

RENDERED: MARCH 5, 2010; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000052-MR

FLOYD MALONE

APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE MARTIN J. SHEEHAN, JUDGE
ACTION NO. 08-CR-00329

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS, CHIEF JUDGE; CAPERTON, JUDGE; WHITE,¹ SENIOR JUDGE.

WHITE, SENIOR JUDGE: Floyd Malone appeals from two Kenton Circuit Court convictions on the charges of first-degree complicity to trafficking in a controlled substance and being a first-degree persistent felony offender. He was sentenced to fifteen years' imprisonment. Malone claims that the trial court should have

¹ Senior Judge Edwin M. White 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.

instructed the jury on the lesser charges of facilitation to trafficking in a controlled substance, criminal attempt to trafficking in a controlled substance, and facilitation of criminal attempt to trafficking in a controlled substance. Finding that Malone was not entitled to these instructions, we affirm Kenton Circuit Court convictions.

Kevin Johnson worked as a confidential informant for the Kenton County Sheriff's Department. On March 3, 2008, Johnson contacted Malone and asked if he could purchase one-sixteenth of an ounce of cocaine.² They agreed to meet later in front of Malone's house.

When Johnson arrived, Malone walked outside and entered Johnson's truck. Malone made a few phone calls and ordered two grams of cocaine. Johnson realized that the Sheriff's department forgot to give him the "buy money" to purchase the drugs. He told Malone that he would return after he went to the ATM. After he picked up the money, Johnson returned to Malone's house.

Shortly thereafter, a vehicle parked behind Johnson's truck. After talking to the vehicle's occupants, Malone told Johnson that the men had "better stuff." Malone cancelled his previous order and walked inside the house. The men gave Malone the cocaine. Malone gave a share of it to Johnson, who paid him \$100.

At trial and on appeal, Malone admits that he ordered cocaine for Johnson. He even admits that he took Johnson's money in exchange for the cocaine. Malone, however, claims that his actions do not amount to trafficking but

² A sixteenth of an ounce is approximately 1.8 grams.

a crime of facilitation, criminal attempt, or a combination of both. Malone claims that the trial court erred by denying his request for jury instructions on these charges.

“An instruction on a lesser-included offense is appropriate if and only if on the given evidence a reasonable juror could entertain reasonable doubt of the defendant’s guilt on the greater charge, but believe beyond a reasonable doubt that the defendant is guilty of the lesser offense.” *Skinner v. Commonwealth*, 864 S.W.2d 290, 298 (Ky. 1993). After reviewing the record and applicable case law, we conclude that Malone was not entitled to additional instructions.

First, a criminal facilitation instruction was not required because the evidence showed that Malone did not aid another in the commission of a crime but committed a crime himself. KRS 506.080 (1) states:

A person is guilty of criminal facilitation when, acting with knowledge that another person is committing or intends to commit a crime, he engages in conduct which knowingly provides such person with means or opportunity for the commission of the crime and which in fact aids such person to commit the crime.

While this description may appear similar to complicity, the difference lies in the defendant’s state of mind. *Monroe v. Commonwealth*, 244 S.W.3d 69, 75 (Ky. 2008). “Facilitation reflects the mental state of one who is ‘wholly indifferent’ to the actual completion of the crime.” *Perdue v. Commonwealth*, 916 S.W.2d 148, 160 (Ky. 1995), *cert. denied*, 519 U.S. 855, 117 S.Ct. 151, 136 L.Ed.2d 96 (1996).

Malone claims that he merely ordered the drugs and provided a location for the transaction. By Malone's admission, however, he made several calls to order cocaine and gave the cocaine to Johnson in exchange for money. The facts clearly indicate that Malone was an active participant who was not indifferent to the crime. Therefore, we conclude that Malone was not entitled to a facilitation instruction.

Second, Malone was not entitled to a jury instruction on the charge of criminal attempt to trafficking a controlled substance because he completed the drug transaction. KRS 506.010 (1), (2), and (3) provide:

(1) A person is guilty of criminal attempt to commit a crime when, acting with the kind of culpability otherwise required for commission of the crime, he:

(a) Intentionally engages in conduct which would constitute the crime if the attendant circumstances were as he believes them to be; or

(b) Intentionally does or omits to do anything which, under the circumstances as he believes them to be, is a substantial step in a course of conduct planned to culminate in his commission of the crime.

(2) Conduct shall not be held to constitute a substantial step under subsection (1) (b) unless it is an act or omission which leaves no reasonable doubt as to the defendant's intention to commit the crime which he is charges with attempting.

(3) A person is guilty of crime attempt to commit a crime when he engages in conduct intended to aid another person to commit that crime, although the crime is not committed or attempted by the other person, provided

that his conduct would establish complicity under KRS 502.020 if the crime were committed by the other person.

Malone argues that the jury could have concluded that he took a substantial step to obtain cocaine for Johnson but later abandoned his efforts. However, Malone admits that ultimately he gave Johnson cocaine in exchange for money. The transaction was completed. Therefore, we conclude that he was not entitled to an instruction on the charge of criminal attempt.

Third, Malone claims that he was entitled to an instruction on the charge of facilitation of criminal attempt to trafficking in a controlled substance. As previously mentioned, instructions on the charges of facilitation and criminal attempt were not warranted in this case, alone or as a combined charge.

Malone sold drugs. The facts of this case do not suggest that Malone is a large scale drug dealer. However, ordering drugs for another and exchanging them for money constitute trafficking. Our state penal code does not differentiate between small and large scale dealers or intermediaries and mastermind traffickers. Thus, we are forced to classify all drug transactions as trafficking and assess the same penalty range to all offenders.

While we recognize Malone's argument, our court system is not the proper avenue to change the statute involved in this case. Instead, a change to Kentucky's penal code to reflect Malone's argument must be done by the state legislature – if at all.

Because Malone's actions do not constitute facilitation or criminal attempt, we affirm the Kenton Circuit Court convictions.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Samuel N. Potter
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

John Paul Varo
Assistant Attorney General
Frankfort, Kentucky