RENDERED: APRIL 20, 2001; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-000051-MR

BILLY J. HUTTON — APPELLANT

v.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE PATRICIA M. SUMME, JUDGE
ACTION NO. 98-CR-00632

COMMONWEALTH OF KENTUCKY — APPELLEE

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

BEFORE: HUDDLESTON, KNOPF, AND MILLER, JUDGES.

KNOPF, JUDGE: Billy Hutton appeals from a December 17, 1999, judgment of the Kenton Circuit Court finding him guilty, in conformity with a jury verdict, of complicity to burglary in the first degree (KRS 502.020 and KRS 511.020) and sentencing him to twelve and one-half years in prison. Hutton contends that he has been convicted of a crime for which he was not indicted; that an investigating police officer subjected him to an unlawful stop, the evidentiary fruits of which should have been suppressed; and that the trial court should have declared a mistrial when a prosecution witness referred to Hutton's post-arrest silence.

For the following reasons we are unpersuaded by these allegations of error and so affirm the trial court's judgment.

The Kenton County Grand Jury indicted Hutton and two others, Donald Morgan and Clifford Webster, in the following terms:

> That on or about November 18, 1998, in Kenton County, Kentucky, the Defendant[s] committed the offense of BURGLARY IN THE FIRST DEGREE, a felony, when with the intent to commit a crime they knowingly entered or remained unlawfully in a building and while in the immediate flight from the building one or all of the above participants in the crime armed himself with a deadly weapon to wit: a gun, in violation of KRS 511.020 and against the peace and dignity of the COMMONWEALTH OF KENTUCKY.

The Commonwealth alleged that, during the day of November 18, 1998, Morgan and Webster rode with Hutton in Hutton's pick-up truck to the Taylor Mill area of Kenton County. There Hutton helped the other two to find an unattended residence. Webster and Morgan broke into the residence and stole various items including three hand guns. The three then made, or at least attempted to make, their get away in the pick-up truck. They had not gone far when an officer of the Kenton County Police Department, acting on a report of suspicious activity in the area, stopped them. The burglary thus came to light, and the indictment just noted soon followed. Morgan and Webster eventually entered guilty pleas and testified for the Commonwealth at Hutton's trial. Hutton denied having participated in the burglary. He claimed that he and Webster had been driving through the area looking for the home of a girl

Hutton knew when they came upon Morgan already in possession of the stolen property and offered him a ride.

The jury instructions permitted the jury to find Hutton guilty of complicity to burglary in the first or the second degree or of facilitation to burglary in the first or the second degree. Hutton maintains that, because he was indicted as a principal, the proof of and the instructions regarding his alleged complicity impermissibly broadened the case against him beyond the scope of the indictment.

While this issue was not preserved in the course of trial, Hutton contends that it implicates the trial court's subject matter jurisdiction and so may be raised for the first time on appeal. We decline to address the jurisdictional question. We need not do so for, even if Hutton is entitled to review, he is not entitled to relief.

It is true, as Hutton contends, that the case actually presented against a criminal defendant may not deviate materially from the indictment:

> A variance occurs when the charging terms [of the indictment] are unchanged, but the evidence at trial proves facts materially different from those alleged in the indictment. . . . In contrast, an amendment involves a change, whether literal or in effect, in the terms of the indictment. . . . A variance rises to the level of a constructive amendment when the terms of an indictment are in effect altered by the presentation of evidence and jury instructions to such a degree that there is a likelihood that the defendant may have been

> convicted of an offense other than that charged in the indictment.[1]

A constructive amendment, or fatal variance as it is sometimes called, may also occur when the proof at trial presents a theory of the crime so different from that contained in or implied by the indictment as to deprive the defendant of meaningful notice of the case to be brought against him.[2] In the federal courts, such constructive amendments

> are considered prejudicial per se because they deny the defendant his right to a grand jury and hamper the ability to prepare adequately for trial.[3]

In Kentucky, RCr 6.16 provides for the amendment of an indictment at any time before a verdict, but only if "no additional or different offense is charged and if substantial rights of the defendant are not prejudiced." This rule has been liberally construed, and even constructive amendments within its scope have been deemed harmless errors.[4] Nevertheless, as Hutton notes, criminal defendants enjoy grand-jury and due-process rights under the Constitution of Kentucky similar to those provided by the federal constitution,[5] and our courts have likewise disallowed variances that departed materially and

---

[1]United States v. Flowal, 163 F.3d 956, 962 (6th Cir. 1998) (citations and internal quotation marks omitted).

