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Commonwealth of Kentucky

Court of Appeals

NO. 2002-CA-001097-MR

CEDRIC WATKINS — APPELLANT

v.

APPEAL FROM DAVIESS CIRCUIT COURT
HONORABLE THOMAS O. CASTLEN, JUDGE
ACTION NO. 01-CR-00436

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** ** ** ** **

BEFORE: EMBERTON, CHIEF JUDGE; BAKER AND HUDDLESTON, JUDGES.

BAKER, JUDGE. Cedric Watkins appeals from a judgment of the Daviess Circuit Court sentencing him to ten years for trafficking in a controlled substance in the first degree and being a persistent felony offender in the first degree following a jury trial. We affirm.

In September 2001, the Owensboro Police Department received complaints about open-air drug dealing near a certain

low-income apartment complex. In response, police officials in the Street Crimes Unit decided to conduct an operation involving a controlled drug-buy utilizing a confidential informant. Sergeant David Thompson, the commanding officer of the Street Crimes Unit, elicited the assistance of C.A., who had worked with Sgt. Thompson on previous occasions, to act as a paid confidential informant.

On the night of September 28, 2001, Sgt. Thompson and Officer Scott Norris met with C.A. at a hotel parking lot, searched him for drugs, installed a microphone transmitter in his truck, gave him a $20 bill to purchase the drugs, and instructed him where to go. C.A. went to the housing complex, drove around for a few minutes, and then parked near a refuse dumpster. Simultaneously, members of the Street Crimes Unit went to the area in two vehicles--one containing Sgt. Thompson and Officers Brock Peterson and Anthony Meadows, and a second containing Officers Scott Norris and Mark Powers. Sgt. Thompson had a receiving device that allowed him to monitor and record transmissions from the microphone transmitter. The first vehicle containing Thompson, Meadows, and Peterson was positioned so that they could also visually observe C.A.'s actions.

As C.A. circled the complex, he saw Watkins on a bicycle. As soon as C.A. stopped his truck at the dumpster,

Watkins approached him and they engaged in a drug transaction. Watkins offered to sell C.A. either two small pieces or one larger piece of rock cocaine. C.A. opted for the single piece, gave Watkins the $20 bill, and drove away. As soon as C.A. left the immediate area, the police officers in both vehicles started pursuing Watkins. As the first vehicle approached Watkins, he recognized Officer Meadows and allegedly threw an object onto the ground. When the officers were in the process of taking him into custody, Watkins was still holding the $20 bill that he received from C.A. in his hand. When the second vehicle arrived, Officer Peterson told them that Watkins had thrown something. In a search of the area, Officer Norris recovered a brown paper napkin containing 6-7 pieces of rock cocaine on the ground a few feet from Watkins.

Sgt. Thompson met with C.A. at the designated meeting place, searched him again, and conducted a debriefing, which was recorded. C.A. gave Sgt. Thompson the piece of rock cocaine that he had purchased from Watkins. Watkins was arrested and charged with trafficking in cocaine.

On November 6, 2001, the Daviess County grand jury indicted Watkins on one felony count of trafficking in a controlled substance in the first degree (cocaine)(Kentucky Revised Statute (KRS) 218A.1412) and for being a persistent felony offender in the first degree (PFO I)(KRS 532.080). The

circuit court conducted a jury trial on March 26-27, 2002. The witnesses included, inter alia, Sgt. Thompson, Officers Norris, Peterson and Powers for the Commonwealth, and Watkins for the defense. Watkins admitted selling C.A. the cocaine but suggested that he had been entrapped and targeted by the police in retaliation for his criticism of the police department in a newspaper article. Defense counsel moved for a directed verdict based in part on a defense of entrapment at the close of the Commonwealth's case, which was denied. The trial court instructed the jury on first-degree trafficking in a controlled substance (cocaine) with an entrapment defense and first-degree possession of a controlled substance. The jury returned a guilty verdict on first-degree trafficking in a controlled substance (cocaine) and PFO I and recommended a sentence of ten years. On May 13, 2002, the trial court entered a judgment sentencing Watkins to serve ten years' imprisonment for first-degree trafficking in a controlled substance (cocaine) and being a PFO I consistent with the jury's verdict. This appeal followed.

