

Commonwealth of Kentucky
Court of Appeals

NO. 2008-CA-001673-MR

DAVID S. SMITH

APPELLANT

v. APPEAL FROM BRECKINRIDGE CIRCUIT COURT
HONORABLE SAM H. MONARCH, JUDGE
ACTION NO. 06-CR-00005

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: VANMETER, ACTING CHIEF JUDGE; COMBS AND KELLER,
JUDGES.

KELLER, JUDGE: A jury found David Smith (Smith) guilty of theft by failure to
make required disposition of property valued at \$300.00¹ or more and
recommended a sentence of five-years' imprisonment. The trial court entered a
judgment consistent with the jury's verdict and sentencing recommendation.

¹ We note that the chargeable amount has since been raised to \$500 for a felony. KRS 514.030,
effective date: June 25, 2009.

Smith appeals, arguing that the trial court erred when it excluded: (1) evidence of two witnesses' prior felony convictions, and (2) testimony from Smith regarding the finances of those witnesses. For the following reasons, we affirm.

FACTS

At the outset we note that, due to technical difficulties, a substantial portion of the relevant trial proceedings is not in the record. Therefore, the parties have provided a narrative statement of the missing proceedings. Our recitation of the facts is based on our review of that narrative and the record that is available.

In the spring of 2004, Smith agreed to sell farm equipment for Linda Tackett (Linda) and her husband Grayson. The agreement provided that the Tacketts would receive the first \$50,000 of the proceeds from the sale, and Smith would receive any amount in excess of \$50,000 as his commission. Smith ultimately gave the Tacketts four checks totaling \$68,000, all of which were returned by the bank for insufficient funds. A grand jury indicted Smith and he went to trial in the summer of 2008. We note that the trial was delayed, in part, due to Smith's imprisonment on federal charges.

Prior to trial, the Commonwealth made a motion *in limine*, seeking to prohibit Smith from questioning the Tacketts about their 1995 federal felony convictions for obstructing justice. Those convictions arose from crimes committed by the Tacketts' son, Brian, in 1991. Brian was charged by federal authorities with arson and with carrying a firearm while committing a crime of violence. Grayson and Linda attempted to convince the firearms dealer who sold

Brian the weapon to alter the date of the purchase to a time after the arson and to show Grayson as the purchaser. Federal investigators discovered Grayson's and Linda's activities with regard to the weapon, leading to their 1995 convictions.

In support of its motion *in limine*, the Commonwealth argued that the convictions were more than ten years old and therefore properly excludable under Kentucky Rule of Evidence (KRE) 609(b). Smith argued that the convictions were relevant as to the Tacketts' credibility and that the probative value of the evidence outweighed its prejudicial effect.

After reviewing the opinion from a federal court of appeals panel regarding the Tacketts' convictions and the relevant evidentiary rules, the trial court "provisionally" granted the Commonwealth's motion. In doing so, the trial court noted that the crimes committed by the Tacketts occurred more than ten years before trial and were not in any way related to the issues before the trial court. However, the trial court stated that, if any evidence was introduced that would otherwise make the convictions relevant or if the Tacketts' testimony "look[ed] questionable" or "shaky," the trial court would reconsider its order.

At trial, the Tacketts testified regarding the arrangements they made with Smith to sell their farm equipment. Additionally, Linda testified that Smith "had not maintained communication" with her or Grayson. On cross-examination, Linda testified that Smith had given the Tacketts a mortgage on property he owned in Breckinridge County; however, she stated that she had received nothing from the mortgage and considered it worthless.

Grayson then testified. His testimony was similar to Linda's with regard to the agreement with Smith. However, Grayson stated that Linda's participation in the negotiations was less than she had indicated. Furthermore, Grayson testified that he went to the bank with Smith and they discussed "money concerns," but he denied that he altered the agreement with Smith.