[2]Lucas v. O'Dea, 179 F.3d 412 (6th Cir. 1999).

[3]United States v. McAnderson, 914 F.2d 934, 944 (7th Cir. 1990) (citations omitted).

[4]Johnson v. Commonwealth, Ky., 864 S.W.2d 266 (1993); Robards v. Commonwealth, Ky., 419 S.W.2d 570 (1967).

[5]Ky. Const. §§ 11 and 12.

prejudicially from the indictment.[6] Indeed, our highest court has held that

> where an indictment charged one alone with the commission of a crime, it is error to instruct that he may be convicted if he aided or abetted another in its commission.[7]

The rule is otherwise, however, where the indictment charges more than one defendant with the commission of the crime. In that case, each of the defendants is deemed to be on notice that he or she may be prosecuted as an accomplice of the others, and evidence or jury instructions to that effect "do[] not constitute a variance in the proof and the charge."[8]

Hutton, of course, was indicted jointly with Webster and Morgan, so, under the rule just stated, it was proper for the Commonwealth to proceed against him as either a principal or an accomplice. Its proof that Hutton was guilty by complicity clearly did not take Hutton by surprise or in any way unfairly compromise his defense. The trial court, therefore, did not err by instructing the jury on a theory of complicity, and Hutton's conviction on that basis did not exceed the scope of the indictment.

---

[6]Wolbrecht v. Commonwealth, Ky., 955 S.W.2d 533 (1997).

[7]Brown v. Commonwealth, Ky., 498 S.W.2d 119, 120 (1973) (quoting from Rice v. Commonwealth, Ky., 259 S.W.2d 440, 441 (1955)).

[8]Broughton v. Commonwealth, 303 Ky. 18, 196 S.W.2d 890, 892 (1946); Murphy v. Commonwealth, Ky., 279 S.W.2d 767 (1955). *See also* United States v. Ellis, 121 F.3d 908 (4th Cir. 1997) (defendant indicted as a principal was not prejudiced by evidence and instructions that he participated in crime as an aider and abettor); State of West Virginia v. Petry, 273 S.E.2d 346 (W.Va. 1980) (discussing the stability of this rule from the common law through modern penal codes).

Against this result, Hutton relies on Linder v. Commonwealth[9] for the proposition that complicity constitutes a separate and distinct offense from participation as a principal, from which he argues that he has been convicted of an offense different from that for which he was indicted. Linder, however, concerned separate and distinct instances of theft, in one of which Linder participated as a principal and in the other she participated as an accomplice. Because the court believed that there had been two different thefts, Linder's two convictions for having participated in both were held not to have violated the constitutional guarantee against double jeopardy. Linder does not state that complicity constitutes an offense distinct from participation as a principal. Complicity, rather, is a distinct manner of committing the same offense.[10] For this reason and for those discussed above, Hutton's reliance on Linder is unavailing.

Hutton next contends that he was subjected to an unreasonable investigatory stop by Kenton County police officers and that the trial court erred by denying his motion to suppress the evidence gathered in conjunction with that stop. At the suppression hearing on this issue, the arresting officer, Detective Gilvin, testified that on November 18, 1998, at about 1:45 P.M., he had received a dispatch over his car's radio concerning a 911 call from a citizen, Lewis Neuspickle, residing on Kenton Station Road. A young caucasian man had come to the caller's door and had told him that he was looking for someone

[9]Ky., 714 S.W.2d 154 (1986).

[10]KRS 502.020.

who lived in a house like the caller's. The caller had noticed two other young caucasian men standing near a white, older model Mazda pick-up apparently waiting for the young man at the door. When the young man had left, the caller had seen the three drive away together in the pick-up and had noted their direction. The man called 911 because there were no other houses like his in the area, a fact that made the young man's statement ring false and suggested that he and the two others may have been there for some other reason.