Watkins raises two issues on appeal. First, he challenges the trial court's exclusion of certain evidence offered by the defense concerning C.A.'s prior criminal record. During cross-examination of Sgt. Thompson, defense counsel asked him that whether when he hired informants, he wanted persons who

would be believable as a witness in a trial. Sgt. Thompson responded affirmatively and said he performed a background investigation of a potential informant's criminal history to determine character and suitability. When asked what his investigation of C.A. revealed, Sgt. Thompson said he found only "assaults." Defense counsel then attempted to question Sgt. Thompson about several prior charges involving C.A., and the Commonwealth objected.

The trial court conducted a hearing outside the presence of the jury where defense counsel indicated that he wanted to question Sgt. Thompson and C.A. for impeachment purposes about the following aspects of C.A.'s criminal history: (1) a 1995 misdemeanor conviction for violation of an emergency protective order; (2) a 1995 charge for hindering prosecution that was dismissed; (3) a July 2000 misdemeanor conviction for fourth-degree assault; and (4) a pending charge for public intoxication. The trial court sustained the Commonwealth's objection with respect to excluding reference to the first three items, but it allowed defense counsel to question C.A. during his cross-examination as to the pending public intoxication charge for purposes of demonstrating possible bias on the part of C.A.. See, e.g., Bowling v. Commonwealth, Ky., 80 S.W.3d 405, 411 (2002)(evidence of pending indictment admissible to show bias of witness in seeking favor of prosecutor though not

for impeachment). Watkins contends that the evidence of C.A.'s criminal history was admissible to impeach Sgt. Thompson's statement concerning C.A.'s credibility based on a criminal history containing only "assaults."[1]

Kentucky Rule of Evidence (KRE) 611(b) sets forth the general scope of cross-examination stating: "A witness may be cross-examined on any matter relevant to any issue in the case, including credibility. In the interest of justice, the trial court may limit cross-examination with respect to matters not testified to on direct examination." In addition, KRE 608 limits attack of a witness' character to general reputation evidence and KRE 609(a) limits attack of a witness' credibility by evidence of his criminal history to felony convictions. See also KRE 404(a)(3)(referring to KRE 607, KRE 608, and KRE 609 with reference to admissibility of character evidence relating to witnesses). Watkins asserts that the criminal history evidence was not offered to question C.A.'s character, and these rules do not prohibit use of the evidence to impeach Sgt. Thompson's testimony with respect to the thoroughness of his research of C.A.'s background. This position is untenable and disingenuous.

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[1] Watkins appears to have abandoned any claim of error by the trial court concerning denial of his request to use the proffered (FOOTNOTE CONTINUED)

The issue of C.A.'s criminal history arose during cross-examination of Sgt. Thompson by defense counsel involving C.A.'s credibility or believability as a witness in any potential criminal prosecution. This line of questioning clearly was intended to solicit information implicating C.A.'s character and credibility, which is generally limited to general reputation and not specific criminal acts. Use of the misdemeanor convictions would have been inadmissible to impeach C.A. during his cross-examination under KRE 609(a), and the defense cannot introduce evidence of specific acts that would be otherwise inadmissible in questioning C.A. indirectly through questioning of Sgt. Thompson absent some other valid basis other than impeachment or attack of C.A.'s credibility or character for truthfulness. Although the rules of evidence do not explicitly prohibit impeachment generally by evidence of specific instances of conduct, the Kentucky Supreme Court has stated that the principle prohibiting impeachment of a witness by "'particular wrongful acts'" is embedded in CR 43.07 and case law. See e.g., Tamme v. Commonwealth, Ky., 973 S.W.2d 13, 29 (1998); Daugherty v. Kuhn's Big K Store, Ky. App., 663 S.W.2d 748 (1983). RCr 43.07 provides in relevant part:

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evidence during cross-examination of C.A.

