

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-002028-MR

HERMAN TUCKER

APPELLANT

v.

APPEAL FROM LAUREL CIRCUIT COURT
HONORABLE RODERICK MESSER, JUDGE
ACTION NO. 01-CR-00026

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * **

BEFORE: KNOPF, MILLER, AND TACKETT, JUDGES.

MILLER, JUDGE: Herman Tucker brings this appeal from an August 21, 2001 judgment of the Laurel Circuit Court. We affirm.

In February 2001, appellant was indicted by the Laurel County Grand Jury upon two counts of trafficking in a controlled substance in the first degree, Kentucky Revised Statutes (KRS) 218A.1412, trafficking in a controlled substance second degree, KRS 218A.1413, and for being a persistent felony offender (PFO) in the second degree, KRS 532.080(2). The indictment stemmed from an undercover operation wherein appellant allegedly sold

either oxycodone or hydrocodone on three separate occasions to a police informant.

The jury convicted appellant of trafficking in a controlled substance second degree, and upon two counts of trafficking in a controlled substance first degree. The circuit court dismissed the PFO charge. In August 21, 2001, the circuit court sentenced appellant to four years' imprisonment on trafficking in controlled substance second degree, and to nine years' imprisonment upon each count of trafficking in a controlled substance first degree. The sentences were to run concurrently for a total of nine years' imprisonment. This appeal follows.

Appellant contends the circuit court improperly failed to instruct the jury upon the defense of intoxication. Appellant asserts that he was intoxicated on all three separate occasions that he allegedly sold controlled substances to an undercover informant. Intoxication is a defense only if such condition "[n]egates the existence of an element of the offense." KRS 501.080. Appellant argues that his intoxication negated an essential element of KRS 218A.1412 -- namely, that he "knowingly" transferred a controlled substance.

It is well established that "[m]ere drunkenness will not raise the defense of intoxication." Jewell v. Commonwealth, Ky., 549 S.W.2d 807, 812 (1977), *overruled upon other grounds by Payne v. Commonwealth*, Ky., 623 S.W.2d 867 (1981). In fact, it has been held that:

[I]t has no defensive effect unless the intoxication is so complete and of such an

advanced degree as to totally deprive the defendant of his reason and to render him incapable of knowing right from wrong. In other words, that the intoxication must be, in order to be available, of that degree and extent as renders the defendant practically an automaton with the loss of his rudder of reason, thereby depriving him of the ability to entertain a criminal intent. (Emphases added).

Tate v. Commonwealth, 258 Ky. 685, 80 S.W.2d 817, 821 (1935).

In the case at hand, there is insufficient evidence that appellant was so drunk that his level of intoxication affected his ability to know that he was drug trafficking. The evidence merely indicated that appellant smelled of alcohol, and was somewhat intoxicated. Importantly, there was also evidence that appellant counted both money and/or pills at the time of the alleged drug transactions. We do not think the evidence sufficient to mandate an instruction upon the defense of intoxication. See Springer v. Commonwealth, Ky., 998 S.W.2d 439 (1999). Simply put, the evidence failed to adequately demonstrate that appellant was "totally" deprived of his ability to reason. See Richards, 517 S.W.2d 237.

Upon the whole, we are of the opinion that the circuit court did not abuse its discretion by failing to instruct the jury upon the defense of intoxication.

For the foregoing reasons, the judgment of the Laurel Circuit Court is affirmed.

ALL CONCUR.

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