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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-000811-MR

FRANKLIN D. FRANKLIN

APPELLANT

v. APPEAL FROM BOURBON CIRCUIT COURT
HONORABLE ROBERT OVERSTREET, JUDGE
ACTION NO. 01-CR-00022

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: JOHNSON, KNOPF, AND SCHRODER, JUDGES.

JOHNSON, JUDGE: Franklin D. Franklin has appealed from the judgment and sentence of the Bourbon Circuit Court entered on January 24, 2003, following a bench trial, finding him guilty of receiving stolen property valued at \$300.00 or more¹ and sentencing him to a term of imprisonment of one year, probated for three years. Having concluded that it was not clearly unreasonable for the trial court to find Franklin guilty, we affirm.

¹ Kentucky Revised Statutes (KRS) 514.110.

This case arose in the summer of 2000 in Bourbon County, Kentucky, where Franklin owns three farms. One of Franklin's farms adjoins the farm of Brian Williams. Both Franklin and Williams raise cattle. On July 31, 2000, Williams noticed that two of his bulls were missing. One bull was a Black Angus and the other was a white-faced Simmental crossbreed. The two bulls had wandered from their field six to ten times before and Williams had always found them in a neighbor's field. However this time, after searching his neighbors' fields for a couple of days, he was unable to find them.

On the evening of August 1, 2000, Williams drove to the adjoining farm belonging to Franklin, where he encountered Joe Bishop. Bishop managed the farm for Franklin and lived on the Franklin farm that adjoined Williams's property. Williams asked Bishop if he had seen his two bulls, and Bishop said he had not seen them. When Williams asked Bishop where Franklin's cattle were, he said they were being hauled to auction at a stockyard in Mt. Sterling by a man named "Terry". Bishop said that Franklin was going to be out of town until August 5, 2000.

On August 5, 2000, Williams went to the stockyard in Mt. Sterling, and he was told that Franklin had not sold any cattle there for the last three sales. Later that day, Williams saw Franklin at a farm store, and explained to Franklin that he

was missing two bulls and he was concerned that they had gotten mixed in with Franklin's cattle that had been hauled to auction. Williams explained his visit to the stockyard in Mt. Sterling and he asked Franklin where Franklin's cattle had been taken. Franklin claimed that he did not know where "Terry" had taken his cattle, but he agreed to check his records so he could locate Terry and find out where his cattle had been auctioned.

Franklin failed to get back in contact with Williams, but Williams got an anonymous telephone call on August 7, 2000, stating that the man who hauled his cattle was named Terry Crouch. Williams called Crouch, who told him that he and his partner, Danny VanLandingham, had hauled Franklin's cattle to the stockyard in Paris. Terry and Danny both stated that they had noticed a white-faced bull with Franklin's cattle. They also said that Franklin and Bishop came to the Paris stockyard twice before the auction on August 3-- once on August 1, the day the cattle were delivered, and once on August 3, the day of the auction. They said that on both of these occasions Franklin and Bishop were close enough to the cattle to have noticed the white-faced bull. Upon learning this information, Williams contacted the Kentucky State Police and their investigation led to the arrest of Franklin and Bishop.

On April 10, 2001, a Bourbon County grand jury indicted Franklin on one count of receiving stolen property

alleging that he had "retained or disposed of a bull recently stolen from Brian Williams." Franklin entered a plea of not guilty, and he and a co-defendant, Joe Bishop, were tried before the court on August 2, 2002. The trial court acquitted Bishop and found Franklin guilty. On January 24, 2003, the trial court entered the judgment of conviction and sentenced Franklin to prison for a term of one year, probated for three years.² This appeal followed.

Franklin argues that the trial court erred by convicting him based on insufficient evidence. Franklin makes three arguments: (1) "elements of KRS 514.050, with which Defendant was not charged, [were used] to establish guilt of KRS 514.110"; (2) "every essential element" of receiving stolen property was not proven; and (3) the circumstantial evidence relied upon by the trial court constituted no more "than a mere suspicion".

KRS 514.110 defines the offense of receiving stolen property, in part, as follows:

- (1) A person is guilty of receiving stolen property when he receives, retains, or disposes of movable property of another knowing that it has been stolen, or having reason to believe that it has been stolen, unless the property is received, retained, or disposed of with intent to restore it to the owner.

