RENDERED: MAY 4, 2001; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-000944-MR

ROBERTO DELGADILLO — APPELLANT

V.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE LAURANCE B. VANMETER, JUDGE
ACTION NO. 99-CR-01361-002

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION AFFIRMING

* * * * * * * *

BEFORE: GUDGEL, Chief Judge; EMBERTON and SCHRODER, Judges.

GUDGEL, CHIEF JUDGE: This is an appeal from a judgment entered by the Fayette Circuit Court convicting appellant of criminal facilitation to trafficking in marijuana over five pounds. We are satisfied that even if the court erred by giving a facilitation instruction herein, no palpable error occurred. Hence, we affirm.

On November 13, 1999, Avelino Rodriguez and appellant Roberto Delgadillo twice went to the Kentucky Horse Center tack shop and inquired as to whether the shop had received a package addressed to John Peterson. Each time, one man entered the shop while the other remained outside in a car. Subsequently, the tack shop indeed received a large package addressed to John Peterson. Upon learning that no one by that name worked at the

Kentucky Horse Center, the employee who received the package turned it over to her supervisor, who opened the package and discovered fourteen pounds of what was later confirmed to be processed marijuana. The police were contacted, and a drug sting operation was set up to see who would claim the box. According to the testimony, appellant took possession of the package on November 15 while Rodriguez waited in the driver's seat of the car. When police asked appellant why he obtained the package, appellant indicated that he was to later meet someone who had given him one hundred dollars to pick it up. Although a narcotics officer was then dispatched to the location given by appellant, no one was seen waiting for appellant.

The postal markings on the package indicated that it was mailed from McAllen, Texas. Papers found inside appellant and Rodriguez's car contained phone numbers traced to pay phones in McAllen, as well as numerous examples of the signature of a John Peterson which the Commonwealth maintained were practice signatures.

Appellant and Rodriquez were jointly indicted on December 21, 1999. Count One of the indictment, charging them with trafficking in marijuana over five pounds pursuant to KRS 218A.1421, stated that "[o]n or about the 15th day of November, 1999, in Fayette County, Kentucky, the above named Defendants trafficked in over five pounds of marijuana."

Rodriguez's fiancee testified at trial that he told her that on the day in question, he had to give a ride to appellant, a stranger, to pick something up. Appellant in turn testified that when he was at a gas station looking for a job, two men

asked him to pick up a United Parcel Service package at the Kentucky Horse Center.

At the conclusion of the evidence, the Commonwealth requested an instruction on criminal facilitation to trafficking in marijuana over five pounds, as well as instructions on both possession and trafficking in marijuana over five pounds. The Commonwealth requested the facilitation instruction based on the theory that either one of the defendants was helping the other, or both were helping a third party. Appellant's counsel not only did not object to the facilitation instruction, but in fact she expressed satisfaction with the prospect of the court giving such an instruction. The jury found appellant not guilty of the possession and trafficking charges, but convicted him of the offense of criminal facilitation to trafficking in marijuana. This appeal followed.

Appellant's sole argument on appeal is that the trial court erred by giving an instruction on the offense of criminal facilitation to trafficking in marijuana because he was not indicted for the offense, and the offense is not a lesser included offense to trafficking in marijuana. However, even though this argument may have merit, there is no basis for reversing the court's judgment.

In the first place, as appellant did not object to the court giving a facilitation instruction, the issue was not preserved for review. RCr 9.54(2). In fact, the agreement by appellant's counsel to the giving of such an instruction, and the express waiver of any objection thereto, may have occurred as a deliberate matter of trial strategy since the guilty verdict on

the facilitation charge resulted in a misdemeanor rather than a felony conviction. Appellant therefore is in no position to complain about the facilitation instruction on appeal. Moreover, appellant's reliance upon the palpable error provision set out in RCr 10.26 is misplaced, as the giving of an unwarranted instruction, with the defendant's consent and approval, simply does not rise to the level of a palpable error justifying relief under the rule. Commonwealth v. Wolford, Ky., 4 S.W.3d 534 (1999).

The court's judgment is affirmed.

EMBERTON, J., CONCURS.

SCHRODER, J., DISSENTS AND FILES SEPARATE OPINION.

