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Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001059-MR

JAMES PATRICK RODEFER

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JOHN R. ADAMS, JUDGE
ACTION NO. 02-CR-00902

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING IN PART AND REVERSING AND REMANDING IN PART

** ** * * *

BEFORE: JOHNSON, TAYLOR AND VANMETER, JUDGES.

JOHNSON, JUDGE: James Patrick Rodefer has appealed from a final judgment and sentence of the Fayette Circuit Court entered on April 24, 2003, which, following his conviction for trafficking in a controlled substance in the first degree,¹ criminal attempt to commit burglary in the third degree,² possession of burglar's

¹ Kentucky Revised Statutes (KRS) 218A.1412.

² KRS 511.040; KRS 506.010. Criminal attempt to commit burglary in the third degree is a Class A misdemeanor.

tools,³ possession of drug paraphernalia (first offense),⁴ and as being a persistent felony offender in the first degree (PFO I),⁵ sentenced Rodefer to ten years' imprisonment in accordance with the jury's recommendations. The trial court ordered Rodefer's ten-year sentence to run consecutively with any other previous felony sentences that Rodefer had left to serve. Having concluded that the trial court erred by submitting an improper jury instruction with respect to the charge of trafficking in a controlled substance in the first degree, we affirm in part and reverse and remand in part for further proceedings.

On July 2, 2002, officers from the Lexington Police Department received a tip that a CVS Pharmacy in Lexington was going to be burglarized. According to the tip, the perpetrators were going to gain entry through a crack in the wall of the building, and take OxyContin from the pharmacy once inside. Later that night, Sergeant Scott Blakely and Detective Phillip Harrison, along with another officer, set up surveillance at the pharmacy.

At around 5:00 a.m. the next morning, Rodefer and two accomplices arrived at the pharmacy. The officers observed Rodefer using a sledge hammer in an attempt to break the window

³ KRS 511.050. Possession of burglar's tools is a Class A misdemeanor.

⁴ KRS 218A.500. Possession of drug paraphernalia, first offense, is a Class A misdemeanor.

⁵ KRS 532.080(3).

of an adjoining business. Thereafter, the officers converged on the suspects, and all three men attempted to flee the scene. Det. Harrison apprehended Rodefer, but Rodefer's two accomplices managed to escape. Upon searching Rodefer's person incident to his arrest, the officers discovered a crack pipe, a tin can containing 1.02 grams of crack cocaine, a baggie containing 16.46 grams of powder cocaine, and \$1,146.00 in cash.

On August 26, 2002, a Fayette County grand jury indicted Rodefer on one count of trafficking in a controlled substance in the first degree, one count of criminal attempt to commit burglary in the third degree, one count of possession of burglar's tools, one count of possession of drug paraphernalia (first offense), and for being a PFO I. Rodefer entered pleas of not guilty to all of the charges.

A jury trial was scheduled for March 2003. However, on January 10, 2003, Rodefer appeared in open court and indicated that he wished to plead guilty to all of the charges. At that time, Rodefer was on probation for felony convictions he had received in Indiana.⁶ Thus, the trial court informed Rodefer that if he pleaded guilty to his pending charges, there was a possibility that the trial court would have no choice but to

⁶ According to the record, Rodefer was convicted on numerous counts of burglary in Indiana, and faced the possibility of having to serve ten years or more on those suspended Indiana sentences due to his probation violation.

order his Kentucky sentences to run consecutively with any remaining sentences in Indiana.

A week later, on January 17, 2003, Rodefer's defense counsel stated that, in his opinion, if Rodefer pleaded guilty to his pending charges, KRS 533.060(2) would require the trial court to order his Kentucky sentences to run consecutively with his Indiana sentences. Hence, Rodefer indicated that he did not want to plead guilty, and that he wished to proceed to trial.

A jury trial was held on March 20, 2003, during which Rodefer was found guilty on all charges. The jury recommended a five-year sentence on the conviction for trafficking in a controlled substance in the first degree, enhanced to ten years for the PFO I conviction, 12 months on the conviction for criminal attempt to commit burglary in the third degree, 12 months on the conviction for possession of burglar's tools, and 12 months on the conviction for possession of drug paraphernalia.