Smith testified that he sold some of the equipment, receiving \$15,000 to \$18,000 for a Ford tractor, \$10,000 for a John Deere tractor, and \$1,800 for a bush hog. He also sold a hay rake and hay baler, but did not specify the amount received for those items. Smith admitted that he did not account to the Tacketts for the proceeds from the sales. According to the narrative statement provided by the parties, Smith stated that he and Grayson had discussed the Tacketts' debts and the possibility of the parties going into business together. The Commonwealth objected to that testimony and, following an in-chambers hearing, the trial court sustained the objection.

During that in-chambers hearing the trial court stated that Smith's counsel had started to question Smith about his own finances. This appears to contradict the narrative statement, but that contradiction will not have an impact on our analysis.

Smith wanted to testify that Grayson approached him about investing in a business. According to Smith, Grayson agreed to let Smith use the proceeds from the sale of the farm equipment to pay off some of his personal debts. Once those debts had been extinguished, Smith was going to effectuate a "1031

exchange” of real estate² and would then be in a position to invest in the business. Smith’s counsel indicated that he wanted to present evidence of Smith’s financial condition in order to establish background for Smith’s testimony regarding the alleged change in the terms of his agreement with the Tacketts.

The trial court stated that it would permit Smith’s counsel to ask Smith if the terms of the agreement had been altered. However, the trial court stated that any testimony regarding Smith’s financial condition would not be relevant. Furthermore, the trial court indicated that testimony from Smith regarding the alleged business deal could open the door to introduction of character evidence. The trial court then noted Smith’s long history of convictions of various criminal charges, and warned Smith’s counsel that opening the door to that evidence would not be beneficial to his client. Smith apparently did not testify any further regarding either his or the Tacketts’ financial condition and rested his case. The jury then deliberated and returned a verdict of guilty.

STANDARD OF REVIEW

The standard of review regarding the admission or exclusion of evidence is whether the trial court abused its discretion. “The test for abuse of discretion is whether the trial judge’s decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). With that standard in mind, we address the issues raised by Smith.

² We believe that Smith was going to testify about a “like kind exchange” under Section 1031 of the Internal Revenue Code.

ANALYSIS

Smith first argues that the trial court erred by excluding evidence of the Tacketts' 1995 federal felony convictions. KRE 609(a) provides that

[f]or the purpose of reflecting upon the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record if denied by the witness, but only if the crime was punishable by death or imprisonment for one (1) year or more under the law under which the witness was convicted. The identity of the crime upon which conviction was based may not be disclosed upon cross-examination unless the witness has denied the existence of the conviction. However, a witness against whom a conviction is admitted under this provision may choose to disclose the identity of the crime upon which the conviction is based.

However, evidence of a conviction “is not admissible if a period of more than ten (10) years has elapsed since the date of the conviction unless the trial court determines that the probative value of the conviction substantially outweighs its prejudicial effect.” KRE 609(b).

Although the parties disagree with regard to its application, they agree that trial courts should analyze the admission of evidence of felony convictions under KRE 609(b) using the guidelines set forth in *Holt v. Commonwealth*, 250 S.W.3d 647 (Ky. 2008). In *Holt*, a case involving charges of rape, sodomy, and impersonating a police officer, the trial court admitted evidence that Holt was a convicted felon. The felonies involved theft and receiving stolen property and the convictions were twenty-four and twenty-five years old. In doing so, the trial court

indicated that evidence of Holt's convictions was admissible because the crimes involved "veracity" and Holt's credibility was at issue. *Id.* at 649-651.

