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Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-000460-MR

KEELIN GRAY — APPELLANT

v.

APPEAL FROM WAYNE CIRCUIT COURT
HONORABLE EDDIE LOVELACE, JUDGE
ACTION NO. 99-CR-00003

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING IN PART - REVERSING IN PART AND REMANDING
** ** ** ** **

BEFORE: COMBS, GUIDUGLI AND MILLER, JUDGES.

GUIDUGLI, JUDGE. Keelin Gray (Gray) appeals from a judgment and sentence on plea of not guilty (jury trial) entered by the Wayne Circuit Court on February 15, 2000. We affirm in part, reverse in part and remand.

Gray was indicted on the charge of burglary first degree (KRS 511.020) arising from an incident that occurred on November 19, 1998. After discovery was completed and several bill of particular motions were argued before the trial court, a jury trial was scheduled for December 23, 1999. However, the trial did not take place on that date but was reassigned for January 13, 2000. Prior to the new trial date, the Commonwealth

conveyed an offer of a plea agreement to Gray's attorney. After the attorney discussed the plea offer with Gray, she informed the Commonwealth that Gray would accept the offer.[1] No further action was taken by either party until the day of the trial, January 13, 2000. On that day, in the judge's chambers, the parties acknowledged to the trial court that they had reached a plea agreement. However, when the Commonwealth informed the trial judge that the alleged victim of the crime was "not happy" with the offer but that the police were okay with it, the trial judge stated, "It appears the parties have not had a meeting of the minds. The Court never accepted any plea. The court was contacted but the court never accepted any plea. I'm going to overrule the motion for a continuance and motion to bind the Commonwealth to the plea. Let's go to trial." Gray's attorney then asked the court, "If I make a motion to enter a plea of guilty at this time are you going to overrule it?" To which the court replied, "I am." The jury trial then began despite claims of counsel for Gray claims that she was not ready to proceed with the trial. The jury returned a guilty verdict and recommended a ten year sentence, which the court imposed. This appeal followed.

On appeal, Gray raises four arguments:

(1) The trial court abused its discretion in denying his motion to bind the Commonwealth to the plea agreement;

[1]Although no formal plea agreement document is found in the record, it appears that the agreement reached would permit Gray to plea guilty to burglary second degree and be sentenced to five years' imprisonment, with Gray serving 90 days and the balance probated for five years.

(2) The trial court erred by failing to grant him a continuance;

(3) The trial court erred in not giving a facilitation instruction as requested;

(4) The trial court erred by not allowing him to cross-examine a witness about a pending charge which would have shown witness bias.

As to Gray's first argument, we believe he is mistaken that the Commonwealth "welshed" on the plea agreement. It is clear from the hearing that the Commonwealth agreed to the plea agreement and never attempted to withdraw from the bargain. It was the trial court that refused to accept the plea bargain and it so informed Gray and his counsel of that fact. RCR 8.08 and RCR 8.10 were complied with in this case. The trial court is given discretion in whether it will accept or reject a plea agreement. In this case it is clear that when the court was informed that the alleged victim was "not happy" with the Commonwealth's recommended plea agreement, the court properly exercised its discretion in refusing to accept the proposed plea bargain and promptly and thoroughly informed the parties of such fact. We believe the case of Skinner v. Commonwealth, Ky., 864 S.W.2d 290 (1993) and Cobb v. Commonwealth, Ky. App., 821 S.W.2d 817 (1992), thoroughly address this issue. In Skinner, our Supreme Court held:

> According to RCR 8.08, the court "may refuse to accept a plea of guilty." The discretion of the trial court exists whether the proposed guilty plea is offered with or without consideration in the form of a plea agreement. In view of that discretion, we are unable to conclude that Skinner could have reasonably relied on the purported

> agreement to the point of neglecting his defense in the event of rejection.

Skinner, supra, at 294.