On April 24, 2003, after a pre-sentence investigation had been completed, the trial court followed the jury's recommendation and sentenced Rodefer to five years' imprisonment for his conviction for trafficking in a controlled substance in the first degree, which was then enhanced to ten years'

imprisonment pursuant to his PFO I conviction.⁷ The trial court ordered Rodefer to serve this ten-year sentence "consecutively with any other previous felony sentence [Rodefer] must serve." This appeal followed.

Rodefer first argues that the trial court erred by giving an improper jury instruction with respect to the charge of trafficking in a controlled substance in the first degree. As Rodefer has conceded in his brief, this claim of error has not been preserved for appellate court review. However, having concluded that the instruction at issue permitted the jury to convict Rodefer based on a theory not supported by law, we review Rodefer's argument pursuant to the substantial error standard of RCr⁸ 10.26.⁹

Pursuant to KRS 218A.1412(1), "[a] person is guilty of trafficking in a controlled substance in the first degree when he knowingly and unlawfully traffics in: a controlled substance" [emphasis added]. Under KRS 218A.010(28), the term

⁷ All three 12-month sentences were ordered to run concurrently with his ten-year sentence, which resulted in a total Kentucky sentence of ten years' imprisonment.

⁸ Kentucky Rules of Criminal Procedure.

⁹ RCr 10.26 reads in full as follows:

A palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error.

"[t]raffic" means "to manufacture, distribute, dispense, sell, transfer, or possess with intent to manufacture, distribute, dispense, or sell a controlled substance" [emphasis added]. Further, pursuant to KRS 218A.010(29), the term "[t]ransfer" means "to dispose of a controlled substance to another person without consideration and not in furtherance of commercial distribution."

Hence, a person may be found guilty of trafficking in a controlled substance in the first degree if the jury finds that he knowingly manufactured, distributed, dispensed, sold, or transferred a controlled substance, or if the jury finds that he knowingly possessed a controlled substance with the intent to manufacture, distribute, dispense, or sell the controlled substance. However, a person may not be found guilty of trafficking in a controlled substance in the first degree based solely on a jury's finding that he knowingly possessed a controlled substance with the intent to transfer the controlled substance.¹⁰

Turning to the jury instructions in the case sub judice, we find that the submitted instructions permitted the

¹⁰ Our review of Cooper, Kentucky Instructions to Juries, supports this interpretation of KRS 218A.1412(1). Section 9.11A contains an instruction for cases in which a defendant is charged with actually selling, transferring, distributing, dispensing, or manufacturing the controlled substance, while Section 9.11B contains an instruction for cases in which a defendant is charged with possessing a controlled substance with the intent to sell, distribute, dispense, or manufacture the substance.

jury to find Rodefer guilty based solely upon a finding that he possessed cocaine with the intent to transfer. The instructions submitted to the jury read in pertinent part as follows:

"Traffic" - Means to distribute, dispense, sell, transfer, or possess with the intent to distribute, dispense, sell, or transfer a controlled substance.

You will find the Defendant guilty of First-Degree Trafficking in a Controlled Substance under this Instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following

A. That in this county on or about July 3, 2002 and before the finding of the Indictment herein, he had in his possession a quantity of cocaine;

AND

B. That he knew the substance so possessed by him was cocaine;

AND

C. That he had the cocaine in his possession wit[h] the intent to sell, transfer, dispense, or distribute to another [emphases added].

Thus, the above instruction permitted the jury to find Rodefer guilty of trafficking in a controlled substance in the first degree if, inter alia, it found that he knowingly possessed cocaine with the intent to transfer the cocaine to another person. As we mentioned above, KRS 218A.1412(1) does

not define merely possessing a controlled substance with the intent to transfer as trafficking.¹¹ Therefore, the instruction at issue permitted the jury to convict Rodefer based on a theory unsupported in the law.

Since Rodefer admitted during his testimony that he "possessed" the cocaine on the night in question and that he shared, i.e., transferred the cocaine to his friends, we conclude that there is a substantial possibility that the jury found Rodefer guilty based upon this erroneous "possession with the intent to transfer" theory. Therefore, the inclusion of the jury instruction at issue constituted palpable error and warrants a reversal of Rodefer's conviction for trafficking in a controlled substance in the first degree.¹² Accordingly, we reverse both Rodefer's conviction for trafficking in a controlled substance in the first degree and his PFO I conviction, but affirm his convictions for criminal attempt to

¹¹ See Commonwealth v. Whitmore, Ky., 92 S.W.3d 76, 82 n.3 (2002)(Keller, J., concurring)(noting that "[t]he [G]eneral [A]ssembly has not defined 'possession with the intent to transfer' as trafficking").

