RENDERED: MARCH 2, 2007; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2005-CA-002431-MR

FRANCIS E. LATENDRESSE — APPELLANT

v.

APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE JANET P. COLEMAN, JUDGE
ACTION NO. 03-CR-00173

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** ** ** ** **

BEFORE: WINE JUDGE; BUCKINGHAM AND EMBERTON SENIOR JUDGES.[1]

BUCKINGHAM, SENIOR JUDGE: Francis E. Latendresse appeals from a final judgment entered upon a jury verdict by the Hardin Circuit Court convicting him of nine counts of complicity to commit diverting charitable gaming funds, $300 or more, and nine counts of complicity to commit theft by failure to make required disposition of property over $300, and sentencing him to 13 months on each count, to be served concurrently. For the reasons stated below, we affirm.

On April 29, 2003, Latendresse was indicted by a Hardin County grand jury on nine counts of complicity to commit diverting charitable gaming funds, $300 or more, in violation of Kentucky Revised Statutes (KRS) 238.995(4) and KRS 502.020, and nine

[1] Senior Judge David C. Buckingham and Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

counts of complicity to commit theft by failure to make required disposition of property over $300, in violation of KRS 514.070 and KRS 502.020. Arthur R. Fisher, Jan E. Cooper, and Yon Frantum were indicted as codefendants.

The charges were brought in connection with an allegation that over a three-year period (1999-2001) Latendresse and his codefendants had participated in the skimming of proceeds from bingo games sponsored by the Military Order of the Purple Heart, the North Hardin Lions Club, and the Disabled American Veterans #156.

Yon Frantum entered a guilty plea prior to trial. At the conclusion of the Commonwealth's case in the trial of Latendresse, Fisher, and Cooper, the trial court granted a directed verdict in Cooper's favor. The jury, however, found Latendresse and Fisher guilty of all charges. The jury recommended a sentence of 13 months on each charge, to run concurrently, for each defendant.

On November 7, 2005, the trial court entered a final judgment consistent with the jury's verdict and sentencing recommendation. Both Latendresse and Fisher were granted probation. In addition, the final judgment ordered Latendresse and Fisher to pay restitution pursuant to KRS 533.030(3) in the amount of $341,776.86. This appeal followed.

Denial of Motion to Dismiss

First, Latendresse contends that the trial court erred by failing to dismiss the indictment because at a previously scheduled trial date the Commonwealth released its witnesses without the trial court's permission.

The record discloses that the case was previously scheduled for trial on June 20, 2005. At the scheduled start-time, however, the presiding judge was not present. In the wake of the confusion surrounding the judge's absence, the Commonwealth released its witnesses. The trial was therefore continued until August 3, 2005.

Latendresse subsequently moved to dismiss the indictment based upon the Commonwealth having released the witnesses without the trial court's permission. The trial court addressed the motion prior to the commencement of trial on August 3, 2005. In denying the motion, the court stated as follows:

> We did have confusion on, and I had been on vacation a few days. Let me see. This was scheduled to be tried on the last day that I was coming back. And, I had spoken with Judge Easton because he had said that he might be able to go ahead and start that, and if not, he would have it put on for the next day, or next trial day, which would be Wednesday. And my understanding all along was that we were, if he could not start it on Monday, as he had hoped to, that we would start right in on Wednesday. When I got here on Wednesday, I was told that the Commonwealth, apparently, for some reason, had cut all of their witnesses loose. And, that was not my understanding of what was to happen; however, because of the possibility of confusion on the issue and because we had had several delays in the case previous, at least some of which were caused by situations that had arisen with the defense, and specifically I recall a call over the weekend on my cell phone at my sister's house wherein I was told that one of the defendant's [unintelligible] passed away. I mean, just because there had been other delays, I thought it would be most fair, in my judgment to delay it briefly. I had this date here that was available, and nobody indicated an objection at that time. So, I had already overruled this particular motion to dismiss based on the Commonwealth releasing its witnesses, assuming that there might have been some confusion there. And we've already dealt with that fairly extensively.

. . . .