> A witness may be impeached by any party, without regard to which party produced him, by contradictory evidence, . . . or by evidence that his general reputation for untruthfulness renders him unworthy of belief; but not by evidence of particular wrongful acts, except that it may be shown by the examination of a witness, or record of a judgment, that he has been convicted of a felony.

Watkins' argument that C.A.'s criminal record was admissible to impeach through contradictory evidence the testimony of Sgt. Thompson concerning his background search of C.A. is unavailing. This rationale violates the collateral facts doctrine, which is well established in case law. See Robert Lawson, The Kentucky Evidence Law Handbook § 4.10 (3d ed. 1993); Eldred v. Commonwealth, Ky., 906 S.W.2d 694, 705 (1994). This doctrine prohibits impeachment by contradiction on facts that have no independent material relevance and require extrinsic evidence. "'A matter is considered collateral if the matter itself is not relevant in the litigation to establish a fact of consequence, i.e., not relevant for a purpose other than mere contradiction of the in-court testimony of the witness.'" Simmons v. Small, Ky. App., 986 S.W.2d 452, 455 (1998)(quoting United States v. Beauchamp, 986 F.2d 1, 4 (1st Cir. 1993)). The purpose of the doctrine against impeachment by contradiction on collateral facts is to minimize confusion for the fact-finder by avoiding proliferation of side issues. Simmons, 986 S.W.2d at

455 (quoting Lawson, § 410 at 177); Baker Pool Co. v. Bennett, 411 S.W.2d 335, 338 (1967). While it is not necessarily determinative which party solicits the issue subject to contradiction, see, e.g., Rowe v. Commonwealth, Ky. App., 50 S.W.3d 216, 224 (2001), many courts recognize a stricter standard where the testimony sought to be contradicted is elicited on cross-examination, as opposed to being volunteered on direct examination. See, e.g., United States v. Castillo, 181 F.3d 1129 (9th Cir. 1999); 28 Charles A. Wright and Victor J. Gold, Federal Practice and Procedure, § 6119 at 116-19 (1993). This is based on the theory that a witness should not be permitted to engage in perjury or mislead the jury and shield himself from impeachment by asserting the collateral fact doctrine. On the other hand, opposing counsel may manipulate questions to trap an unwary witness into volunteering statements on cross-examination. "[A] party cannot delve into collateral matters on its own initiative and then claim a right to impeach that testimony with contradictory evidence. This would be 'a mere subterfuge to get before the jury evidence not otherwise admissible.'" Jones v. Southern Pacific R.R., 962 F.2d 447, 450 (5th Cir. 1992)(quoting Taylor v. National Railroad Passenger Corp., 920 F.2d 1372, 1376 (7th Cir. 1990)). The courts generally have analyzed issues of impeachment by contradiction under the collateral facts doctrine under a balancing test

weighing the probative value against its prejudicial or harmful effect under evidentiary rule 403. See, e.g. Simmons, supra; Lawson, supra; cf. Castillo, supra. The standard of review is whether the trial court abused its discretion in either admitting or denying impeachment by contradiction. Simmons, 986 S.W.2d at 455; Castillo, 181 F.3d at 1132. See also KRE 611.

In the current case, the issue of C.A.'s criminal record arose on cross-examination of Sgt. Thompson by a line of questions specifically designed to elicit responses concerning C.A.'s credibility and prior criminal activity. Whether Sgt. Thompson conducted a background search of C.A.'s criminal history and the thoroughness of his search was not relevant to the issue of Watkins' conduct. Additionally, C.A.'s prior convictions for violation of an emergency protective order and fourth-degree assault and the dismissal charge for hindering prosecution were irrelevant to his conduct as a confidential informant participating in a controlled drug-buy. Furthermore, the law recognizes the significant effect of information on prior criminal activity by restricting its use as evidence, specifically for misdemeanor offenses. Admission of this evidence would have diverted the trial to extraneous issues involving the extrinsic evidence on facts surrounding C.A.'s prior criminal activity. Any minimal relevance of C.A.'s criminal record was outweighed by its prejudicial and harmful

effects. Under the circumstances, the information sought to be introduced by Watkins to contradict Sgt. Thompson's testimony was subject to exclusion under the collateral facts doctrine and the trial court did not abuse its discretion by excluding it.

