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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-002488-MR

ANGELA DRAKE — APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE LAURANCE B. VANMETER, JUDGE
ACTION NO. 99-CR-00898

COMMONWEALTH OF KENTUCKY — APPELLEE

AND: NO. 2000-CA-002490-MR

JAMES CAMPBELL — APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE LAURANCE B. VANMETER, JUDGE
ACTION NO. 99-CR-00898

COMMONWEALTH OF KENTUCKY — APPELLEE

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

BEFORE: GUIDUGLI, MILLER AND SCHRODER, JUDGES.

GUIDUGLI, JUDGE. James Kelly Campbell ("Campbell") and Angela Drake ("Drake") bring separate appeals from judgments of the Fayette Circuit Court entered on conditional pleas of guilty. As the facts and the issues of law raised are identical, and in the

interest of judicial economy, we will dispose of their appeals by way of a single opinion.

The facts are not in controversy. Campbell was indicted by the Fayette County Grand Jury on August 24, 1999, (hereinafter referred to as "the 1999 indictment") on one felony count of theft by unlawful taking ("TBUT"), two misdemeanor counts of TBUT, and first-degree persistent felony offender ("PFO"). Drake, Campbell's co-defendant, was charged under the same indictment with two counts of felony TBUT, three counts of misdemeanor TBUT, and PFO I. The charges against both Campbell and Drake arose from the theft of merchandise occurring at Fayette County K-Mart stores between March, 1999 and May, 1999. Two of the thefts occurred on consecutive days, i.e., May 26, 1999 and May 27, 1999.

On April 11, 2000, Campbell and Drake were again indicted by the Fayette County Grand Jury (hereinafter referred to as "the 2000 indictment"). This indictment treated the misdemeanor offenses occurring on May 26, 1999 and May 27, 1999, as a single occurrence, thus combining them into one felony per defendant. The result was two counts of felony TBUT and a PFO I as against Campbell, while Drake was charged with three felony TBUTs, one misdemeanor TBUT, and PFO I.

Thereafter, Campbell and Drake moved to dismiss the 2000 indictment since it addressed the same charges already pending under the 1999 indictment. The Commonwealth responded by moving to dismiss the 1999 indictment.

On July 14, 2000, the circuit court rendered an order denying the motion of Campbell and Drake to dismiss the 2000 indictment. On September 6, 2000, it rendered an order consolidating the two indictments. The consolidated indictment included one count of contempt for Campbell's failure to appear.

Campbell and Drake then entered guilty pleas, conditioned on their separate appeals of the "combined misdemeanor" issue. Campbell and Drake each received a sentence of one year in prison, enhanced to 10 years by operation of the PFO I convictions. These appeals followed.

Campbell and Drake now argue that the trial court committed reversible error in allowing the Commonwealth to combine two misdemeanor counts set forth in the 1999 indictment into a single felony in the 2000 indictment. They maintain that the case law upon which the Commonwealth relied is distinguishable from the facts at bar, and should not serve as a basis for combining misdemeanors occurring on consecutive days into a single felony. Alternatively, they argue that if the charges were properly combined, the court should have consolidated all of the charges (both misdemeanor and felony) into a single felony.

We have closely examined this argument and find no error. The case law cited by the Commonwealth, and which Campbell and Drake attempt to distinguish, stands for the general proposition that thefts occurring at different times and places may be combined into a single offense if the acts were so closely related as to be considered a single event. Commonwealth v.

Caudill, Ky. App., 812 S.W.2d 158 (1991). In Caudill, we stated as follows:

> Where the offense alleged is a series of successive takings, we believe the view expressed in Weaver v. Commonwealth, 27 K.L.R. 743, 86 S.W. 551 (1905), is applicable:
>
> > "If the taking was at one time, then the value of all articles taken at that time could be added together in estimating the degree of the offense. Or if the articles were taken by appellant [defendant] as the result of a single purpose or impulse, though the asportation was at intervals to better suit his convenience, the degree of the offense will not be lessened by the fact that he could not or did not carry away all the articles at one load."

Caudill, 812 S.W.2d at 159. See also, Fair v. Commonwealth, Ky., 652 S.W.2d 864 (1983) (holding that three thefts occurring at the same store on the same night constituted one offense); and, Jacobs v. Commonwealth, Ky., 84 S.W.2d 1 (1935) (holding that separate thefts committed over a period of three days could constitute a single offense).

In applying these principles to the facts at bar, we cannot conclude that the trial court erred in determining that the criminal acts at issue constituted a single offense. It is uncontroverted that the thefts occurred on consecutive nights, in the same manner, by the same individuals, at the same discount store chain. Sufficient evidence exists on the face of the record to reasonably support the conclusion that the thefts were, in the language of Caudill, the result of a single purpose or

impulse. As such, we find no basis for concluding that the trial court committed reversible error on this issue.

As for the alternative argument that the Commonwealth was bound to combine all offenses, both misdemeanor and felony, into a single offense, we again find no error. As the Commonwealth properly notes, the misdemeanor offenses which were combined into a single felony occurred on consecutive days, and with the aid of a single third party (a store employee). The offenses which were not combined occurred as much as nine weeks earlier, and were accomplished with the assistance of different individuals. As above, the record contains evidence sufficient to support the trial judge's conclusion on this issue, and accordingly we find no error.

For the foregoing reasons, we affirm the final judgments of the Fayette Circuit Court.

ALL CONCUR.

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