> I assumed that there was confusion. And partly because my schedule might have caused the confusion too. May have even been confusion on my part. And, considering how many delays there have been, and the fact that I know the most recent delay had been a delay which was sought by the defense. And it was very reasonably sought. I don't mean to say it wasn't. But, that is kind of of what I had, and that's the ruling I made, and why. But we are here today. Nobody objected to today's date.
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> . . . .
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> I believe, I mean my understanding of the case law, in situations like this, is that it's a matter within my discretion. That is my belief. And, while I did not, I did not authorize those witnesses to be released, my intention was to start it Wednesday, and to try it. As I said, Because of the potential confusion and previous continuances, my feeling was that it would be most fair to grant a short delay . . . . I thought that the harm in the situation was minimal considering the the number of delays that had already taken place.

Generally, a trial court is not unilaterally permitted to dismiss an indictment. *See* Kentucky Rules of Criminal Procedure (RCr) 9.64.[2] A generally recognized exception to this rule is, of course, dismissal upon speedy trial grounds. *See*, e.g., *Gerlaugh v. Commonwealth*, 156 S.W.3d 747, 750 (Ky. 2005). Latendresse, however, does not allege a violation of his right to a speedy trial.

Prosecutorial misconduct may also warrant unilateral dismissal. *See*, e.g., *Commonwealth v. Baker*, 11 S.W.3d 585 (Ky.App. 2000) (presentation of false testimony to grand jury). Here, however, the trial court concluded that the Commonwealth's release

[2] RCr 9.64 provides as follows: "The attorney for the Commonwealth, with the permission of the court, may dismiss the indictment, information, complaint or uniform citation prior to the swearing of the jury or, in a non-jury case, prior to the swearing of the first witness."

of its witnesses was as a result of confusion – not calculated efforts by the Commonwealth aimed at gaining a strategic advantage or for some other improper motive.

In the final analysis, this was a ruling by the trial court, albeit retrospectively, concerning whether a continuance was proper. RCr 9.04 states that a court may grant a continuance upon "sufficient cause shown." The decision as to whether to grant a continuance is within the sound discretion of the trial court based upon the unique facts and circumstances of the case. *Eldred v. Commonwealth*, 906 S.W.2d 694, 699 (Ky. 1994), (*overruled on other grounds by Commonwealth v. Barroso*, 122 S.W.3d 554 (Ky. 2003)). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Woodard v. Commonwealth*, 147 S.W.3d 63, 67 (Ky. 2004). As set forth above, the trial court provided sound reasons why a continuance was proper following the release of the witnesses, the principal reason being that the Commonwealth's release of the witnesses was a product of confusion. Accordingly, the court did not abuse its discretion in denying Latendresse's motion to dismiss the indictment.

Denial of Motion to Produce Documents

Next, Latendresse contends that the trial court erred "by refusing to require the Commonwealth to produce each document that supported a witness's claim or assertion."

Prior to trial, Latendresse filed a motion in limine moving

> [t]he court to require all witnesses for the Commonwealth to identify and to produce each specific record or document that relates to or supports a statement, assertion or conclusion made by that witness or another witness through his or her testimony. The defendants object to any witness merely making a general reference to "documents" or "records." Production of the specific document or record during testimony should be required.
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> Prior to the commencement of trial, the trial court orally denied the motion.

In so doing, the court stated as follows:

> I will not rule in limine on an issue like that. I think it is appropriate for me to see what you are seeking to present as it comes up. I don't think it would be appropriate for me to make a general, overall ruling they can't refer to stuff in boxes, or something. If you think, as the testimony is produced, as the testimony develops, you think that there is something wrong, tell me that. But, just a blanket motion in limine, such as this, I'm overruling. And, I'll consider each individual objection as it's made because I don't think I have enough information, as I sit here, to intelligently rule upon it. I mean, generally speaking, if they are testifying about something, sure, they're supposed to present documentation. I mean, you know, on the other hand, you're right, they're supposed to [unintellgible]. But exactly how they do it, I don't think its incumbent upon me to direct that, at this point, based on this motion.
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> Kentucky Rule of Evidence (KRE) 103(d), which deals with ruling on

motions in limine, states the following:

> A party may move the court for a ruling in advance of trial on the admission or exclusion of evidence. The court may rule on such a motion in advance of trial or may defer a decision on admissibility until the evidence is offered at trial. . . . Nothing in this rule precludes the court from reconsidering at trial any ruling made on a motion in limine.