Watkins also challenges the trial court's denial of his motion for a directed verdict. More specifically, he alleges that the Commonwealth failed to satisfy its burden of proof that he was not entrapped by the confidential informant.

Under KRS 505.010, a person is not guilty of an offense, when he was "induced or encouraged to engage in [proscribed] conduct by a public servant or by a person acting in cooperation with a public servant" and "at the time of the inducement or encouragement, he was not otherwise disposed to engage in such conduct." The entrapment defense is not available if the public servant or person acting in cooperation with the public servant "merely affords the defendant an opportunity to commit an offense." KRS 505.010(2)(a). See also Johnson v. Commonwealth, Ky. App., 554 S.W.2d 401 (1977). "The critical test is not the extent of the police participation in planning and assisting in the crime, but whether the defendant was predisposed to commit the crime regardless of any encouragement or inducement on the part of the authorities." Commonwealth v. Sanders, Ky., 736 S.W.2d 338, 340 (1987). As a "defense" under the penal code, once the defendant produces

enough evidence to create a doubt as to the defense, the burden of proof shifts to the Commonwealth. Commonwealth v. Day, Ky., 983 S.W.2d 505, 508 (1999); KRS 500.070(3). With respect to entrapment, where the government has induced a person to violate the law, the prosecution must prove beyond a reasonable doubt that the defendant was predisposed to commit the criminal act prior to first being approached by the government agents. Day, 983 S.W.2d at 508 (citing Jacobson v. United States, 503 U.S. 540, 549, 112 S.Ct. 1535, 1540, 118 L.Ed2d 174 (1992)).

"Predisposition . . . focuses upon whether the defendant was an unwary innocent or, instead, an unwary criminal who readily availed himself of the opportunity to perpetuate the crime." Mathews v. United States, 485 U.S. 58, 62, 108 S.Ct. 883, 99 L.Ed2d 54 (1988)(internal questions and citations omitted). The courts have identified five factors relevant to determine whether a defendant was predisposed to commit a crime: (1) the character or reputation of the defendant; (2) whether the initial suggestion of criminal activity was made by the government; (3) whether the defendant engaged in criminal activity for a profit; (4) whether the defendant expressed reluctance to commit the offense which was overcome by government persecution; and (5) the nature of the inducement or persuasion applied by the government. See, e.g., United States v. Khalil, 279 F.3d 358, 365 (6th Cir. 2002); United States v.

Thomas, 134 F.3d 975, 978 (9th Cir. 1998); United States v. Santiago-Godinez, 12 F.3d 722, 728 (7th Cir. 1993). Although none of these factors alone is determinative, the most important factor is whether the defendant exhibited a reluctance to commit the offense that was overcome by government inducement. Santiago-Godinez, 12 F.3d at 728; United States v. Skarie, 971 F.2d 317, 320 (9th Cir. 1992); United States v. McLernon, 746 F.2d 1098, 1113 (6th Cir. 1984).

Watkins raises the entrapment issue in the context of a directed verdict motion. In Commonwealth v. Benham, Ky., 816 S.W.2d 186 (1991), the Kentucky Supreme Court delineated the standard for handling a criminal defendant's motion for directed verdict as follows:

> 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 is sufficient to induce 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.

