

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-001712-MR

SHELLY LYNN ROBBINS

APPELLANT

v. APPEAL FROM BOYLE CIRCUIT COURT
HONORABLE DARREN W. PECKLER, JUDGE
INDICTMENT NO. 00-CR-00064

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

REVERSING

** ** * * *

BEFORE: GUIDUGLI, HUDDLESTON and KNOPF, Judges.

HUDDLESTON, Judge: Shelly Lynn Robbins appeals from a Boyle Circuit Court judgment imposing a probated sentence of five years for theft by failure to make required disposition of property valued at \$300.00 or more¹ following a jury trial. Robbins challenges, inter alia, the circuit court's failure to dismiss the indictment for failure to charge an offense under the fact situation in this case.

In the summer of 1999, Shelly and his brother, Norman Robbins, orally agreed to jointly purchase for \$3,400.00 and share

¹ Ky. Rev. Stat. (KRS) 514.070.

in the handling of two standard-bred trotting horses named Norobbinthelady and Norobbinthebarbie. Under their joint venture² agreement, Norman served as the trainer and principle manager of the horses with Shelly and Norman sharing equal responsibility for the expenses associated with maintenance and racing the horses and equal allocation of the profits or winning purses. In January 2000, the two horses were registered with the United States Trotting Association (U.S.T.A.) and a certificate of registration was issued listing Shelly and Norman as the owners. At that time, Susan Stahl, Norman's fiancée, assisted Norman with the care of the horses. Subsequently, Susan and Norman married.

In June 2000, amidst a dispute concerning the proper accounting of costs and profits for the horses, Shelly informed Norman that he wanted to terminate their arrangement. Shelly initially offered to purchase Norman's interest but quickly changed his mind. Norman alleged that he told Shelly that Susan wanted to purchase Shelly's half-interest in Norobbinthelady for \$9,000.00.³ Shelly asserts that Norman stated that he (Norman) would purchase the horse.

On June 29, 2000, the three participants met at the Farmers Bank to complete the transfer. Shelly and Norman went into the bank while Susan remained in the car. Norman gave Shelly a check made out to Shelly by Susan on her checking account for

² See Huff v. Rosenberg, Ky., 496 S.W.2d 352 (1973) (listing characteristics of a joint venture or joint enterprise); Roethke v. Sanger, Ky., 68 S.W.3d 352 (2001).

³ Because Norobbinthebarbie had developed health problems, Susan indicated that she had no desire to acquire an interest in that horse.

\$9,000.00 with the written memo "1/2 interest Norobbinthelady." Shelly endorsed the check and presented it to the bank, which immediately transferred the funds into his checking account. When Norman then asked Shelly to sign the U.S.T.A. certificate of registration signifying a transfer of ownership to Susan, he refused. Shelly allegedly told Norman that he would not fill out the registration document until they settled their dispute about various other debts and costs associated with the two horses. A heated discussion ensued and Shelly left without signing the certificate of registration. When Susan immediately inquired about stopping payment on the check, the bank employees informed her that the funds transfer had been completed and could not be revoked. Subsequently, Susan asked Shelly to return the \$9,000.00, but he responded that he would sign the certificate of registration in connection with a full settlement and accounting of all the debts between himself and Norman. Meanwhile, Norman retained physical possession of Norobbinthelady.⁴

On September 1, 2000, a Boyle County grand jury indicted Shelly for the felony offense of theft by failure to make required disposition of property. The indictment charged that:

On or about the 29th day of June, 2000, in Boyle County, Kentucky, the above named defendant, Shelly Lynn Robbins, committed the offense of Theft by Failure to Make Required Disposition Over \$300[.00] when he took \$300.00 or more from Susan Stahl Robbins in exchange for

⁴ In fact, Norman entered Norobbinthelady in a race without telling Shelly, but she finished out-of-the-money.

half interest in a horse and refused to transfer half interest in the horse, and converted the proceeds to his own use, against the peace and dignity of the Commonwealth of Kentucky.

On September 29, 2000, Shelly filed a motion to dismiss the indictment because the circumstances involved a civil dispute rather than criminal conduct. His motion was summarily denied.

On March 26, 2001, the morning of trial, Shelly's attorney orally renewed his motion to dismiss the indictment arguing that the case involved a civil matter concerning the sale of a horse and a dispute about money owed to Shelly by his brother. The trial court denied the motion stating the Commonwealth could establish a prima facie case of theft by failure to make required disposition by showing Shelly received money with an obligation to transfer the proper title of ownership to the horse through a sale of his interest to Susan Stahl Robbins.

At the one-day trial, Susan Stahl Robbins, Norman Robbins and Shelly Robbins testified. The jury found Shelly guilty of theft by failure to make required disposition of property valued at \$300.00 or more and recommended a sentence of five years.

On April 5, 2001, Shelly filed and served three motions including a motion "to vacate the judgment of conviction and dismiss this case for failure of the indictment to charge an offense" based on Commonwealth v. Jeter,⁵ a motion to set aside the conviction and enter a judgment of acquittal based on insufficient

⁵ Ky. App., 590 S.W.2d 346 (1979).

evidence, and a motion for a new trial because the case was based on a legal theory not supported by the statute he was charged with violating. The circuit court considered these motions at the sentencing hearing on July 20, 2001.⁶ After denying the motions, the circuit court sentenced Shelly to five years' imprisonment but suspended imposition of imprisonment and placed him on probation for a period of five years. This appeal followed.

