

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 1998-CA-001830-MR

DARRYL EDWARD BAKER

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE JAMES E. KELLER, JUDGE  
ACTION NO. 1998-CR-479-1

COMMONWEALTH OF KENTUCKY

APPELLEE

NO. 1998-CA-001831-MR

WILLIAM VINCENT HENDERSON

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE JAMES E. KELLER, JUDGE  
ACTION NO. 1998-CR-479-2

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING IN APPEAL NO. 1998-CA-001830  
REVERSING AND REMANDING IN APPEAL NO. 1998-CA-1831  
\*\* \*\* \* \* \* \* \*

BEFORE: KNOFF, MILLER AND SCHRODER, JUDGES.

KNOFF, JUDGE: These are consolidated appeals from judgments of conviction against the appellants, Darryl Edward Baker and

William Vincent Henderson. We find that Baker's conviction for second degree robbery was supported by substantial evidence. Hence, we affirm his conviction. However, we find that the trial court erred in denying Henderson's motion for a directed verdict on the charges of tampering with physical evidence and being a persistent felony offender in the first degree. Hence, we reverse his conviction on these counts.

There is no dispute regarding the underlying facts of these appeals. During the early morning hours of April 1, 1998 in Lexington Kentucky, Lea Anna Toney drove her daughter-in-law to work. She returned to the parking lot of her apartment around 5:20 a.m. As she began to get out of her car when another car pulled up beside her. The driver got out of the car, pointed at her purse and said, "I want that." He yanked the purse several times until the strap broke. The driver then got back into his car and drove away. Toney immediately reported the incident to the police. In addition to her assailant, she told the police that she also saw a passenger in the vehicle. She further reported that her purse contained approximately \$133.00 in cash.

Shortly thereafter, Lexington-Fayette County Police Officers Todd Combs and Todd Johnson heard the call concerning the robbery, along with a brief description of the automobile and the suspects. Upon driving to the area, they observed a car matching the general description given by Toney. After following the vehicle for a while, they pulled it over. Baker was the driver and Henderson was the passenger.

Officer Combs walked up to the passenger side door and looked in the car. He observed a black purse on the floorboard

behind the driver's seat. He asked Baker about the purse, and Baker replied that it belonged to his sister. Officer Combs then turned to Henderson. He asked Henderson about the purse, but before Henderson could answer, Baker restarted the engine and drove away. A high speed chase ensued, finally ending up in Paris, Kentucky.

After the two men were apprehended, Baker admitted taking the purse, claiming that he needed the money for gas. The police retrieved \$130.00 from Henderson's shoe. He initially claimed that it was his own money, but soon afterward, he admitted that he had put the money from Toney's purse in his shoe when the police began following him. Henderson also told the police that Baker spent \$3.00 of the stolen money on gas for the car. During the chase, Henderson threw the purse out the window. Later that morning, the police recovered the purse in a ravine along the roadway, in an area where Henderson told them it would be.

Baker and Henderson were tried together on the charges arising out of the incident. Following the trial, the jury found Baker guilty of second degree robbery (KRS 515.030) and attempting to elude (KRS 189.393). The jury fixed his punishment at five years on the robbery charge, and ninety days and a \$500.00 fine for attempting to elude. The jury found Henderson guilty on the charges of criminal facilitation of robbery (KRS 506.080), tampering with physical evidence (KRS 524.100), and being a persistent felony offender in the first degree (KRS 532.080) (PFO I). The jury fixed his punishment at twelve months and a \$500.00 fine on the facilitation charge, and five years for

tampering with physical evidence, enhanced to thirteen years by virtue of the PFO I. The trial court imposed the jury's sentences for both Baker and Henderson. These separate appeals followed, although they have been consolidated before this panel.

Both Baker and Henderson primarily argue that the trial court erred in denying their motions for directed verdicts on the charges, respectively, of second degree robbery and tampering with physical evidence. The Kentucky Supreme Court restated the directed verdict standard in Commonwealth v. Benham, Ky., 816 S.W.2d 186 (1991), holding as follows:

On a 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.

Benham, 816 S.W.2d at 187.

We shall address Baker's ground of appeal first. His sole argument on appeal is that the Commonwealth failed to establish that he took Toney's purse with the use or threatened use of physical force. KRS 515.030. The gravamen of the offense of robbery is the use or the threat of use of physical force against another person in order to accomplish a theft. Morgan v. Commonwealth, Ky., 730 S.W.2d 935, 938 (1987). "Physical force" means ". . . force used upon or directed toward the body of another person." KRS 515.010. While taking Toney's purse, Baker yanked it with sufficient force to break the shoulder strap. We

have no difficulty finding that such conduct is within the definition of physical force. Therefore, we find no error in denying his motion for a directed verdict.