The trial court has discretion in deciding whether to rule on a motion in limine. *Stanford v. Commonwealth*, 793 S.W.2d 112, 117 (Ky. 1990). Moreover, a trial court has wide discretion regarding evidentiary matters. It is well-settled that the evidentiary decisions of the trial court will not be disturbed absent an abuse of discretion. *Partin v. Commonwealth*, 918 S.W.2d. 219, 222 (Ky. 1996).

The court's ruling denying Latendresse's motion recognized the vagueness of the motion and the difficulties associated with granting such a broad request. Further, the court invited Latendresse's attorney to object during the trial to specific testimony unsupported by documentation as the occasion arose. In that regard, Latendresse has not cited us to subsequent objections that were overruled. In view of the foregoing, we conclude that the court did not abuse its discretion in denying Latendresse's motion in limine.

Denial of Motion for Directed Verdict

Latendresse next contends that the trial court erred by failing to grant his motion for a directed verdict based upon insufficiency of the evidence. He argues that no evidence was presented at trial of a complicity to commit the offenses charged; that there was no evidence that he acted contrary to law in his individual capacity; that there was no documentary evidence of substance in support of the charges; and that the undisputed testimony was that another individual, Archie Gaige, now deceased, manipulated the bingo financial records.

When ruling on a motion for a directed verdict of acquittal, the trial court is required to consider all evidence presented in a light most favorable to the

Commonwealth. *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991). On appeal, the standard of review is whether or not it was clearly unreasonable for the fact-finder to find guilt. *Commonwealth v. Sawhill*, 660 S.W.2d 3,5 (Ky. 1983). Under these standards, we conclude there was sufficient evidence to support the jury's verdict.

KRS 238.995, the diversion of charitable funds statute, provides as follows:

> Any person who knowingly diverts charitable gaming funds from legitimate charitable purpose or lawful expenses allowed under this chapter to his financial benefit or the financial benefit of another person shall be guilty of a Class A misdemeanor if the amount involved is less than three hundred dollars ($300) and a Class D felony if the amount involved is three hundred dollars ($300) or more.

KRS 514.070, the theft by failure to make required disposition of property statute, provides, in relevant part, as follows:

> (1) A person is guilty of theft by failure to make required disposition of property received when:
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> (a) He obtains property upon agreement or subject to a known legal obligation to make specified payment or other disposition whether from such property or its proceeds or from his own property to be reserved in equivalent amount; and
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> (b) He intentionally deals with the property as his own and fails to make the required payment or disposition.
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> (2) The provisions of subsection (1) apply notwithstanding that it may be impossible to identify particular property as belonging to the victim at the time of the actor's failure to make the required payment or disposition.

And KRS 502.020, the complicity statute, provides as follows:

> (1) A person is guilty of an offense committed by another person when, with the intention of promoting or facilitating the commission of the offense, he:
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> (a) Solicits, commands, or engages in a conspiracy with such other person to commit the offense; or
>
> (b) Aids, counsels, or attempts to aid such person in planning or committing the offense; or
>
> (c) Having a legal duty to prevent the commission of the offense, fails to make a proper effort to do so.
>
> (2) When causing a particular result is an element of an offense, a person who acts with the kind of culpability with respect to the result that is sufficient for the commission of the offense is guilty of that offense when he:
>
> (a) Solicits or engages in a conspiracy with another person to engage in the conduct causing such result; or
>
> (b) Aids, counsels, or attempts to aid another person in planning, or engaging in the conduct causing such result; or
>
> (c) Having a legal duty to prevent the conduct causing the result, fails to make a proper effort to do so.

Trial testimony disclosed that Latendresse and Fisher incorporated and owned a licensed gaming facility known as M.D.L. Charities, Inc., d/b/a Globe Bingo Hall, and a licensed gaming supplies distributor known as L&F Distributors. The bingo games for three charities, Disabled American Veterans #156, the Military Order of the Purple Heart, and North Hardin Lions Club, were conducted at Globe Bingo Hall. The gaming supplies for the sessions were provided by L&F.

M.D.L. Charities and L&F Distributors listed their address as 309 N. Wilson Street, Radcliff, Kentucky. In their gaming license applications, each of the three charities also listed its address as the same location.

As owners of Globe Bingo Hall, Latendresse and Fisher were prohibited by law from receiving or handling any of the charities' gaming proceeds. Nevertheless, trial testimony disclosed that they did handle the proceeds and had signature authority for the charitable gaming bank account for each of the three charities.

