

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-002268-MR

GLOSTER HAYES

APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE THOMAS L. CLARK, JUDGE
ACTION NO. 98-CR-00324

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS, JOHNSON, and McANULTY, Judges.

COMBS, JUDGE: Gloster Hayes (Hayes) appeals the order of the Fayette Circuit Court sentencing him to a total of ten-years' imprisonment following a jury trial in which he was convicted of second-degree escape, first-degree perjury, and being a second-degree persistent felony offender (PFO II). Having reviewed the record and applicable law, we affirm.

In January 1998, as a result of violating the terms of his participation in the drug court program, Hayes was interned in the Fayette County Detention Center under a work release program. Hayes's term of commitment was to run from January 7, 1998, to January 21, 1998. Under the terms and conditions of the

program, Hayes was released from the detention center at 6:00 a.m. and was required to return at 6:00 p.m. on Mondays through Saturdays. On January 17, 1998, Hayes failed to return to the facility, and a warrant for his arrest was issued that same evening. On January 19, 1998, Hayes was identified in the vicinity of Sixth Street and North Limestone Avenue by patrol Officer Wright of the Lexington-Fayette County Metro Police Department. Following their initial eye contact, Officer Wright lost sight of Hayes, and it was not until some minutes later that Hayes was located and arrested at North Limestone Avenue and Bryan Station Road.

On March 17, 1998, Hayes testified on his own behalf before the grand jury, stating that: (1) he was unaware that his departure from the detention center was unlawful as he believed that he had been released; (2) he was en route to turn himself in to law enforcement officials when arrested by Officer Wright; (3) he was "doing alright" under the drug court program; (4) he had spent the two days away from the detention center with his sobriety sponsor, Darnell Edwards, in Cincinnati, Ohio; and (5) he was unfamiliar with the release procedure as he had never been released from the detention center annex.

The grand jury indicted Hayes for the offenses of second-degree escape and first-degree perjury as a result of his testimony – as well as for being a PFO II. A jury trial was held on July 21, 1998, resulting in guilty verdicts on all the charges. The jury recommended a sentence of one (1) year on the escape offense and two and one-half (2½) years on the perjury

count. Because of his PFO II status, the jury recommended that each sentence be enhanced to five (5) years – to run consecutively. The court entered its judgment adopting the jury's recommendations on August 27, 1998. This appeal followed.

On appeal, Hayes argues that the trial court erred in: (1) failing to direct a verdict on his behalf; (2) permitting the Commonwealth to admit evidence through a rebuttal witness; and (3) denying the defense's request for a jury instruction on false swearing. We shall address his arguments in the order in which they were presented.

The appellate standard of review as to a directed verdict is that "[i]f under the evidence as a whole it would not be clearly unreasonable for a jury to find the defendant guilty, he is not entitled to a directed verdict of acquittal." Trowel v. Commonwealth, Ky., 550 S.W.2d 530, 533 (1977).

The trial court must draw all fair and reasonable inferences from the evidence in favor of the party opposing the motion, and a directed verdict should not be given unless the evidence is insufficient to sustain a conviction. The evidence presented must be accepted as true. The credibility and the weight to be given the testimony are questions for the jury exclusively.

Commonwealth v. Sawhill, 660 S.W.2d 3, 5 (1983).

Hayes moved for a directed verdict based on the insufficiency of the evidence at the close of the Commonwealth's case, again at the end of his own case, and a third time following the rebuttal testimony provided by Corporal Hughes. Each time, the motion was denied, and the case then went to the jury.

The Commonwealth presented eight witnesses during its case-in-chief. A portion of the testimony revealed that while participating in the drug court program, Hayes had been on work release three previous times: in June 1994, June 1995, and December 1996. Darnell Edwards, Hayes's longtime friend and sponsor in a sobriety program, testified that Hayes was not with him from January 17 through January 19 but rather that he had phoned after the grand jury hearing and asked Edwards to lie about his whereabouts during this time period. Additionally, Hayes's drug court case specialist testified that following his arrest, Hayes had called him and stated that he had suffered a "relapse" and had not turned himself in.

Testimony was also presented establishing that Hayes was serving time in the detention center for his third and fourth dirty urine samples – in addition to having previously served time for missing urine drops and for a pattern of behavior that violated the terms of the drug court program. Officer Wright testified that Hayes fled on foot when first approached and was found travelling outbound on North Limestone Avenue and New Circle Road – in a direction more distant and opposite from the detention center. Officer Wright stated Hayes acted shocked and surprised that he was being arrested.

Testimony was presented as to the fact that Hayes was fully and adequately informed about requirements and rules of the work release policies and procedures. Susan Torrey-Preston was the adult probation officer aide who allegedly gave Hayes permission not to return to the detention center; contrary to his

allegation, she testified that she neither authorized his release nor was she empowered to do so.

The defense called two witnesses: Hayes's grandmother and Gloster Hayes himself. His grandmother contradicted his account of how he learned of the warrant for his arrest. According to Hayes, upon his return from Cincinnati, his grandmother informed that she had seen him reported on television as an escapee and that a warrant had been issued. However, according to her direct testimony, she knew nothing of the warrant – nor had she informed Hayes of its existence. On the contrary, she stated that she recalled hearing Hayes say that he was going to "turn himself in."

