

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 2001-CA-002231-MR

PATRICIA ANN TIA

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE REBECCA M. OVERSTREET, JUDGE  
INDICTMENT NO. 01-CR-00484

COMMONWEALTH OF KENTUCKY

APPELLEE

### OPINION

### AFFIRMING

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BEFORE: BUCKINGHAM, HUDDLESTON and JOHNSON, Judges.

HUDDLESTON, Judge: Patricia Ann Tia appeals from a Fayette Circuit Court judgment sentencing her to twelve months in jail following a jury verdict finding her guilty of the unauthorized use of a motor vehicle.<sup>1</sup>

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<sup>1</sup> Although the relevant statute uses different language, "unauthorized use of a motor vehicle" is the phrasing used throughout the record and the charge will be referred to as such in this opinion.

Ky. Rev. Stat. (KRS) 514.100, **Unauthorized use of automobile or other propelled vehicle**, provides, in relevant part, as follows:

(1) A person is guilty of the unauthorized use of an automobile or other propelled vehicle when he knowingly  
(continued...)

Carolyn Wehrle, the victim, ministers to jail inmates. Tia, a recovering drug addict, was a client of Wehrle's that she had been acquainted with for approximately two years at the time of the incident in question. Wehrle was responsible for placing Tia in a drug rehabilitation program in Michigan which Tia "passed with flying colors."

When Tia's grandmother passed away, she returned to Kentucky for the funeral. Tia's mother and Wehrle arranged to meet after the funeral so that Wehrle could give Tia a ride to Lexington. Tia was supposed to take a bus back to the rehabilitation center on March 10, 2001, in order to begin a job there on March 12, 2001. While in Lexington, Tia stayed with the Gandolfos, mutual friends of the two women. She planned to stay with Wehrle from March 8, 2001, until her departure date. Wehrle was in possession of Tia's bus ticket during her visit.

The Gandolfos were scheduled to leave on a trip on March 8, and Wehrle had agreed to drive them to the airport. That evening, however, Wehrle was busy, so Tia volunteered to give the Gandolfos a ride. Wehrle loaned Tia her van as Tia did not have access to a vehicle. Although Tia had mentioned the possibility of borrowing the van to visit friends during a conversation with Wehrle which took place earlier in the day, Wehrle did not respond and there was no discussion of Tia using the van for that purpose before she departed for the airport. According to her testimony,

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<sup>1</sup> (...continued)  
operates, exercises control over, or otherwise uses such vehicle without consent of the owner or person having legal possession thereof.

Wehrle expected Tia to return the van later that same day, although she did not specify which route Tia was to take or exactly how long she could keep the van. Tia never returned the van or contacted Wehrle.

On March 9, 2001, Wehrle notified the police and began looking for the van. According to Wehrle, she became concerned about Tia and accompanied police in search of the van, but efforts to locate it were unsuccessful. Wehrle called Tia's mother on March 10, 2001, in an attempt to ascertain her whereabouts, but her mother had not heard from her. Between March 10 and March 12, Wehrle contacted the Michigan rehabilitation center and learned that Tia had not returned.

Wehrle filed a criminal complaint against Tia on March 12, 2001, alleging a violation of Kentucky Revised Statutes (KRS) 514.070,<sup>2</sup> theft by failure to make required disposition of property, a class D felony when, as here, the value of the property exceeds \$300.00. In the complaint, Wehrle indicated that she had loaned her van to Tia on March 8, 2001, to take a friend to the airport; Tia took said friend to the airport and was supposed to return the van after that errand; Tia disappeared with said van and

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<sup>2</sup> KRS 514.070 in relevant part, reads as follows:

(1) A person is guilty of theft by failure to make required disposition of property received when:

(a) He obtains property upon agreement or subject to a known legal obligation to make specified payment or other disposition whether from such property or its proceeds or from his own property to be reserved in equivalent amount; and

(b) He intentionally deals with the property as his own and fails to make the required payment or disposition.

has not informed her family or Wehrle as to her whereabouts or the location of the van; and that Tia failed to show for her job on March 10, 2001, and no one knows her whereabouts. Wehrle estimated the value of the van to be \$30,000.00.

On March 15, 2001, at around 1:00 a.m., the police located the van and had it towed to an impoundment lot. Wehrle then had it towed to the dealership where she purchased it. She later testified that the van sustained approximately \$2,100.00 in damage. Tia was arrested on the corner of North Broadway and Seventh Street in Lexington, Kentucky, on March 27, 2001. In May 2001, a Fayette County Grand Jury returned an indictment against Tia charging her with theft by failure to make required disposition of property and persistent felony offender second degree.