The Cobb case addresses whether the court's refusal to accept a plea agreement was arbitrary and capricious. In rejecting that argument, the Court stated:

> On appeal it is argued that the trial court acted as both judge and prosecutor in refusing to accept the plea when the Commonwealth had no objection to its entry. Cobb maintains that the denial was arbitrary and capricious. We disagree.
>
> [1] RCR 8.08 pertains to guilty pleas and provides as follows:
>
> > A defendant may plead not guilty, guilty or guilty but mentally ill. The court may refuse to accept a plea of guilty or guilty but mentally ill, and shall not accept the plea without first determining that the plea is made voluntarily with understanding of the nature of the charge. If a defendant refused to plead or if the court refuses to accept a plea of guilty or guilty but mentally ill or if a defendant corporation fails to appear, the court shall enter a plea of not guilty.
>
> There is no requirement, constitutional or otherwise, that a court accept a guilty plea. Keller v. Commonwealth, Ky. App., 719 S.W.2d 5 (1986). Moreover, the rule itself specifically provides that "[t]he court may refuse to accept a plea of guilty...."

Cobb, supra, at 818.

Based upon the foregoing cases, we believe the trial court properly acted within its authority in refusing to accept the plea agreement and no abuse of discretion has been shown by Gray.

As to Gray's next argument, we believe the trial court did abuse its discretion in refusing to grant Gray a continuance. The criminal rules and case law are clear that the granting of a continuance is solely within the discretion of the trial court; however, that discretion is not without limits.

> The trial judge has broad discretion in either granting or refusing a continuance. Pelfrey v. Commonwealth, Ky., 842 S.W.2d 524 (1993). A reviewing court will not reverse a criminal conviction unless the trial court abused its discretion in the denial of a continuance. Abbott v. Commonwealth, Ky., 822 S.W.2d 417 (1992). In order to obtain a continuance, a criminal defendant must show sufficient cause. Abbott, supra; RCR 9.04. Sufficient cause was not established here. A careful examination of the record in this case indicates that there was no abuse of discretion by the trial judge.

Dishman v. Commonwealth, Ky., 906 S.W.2d 335, 339 (1995).

Gray cites this Court to the case of Eldred v. Commonwealth, Ky., 906 S.W.2d 594 (1995), which held that the trial court had abused its discretion by not granting a continuance in a complex capital murder case. In Eldred, the Court addressed the issue of continuances as follows:

> The first issue presented is whether the trial court abused its discretion in not granting Appellant's motion for a continuance of sixty days. A continuance will be granted upon a showing of sufficient cause. RCR 9.04; Snodgrass v. Commonwealth, Ky., 814 S.W.2d 579, 581 (1991). The decision as to whether to grant a continuance is within the sound discretion of the trial court based upon the unique facts and circumstances of the case. Snodgrass, 814 S.W.2d at 581. Factors that should be considered by the trial court include:
>
> (1) The length of delay;

> (2) Whether there have been any previous continuances;
>
> (3) The inconvenience to the litigants, witnesses, counsel, and the court;
>
> (4) Whether the delay is purposeful or caused by the accused;
>
> (5) The availability of competent counsel, if at issue;
>
> (6) The complexity of the case; and
>
> (7) Whether denying the continuance would lead to any identifiable prejudice.
>
> Id. We also note that Appellant's case was a capital case, with the death penalty possible, which makes the case qualitatively different. See Smith v. Commonwealth, Ky., 845 S.W.2d 534 (1993).

Eldred, Id. at 699.

Reviewing the case before us under the standard set forth in Dishman and Eldred, we believe the trial court abused its discretion when it denied Gray's motion for a continuance. It is clear that Gray's counsel had relied upon the Commonwealth's plea offer and had not taken additional action to be ready for a trial by jury. Though we do not condone counsel's dilatory lack of preparation, we believe Gray was entitled to a continuance in this matter.