Detective Gilvin testified that upon hearing the dispatch he immediately thought the young men may have been would-be burglars because he had learned in the course of his work that burglars frequently look for unattended houses simply by knocking on the door and, if there is a response, offering a pretext for being there. The detective and his partner drove to the area identified in the dispatch and in short order encountered an older, white Mazda pick-up bearing three young caucasian males. As soon as he saw the truck, Detective Gilvin signaled for it to stop. The driver, who was Hutton, complied. Webster was sitting in the bed of the truck where there were also four gym bags and a speaker box. After taking Hutton's license to his partner to run a license check, Detective Gilvin noticed the butt of a gun showing from one of the gym bags. Morgan, who was in the cab with Hutton, said that the gun was his and claimed that it was 22-caliber. With Morgan's permission, the detective examined the gun, and when he confronted Morgan with the fact that it was a much larger 45-caliber, Hutton volunteered that

Morgan had placed a box with two other guns beneath the passenger's seat. From that point, apparently, the young men became increasingly confused and inconsistent in their statements, and it did not take long for the burglary to come to light. Hutton does not contend that Detective Gilvin lacked justification for anything he did after he had stopped the three men, but he claims that the radio dispatch did not justify the stop itself. We disagree.

A police officer's warrantless, investigatory stop of a vehicle is lawful under the Fourth Amendment to the United States Constitution and Section 10 of the Kentucky Constitution only if the officer has a reasonable and objectively articulable suspicion that a person or persons in the vehicle are, or are about to become, involved in criminal activity.[11] In determining whether the officer's suspicion met this standard, a reviewing court is to consider the totality of the circumstances presented to the officer, including the officer's training and experience, and to ask whether, given those circumstances and reasonable inferences from them, an objective suspicion--more than a mere hunch--focused on the particular vehicle and its occupants.[12] Although this Court will defer to the trial court's properly supported factual findings, as a general matter determinations of

[11]United States v. Cortez, 449 U.S. 411, 66 L. Ed. 2d 621, 101 S. Ct. 690 (1981); Taylor v. Commonwealth, Ky., 987 S.W.2d 302 (1998).

[12]United States v. Cortex, *supra.*

reasonable suspicion and probable cause should be reviewed *de novo* on appeal.[13]

We agree with the trial court that the circumstances in this case justified an investigatory stop of Hutton's pick-up. The fact that the 911 call was not anonymous suggested that its factual content was reliable. That is, the police had little reason to doubt that the young men had come to Mr. Neuspickle's house and that the one who had come to the door had accounted for their presence in the manner reported. The caller's belief that the young man had offered a mere pretext for having knocked on the door was objectively based. The young man's claim to be looking for a similar house in that area could not have been true. Hutton argues that people often come to strangers' doors to ask for directions or other information, so the mere fact that he, Webster, and Morgan did so can not be the basis of a legitimate suspicion that they were involved in wrongdoing. But a person seeking directions or an otherwise innocent stranger does not often knock on a person's door and then lie about why he or she did so. Detective Gilvin had learned that burglars often do this. The Detective could thus reasonably conclude that the young men had burglary on their minds. At least the possibility that they did was significant enough to permit investigation. The young men and their truck, moreover, had been described with sufficient detail to make it very likely that only the men who had called upon Mr. Neuspickle would answer that description.

---

[13]Ornelas v. United States, 517 U.S. 690, 134 L. Ed. 2d 911, 116 S. Ct. 1657 (1996); Adcock v. Commonwealth, Ky., 967 S.W.2d 6 (1998).

The officer's suspicion was thus substantial, objectively based, and particularly focused. The trial court did not err by deeming the investigatory stop lawful and by denying Hutton's motion to suppress the evidence it produced.