Id. at 187 (citing Commonwealth v. Sawhill, Ky., 660 S.W.2d 3 (1983)). See also Norris v. Commonwealth, Ky., 89 S.W.3d 411, 416 (2002). A court must be mindful of the rule that "[c]redibility and weight of the evidence are matters within the

exclusive province of the jury." Commonwealth v. Smith, Ky., 5 S.W.3d 126, 129 (1999)(citations omitted). Jurors are free to believe parts and disbelieve other parts of the evidence including the testimony of each witness. Id. The standard for appellate review of a denial of a motion for directed verdict alleging insufficient evidence dictates that if under the evidence as a whole it would not be clearly unreasonable for a jury to find the defendant guilty, he is not entitled to a directed verdict of acquittal. Benham, 816 S.W.2d at 187; Holbrooks v. Commonwealth, Ky., 85 S.W.3d 563, 569 (2002).

In order to obtain a directed verdict and dismissal as a matter of law based on entrapment, a defendant must establish "undisputed" evidence demonstrating a "patently clear" absence of predisposition. United States v. Harris, 9 F.3d 493, 498 (6th Cir. 1993); United States v. Tucker, 28 F.3d 1420, 1428-29 (6th Cir. 1994). In determining whether the evidence was insufficient to establish predisposition, a reviewing court must view the evidence in the light most favorable to the prosecution and resolve all reasonable inferences in its favor, and cannot choose between conflicting testimony or make credibility determinations. United States v. Barger, 931 F.2d 359, 366 (6th Cir. 1991); United States v. Silva, 846 F.2d 352, 355 (6th Cir. 1988). The question of entrapment is a factual issue generally left to a jury to decide. See Mathews, 485 U.S. at 63, 108

S.Ct. at 886; Barger, 931 F.2d at 366. See also Day, 983 S.W.2d at 588.

The evidence indicated that Watkins approached C.A.'s vehicle shortly after C.A. parked near a dumpster in the housing complex. Both C.A. and Officer Patterson testified that Watkins made the initial contact asking C.A. what he wanted. Watkins testified that C.A. spoke first asking for "a 20," referring to $20 worth of drugs. The audiotape of the transaction revealed that Watkins asked C.A. if he was a policeman and then negotiated with C.A. over the sale of one large or two small pieces of rock cocaine. Officers Thompson and Peterson stated that when Watkins recognized the police officers approach him after the transaction, he threw an item that was later retrieved and found to contain 6-7 pieces of cocaine. Although Watkins denied throwing any item and denied ownership of the brown napkin, it was recovered a few feet from him and in the area pointed out to Officer Norris by Officer Peterson. Furthermore, on the audiotape of the debriefing of C.A. by Sgt. Thompson shortly after the controlled drug-buy, C.A. stated that Watkins had taken the pieces of cocaine offered him from a similar brown napkin. Finally, Watkins still had the $20 bill received from C.A. in his hand when arrested by the police.

Analysis of the five factors establishes sufficient evidence to withstand a directed verdict motion. The

Commonwealth did not attempt to offer evidence of Watkins' character or reputation. There was testimony that Watkins made the initial contact, albeit disputed by Watkins. Credibility, however, is reserved for the jury. Watkins conceded selling the drugs for profit, and his attempt to ameliorate this fact by alleging he was merely trying to acquire additional funds to purchase drugs for his own use is virtually irrelevant. Watkins' only reluctant in selling the drugs was his fear that C.A. was a police officer and he freely engaged in negotiations without repeated or strong persuasion from C.A. Finally, the nature of the inducement or persuasion supplied by the government was not unusual but rather a relatively paltry sum of $20. Watkins mischaracterizes the analysis in asserting the charge should have been dismissed "because the evidence strongly supports an entrapment by [C.A.]." Viewing the evidence in the light most favorable to the Commonwealth, Watkins obviously did not show undisputed evidence demonstrating a patently clear absence of predisposition. Accordingly, the trial court properly submitted the question of entrapment to the jury and denying Watkins' request for a directed verdict.

For the foregoing reasons, we affirm the judgment of the Daviess Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Kim Brooks
Covington, Kentucky

BRIEF FOR APPELLEE:

Albert B. Chandler, III
Attorney General

Ian G. Sonego
Assistant Attorney General
Frankfort, Kentucky