

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-002946-MR

RONALD MELVIN GOWER

APPELLANT

v. APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE JAMES R. DANIELS, JUDGE
ACTION NO. 98-CR-00004

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING IN PART, REVERSING IN PART, AND REMANDING

** ** * * *

BEFORE: HUDDLESTON, KNOPF and MILLER, Judges.

HUDDLESTON, Judge. Ronald Gower appeals from a conviction in the McCracken Circuit Court for theft by unlawful taking over \$300.00. Gower received a three year sentence, enhanced to 16 years upon the verdict of the jury that Gower was a first-degree persistent felony offender.

On January 9, 1998, the McCracken County Grand Jury charged Ronald Gower in an indictment with theft by unlawful taking

of over \$300.00,¹ giving a police officer a false name or address² and with being a first-degree persistent felony offender.³ The indictment resulted from the allegation that on December 13, 1997, at a Paducah Wal-Mart Supercenter, Gower loaded a \$1,300.00 computer from a shelf into his shopping cart and attempted to leave the store without paying for it. Gower had a proof of purchase sticker from another Wal-Mart and claimed that he was merely attempting to return the computer; however, the store's security video showed Gower entering the store without the computer. When police arrived at the scene, Gower gave them an incorrect address. The PFO indictment was based upon a February 10, 1993, felony conviction in Caldwell Circuit Court, and three felony convictions in Los Angeles County, California, in 1983, 1984 and 1985.

Gower pled not guilty and, following a psychiatric evaluation regarding his competency to stand trial, on July 26 and July 27, 1999, the case was tried before a jury. At the close of the defense case, Gower was granted a directed verdict on the giving a false address charge, but was found guilty, but mentally ill, of theft by unlawful taking of over \$300.00. Thereafter the jury found Gower guilty on the first-degree PFO charge. The jury sentenced Gower to three years on the theft charge, enhanced to 16 years as a result of the PFO conviction. The trial court subsequently entered judgment and sentencing in accordance with the jury's recommendations.

¹ Ky. Rev. Stat.(KRS) 514.030.

² KRS 523.110.

³ KRS 532.080.

On appeal, Gower contends that the trial court erred by limiting his presentation of evidence in support of a choice of evils instruction and by denying his request for a choice of evils instruction.

From the commencement of the case, Gower pursued a trial strategy aimed at presenting a choice of evils defense. In this regard, Gower sought to present (1) testimony regarding his dire economic circumstances, and (2) the testimony of Dr. Michael Nichols that based upon Gower's mental disorders and impaired intellectual functioning, he could well have believed that he had no choice but to steal a computer to support himself and his pregnant, homeless wife. In pretrial rulings, the trial court limited the presentation in this regard and ultimately denied Gower's request for a choice of evils instruction.

In summary, Gower contends that had he been permitted to present the excluded evidence he would have been entitled to a choice of defense instruction because (1) Gower and his pregnant wife were in dire economic circumstances at the time of the offense; (2) they lived in a friend's backyard and slept on a hammock; (3) they went to various offices, including the mayor's office, and no one would help them; (4) they had asked "everyone" for help; (5) it was very cold and they went days without food; (6) churches would help out with money for a room for one night "but that was about it"; (7) Gower felt that he had exhausted every resource available to him; and (8) Gower suffered from mental disorders and impaired intellectual functioning which led him to

believe that he had no choice but to steal to support himself and his pregnant, homeless wife.

The choice of evils statute, Kentucky Revised Statutes (KRS) 503.030, provides that:

(1) Unless inconsistent with the ensuing sections of this code defining justifiable use of physical force or with some other provisions of law, conduct which would otherwise constitute an offense is justifiable when the defendant believes it to be necessary to avoid an imminent public or private injury greater than the injury which is sought to be prevented by the statute defining the offense charged, except that no justification can exist under this section for an intentional homicide.

In order to be entitled to a choice of evils instruction "the danger presented to the defendant must be compelling and imminent, constituting a set of circumstances which affords him little or no alternative other than the commission of the act which otherwise would be unlawful."⁴ The choice of evil defense applies only to an imminent physical injury, not to a financial or property injury.⁵ The option provided by KRS 503.030 must be a choosing on the part of the defendant which is sufficiently contemporaneous with the offense sought to be justified so as to be considered a

⁴ Senay v. Commonwealth, Ky., 650 S.W.2d 259, 260 (1983).

⁵ Greer v. Commonwealth, Ky. App., 748 S.W.2d 674, 676 (1988).

part of the res gestae.⁶ Since "choice of evils" is a defense, the defendant bears the burden of proving the defense.⁷

The case of Damron v. Commonwealth⁸ is analogous to the present case. In Damron, the appellant "testified that he escaped from jail because it was a 'matter of life or death.' . . . that he was ill while in jail, lost weight, and suffered severe chest pains . . . had been denied medical attention and felt that 'it was serious enough that [his] life was in jeopardy.'" Despite the "life or death" circumstances described by Damron - a situation analogous to Gower's "dire economic circumstances" - it was held that "the situation described by Damron is not sufficient to invoke the provisions of KRS 503.030. There must be a showing of a specific and imminent threat to his person in order to justify the giving of the instruction."⁹

Gower's defense theory is missing an essential element of a choice of evils defense: the requirement that there be the threat of a specific and imminent physical injury. The choice of evils defense does not provide a person in dire economic circumstances the right to steal. Thus, the trial court did not err in denying Gower's request for a choice of evils instruction. Moreover the evidence and testimony which Gower complains was

⁶ Duvall v. Commonwealth, Ky. App., 593 S.W.2d 884, 886 (1979).

