RENDERED: February 4, 2000; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-002446-MR

DEAN A. SPARKS — APPELLANT

v.

APPEAL FROM HOPKINS CIRCUIT COURT
HONORABLE CHARLES W. BOTELER, JR., JUDGE
ACTION NOS. 96-CR-00178 and 98-CR-00118

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING
** ** ** ** **

BEFORE: COMBS, GUIDUGLI, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: This is an appeal of a conviction for flagrant nonsupport and being a persistent felony offender in the second degree. Because appellant was not entitled to a directed verdict nor a jury instruction on the lesser included offense of nonsupport, we affirm.

Appellant, Dean Sparks, and Pam Baker (Baker) are the parents of a child born on January 29, 1995. Appellant and Baker separated two months after the child was born. On August 29, 1995, appellant was ordered by the Webster District Court to pay the amount of $328.32 per month child support to Baker.

On September 30, 1996, appellant was indicted by the Hopkins Circuit Grand Jury for flagrant nonsupport in violation of KRS 530.050(2). Appellant failed to appear for arraignment and was considered a fugitive. Appellant was eventually arrested on April 11, 1998. On June 9, 1998, appellant was indicted by the Hopkins Circuit Grand Jury for being a second-degree persistent felony offender (PFO II). The PFO II charge was based on appellant's prior conviction for flagrant nonsupport on April 1, 1996, for which he received a sentence of three years, probated for a term of five years. Appellant was tried by jury on June 23, 1998. The Commonwealth's witnesses included Baker and Sandra Messamore (Messamore), an employee of the Child Support Unit of the county attorney's office. The Commonwealth presented evidence that, between November, 1995 and the time he was indicted in September, 1996, appellant had accumulated an arrearage in his child support payments of $2672.77, and that he had not made any child support payments since March, 1996. Appellant did not testify, and the defense presented no witnesses. Appellant was found guilty of both charges, and sentenced to seven years' imprisonment. This appeal followed.

Appellant first argues that he was entitled to a directed verdict of acquittal as the Commonwealth offered no proof that he was reasonably able to provide support, as required by KRS 530.050(2), which states in pertinent part:

> (2) A person is guilty of flagrant nonsupport when he persistently fails to provide support <u>which he can reasonably</u>

provide and which he knows he has a duty to provide by virtue of a court or administrative order to a minor or to a child adjudged mentally disabled, indigent spouse or indigent parent and the failure results in:

(a) An arrearage of not less than one thousand dollars ($1,000); or

(b) Six (6) consecutive months without payment of support; or

(c) The dependent having been placed in destitute circumstances. . . . [Emphasis added.]

Appellant argues that the Commonwealth produced no evidence that he could reasonably provide the support ordered during the time period that the arrearage accrued. Upon review of the record, we adjudge the Commonwealth did produce sufficient evidence that appellant was employable and able to work during this time. Baker testified that during her relationship with appellant, he held four different jobs, the last one being at the Executive Inn in Owensboro. Baker testified that appellant was employed by the Executive Inn at the time appellant's and her relationship ended when their child was two months old. Messamore testified that the four child support payments which appellant did make between November, 1995 and September, 1996, were through wage assignments. These payments, of $50.00,

$282.50, $325.00, and $281.25, were made on December 13, 1995, December 13, 1995, January 4, 1996, and March 4, 1996, respectively. Neither appellant nor the Commonwealth presented any evidence that appellant was physically disabled or financially unable to make his support payments. Rogers v. Commonwealth, Ky., 321 S.W.2d 779 (1959).

On appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then is the defendant entitled to a directed verdict of acquittal. Commonwealth v. Benham, Ky., 816 S.W.2d 186 (1991). Based on the aforementioned evidence of appellant's work history, we conclude that a reasonable jury could have found appellant could "reasonably provide" the support he was ordered to pay. Further, the evidence clearly showed both that appellant was over $1,000 in arrears and had not made any payments for six consecutive months. Accordingly, the trial court did not err in denying appellant's motion for a directed verdict.

Appellant's second argument is that the trial court erred in overruling his motion for a jury instruction on the lesser included offense of nonsupport. Nonsupport is defined in KRS 530.050(1), which states:

> (1) A person is guilty of nonsupport:
>
> (a) When he persistently fails to provide support which he can reasonably provide and which he knows he has a duty to provide to a minor or to a child adjudged mentally

disabled, indigent spouse or indigent parent; or

(b) Upon a finding that a defendant obligor, subject to court order to pay any amount for the support of a minor child, is delinquent in meeting the full obligation established by such order and has been so delinquent for a period of at least two (2) months duration.

Appellant argues that the Commonwealth's child support record-keeping system was "flawed" and therefore no specific finding could be made as to his exact amount of arrearage or which monthly payments he specifically missed and why. Appellant bases this argument on the testimony of Messamore that "some errors creep into the [Commonwealth's] computer system". Appellant argues that, because the Commonwealth's record-keeping system is "flawed", the jury may have doubted that he had accumulated either the total arrearage or missed monthly payments necessary for a flagrant nonsupport conviction, and that the unexplained halt in wage assignments might have caused the jury to infer he had an inability to pay. Thus, he argues the jury may have doubted that he was guilty of flagrant nonsupport while concluding he was guilty of simple nonsupport.

A defendant is entitled to a lesser included offense instruction "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, Ky., 864 S.W.2d 290, 298 (1993). See also Webb v. Commonwealth, Ky., 904 S.W.2d 226, 229 (1995); Bills v. Commonwealth, Ky., 851 S.W.2d 466, 469 (1993). The evidence in this case did not merit the giving of an instruction on nonsupport. The Commonwealth's records clearly showed that at the time of indictment in September 1996, appellant had not made any child support payments since March, 1996 and had accrued an arrearage of $2,672.77 since November, 1995. Baker testified that she had not received any child support payments from appellant since March, 1996, nor had she received any other monetary or other support for the child of any kind from appellant. Although appellant argues that the Commonwealth's record keeping system is flawed, he offered no evidence that the Commonwealth made any errors in his case, nor any evidence that he had made any payments not accounted for.

The evidence at trial clearly showed that appellant had accumulated an arrearage of greater than $1000 and six consecutive months without payment. Only one of these facts is required for a conviction of flagrant nonsupport pursuant to KRS 530.050(2). Further, had the jury believed that appellant could not "reasonably provide" the support required, as appellant argues, he would been acquitted of flagrant nonsupport, as well as the lesser offense of nonsupport, as such a finding is required for both crimes. KRS 530.050(1)(a) and (2). Therefore, we do not believe that a reasonable juror could have acquitted

appellant of flagrant nonsupport, and still have found him guilty of nonsupport. Skinner, 864 S.W.2d at 298. Accordingly, the trial court did not err in overruling appellant's motion for an instruction on the lesser included offense of nonsupport.

For the aforementioned reasons, the judgment of the Hopkins Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Irvin J. Halbleib
Louisville, Kentucky

BRIEF FOR APPELLEE:

A. B. Chandler, III
Attorney General

Gregory C. Fuchs
Assistant Attorney General
Frankfort, Kentucky