Finally, Hutton contends that the trial court erred by denying his motion for a mistrial. During Detective Gilvin's testimony at trial the following exchange occurred:

> Prosecutor: At some point, I assume we get everybody back up to the police department.
> Gilvin: Yes.
> Prosecutor: What happens there?
> Gilvin: Mr. Hutton didn't want to speak with me. He wanted his attorney. Mr. Webster did not want to speak with me. He wanted his . . .
> Defense Counsel: Objection your honor, may we approach?

Under the Fifth Amendment to the United States Constitution and Miranda v. Arizona,[14] Hutton enjoyed a right to remain silent following his arrest. He moved for a mistrial on the ground that Detective Gilvin's reference to his silence compromised that right and rendered the trial unfair. Having determined that the reference was incidental and not likely to weigh on the jury's decision, the trial court denied the motion but offered to give an admonition. Hutton declined the admonition. He would rely, he said, on his own testimony to counteract any suggestion that his silence was evidence of guilt.

As Hutton correctly notes, the prosecution is not permitted to use a defendant's post-arrest silence as evidence in its case-in-chief, and violations of that rule have been held to

[14]384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602 (1966).

require relief on appeal.[15] Relief is not required, however, if the error was harmless.[16] In making that determination, a reviewing court "must consider the weight of the evidence and the degree of the punishment fixed by the verdict."[17]

We are persuaded that the error was harmless in this case. The prosecution here did not truly use the fact of Hutton's silence. The detective's statement was not elicited for that purpose, and the prosecutor made no comment about it. He certainly did not suggest that Hutton's refusal to make a statement implied his guilt. Morgan, moreover, had already testified on cross-examination that neither Webster nor Hutton made a statement at the police station. And, in lieu of an admonition, Hutton testified that he had refused to make a statement at the police station because by that time he was frightened and confused and felt that the police had attempted to put words in his mouth.

The evidence against Hutton, furthermore, was substantial. Although Morgan and Webster were testifying in exchange for plea bargains, their account of the incident--that the three men had deliberately set out together to commit a burglary--was simply more plausible than Hutton's. Hutton asked the jury to believe that Morgan had attempted the burglary alone

---

[15]Hall v. Commonwealth, Ky., 862 S.W.2d 321 (1993); Churchwell v. Commonwealth, Ky. App., 843 S.W.2d 336 (1992).

[16]Green v. Commonwealth, Ky., 815 S.W.2d 398 (1991).

[17]Hall v. Commonwealth, 862 S.W.2d at 323 (citing Niemeyer v. Commonwealth, Ky., 533 S.W.2d 218 (1976)).

and on foot, that he had somehow carried four gym bags and two or three boxes from the burgled home by himself, and that he had planned to make his get away by walking until Hutton and Webster just happened to come along. Nor does the degree of punishment, which was far closer to the minimum allowed than to the maximum, suggest that the jury had been led to exaggerate Hutton's culpability. For these reasons we conclude both that there is no substantial possibility that the detective's unsolicited statement tainted the result, and that the trial court did not err by denying Hutton's motion for a mistrial.[18]

In sum, the indictment against Hutton, Webster, and Morgan as joint principals in the burglary did not preclude the Commonwealth's proceeding against Hutton as an accomplice, nor did it preclude his being found guilty by complicity. One indicted jointly is presumed to be on notice that complicity with the other indictees may be alleged against him. Hutton was not subjected to an illegal investigatory stop. He and his companions were the object of legitimate police suspicions and so were subject to the investigation that took place. Nor, finally, should a mistrial have been declared because the arresting officer referred incidentally during testimony to Hutton's post-arrest silence. There was no indication of prosecutorial misconduct and little if any chance of actual prejudice against Hutton.

[18]Grundy v. Commonwealth, Ky., 25 S.W.3d 76 (2000) (mistrial should not be ordered unless manifestly necessary); Clay v. Commonwealth, Ky. App., 867 S.W.2d 200 (1993) (same).

For these reasons, we affirm the December 17, 1999, judgment of the Kenton Circuit Court.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Irvin J. Halbleib
Appellate Public Advocate
Louisville, Kentucky

BRIEF FOR APPELLEE:

Albert B. Chandler III
Attorney General of Kentucky

Brian T. Judy
Assistant Attorney General
Frankfort, Kentucky