

RENDERED: December 19, 1997; 10:00 a.m.
NOT TO BE PUBLISHED

NO. 96-CA-2997-MR

LESLIE DILLARD OLDHAM, JR.

APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE REBECCA OVERSTREET, JUDGE
ACTION NO. 96-CR-00754

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

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

BEFORE: DYCHE, MILLER, and SCHRODER, Judges.

MILLER, JUDGE: Leslie Dillard Oldham, Jr. (appellant), brings this appeal from an October 29, 1996 judgment of the Fayette Circuit Court. We affirm.

The facts are these: On May 30, 1996, the Lexington Metro Police Department enlisted the aid of a confidential informant, Robert Wilson, to make a controlled drug buy. Wilson "cruised" certain areas until he was approached by appellant and one other male. Appellant entered Wilson's vehicle, and Wilson expressed interest in purchasing a "\$40.00 piece" of crack cocaine. Appellant then instructed Wilson to drive them to another location where the cocaine could be obtained. Upon

arrival, appellant left the car and returned shortly with the contraband. According to Wilson's testimony, appellant handed him the drugs, and, in return, he gave appellant \$40.00. Appellant testified, however, that he received no money for the drugs.

Appellant was indicted upon one count of trafficking in a controlled substance in the first degree (Ky. Rev. Stat. (KRS) 218A.1412). On September 30, 1996, a jury trial ensued, and, subsequently, appellant was found guilty. He was sentenced to five years' imprisonment, but the term of imprisonment was probated for a period of five years. This appeal followed.

Appellant argues that the trial court erred by refusing to instruct the jury on the lesser charges of first-degree criminal attempt to traffick in a controlled substance (KRS 506.010, KRS 218A. 1412) and criminal facilitation of same (KRS 506.080). He contends such errors were prejudicial because conviction upon either charge would have resulted in lesser punishment. We disagree.

It is well established that a court must instruct upon the whole law of the case. Callison v. Commonwealth, Ky. App. 706 S.W.2d 434 (1986). "Where there is sufficient evidence to support a reasonable inference concerning the ultimate fact in a case, the issue should be submitted to the jury with appropriate instructions." Id. at 436.

We first address the circuit court's refusal to instruct on criminal attempt. Appellant specifically asserts that the jury could have reasonably inferred that he did not traffick in a controlled substance, but rather could have reason-

ably inferred that he was guilty only of criminal attempt. In support thereof, he points to his testimony that he accepted no money in exchange for the cocaine. This argument fails because the crime of trafficking is not predicated upon receipt of money in exchange for a controlled substance.

KRS 218A.010(24) defines trafficking as:

to manufacture, distribute, dispense, sell, **transfer**, or possess with intent to manufacture, distribute, dispense, or sell a controlled substance [emphasis added].

Transfer is defined as the disposition "of a controlled substance to another person without consideration and not in furtherance of commercial distribution." KRS 218A.010(25). Both appellant and Wilson testified that the delivery of the crack cocaine to the appellant was completed. Consequently, we are of the opinion that the trial court did not commit reversible error by refusing to render an instruction upon criminal attempt.

We next address the trial court's refusal to instruct on criminal facilitation to traffick in a controlled substance. In Luttrell v. Commonwealth, Ky., 554 S.W.2d 75, 79 (1977), the Court characterized "criminal facilitation" as follows:

[The defendant] would be guilty of criminal facilitation if he furnished [another] with the means of committing a crime knowing that he would use it to commit a crime but without intention to promote or contribute to its fruition.

The Court, in Perdue v. Commonwealth, Ky., 916 S.W.2d 148, 160 (1996), further explained that "[f]acilitation reflects the

mental state of one who is '**wholly indifferent**' to the actual completion of the crime [emphasis added]."

The uncontroverted evidence demonstrates that appellant was not wholly indifferent to whether Wilson obtained the crack cocaine. Appellant testified that he was caught "red handed" and that he was going to get high with Wilson. If appellant's testimony is to be given credence, his interest was in the sharing of drugs with Wilson. Conversely, if Wilson's testimony is to be believed, appellant's interest was that of monetary compensation. Either way, appellant's conduct and testimony demonstrate that he was not indifferent to the transaction. In sum, we perceive no error by the trial court in refusing to instruct the jury on criminal facilitation.

For the foregoing reasons, the judgment of the Fayette circuit court is affirmed.

ALL CONCUR.

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