⁷ Beasley v. Commonwealth, Ky. App., 618 S.W.2d 179, 180 (1981).

⁸ Ky., 687 S.W.2d 138 (1985).

⁹ Id. at 139; see also Montgomery v. Commonwealth Ky., 819 S.W.2d 713 (1991).

excluded by the trial court regarding his choice of evils defense would not, if permitted, have warranted a choice of evils instruction, and the trial court did not err by excluding the evidence as irrelevant.

Next, Gower contends that the trial court erred when it permitted the Commonwealth to introduce abstracts of Gower's 1983 and 1984 Los Angeles County, California, felony convictions, rather than the actual convictions, to prove the first-degree PFO charge.

In Count 3 of the January 9, 1998, indictment Gower was charged with being a first-degree PFO based upon four prior felony convictions: (1) a February 10, 1993, robbery conviction in Caldwell County, Kentucky; (2) a January 1, 1985, bank robbery conviction in California; (3) a March 9, 1984, second degree burglary conviction in California; and (4) a March 3, 1983, grand theft auto conviction in California. Based upon discovery documents provided by the Commonwealth in support of the California convictions, prior to trial, Gower objected to the introduction of the documents supporting the California convictions on the basis that they were not self-authenticating under KRS 422.040, Kentucky Rules of Criminal Procedure (RCr) 11.04 and Davis v. Commonwealth.¹⁰

In the PFO phase of the trial, the Commonwealth presented evidence seeking to prove the 1993 Caldwell County conviction and the 1983 and 1984 California convictions. Evidence regarding the 1995 California conviction was not presented, and Gower does not contest the proof regarding the 1993 Caldwell County conviction.

¹⁰ Ky., 899 S.W.2d 487 (1995).

As proof of the 1983 and 1984 California convictions, the Commonwealth proffered the following:

1. A document captioned "Information" setting forth the 1983 felony charge.
2. Two documents captioned "Complaint Felony" setting forth the 1983 and 1984 felony charges, respectively.
3. A document captioned "Amendment to Complaint 1 Prior Conviction(s)" amending the 1984 felony charge to consider the 1983 conviction.
4. Two documents captioned "Abstract of Judgment - Commitment Single or Concurrent Count Form" reflecting the 1983 felony convictions, respectively.
5. Two transcripts of the Los Angeles County Superior Court hearings wherein Gower pled guilty to the 1983 and 1984 felony convictions, respectively.
9. Two documents captioned "Superior Court of California, County of Los Angeles" reflecting that Gower was withdrawing his plea of not guilty to the 1983 and 1984 charges, respectively, setting his sentence to those respective convictions, and reflecting other administrative matters.

Each of the foregoing documents bears, on the reverse side, the stamped Seal of the Los Angeles County, California, Superior Court and is signed by T. Paris, as Deputy, on behalf of Executive Officer/Clerk of the Superior Court of California, County of Los Angeles, John A. Clarke. The Seal and signature certify that "The Document to which this certificate is attached is a full,

true and correct copy of the original on file and of record in my office." The certification is dated June 21, 1999. However, none of the documents is certified by the judge, chief justice or presiding magistrate of the Los Angeles Superior Court.

At issue is whether the above-listed documents are sufficient to prove the California convictions.¹¹ Because this case is identical in every relevant respect to the foreign judgments at issue in Davis v. Commonwealth¹², we agree with Gower that the documents presented by the Commonwealth are insufficient to prove a PFO conviction. The Davis court said that:

Appellant also contends that the introduction and use of his prior felony convictions in the State of Arkansas failed to meet authentication standards which would allow them to be used for the persistent felony offense. The prosecution presented four documents which were certified by the Arkansas court clerk. These documents, however, were not exemplified by a judge, as required for a document to be self-authenticating, nor were they authenticated by a witness.

KRS 422.040 provides that

¹¹ As an appendix to its brief the Commonwealth attached a copy of a document bearing the seal of the California Department of Corrections and certifying that "the attached documents" were official incarceration records for Ronald Gower. Neither the Certification sheet nor the "attached documents" are included among the trial exhibits, and our review of the PFO phase of the trial discloses no reference to the California Department of Corrections records. We have accordingly disregarded the appendix to the Commonwealth's brief; however, we note that it does not appear that the California Department of Corrections records would have any relevance to our disposition of this issue.

¹² Ky., 899 S.W.2d 487 (1995).