At trial, Wehrle's testimony was consistent with the foregoing factual summary.<sup>3</sup> Tia confirmed Wehrle's version of events, admitting that she did not return to Wehrle's home upon leaving the airport. Instead, she went to visit an ex-boyfriend and proceeded to search for a person named "Red" who lived on the

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<sup>3</sup> On redirect examination at trial, the Commonwealth had Wehrle read a selected passage from the complaint aloud as well as a portion of a redacted "affidavit of vehicle theft" (not in the record). Wehrle attested to the fact that the signatures on the documents are authentic. Counsel for both parties then approached the bench, at which point the Commonwealth moved in limine to preclude Tia from questioning Wehrle regarding the officer's initial classification of the incident as "unauthorized use of a motor vehicle" (contained in the "information required to obtain report" form), arguing that it was a legal conclusion with no relevance and constituted hearsay. The defense sought to have the related form admitted under the rule of completeness but the court denied the request and granted the Commonwealth's motion to exclude, finding that the original assessment of the charge was irrelevant as Tia was ultimately charged with a different crime.

other side of town. According to Tia, she fell asleep at Red's residence while watching television. When she awakened around midnight, she noticed that the key to Wehrle's van was missing from her coat pocket along with \$35.00. She then looked outside for the van and discovered that it was gone.

Tia claimed to have walked around the area looking for the van. At some point in the early morning hours, she met a man named Charles with whom she decided to stay for several days. Tia also asserted that she suffered a relapse between March 15 and the date of her arrest. She conceded that she never called Wehrle, her family or the rehabilitation center and admitted that she did not consider calling the police.

At the conclusion of the Commonwealth's case-in-chief, Tia moved for a partial directed verdict, conceding that the Commonwealth had presented sufficient evidence to submit the question of Tia's guilt as to a charge of unauthorized use of a motor vehicle to the jury,<sup>4</sup> but arguing that the Commonwealth had not proved that Wehrle was permanently deprived of the van, Tia profited from its use or that she intended not to return it as

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<sup>4</sup> Under this instruction, the jury was told to find the defendant guilty if it believed beyond a reasonable doubt:

A. That in Fayette County on or about 8th day of March, 2001 and within 12 months before the finding of the Indictment herein, the Defendant knowingly operated, exercised control over, and/or used a motor vehicle which belonged to Ms. Carolyn Wehrle;

AND

B. That in so doing, the Defendant did not, and knew that she did not, have the consent of Ms. Carolyn Wehrle to do so.

required for a finding of guilt as to the theft charge. The court denied the motion but granted Tia's request to instruct the jury on the lesser-included offense of unauthorized use of a motor vehicle. Ultimately, the jury found Tia guilty of unauthorized use of a motor vehicle and recommended a sentence of twelve months to serve. In a final judgment and sentence of imprisonment entered on September 19, 2001,<sup>5</sup> the court adjudged Tia guilty of the lesser-included offense and imposed an indeterminate sentence, "the maximum term of which shall be twelve months." The court also dismissed the PFO charge and gave Tia credit for the 172 days spent in custody prior to commencement of sentence. Tia appeals from that judgment.

Tia's first argument on appeal is that she was entitled to a directed verdict as to the theft charge since the Commonwealth failed to produce sufficient evidence to withstand the motion. We begin by stating the long-standing rule regarding directed verdicts:

On motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. If the evidence

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<sup>5</sup> Having reviewed the pre-sentence investigation report and "given due consideration to the nature and circumstances of the crime, and the history character and condition of [Tia]," the court considered sentencing alternatives but was of the opinion "that imprisonment is necessary because there is substantial risk that [Tia] will commit another crime during any period of probation or conditional discharge, [Tia] is in need of correctional treatment that can be provided most effectively by [her] commitment to a correctional institution," and "[p]robation or conditional discharge would unduly depreciate the seriousness of [Tia's] crime," given her prior criminal record, drug addiction, failure to maintain regular employment and the "deliberate nature" of her crime.

is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given. For the purpose of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but reserving to the jury questions as to the credibility and weight to be given to such testimony.<sup>6</sup>

On appeal, "the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt;"<sup>7</sup> only then would Tia have been entitled to a directed verdict of acquittal. A directed verdict is expressly authorized if the prosecution produces "no more than a mere scintilla of evidence."<sup>8</sup> A review of the evidence presented in this case leaves no doubt that the prosecution produced more than " a mere scintilla of evidence" and the court properly determined that a reasonable juror could fairly find guilt beyond a reasonable doubt.<sup>9</sup>

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<sup>6</sup> Commonwealth v. Benham, Ky., 816 S.W.2d 186, 187 (1991).