Hayes testified that he had relied on Torrey-Preston's statement to him that he was not required to "come see them anymore." When asked about the conflicting evidence produced by the other witnesses – including that of his grandmother, Hayes stated that either they held different "perceptions" about issues, or that they were simply lying.

Our review of the record convinces us that the Commonwealth presented ample testimony to prove Hayes's guilt. Thus, the issue was properly submitted to the jury so that it might sift through the evidence and determine its credibility and weight. The trial court did not err in finding the evidence sufficient to sustain convictions on both counts of the indictment. The motions for directed verdict were properly denied.

Hayes next argues that the trial court committed reversible error by allowing the Commonwealth to recall Corporal Hughes as a rebuttal witness following the close of the case for the defense. He contends that the Commonwealth recalled this witness at this time deliberately and calculatedly in order to prejudice the defense. He also claims that the Commonwealth's contention that it was rebuttal testimony was merely a subterfuge.

Absent arbitrariness or an abuse of discretion, an appellate court must defer to the prerogative of the trial court to determine whether rebuttal evidence will be allowed. Pilon v. Commonwealth, Ky., 544 S.W.2d 228 (1976); RCr 9.42. Only where it clearly appears the evidence at issue was purposefully withheld and prejudicially interjected at the close of the trial under the guise of "rebuttal evidence" will the trial court's decision be disturbed. Gilbert v. Commonwealth, Ky., 633 S.W.2d 69 (1982).

Hayes testified that he failed to return to the detention facility solely in reliance on Ms. Torrey-Preston's comment that he did not have to "come see them anymore," believing that her statement meant that he had been released. That conversation took place on Friday, January 16, 1998. The adult probation center was closed on Saturday and Sunday (the 17th and 18th, respectively); the following Monday, January 19, was a legal holiday. Ms. Torrey-Preston apparently miscalculated days and dates and believed that Hayes's last day, January 21, would fall on that Monday and that she likely would not be seeing

him again. Hayes, however, was insistent that he believed that she had authorized his early release by virtue of this verbal exchange.

The Commonwealth moved to recall Corporal Hughes to rebut Hayes's testimony. Corporal Hughes stated that following Hayes's failure to return, an inventory taken of his quarters at the detention facility revealed that he had left behind most of his personal property; *i.e.*, a black bag, a pair of Nike shoes, assorted clothing, hair brush, hair dressing, assorted toiletries, underwear, *etc.* Corporal Hughes testified that when inmates are released from custody, they generally take all of their personal property along. However, in Hayes's case, his personal possessions were placed in the facility's property locker until March 6, 1998 – at which time Hayes signed for the release of some of the items.

Hayes relies on Wager v. Commonwealth, Ky., 751 S.W.2d 28 (1988), as to the rebuttal issue. Wager involved a situation in which the Commonwealth called a surprise witness on rebuttal for the purpose of introducing an out-of-court statement that had been made by the defendant. That statement constituted an admission of guilt or amounted to a confession. The Wager court held that the evidence was highly prejudicial and that it had been improperly introduced under the facts of that case. We find that case highly distinguishable from the facts before us.

Corporal Hughes was not a surprise witness; he had already testified in the Commonwealth's case-in-chief. Similarly, the nature of the evidence presented was neither

inflammatory nor pivotal as to guilt or innocence *per se*. It merely raised a legitimate question as to evidence already at issue: if Hayes truly believed he had been released, why did he not take his personal property with him? Furthermore, Hayes was allowed to take the stand again in order to explain his conduct as to the abandoned property. We find no error in the trial court's exercise of discretion in permitting the Commonwealth's rebuttal testimony.

Hayes's last argument is that the court erred in refusing to instruct the jury on false swearing.

An alternative instruction is required only if, considering the totality of the evidence, the jury might reasonably conclude that the defendant was not guilty of the charged offense, but was guilty of a lesser included offense.

Bills v. Commonwealth, Ky., 851 S.W.2d 466, 469 (1993).

KRS 523.020(1) provides that a person is guilty of perjury in the first degree if he "makes a material false statement, which he does not believe, in any official proceeding under an oath required or authorized by law[.]" False swearing is defined at KRS 523.040 as the making under oath of a "false" statement which one knows not to be true. The distinction between the offenses turns on the materiality or gravity of the contents of the statement. A statement is deemed to be sufficiently material if it has the potential to influence the tribunal or the jury.

Commonwealth v. Thurman, Ky., 691 S.W.2d 213, 215 (1985).

In this case, Hayes testified before both the grand jury and the petit jury at trial regarding: the reason for his failure to return to the detention center; his whereabouts during

his time of absence; the means by which he discovered his status as an "escapee"; and his alleged effort to turn himself into the appropriate authorities prior to being arrested on the street. Furthermore, the jury did not believe Hayes's testimony regarding his record and performance within the drug court program, believing instead the contradictory facts set forth by the record.

There can be no question that Hayes's testimony was offered as a defense for his unlawful departure from the detention facility's work release program. Not only did his statements have the potential of influencing the outcome of the proceedings; they were carefully crafted and designed to achieve that very outcome. Therefore, we conclude that the trial court did not err in refusing to instruct on false swearing as Hayes's statements were wholly material to the proceedings.

The judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

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