The records and judicial proceedings of any court of any state, attested by the clerk thereof in due form, with the seal of the court annexed if there be a seal, and certified by the judge, chief justice, or presiding magistrate of the court, shall have the same faith and credit given to them in this state as they would have at the place from which the records come.

Thus, for a court of this Commonwealth to properly give full faith and credit to the judgment of a court of another state, certification by that court is required.¹³

In this case, the documents proffered by the Commonwealth in support of Gower's convictions in Los Angeles County Superior Court lacked "certification by that court", i.e. certification by the judge, chief justice or presiding magistrate of the Los Angeles County Superior Court.

The Commonwealth contends that the records were admissible as self-authenticating pursuant to Kentucky Rules of Evidence (KRE) 902(1), KRE 902(4) and KRE 1005. This is consistent with the position adopted by this court in Skimmerhorn v. Commonwealth¹⁴ in cases regarding the admissibility of court documents to prove a Kentucky conviction. If the 1983 and 1984 convictions were Kentucky convictions, as opposed to foreign jurisdiction convictions, the Commonwealth's argument would

¹³ Id. at 489.

¹⁴ Ky. App. 998 S.W.2d 771 (1998).

prevail; however, this is a foreign jurisdiction case and we are bound by Davis. We therefore reverse Gower's PFO I conviction.

Next we consider the remedy to which Gower is entitled for the Commonwealth's improper use of the California convictions in obtaining his PFO I conviction. "When evidence at trial is insufficient to sustain a guilty verdict, retrial on the same issue amounts to double jeopardy."¹⁵ However, whereas a conviction based on insufficient evidence may require a judgment of acquittal upon reversal, this is not the rule where the conviction has been set aside for trial error. Reversal of a judgment of conviction on the ground that evidence to support the conviction was erroneously admitted does not, on grounds of double jeopardy, prohibit a retrial.¹⁶

We are persuaded that the trial court's permitting of the Commonwealth to present incompetent evidence in support of the two California convictions was trial error and did not amount to an insufficiency of evidence to support Gower's PFO I conviction.

While we must reverse Gower's PFO I conviction, that reversal is due to the admission of improper evidence. The reversal is not because the Commonwealth failed to present sufficient evidence to demonstrate that Gower was a first degree PFO, but, rather, because the evidence of the California

¹⁵ Davis at 490 (citing Burks v. United States, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978), and Hobbs v. Commonwealth, Ky., 655 S.W.2d 472 (1983)).

¹⁶ Estes v. Commonwealth, Ky., 744 S.W.2d 425 - 426 (1987) (citing Commonwealth v. Mattingly, Ky., 722 S.W.2d 288 (1986)).

convictions was improperly authenticated and therefore incompetent. In this case, there was sufficient evidence to convict Gower of being a PFO I. His California convictions simply needed to be attested to by the judge, chief justice or presiding magistrate of the Los Angeles County Superior Court. This error does not negate the evidence. Gower does not contest the verity of the Caldwell County conviction and, upon remand, if the Commonwealth is able to produce properly verified proof of the California convictions, Gower may be retried upon the first-degree PFO charge.

Finally, Gower contends that the trial court erred when it sustained the Commonwealth's objection to his testimony concerning his claim that a third-person, now deceased, had induced him to steal the computer by promising to buy the stolen computer from Gower for \$800.00. Gower contends that the deceased's hearsay statement was admissible under KRE 803(3) as a statement by a co-conspirator and under KRE 804(b)(3) as a statement against penal interest.

The abuse of discretion standard is the proper standard of review of a trial court's evidentiary rulings.¹⁷ The same standard applies under the Kentucky Rules of Evidence.¹⁸

While Gower raises an interesting hearsay question, we need not consider the hearsay rules to resolve this issue. The

¹⁷ See Tumey v. Richardson, Ky., 437 S.W.2d 201, 205 (1969); Transit Authority of River City (TARC) v. Vinson, Ky. App., 703 S.W.2d 482, 484 (1985).

¹⁸ Mitchell v. Commonwealth, Ky., 908 S.W.2d 100, 102 (1995), overruled on other grounds, Fugate v. Commonwealth, Ky., 993 S.W.2d 931 (1999); accord United States v. Abel, 469 U.S. 45, 54, 105 S.Ct. 465, 470, 83 L.Ed.2d 450, 459 (1984). Goodyear Tire and Rubber Co. v. Thompson, Ky., 11 S.W.3d 575, 577 (2000).

trial court did not abuse its discretion in its ruling in that the deceased witness's statements to Gower were irrelevant. The significance of the statement is relevant only insofar as it bolsters Gower's choice of evils defense. As previously discussed, however, Gower's choice of evils defense theory is fatally flawed. Even if the statement of the deceased witness was otherwise admissible as a hearsay exception, the trial court nonetheless properly excluded the statement as irrelevant.

For the foregoing reasons, the judgment is affirmed in part and reversed in part, and this case is remanded to McCracken Circuit Court for additional proceedings consistent with this opinion.

ALL CONCUR.

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