Henderson argues that the evidence did not support an instruction to the jury on the charge of tampering with physical evidence. He contends that the conduct with which he was charged, concealing the stolen money in his shoe, does not meet the definition of tampering with physical evidence contained in KRS 524.100(1). The Commonwealth responds that Henderson concealed the money in his shoe while he was being pursued by the police. Thus, the Commonwealth asserts that it proved that Henderson concealed physical evidence which was about to be produced in the course of their investigation, with the intent to impair its availability in an official proceeding.

KRS 524.100(1) provides in pertinent part as follows:

A person is guilty of tampering with physical evidence when, believing that an official proceeding is pending or may be instituted, he:

(a) Destroys, mutilates, conceals, removes or alters physical evidence which he believes is about to be produced or used in the official proceeding with intent to impair its verity or availability in the official proceeding.

In two recent cases, the Kentucky Supreme Court considered the applicability of KRS 524.100 to specific situations. In Burdell v. Commonwealth, Ky., 990 S.W.2d 628 (1999), two police officers observing through an open door saw the defendant place a baggie containing a white powdery substance on the kitchen counter. This item disappeared from the kitchen counter after the defendant became aware of the presence of the

officers and closed the front door, and before the officers were granted entry through the back door. Subsequently, the officers found a baggie containing cocaine on the floor in the living room between the couch and the chair. The Supreme Court concluded that the sequence of events described by the officers sufficed to support a conclusion that the defendant participated in the concealment or removal of this evidence.

Similarly, in Taylor v. Commonwealth, Ky., 987 S.W.2d 302 (1998), the defendant, upon being stopped by the police, attempted to hide a bag of cocaine under the seat in his car. He contended that this conduct did not amount to tampering with physical evidence because he placed the cocaine under the seat in the plain view of the officers. Nonetheless, the Supreme Court found this evidence sufficient to make a case for tampering with physical evidence. Id. at 305.

In both of these cases, the defendants actively sought to disrupt the investigatory process by attempting to separate themselves from incriminating evidence. In the present case however, the charge of tampering with physical evidence was based on the fact that Henderson concealed the money from the robbery in his shoe while the police were pursuing him and Baker. Although there was evidence that he also threw the purse out of the car window during the chase, that action was not the basis for the charge. Unlike the situations in Burdell and Taylor, Henderson concealed most of the money (except for the \$3.00 which Baker spent at the gas station) on his own person. His actions are no different than if he had placed the money in his pocket.

We are unwilling to stretch the statute to include this type of conduct within the meaning of concealment. Merely concealing evidence is not enough to prove tampering with physical evidence. The Commonwealth must prove that Henderson concealed the money with the intent "to impair its verity or availability in an official proceeding." KRS 524.100(1). There was no evidence that the money's availability was even potentially impaired by Henderson's act of placing it in his shoe. The money was always on Henderson's person, and it was in his actual possession when the police officers took custody of him. Consequently, we find that Henderson's actions were not within the definition of tampering with physical evidence.<sup>1</sup> As a result, we find that the trial court erred in denying his motion for a directed verdict on this charge.

Since we are setting aside Henderson's conviction for tampering with physical evidence, we must also set aside his conviction for PFO I. KRS 532.080(3) provides that a "persistent felony offender in the first degree is a person who is more than twenty-one (21) years of age *and who stands convicted of a felony* after having been convicted of two (2) or more felonies." (*Emphasis added*). The only remaining conviction against Henderson is for criminal facilitation of second degree robbery, a Class A misdemeanor. KRS 506.080(2)(b). The absence of a

---

<sup>1</sup> Although theoretically, a defendant who swallowed drugs or money to prevent its seizure by the police would be guilty of tampering with physical evidence, even though the evidence remained "on his person," because that defendant would intend to destroy the evidence or otherwise impair its verity or availability in an official proceeding.

valid conviction on the underlying felony charge renders improper Henderson's conviction for being a PFO I.

Accordingly, the judgment of conviction by the Fayette Circuit Court against Darryl Edward Baker in Indictment No. 1998-CR-00479 is affirmed. The judgment of conviction by the Fayette Circuit Court against William Vincent Henderson on the charges of tampering with physical evidence and being a persistent felony offender in the first degree are reversed, and this matter is remanded for entry of a corrected judgment reflecting the remaining charge of Criminal Facilitation of Robbery, the remaining misdemeanor count.

MILLER, JUDGE, CONCURS.

SCHRODER, JUDGE, CONCURS IN 1998-CA-001830-MR (BAKER) AND DISSENTS IN 1998-CA-001831-MR (HENDERSON).

BRIEF FOR APPELLANT:  
DARRYL EDWARD BAKER

Karen Mead  
Fayette County Legal Aid, Inc.  
Lexington, Kentucky

BRIEF FOR APPELLANT:  
WILLIAM VINCENT HENDERSON

Gene Lewter  
Lexington, Kentucky

BRIEFS FOR APPELLEE:

Albert B. Chandler, III  
Attorney General of Kentucky

Kent T. Young  
Assistant Attorney General  
Frankfort, Kentucky