¹² See Partin v. Commonwealth, Ky., 918 S.W.2d 219, 224 (1996)(holding that "[a] palpable error is one which affects the substantial rights of a party and relief may be granted for palpable errors only upon a determination that a manifest injustice has resulted from the error. This means, upon consideration of the whole case, the reviewing court must conclude that a substantial possibility exists that the result would have been different in order to grant relief").

commit burglary in the third degree, possession of burglar's tools, and possession of drug paraphernalia.¹³

Rodefer next argues that the trial court had the discretion to determine whether to run the sentences for his Kentucky convictions concurrently or consecutively with his previous Indiana sentences. Although this issue was concededly not preserved for appellate review,¹⁴ we nonetheless consider and reject Rodefer's argument on appeal.

Pursuant to KRS 533.060(2), a defendant who is convicted of a felony while on probation or parole for a previous felony is not entitled to have his sentence for the subsequent felony conviction to run concurrently with his previous sentence:

When a person has been convicted of a felony and is committed to a correctional detention facility and released on parole or has been released by the court on probation, shock probation, or conditional discharge, and is convicted or enters a plea of guilty to a felony committed while on parole, probation, shock probation, or conditional discharge, the person shall not be eligible

¹³ Since Rodefer's PFO I conviction was based on his conviction for trafficking in a controlled substance in the first degree, his PFO I conviction must also be reversed. Rodefer has not appealed from his conviction for criminal attempt to commit burglary in the third degree, his conviction for possession of burglar's tools, or his conviction for possession of drug paraphernalia, first offense, all of which are Class A misdemeanors.

¹⁴ As we mentioned previously, after initially indicating that he wished to plead guilty to all of his charges, Rodefer elected to proceed to trial after his defense counsel formed the opinion that KRS 533.060(2) would require the trial court to run his Kentucky sentences consecutively with his previous Indiana sentences.

for probation, shock probation, or conditional discharge and the period of confinement for that felony shall not run concurrently with any other sentence [emphasis added].

In his brief to this Court, Rodefer argues that the above provision is in conflict with KRS 532.115, and that the latter should control. We disagree. KRS 532.115 reads in pertinent part as follows:

The court in sentencing a person convicted of a felony, shall be authorized to run the sentence concurrent with any federal sentence received by that defendant for a federal crime and any sentence received by that defendant in another state for a felony offense. The time spent in federal custody and the time spent in custody in another state under the concurrent sentencing shall count as time spent in state custody; but the federal custody and custody in another state shall not include time spent on probation or parole or constraint incidental to release on bail.

Hence, KRS 532.115 generally authorizes a trial court to order that a Kentucky sentence run concurrently with a federal sentence or sentence from another state. However, KRS 533.060(2) specifically deals with a situation in which a defendant has been convicted of a felony while on probation or parole for a previous felony. Accordingly, since Rodefer was on probation for previous felony convictions from Indiana when he was convicted of the charges brought against him in the instant

case, KRS 533.060(2) governs under the facts of the case at bar.¹⁵

Based on the foregoing, the judgment of the Fayette Circuit Court is affirmed in part and reversed in part, and this matter is remanded for further proceedings consistent with this Opinion.

TAYLOR, JUDGE, CONCURS.

VANMETER, JUDGE, CONCURS IN PART, DISSENTS IN PART AND FILES SEPARATE OPINION.

VANMETER, JUDGE, CONCURRING IN PART AND DISSENTING IN PART:

Respectfully, I dissent from so much of the majority opinion as holds that the erroneous jury instruction was a palpable error warranting reversal under RCr 10.26. Under the standard for palpable error established by *Commonwealth v. Pace*, Ky., 82 S.W.3d 894 (2002), and upon consideration of the whole case, I do not believe there is a substantial possibility that the result would have been any different if the jury had been instructed correctly. The evidence of the amount of money and the quantity of drugs in Rodefer's possession at the time of his arrest was sufficient to convict him of trafficking with the intent to sell.

¹⁵ See *Commonwealth v. Phon*, Ky., 17 S.W.3d 106, 107 (2000)(stating that "[w]hen there appears to be a conflict between two statutes, as here, a general rule of statutory construction mandates that the specific provision take precedence over the general" [footnote omitted]).

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