Though we are reversing and remanding for a new trial, we shall address Gray's remaining two arguments. Gray's next contention is that he was entitled to an instruction on criminal facilitation. Although this issue was not properly preserved because Gray failed to comply with RCR 9.54, we will address it in that he was not entitled to a criminal facilitation

instruction based upon the evidence offered at trial. Gray cites the case of Luttrell v. Commonwealth, Ky., 554 S.W.2d 75 (1977), for the proposition that he was entitled to an instruction on criminal facilitation. However, the more recent case of Houston v. Commonwealth, Ky., 975 S.W.2d 925 (1998) (which also addresses Luttrell) thoroughly reviews this issue and holds that criminal facilitation is not a lesser included "object" offense. Specifically, Houston states:

> Although a trial judge has a duty to prepare and give instructions on the whole law of the case, including any lesser included offenses which are supported by the evidence, Swain v. Commonwealth, Ky., 887 S.W.2d 346, 348 (1994), that duty does not require an instruction on a theory with no evidentiary foundation. Barbour v. Commonwealth, Ky., 824 S.W.2d 861, 863 (1992), overruled on other grounds, McGinnis v. Commonwealth, Ky., 875 S.W.2d 518 (1994); Neal v. Commonwealth, Ky., 303 S.W.2d 903 (1957). An instruction on a lesser included offense is required only if, considering the totality of the evidence, the jury might have a reasonable doubt as to the defendant's guilt of the greater offense, and yet believe beyond a reasonable doubt that he is guilty of the lesser offense. Wombles v. Commonwealth, 831 S.W.2d 172, 175 (1992). It is axiomatic that "one's mere presence at the scene of a crime is not evidence that such one committed it or aided in its commission." Rose v. Commonwealth, Ky., 385 S.W.2d 202, 204 (1964). In the absence of any evidence that Appellant was guarding the contraband for others, his mere presence at the scene would not have supported a conviction of criminal facilitation on that theory.
>
> Even if there had been evidence that Appellant was guarding the drugs and paraphernalia for others, such would not have entitled him to an instruction on criminal facilitation as a lesser included offense. The fact that the evidence would support a guilty verdict on a lesser uncharged offense does not establish that it is a lesser

included offense of the charged offense. Whalen v. Commonwealth, Ky. App., 891 S.W.2d 86 (1995); Hart v. Commonwealth, Ky. App., 768 S.W.2d 552 (1989). The definition of a lesser included offense is contained in KRS 505.020(2), viz:

> A defendant may be convicted of an offense that is included in any offense with which he is formally charged. An offense is so included when:
>
> (a) It is established by proof of the same or less than all the facts required to establish the commission of the offense charged; or
>
> (b) It consists of an attempt to commit the offense charged or to commit an offense otherwise included therein; or
>
> (c) It differs from the offense charged only in the respect that a lesser kind of culpability suffices to establish its commission; or
>
> (d) It differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property or public interest suffices to establish its commission.

Subsections (b), (c) and (d) have no application to the facts of this case. Thus, the inquiry is whether the inchoate offense of criminal facilitation is established by proof of the same or less than all the facts required to establish the commission of the charged offenses of trafficking in or possession of a controlled substance. Perry v. Commonwealth, Ky., 839 S.W.2d 268, 272 (1992). The offenses of trafficking in or possession of a controlled substance require

proof that the defendant, himself, knowingly and unlawfully committed the charged offense. KRS 218A.1412; KRS 218A.1415. The offense of criminal facilitation requires proof that someone other than the defendant committed the object offense and the defendant, knowing that such person was committing or intended to commit that offense, provided that person with the means or opportunity to do so. KRS 506.080(1). Thus, criminal facilitation requires proof not of the same or less than all the facts required to prove the charged offenses of trafficking in or possession of a controlled substance, but proof of additional and completely different facts. A fortiori, it is not a lesser included offense when the defendant is charged with committing either of the object offenses.

This conclusion is in accord with the general view of those states with criminal facilitation statutes that the offense is not a lesser included offense of an object offense.

...