SCHRODER, JUDGE, DISSENTING. Appellant's sole argument on appeal is that the trial court erred in instructing the jury on the criminal facilitation to trafficking in marijuana charge because he was not indicted for that offense and that offense is not a lesser included offense of trafficking in marijuana, and I agree. The law requires instructions applicable to every state of the case covered by the indictment and deducible from or supported by the evidence. Reed v. Commonwealth, Ky., 738 S.W.2d 818 (1987). KRS 506.080(1) provides:

> A person is guilty of criminal facilitation when, acting with knowledge that another person is committing or intends to commit a crime, he engages in conduct which knowingly provides such person with means or opportunity for the commission of the crime and which in fact aids such person to commit the crime.

In reviewing the evidence adduced at trial, there was evidence that appellant was guilty of criminal facilitation to

trafficking in marijuana. However, appellant was not indicted for criminal facilitation, nor were there sufficient facts in the indictment to encompass a criminal facilitation charge, contrary to the Commonwealth's position.

It has been established by our Supreme Court that criminal facilitation to trafficking in marijuana is not a lesser included offense of trafficking in marijuana or possession of marijuana. Houston v. Commonwealth, Ky., 975 S.W.2d 925 (1998). While Houston was a case in which the defendant sought a criminal facilitation instruction and claimed error in being refused one, as opposed to claiming he erroneously received such an instruction as in the present case, I do not see that as affecting the general principle set out above.

The Commonwealth further attempts to get around the holding in Houston by relying on the following language in Commonwealth v. Day, Ky., 983 S.W.2d 505, 509 (1999):

> Generally, criminal facilitation is a lesser included offense when the defendant is charged with being an accomplice to an offense, not the principal offender. E.g., *Chumbler v. Commonwealth*, Ky., 905 S.W.2d 488 (1995); *Webb v. Commonwealth*, Ky., 904 S.W.2d 226 (1995).

The Commonwealth contends that since appellant was charged along with another defendant, that was sufficient to put appellant on notice that he was also being charged with criminal facilitation as an accomplice to the crime. I disagree. The indictment in the instant case merely stated that appellant and Rodriguez "trafficked in over five (5) pounds of marijuana." In our view, charging a defendant along with a co-defendant does not alone

allow for a criminal facilitation instruction. In fact, there was evidence in the case at bar that appellant was the principal offender since he was the one who took possession of the package. Since criminal facilitation is not a lesser included offense of trafficking in marijuana, there must some indication in the facts of the indictment that the defendant provided another person with means to commit the offense of trafficking, which there was not.

The Commonwealth next argues that if it was error to instruct the jury on criminal facilitation, appellant waived said error by not objecting to it and, moreover, by expressing satisfaction with it. Defects in an indictment can be waived, whereas the failure to state an offense in an indictment cannot be waived. RCr 8.18; Strunk v. Commonwealth, 302 Ky. 464, 194 S.W.2d 1002 (1946). It has been held to be palpable error to instruct the jury on an offense not contained in the indictment. Caretenders, Inc. v. Commonwealth, Ky., 821 S.W.2d 83 (1991), (citing United States v. Jones, 647 F.2d 696 (6th Cir. 1981), cert. denied, 454 U.S. 898, 102 S. Ct. 399, 70 L. Ed. 2d 214 (1981)). To charge an offense, the offense must be named or sufficient facts must be provided to put the defendant on notice of the offense with which he is being charged. Thomas v. Commonwealth, Ky., 931 S.W.2d 446 (1996). As stated earlier, criminal facilitation was not mentioned in the indictment, was not a lesser included offense of the offenses named in the indictment, and was not encompassed by any facts in the indictment. Hence, the indictment did not charge appellant with criminal facilitation and it was palpable error to instruct the jury on that offense.

I recognize that the unfortunate result of my opinion would be to permit the appellant to benefit from his silence in allowing the erroneous instruction to be given. However, under the existing law on the issue, I see no other choice but to reverse the conviction. Unlike the case in Commonwealth v. Wolford, Ky., 4 S.W.3d 534 (1999), where the Court adjudged that if submission of the instruction was in error, it was waived by the defendant's withholding his objection thereto, the offense instructed on in the instant case was not a lesser included offense of the charged offenses, and I would reverse.

BRIEF FOR APPELLANT:

Bobby Amburgey
Lexington, KY

BRIEF FOR APPELLEE:

A.B. Chandler III
Attorney General

Dennis W. Shepherd
Assistant Attorney General
Frankfort, KY