<sup>7</sup> Id.

<sup>8</sup> Id. at 188 (emphasis supplied).

<sup>9</sup> Of the six elements that the Commonwealth was required to prove beyond a reasonable doubt with regard to the theft charge, the only one Tia contested was E. which said that, in failing to return the van to Wehrle, "[Tia] intended to deprive [Wehrle] of the property and was not acting under a claim of right to the property." Because Tia did not return the van, it can be inferred that she had the necessary intent. "[B]ecause a person is presumed to intend the logical and probable consequences of his conduct, 'a person's state of mind may be inferred from actions preceding and following the charged offense.'" Hudson v. Commonwealth, Ky., 979 S.W.2d 106, 110 (1998) (citation omitted).

However, it is unnecessary to elaborate upon this conclusion given that Tia was found guilty of the lesser-included offense of unauthorized use of a motor vehicle as opposed to the theft charge. A jury's guilty verdict on a lesser-included offense represents an implied acquittal as to the greater offense, whereas, an acquittal on a greater offense does not bar retrial on lesser-included offenses upon which the jury was unable to reach a verdict.<sup>10</sup> "The concept of acquittal by implication climbs up the ladder, not down."<sup>11</sup> Accordingly, in finding Tia guilty of unauthorized use of a motor vehicle, the jury simultaneously acquitted her of the theft charge. Assuming arguendo, that the court should have granted Tia's motion for a directed verdict, any error in failing to do so was harmless and must be disregarded as it does not constitute grounds for disturbing the final judgment under Kentucky Rule of Criminal Procedure (RCr) 9.24.<sup>12</sup> Similarly, Tia's contention that she was prejudiced by the jury instruction on the theft charge has no merit as "conviction of lesser included

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<sup>10</sup> Commonwealth v. Ray, Ky. App., 982 S.W.2d 671, 674 (1998).

<sup>11</sup> Id. (citing McGinnis v. Wine, Ky., 959 S.W.2d 437, 439 (1998)).

<sup>12</sup> Ky. R. Crim. Proc. 9.24 provides as follows:

No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order, or in anything done or omitted by the court or by any of the parties, is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order unless it appears to the court that the denial of such relief would be inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding that does not affect the substantial rights of the parties.



offense renders the instruction on the greater offense harmless error."<sup>13</sup>

Tia's remaining argument is that the court deprived her of the right to develop her "defense and theory of the case," namely that she was authorized to borrow the van and that during the period of authorized use, "the van was misappropriated by another." In Tia's estimation, the court effectively did so by precluding her from engaging in the "ratification line of questioning" with Wehrle which she contends would have enabled her to establish that she was "acting as an agent of Wehrle and thus there was no theft." Again, since Tia sought to present this theory so as to refute the theft charge, any error is harmless.

However, to the extent this argument applies to the lesser-included charge, it also fail on the merits. At trial, Tia emphasized the fact that Wehrle allegedly attempted to have the charge reduced from theft to unauthorized use of a motor vehicle, indicating that she did not wish to proceed with prosecution of the greater offense. In response, the Commonwealth explained that it was the police officer who had initially listed the charge as unauthorized use of a motor vehicle in his report and that both the criminal complaint and indictment charged Tia with theft by failure to make required disposition of property.

Upon hearing both arguments, the court agreed with the Commonwealth that what the police initially charge an accused with and what she is ultimately indicted for are two different things and, in any event, Wehrle's inclination to alter the charge after

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<sup>13</sup> Russell v. Commonwealth, Ky. App., 720 S.W.2d 347 (1986).

the fact would not serve to ratify Tia's behavior. In sum, the court's decision to preclude this line of questioning did not prevent Tia from pursuing the agency/principal theory since the initial charge by the police was irrelevant and she elicited testimony from Wehrle on cross-examination which supported her defense. Apparently, the jury did not find her argument credible.

Because the jury verdict finding Tia guilty of the lesser-included offense of unauthorized use of a motor vehicle renders any error stemming from the theft charge harmless and her substantive argument fails on the merits, the judgment is affirmed.

ALL CONCUR.

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