The only Kentucky case holding that criminal facilitation is a lesser included offense of an object offense is Farris v. Commonwealth, Ky. App., 836 S.W.2d 451 (1992). In Farris, the Court of Appeals did, indeed, make the bald assertion that criminal facilitation is a lesser included offense of trafficking in a controlled substance. Id. at 454. However, the only authority cited for that proposition was Jackson v. Commonwealth, Ky., 633 S.W.2d 61 (1982), which does not address criminal facilitation in any shape, form, or fashion. The issue in Jackson was whether possession of a controlled substance is a lesser included offense of trafficking in a controlled substance. Id. at 62. The opinion in Farris contains no analysis, cites inapplicable authority, and is contrary to existing precedent interpreting KRS 505.020(2). It is hereby overruled.

Since Appellant was not entitled to an instruction on criminal facilitation as a lesser included offense of the object offenses of trafficking in or possession of a

> controlled substance, there was no error in the trial court's ruling.

Houston, Id. at 929, 930, 931.

Gray did not testify at trial nor was there any evidence produced that would justify a criminal facilitation instruction in this case. The trial court did not err in this matter.

Gray's final argument on appeal is that he should have been entitled to question Robert Sloan, a witness who testified for the Commonwealth, about a criminal charge pending against him to show bias. Upon remand, this issue should not re-occur. However, we shall address this issue in the context appealed. Gray cites Commonwealth v. Cox, Ky., 837 S.W.2d 898 (1992), in support of his contention. In response the Commonwealth argues that Gray failed to properly object to this issue and thus the issue is not preserved for appellate review. At trial, counsel for Gray asked Sloan during cross-examination whether he had criminal charges pending against him at this time. The Commonwealth objected and the court sustained the objection and admonished the jury to disregard that question. Gray then continued cross-examination of the witness. After each party rested, Gray's counsel then announced she wanted to put into the record the reason for questioning Sloan regarding his pending charges was to attack his credibility based upon bias. The court noted that during the examination, counsel only made a general objection, that no specific reason for that objection had been given, and that the evidentiary portion of the trial had

concluded. Based upon our review of the record, we believe Gray failed to properly preserve this issue for appeal.

When a defendant fails to request appropriate relief on a timely basis, the matter will not be considered as plain error for reversal on appeal. RCr 9.22; West v. Commonwealth, Ky., 780 S.W.2d 600 (1989); Crane v. Commonwealth, Ky., 833 S.W.2d 813 (1992). When a trial court has not had an appropriate opportunity to rule on an issue, the appellate court is unable to review the alleged error. Sherley v. Commonwealth, Ky., 889 S.W.2d 794 (1994). However, were this issue properly before us we believe that any error would have been harmless error. Under the Cox case, noted by Gray, our Supreme Court stated that if the defendant's opportunity to impeach a witness for bias was improperly denied (thus violating the confrontation clause), the error is subject to the harmless error analysis as set forth in Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), and as applied in Crane v. Commonwealth, Ky., 726 S.W.2d 302 (1987). Though the trial court may have erred in refusing to permit the questioning of Sloan as to pending criminal charges, we believe it was harmless error. As stated in Crane:

> The test for harmless error is whether there is any reasonable possibility that absent the error the verdict would have been different. Commonwealth v. McIntosh, Ky., 646 S.W.2d 43 (1983). Because the test is phrased in terms of "reasonable possibility," an error of constitutional proportions must be shown to be harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). The question here is not whether the jury reached the right result regardless of the error, but whether there is a reasonable possibility

> that the error might have affected the jury's decision.

Crane, Id. at 307.

The evidence in this case was overwhelming against Gray. A witness identified him "beyond a shadow of a doubt," he confessed to his former girl-friend (and daughter of the victim), his vehicle was identified as leaving the scene of the crime, he was identified as selling the stolen property to two separate witnesses, and it was testified that he was one of a few people who knew where the guns were located in the house.

The issue as to the bias testimony was not properly preserved for our review, but even if it had been, it was harmless error. It is our view that there is no reasonable possibility the verdict of the jury would have been different had the erroneous exclusion of evidence not occurred.

The judgment of the Wayne Circuit Court is affirmed in part, reversed in part and remanded for further proceedings consistent with this opinion.

ALL CONCUR.

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