As a result of its preliminary investigations, the Office of Charitable Gaming conducted an audit of each of the three charities' books. The audits disclosed that for each charity there were significant discrepancies between the net receipts (amount of proceeds received less prize payouts) and the amounts deposited into the gaming accounts. The audits disclosed that the total shortage over the three-year period for Disabled American Veterans was $85,686.51, that the total shortage for the three-year period for the Military Order of the Purple Heart was $121,808.10, and that the total shortage for the three-year period for the Lions Club was $134,282.23.

Based upon the audit results testified to at trial, there was sufficient evidence in the record to support a conclusion by the jury that funds were diverted and that there was a failure to make proper disposition of the funds.

Further, there was sufficient evidence presented at trial by which a reasonable jury could conclude that Latendresse was complicit in the disappearance of the funds. Admittedly, much of the evidence linking Latendresse to the disappearance of the funds was circumstantial. However, the Commonwealth may prove guilt

by circumstantial evidence. *Varble v. Commonwealth*, 125 S.W.3d 246, 254-55 (Ky. 2004); *Blades v. Commonwealth*, 957 S.W.2d 246, 250 (Ky. 1997). Circumstantial evidence is evidence that makes the existence of a relevant fact "more likely than not." *Timmons v. Commonwealth*, 555 S.W.2d 234, 237-38 (Ky. 1977). The test of the sufficiency of the evidence on a motion for a directed verdict is the same for circumstantial evidence as for direct evidence. *Davis v. Commonwealth*, 795 S.W.2d 942, 945 (Ky. 1990).

Latendresse and Fisher were the principal organizers and administrators of the bingo operations. Prior to deposit, the money was stored in their office. Thus, Latendresse and Fisher had access to the money after it was placed in the office safe. Latendresse and Fisher also had access to the funds through their signature authority on the bank accounts. Moreover, the audit also disclosed that the session sheets were routinely altered after the fact.

From this evidence, the inference could be made that the principal administrators of the funds – Latendresse and Fisher – were responsible for their disappearance. Further, their involvement in the disappearance of the funds may be inferred from the improbability that over one-third of a million dollars could disappear from the bingo operations over a three-year period without their knowledge. In short, a reasonable jury could conclude that Latendresse and Fisher were involved in the diversion and failure to make proper disposition of the missing gaming funds.

Restitution to Military Order of the Purple Heart

Latendresse contends that the trial court erred by ordering that restitution relating to amounts skimmed from the Military Order of the Purple Heart charity be paid to the state treasurer of the Military Order of the Purple Heart. Latendresse alleges that since the Radcliff organization, which was the specific victim of the thefts, is now defunct, there is no victim to whom restitution is owing, and hence no restitution payment is required. We disagree.

KRS 532.032 provides, in relevant part, as follows:

> (1) Restitution to a named victim, if there is a named victim, shall be ordered in a manner consistent, insofar as possible, with the provisions of this section and KRS 439.563, 532.033, 533.020, and 533.030[3] in addition to any other part of the penalty for any offense under this chapter. The provisions of this section shall not be subject to suspension or nonimposition.
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> . . . .
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> (3) If probation . . . is granted, restitution shall be a condition of the sentence.

Therefore, in order for Latendresse to receive probation – which he requested and received – he was required to make restitution to the "victim" of the thefts from the Military Order of the Purple Heart.

KRS Chapter 532 does not provide a definition for "victim." The direct "victim" of the thefts, the Radcliff branch of the Purple Heart organization, is defunct. However, upon application of the basic principles of statutory construction, we believe

[3] KRS 533.030(3) provides as follows: "When imposing a sentence of probation . . . a case where a victim of a crime has suffered monetary damage as a result of the crime due to his property having been converted, stolen, or unlawfully obtained . . . the court shall order the defendant to make restitution in addition to any other penalty provided for the commission of the offense."

the term "victim," under the facts of this case, also applies to the defunct organization's parent, the state headquarters of the Military Order of the Purple Heart.