Shelly raises three issues on appeal involving the sufficiency of the indictment, the sufficiency of the evidence, and a variance between the indictment and the jury instructions. These issues were also presented in Shelly's post-trial motions. As an initial matter, it appears that the latter two issues were not properly preserved for review. A motion for a judgment of acquittal under Kentucky Rules of Criminal Procedure (RCr) 10.24 or a motion for a new trial under RCr 10.02, other than for newly discovered evidence, must be served within five days after the return of the verdict.⁷ In addition, a motion for judgment of acquittal (sometimes referred to as a motion for Judgment Notwithstanding the Verdict or J.N.O.V.) is available only if the defendant has moved for a directed verdict of acquittal at the

⁶ Unfortunately, the only videotape recording in the appellate record is that of the trial. It does not include the November pretrial hearing or the sentencing hearing.

⁷ See Ky. R. Crim. Proc. (RCr) 10.24; RCr 10.06; and Shadowen v. Commonwealth, Ky., 82 S.W.3d 896 (2002) (pursuant to RCr 1.10(a) the day of the event and intervening weekend days and legal holidays are not included in the time computation for a new trial motion).

close of all the evidence.⁸ Shelly moved for a directed verdict at the close of the Commonwealth's case but did not move for a directed verdict at the close of his case. Thus, the motions for a new trial and J.N.O.V. were untimely, and the latter was also not available because of Shelly's failure to move for a directed verdict at the close of all the evidence.

On the other hand, the issue of whether the indictment charged an offense is properly subject to appellate review.⁹ Although counsel did not reference a particular rule of procedure for his motion to vacate and dismiss the indictment for failure to charge an offense, it may be treated as a renewal or supplement to his earlier motion to dismiss the indictment. Moreover, unlike an objection based on a defect in the indictment¹⁰ which must be raised by motion prior to trial, a defense or objection based on failure of the indictment to charge an offense may be raised "at any time during the proceedings."¹¹

Shelly relies on Commonwealth v. Jeter, for the position that his conduct did not constitute theft by failure to make required disposition under KRS 514.070. In Jeter, several persons pre-paid money for various household appliances at the All Furniture Sales Store, owned by Jeter, that were never delivered.

⁸ See RCr 10.24; Baker v. Commonwealth, Ky., 973 S.W.2d 54, 55 (1998); Commonwealth v. Pevely, Ky. App., 759 S.W.2d 822 (1988).

⁹ See, e.g., RCr 10.12.

¹⁰ See RCr 6.10.

¹¹ RCr 8.18. See also Thomas v. Commonwealth, Ky., 931 S.W.2d 446, 449 (1996); Casey v. Commonwealth, Ky. App., 994 S.W.2d 18 (1999); Fulton v. Commonwealth, Ky. App., 849 S.W.2d 553 (1992).

The Court held that theft by failure to make required disposition did not cover the type of fact pattern described above. It stated:

We agree with the decision of the Fayette Circuit Court and certify that K.R.S. 514.070 does not proscribe the type of transaction whereby a seller accepts money for the purchase of merchandise and then refuses to deliver the property as promised. The statute was instead enacted to penalize the misapplication of property received from another.¹²

The Court noted that Jeter's alleged actions more properly supported an indictment for theft by deception under KRS 514.040.

In its post-judgment order denying the motion to dismiss, the trial court rejected Shelly's position finding the factual situations and decisions in Butts v. Commonwealth¹³ and Commonwealth v. Taylor¹⁴ more apposite. In Butts, Butts was the general manager of Sentry Electronics, Inc., which was a business selling home security systems. The Court upheld his conviction for theft by failure to make required disposition where he failed to return money owed to customers. The Court held that as an agent of the corporation, he was liable for crimes he committed for the benefit of or in the name of the corporation "as if the conduct were performed in his own name or behalf."¹⁵ It stated that Butts

¹² Supra, n. 5, at 347-48.

¹³ Ky., 581 S.W.2d 565 (1979).

¹⁴ Ky., 799 S.W.2d 818 (1990).

¹⁵ Supra, n. 13, at 567 (quoting KRS 502.060).

illegally converted the customers' money to the corporation's benefit. In Taylor, the Court affirmed Taylor's conviction of eight counts of theft by failure to make required disposition where acting as an insurance agent, he collected \$24,000.00 in insurance premiums from clients and spent the money rather than remit it to the insurance company.

We agree with Shelly that the case of Commonwealth v. Jeter is more closely on point and the trial court's reliance on Butts and Taylor is misplaced. The trial court analogized the situations in Butts and Taylor by characterizing the current action as involving "a failure to transfer a partnership asset to a third party after the payment of a sum certain in money." The trial court's application of KRS 514.070 misapprehends the intent and scope of the statute. Theft by failure to make required disposition requires action by a party who obtains property on behalf of and which is intended by the payor to be transferred to a third party. It is the defendant's role or position as the middleman or conduit for transfer of property from one party to another that distinguishes this offense from other types of theft. Where the defendant is the owner of the property that has been or is expected to be received by the payor, the defendant is acting in a direct relationship with the payor rather than as a fiduciary for two other parties.

The current case deals with a single transaction between two parties. As in Jeter, it involves the sale of property owned by the defendant to a second party, rather than the obtaining of money and failure to transfer that money by the defendant to a

third party as in Butts and Taylor. Despite the trial court's characterization of Norobbinthelady as a partnership asset, Shelly was selling his separate ownership interest and was not acting as a conduit or on behalf of any alleged partnership entity. While Shelly may possibly have been subject to prosecution for theft by deception under KRS 514.040, his conduct as described in the indictment did not fall within the parameters of the theft by failure to make required disposition statute. Accordingly, the trial court erred in failing to dismiss the indictment for failure to charge an offense.

The judgment is reversed.

ALL CONCUR.

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