earn income such that the support obligation being enforced is not clearly unreasonable. Beyond that initial showing, the defendant's inability to provide support is an affirmative defense which it is the defendant's burden to prove. Rogers v. Commonwealth, Ky., 321 S.W.2d 779 (1959); Turner v. Commonwealth, Ky., 315 S.W.2d 619 (1958).<sup>1</sup>

Here the Commonwealth introduced evidence that Settles was of sound mind and body, that he had extensive business experience and technical expertise, and that he had inherited from relatives (albeit prior to his bankruptcy) in excess of

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<sup>1</sup>Both of these cases construe the law as it existed prior to 1974 when KRS 530.050 was first adopted. However, not only do we find the reasoning of these cases persuasive, but we believe the pertinent holdings are still controlling because KRS 530.050 did not significantly alter this aspect of the earlier law.

\$600,000. This evidence more than satisfied the Commonwealth's initial burden and was adequate, even in light of Settles's excuses, to lead a rational juror to conclude that Settles could reasonably have met his support obligation. The trial court did not err, therefore, by denying Settles's motions for a directed verdict. Commonwealth v. Benham, Ky., 816 S.W.2d 186 (1991).

Settles also claims that the trial court erred by excluding evidence of the parties' settlement negotiations. Apparently Settles offered to pay Wagner \$7,500 in exchange for a dismissal of the charges. He maintains that Wagner's rejection of this offer is evidence of bad faith and an ulterior motive, the ulterior motive being to pressure Settles to relinquish his parental rights by threatening him with imprisonment.<sup>2</sup> The trial court relied upon KRE 410 to exclude the purported negotiation evidence. KRE 410 provides generally for the inadmissibility of evidence relating to guilty plea negotiations. Settles maintains that KRE 408 is controlling. That rule addresses the admissibility of evidence concerning compromises and offers to compromise and provides that such evidence, although generally inadmissible, need not be excluded when offered not to establish a claim or the amount of a claim, but to prove other facts such as the bias and prejudice of a witness.

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<sup>2</sup>Apparently Settles did relinquish his parental rights as a condition of his successful motion for shock probation. He does not claim, however, that those rights were an issue in the purported settlement negotiations.

We need not decide whether KRE 408 applies only to civil cases, as the Commonwealth insists, for even if it applies to criminal cases as well and is pertinent here, the trial court did not err by excluding evidence of Settles's offer of a compromise. Wagner's alleged bias is relevant only to cast doubt upon her credibility. Her credibility is relevant only with respect to disputed aspects of her testimony. The only factual dispute at trial concerned the furniture Settles claimed to have given Wagner in lieu of support payments. He claimed she accepted the furniture for that purpose and that the furniture was valuable enough to have satisfied a significant portion of his debt. She denied having accepted the furniture as child support and claimed to have received only \$5,000 when she sold it. Beyond his general assertion that the furniture included "antiques," Settles did not dispute this sale price or attempt to prove a higher value. Thus, although Settles may have had a legitimate reason to attack Wagner's credibility on this issue, the tenuous connection between this issue and the settlement negotiations, which makes the relevance of the negotiation evidence doubtful (KRE 401), and the apparent futility of even a successful impeachment,<sup>3</sup> justified the trial court's decision to exclude this evidence. KRE 403.

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<sup>3</sup>Even if the jury did not believe Wagner and thought Settles was entitled to a \$5,000 credit on his arrearage, he would still have been more that \$3,000 in arrears and in violation of KRS 530.050(2).

More problematic are the trial court's decisions to permit amendment of the indictment the day before trial and not to provide Settles additional time to adjust his defense. The trial court explained its decisions by noting that an amendment to bring the indictment up to date would spare the parties and the court the costs of a subsequent proceeding, and it deemed the amendment non-prejudicial, apparently relying on the Commonwealth's assurance that it would not use evidence from the added period. Settles complains that he was improperly denied an opportunity to examine his records relating to the new charges and was not allowed sufficient time to reconsider his defense.

RCR 6.16, on amendments, provides as follows:

The court may permit an indictment, information, complaint or citation to be amended any time before verdict or finding if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced. If justice requires, however, the court shall grant the defendant a continuance when such an amendment is permitted.

We agree with Settles that the last minute amendment of his indictment goes beyond what is contemplated by RCr 6.16. That rule approves formal, clerical changes to the indictment; clarifications of the crime charged; and, in some instances, changes to bring about conformity with the proof. Yarnell v. Commonwealth, Ky., 833 S.W.2d 834 (1992); Gilbert v. Commonwealth, Ky., 838 S.W.2d 367 (1991); Schambon v. Commonwealth, Ky., 821 S.W.2d 804 (1991). It does not approve amendments broadening the alleged offense or charging additional



offenses. Wolbrecht v. Commonwealth, Ky., 955 S.W.2d 533 (1997). Here the amendment patently broadens the crime alleged against Settles and adds considerably to the evidence with which he might be confronted. The trial court erred by allowing such an amendment. The trial court also erred by denying Settles a continuance, for the substantial change in the charges he faced entitled him to a reasonable opportunity to analyze his case anew. The twenty hours or so Settles was allowed was not sufficient. Wolbrecht, supra; Eldred v. Commonwealth, Ky., 906 S.W.2d 699 (1994).

Despite these errors, we are not persuaded that Settles is entitled to a new trial. These rulings were entrusted to the trial court's discretion. To be entitled to relief on appeal from such a ruling, an appellant must show not only that the trial court abused its discretion, but also that the abuse was prejudicial. Yarnell, supra. Settles has failed to make this latter showing. As it assured the trial court it would do, the Commonwealth limited its proof to Settles's arrearage accrued prior to the amendment period. Settles thus had ample notice of all the evidence introduced against him and was not deprived of the defense he had prepared. Furthermore, the evidence against Settles was formidable, and he has specified no additional evidence or argument that the trial court's errors prevented him from introducing. There is simply no reason to think that the outcome would have been different, had the indictment not been amended or had Settles been granted a continuance. Indeed, the

consequences for Settles could have been far worse had he been indicted and tried separately for his additional non-support. We conclude that the trial court's errors were harmless in allowing the indictment to be substantially amended and in denying Settles a continuance.

For this reason and those discussed above, we affirm the March 25, 1997, judgment of McCracken Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

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