The primary purpose of judicial construction is to carry out the intent of the legislature. In construing a statute, the courts must consider "the intended purpose of the statute-and the mischief intended to be remedied." The courts should reject a construction that is "unreasonable and absurd, in preference for one that is 'reasonable, rational, sensible and intelligent[.]'" *Commonwealth v. Kerr*, 136 S.W.3d 783, 785 (Ky.App. 2004); *Commonwealth v. Kash*, 967 S.W.2d 37, 43-44 (Ky.App. 1997)).

The interpretation proposed by Latendresse is that since the Radcliff chapter of the organization is defunct, he should be relieved of any obligation to make restitution and should be able to retain any proceeds stolen from the charity. However, because there is a viable alternative victim – the state headquarters of the organization – Latendresse's proposed interpretation produces an unreasonable result. In short, we believe the trial court properly ordered restitution to be paid to the state treasurer of the Military Order of the Purple Heart.

Amount of Restitution

Latendresse contends that the trial court erred by ordering restitution in the amounts listed based upon the testimony as presented at trial. He alleges that the Commonwealth's evidence was lacking; that the Commonwealth violated KRE 1002 and KRE 1006 by using summaries of documents and data, instead of the original documents with the data, without giving proper advance notice to him of its intention to so proceed

at trial; that the data testified to by the Commonwealth's witnesses was unreliable as it is uncontroverted that it was incorrect, manipulated, incomplete, or otherwise untrustworthy; and that reliance upon the Commonwealth's evidence fails the due process requirement of a "minimum indicium of reliability" of the evidence of the amount of restitution.

KRS 532.033(3) charges the trial court with setting the amount of restitution. As such, the statute contemplates the trial court as being the fact-finder in the matter. Following a hearing on the issue, the trial court ordered total restitution of $341,776.86.

The amount of restitution is before this court upon the trial court's findings of fact and upon the record made in the trial court. Accordingly, appellate review of the trial court's findings of fact is governed by the rule that such findings shall not be set aside unless clearly erroneous. Kentucky Rule of Civil Procedure (CR) 51.01. A factual finding is not clearly erroneous if it is supported by substantial evidence. *Owens-Corning Fiberglas Corp. v. Golightly*, 976 S.W.2d 409, 414 (Ky. 1998); *Uninsured Employers' Fund v. Garland*, 805 S.W.2d 116, 117 (Ky. 1991). Substantial evidence is evidence which, when taken alone or in light of all the evidence, has sufficient probative value to induce conviction in the mind of a reasonable person. *Golightly*, 976 S.W.2d at 414.

There was testimony and evidence, presented at trial and at the hearing, in support of the amount of restitution ordered by the trial court. The $341,776.86 ordered in restitution is based upon a comparison of the sheets reflecting the actual net bingo receipts compared with actual deposits. As such, there is substantial evidence in the

record supporting the court's decision. Latendresse's argument consists of little more than a generalized attack upon the quality and reliability of the testimony and evidence. However, judgment on those issues is within the province of the fact-finder, not this court. Therefore, we will not disturb the trial court's determination of the proper restitution payable to each charity.

Equal Protection

Finally, Latendresse contends that the trial court violated his equal protection rights by ordering him to pay restitution when Yon Frantum, who was convicted by guilty plea of the same offenses, was sentenced to probation without any requirement that she pay restitution.

In support of his argument, Latendresse has included in the appendix to his brief what purports to be Frantum's indictment and plea agreement. However, as noted by the Commonwealth, these documents are not included in the record in this case. As such, these materials are outside of the record on appeal, in violation of CR 76.12(4)(vii). Accordingly, we have disregarded these materials in our consideration of this appeal.

As previously noted, where the victim of a crime has suffered monetary damage as a result of the crime due to his property having been converted, stolen, or unlawfully obtained, an order requiring the defendant to pay restitution is mandatory in connection with the granting of probation. KRS 533.030(3); KRS 532.032(3). However, the Frantum case is not before us, and Latendresse may find no relief in the trial court's failure to impose a restitution requirement upon Frantum, if that, in fact, is what occurred.

We cannot, of course, direct the trial court to now impose a restitution requirement upon Frantum. Moreover, as previously discussed, the trial court properly imposed a restitution requirement upon Latendresse in this case. We accordingly will not disturb the restitution order in this case based upon what may or may not have occurred in the Frantum case – which record we do not have before us.

For the foregoing reasons, the judgment of the Hardin Circuit Court is affirmed.

ALL CONCUR.

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