The Supreme Court of Kentucky reversed, holding that the trial court erred in admitting that evidence. In doing so, the Supreme Court held that the analysis for admissibility under KRE 609(b) begins with the assumption that evidence of a felony more than 10 years old is not admissible. The party seeking admission must then prove that the probative value of the evidence substantially outweighs its prejudicial effect. The Supreme Court noted that this starting point is the opposite of that when analyzing evidence under KRE 403. That analysis begins with the assumption that the evidence is admissible and the opposing party must then show that its prejudicial effect outweighs its probative value. When balancing between probative value and prejudicial effect in a case involving KRE 609(b), the trial court should consider:

- 1) whether the witness has placed his credibility in issue by testifying in contravention to other witnesses;
- 2) whether the prior conviction being offered for impeachment is probative of truthfulness;
- 3) whether the case is civil or criminal; and
- 4) the age of the conviction sought to be introduced.

Id. at 651. In a criminal case, the admission of evidence of a prior felony is deemed to be more prejudicial than in a civil case. *Miller ex rel. Monticello Banking Co. v. Marymount Medical Center*, 125 S.W.3d 274, 286 (Ky. 2004). Weighing these factors, the Supreme Court held that the trial court erred by admitting evidence of Holt's prior felony convictions.

Smith argues that the trial court herein did not apply the standard set forth in *Holt* when it excluded evidence of the Tacketts' prior felony convictions. The Commonwealth argues that, even if the trial court applied the incorrect standard, it ultimately reached the correct result.

Based on our review of the record, it appears that the trial court determined to exclude evidence of the Tacketts' felony convictions because those convictions were not related to the issues before the trial court. Therefore, Smith is correct that the trial court did not apply the *Holt* standard in evaluating the admissibility of evidence regarding the Tacketts' prior felony convictions. However, that failure by the trial court was not error.

Before determining whether to admit evidence, a trial court must first determine if that evidence is relevant. Relevant evidence is that evidence that has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." KRE 401.

The Commonwealth argues that whether Grayson and Smith discussed altering the agreement is irrelevant because Smith had already committed the crime before any such discussion took place. Smith characterizes that argument as absurd. We disagree. As stated in Kentucky Revised Statute (KRS) 514.070(1):

A person is guilty of theft by failure to make required disposition of property received when:

(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

(b) He intentionally deals with the property as his own and fails to make the required payment or disposition.

There is no dispute that Smith agreed to sell the farm equipment for the Tacketts and to give the Tacketts \$50,000 from the proceeds. It is also undisputed that Smith sold the equipment and did not give the Tacketts any of the proceeds. There is a dispute about whether this agreement was altered. However, even if the agreement was altered, Smith did not give any funds to or otherwise do anything that benefited the Tacketts, thereby violating any agreement the parties had. Therefore, testimony regarding the alteration of the agreement was not relevant, and we cannot say that the trial court abused its discretion when it excluded evidence of the Tacketts' prior felony convictions.

Smith next argues that the trial court erred when it excluded evidence of his and/or the Tacketts' finances. As previously noted, there is some discrepancy about the nature of the evidence between the narrative statement and the in-chambers hearing. However, the Commonwealth argues in its brief that the testimony that was objected to involved the Tacketts' finances, not Smith's. Therefore, we will analyze this issue from that perspective.

In support of this argument, Smith states that the trial court's exclusion of evidence of the Tacketts' finances impermissibly impeded his ability

to present a defense. According to Smith, his defense, that the agreement had been altered, depended on his ability to delve into the Tacketts' finances. While we agree with Smith that he was entitled to present a defense, the Commonwealth is also correct that evidence supporting that defense must be admissible.

KRE 402 provides that, with some exceptions, all relevant evidence is admissible. KRE 401 defines relevant evidence as that which has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Any analysis of relevance must begin with whether the fact sought to be proven is "of consequence to the determination of the action." As noted above, whether Grayson and Smith altered the agreement is not relevant because whatever agreement was in place, Smith did not abide by it. Therefore, any evidence of the circumstances surrounding the alleged alteration of the agreement is not relevant, and we discern no error in the trial court's exclusion of that evidence.

CONCLUSION

Having discerned no error in the trial court's evidentiary rulings, we affirm.

ALL CONCUR.

BRIEF FOR APPELLANT:

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