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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-002054-MR

DONNIE RILEY — APPELLANT

v.

APPEAL FROM CALDWELL CIRCUIT COURT
HONORABLE BILL CUNNINGHAM, JUDGE
ACTION NO. 1997-CR-000005

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING
** ** ** ** **

BEFORE: EMBERTON, KNOPF, AND SCHRODER, JUDGES.

KNOPF, JUDGE: Donnie Riley appeals from an August 6, 1997, judgment of the Caldwell Circuit Court convicting him of trafficking in a controlled substance in the first degree (cocaine) (KRS 218A.1412) and sentencing him to five (5) years in prison. Riley contends that his trial was rendered unfair by the trial court's refusal to give a jury instruction on the defense of entrapment. Finding no error, we affirm.

In January 1997, the Caldwell Grand Jury indicted Riley on two (2) counts of trafficking in a controlled substance in the first degree. He was charged with having sold cocaine on two (2) occasions, once in late September and then again in early October

1996. The two (2) counts were severed, and on May 21, 1997, Riley was tried on the alleged October incident.

At trial, Officer William Poe of the Princeton Police Department testified that in September 1996 he had recently joined the police force and had been assigned to an undercover narcotics operation. Poe's duty was to attempt to make "felony" drug transactions and then to help prosecute the drug sellers. Pursuant to this undercover duty, he had arranged to meet with Riley during the evening of October 3, 1996. Riley was to help him obtain cocaine. In exchange Poe would share the cocaine with Riley. The two (2) met that evening as planned, and Poe gave Riley $20.00 for a "rock" of cocaine. Riley, though, had difficulty completing the deal. He made several phone calls to potential suppliers, and he had Poe drive him to numerous locations in search of a supplier, but without success. The two (2) persevered, however, and finally, after more than an hour of searching, Riley presented Poe with slightly less than one (1) gram of "crack."

Riley did not dispute Officer Poe's description of events. Instead, he proposed to raise an entrapment defense on the ground that Officer Poe had been the moving force behind the transaction. There was no evidence, Riley claimed, that apart from Officer Poe's inducements he, Riley, had had any predisposition to sell cocaine.

When Riley made apparent this defensive strategy, the Commonwealth sought to introduce evidence of Riley's other alleged trafficking offense. Riley objected on the ground that

evidence of alleged prior bad acts is not admissible. The trial court overruled his objection, however, and told Riley that he must choose between excluding evidence of the other charge and obtaining an instruction on entrapment. Riley opted to forgo an entrapment instruction, but he objected to having to make the choice and now contends that the court erred and rendered the trial unfair by thus conditioning an entrapment instruction.

Riley is correct that evidence of a defendant's other crimes is generally inadmissible as proof of the defendant's criminal character. KRE 404(b) provides, however, that such evidence may be admissible "[i]f offered for some other purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident . . . ."

As discussed below, motive and intent are issues at the core of an entrapment defense. The trial court did not err by ruling that Riley's pursuit of such a defense would render evidence bearing on those issues admissible, including evidence of his other alleged trafficking offense.

We are not persuaded, moreover, that Riley's entrapment defense was viable even had evidence of his prior alleged trafficking offense been excluded. KRS 505.010 provides for a defense of entrapment, in pertinent part, as follows:

> (1) A person is not guilty of an offense arising out of proscribed conduct when:
>
> (a) He was induced or encouraged to engage in that conduct by a public servant or by a person acting in cooperation with a public servant seeking to obtain evidence against him for the purpose of criminal prosecution; and

> (b) At the time of the inducement or encouragement, he was not otherwise disposed to engage in such conduct.
> (2) The relief afforded by subsection (1) is unavailable when:
> (a) The public servant or the person acting in cooperation with a public servant merely affords the defendant an opportunity to commit an offense.

As stated in the 1974 commentary to this statute, its purpose is to prevent overreaching by police officers and their confederates "which may result in the commission of crime by previously innocent individuals." The statute is aimed at abusive police conduct, and should be narrowly construed in accordance with that aim.

Entrapment is an affirmative defense. Once suitably raised it imposes an additional burden on the Commonwealth which must be reflected in the jury instructions. To create this additional burden, it is incumbent on the defendant to show that it is warranted:

> [I]n order for the defense to be raised, so as to call for an instruction placing the burden on the Commonwealth, there must be something in the evidence reasonably sufficient to support a doubt based on the defense in question.

Brown v. Commonwealth, Ky., 555 S.W.2d 252, 257 (1977). To raise such a doubt, not only must there be evidence that the defendant was encouraged or induced to engage in the offense, but also there must be evidence that the inducement gave rise to a criminal intent, a willingness to commit the crime, that otherwise was lacking. Farris v. Commonwealth, Ky. App., 836 S.W.2d 451 (1992); Sebastian v. Commonwealth, Ky. App., 585 S.W.2d 440 (1979).

Riley claims that aside from the evidence relating to his prior alleged trafficking offense there was no evidence of his predisposition to traffic in cocaine, and thus the Commonwealth should have been obliged to show that he was not entrapped by Officer Poe's inducements. We disagree. Indeed, we are not persuaded that the evidence raises any doubt concerning Riley's willingness to break the law or suggests the least impropriety in Officer Poe's methods.

Riley admitted that he willingly sold cocaine to Officer Poe, that in fact he sought Officer Poe's business and made somewhat elaborate arrangements to carry it out. He admitted also that he did so in order to obtain cocaine for his own use. These admissions belie Riley's claim that Officer Poe entrapped him, for they clearly indicate a predisposition, a preexisting willingness, to violate the law. They thus show that Riley's criminal intent was independent of Officer Poe's inducements.

Riley also maintains that the anti-trafficking statutes are aimed at large-scale drug transactions where financial profit is the principal motive, not small transactions such as the one between himself and Poe which are prompted only by a desire to obtain drugs for personal use. Having thus defined "trafficking," Riley argues that there was no evidence of his intent to "traffic." We are not persuaded, however, by Riley's interpretation of the statutes.

"Traffic" is defined at KRS 218A.010(24) as follows:

> "Traffic" means to manufacture, distribute, dispense, sell, transfer, or possess with

> intent to manufacture, distribute, dispense, or sell a controlled substance.
>
> "Sell" is defined at KRS 218A.010(22) and means:
>
> to dispose of a controlled substance to another person for consideration or in furtherance of commercial distribution.

Although arguably, as he maintains, Riley did not distribute cocaine commercially, nevertheless, he did provide cocaine to Officer Poe for consideration. His actions amounted to "trafficking" as defined above, and his intent to "traffic" is not made doubtful by the fact that his prime interest was to obtain drugs for his own use. Shavers v. Commonwealth, Ky., 514 S.W.2d 883 (1974). That Riley's offense can be considered relatively minor and might not have been committed absent the opportunity Officer Poe provided is simply not enough to entitle him to an entrapment instruction. Riley failed, therefore, to raise the necessary doubt concerning his predisposition to engage in the crime.

For these reasons, we conclude that the trial court did not err by refusing to instruct the jury on the defense of entrapment or by ruling that such an instruction would open the door to evidence of Riley's other alleged offense. Accordingly we affirm the August 6, 1997, judgment of the Caldwell Circuit Court.

ALL CONCUR.

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