² Franklin filed a motion for a new trial on August 7, 2002, which was not ruled upon until its denial on December 10, 2002.

- (2) The possession by any person of any recently stolen movable property shall be prima facie evidence that such person knew such property was stolen.
- (3) Receiving stolen property is a Class A misdemeanor unless the value of the property is three hundred dollars (\$300) or more, in which case it is a Class D felony[.]

Franklin complains that in finding him guilty of receiving stolen property under KRS 514.110, the trial court made reference to the offense of theft of property lost. KRS 514.050 provides as follows:

- (1) Except as provided in KRS 365.710, a person is guilty of theft of property lost, mislaid, or delivered by mistake when:
 - (a) He comes into control of the property of another that he knows to have been lost, mislaid, or delivered under a mistake as to the nature or amount of the property or the identity of the recipient; and
 - (b) With intent to deprive the owner thereof, he fails to take reasonable measures to restore the property to a person entitled to have it.
- (2) Theft of property lost, mislaid, or delivered by mistake is a Class A misdemeanor unless the value of the property is three hundred dollars (\$300) or more, in which case it is a Class D felony.

Franklin argues that the trial court erred "by permitting elements of KRS 514.050, with which Defendant was not charged, to establish guilt of KRS 514.110[,]" but he fails to cite any legal authority to support his argument. The flaw in Franklin's argument is that the Commonwealth does not have to prove that a defendant stole property to convict him of receiving stolen property. KRS 514.110 requires a showing that the defendant received, retained, or disposed of movable property of another knowing that it had been stolen. Kentucky's statutes on theft of property include KRS 514.030, theft by unlawful taking or disposition; KRS 514.040, theft by deception; KRS 514.050, theft of property lost; KRS 514.070, theft by failure to make required disposition of property; and KRS 514.080, theft by extortion. The identity of the owner of the property and the circumstances surrounding its theft are not controlling elements in the crime of receiving stolen property. Rather, "knowledge of the property's dishonest origin, without any necessity of a further particularity in relation thereto, is the gist of this crime."³ Thus, the fact that the bull was lost and had come into the control of another person was sufficient

³ Decker v. Commonwealth, 198 S.W.2d 212, 214 (Ky. 1946). See also Magruder v. Commonwealth, 281 S.W.2d 716, 719 (Ky. 1955) (noting that knowledge that the property was stolen is the controlling element); and Allison v. Commonwealth, 83 Ky. 254 (1885) (stating that "[i]t is not necessary, in order to convict of [receiving stolen property], that the guilt of the person who stole the property shall be first established, nor his name to be known or even stated in the indictment, or to prove the accused to be in any way connected with the larceny.")

to establish that a theft of property lost had occurred. Since the bull was lost property which became stolen movable property, this element of KRS 514.110 was properly established.

Franklin also argues that "[t]he Commonwealth failed to meet its burden of proving every essential element of the crime of Receiving Stolen Property." Franklin contends that since the bull had "escaped" on "five, six or maybe ten" occasions that there was no evidence that it had been stolen. This argument is negated by the trial court's reliance on the theft of lost property statute for establishing the element of the bull being stolen property. KRS 514.050 provides that a person is guilty of theft of property lost when he comes into control of the property of another that he knows to have been lost. The evidence presented by the Commonwealth that the bull left Williams's farm and ended up on Franklin's farm was sufficient to establish that the bull was lost property. The Commonwealth was not required to prove the detailed circumstances of how this occurred to show that Franklin disposed of Williams's bull knowing that it had been lost.⁴

Franklin's final argument is that the circumstantial evidence relied upon by the trial court constituted no more than a mere suspicion of his guilt. Franklin summarizes the evidence against him as follows: (1) Franklin and Williams owned

⁴ Decker, 198 S.W.2d at 214.

adjoining farms; (2) Williams's cattle had previously wandered from Williams's farm on five, six, or maybe, ten occasions; (3) Franklin's farm was being managed by co-defendant, Bishop, who lived on the premises; (4) Franklin's presence on the farm is not established for the period in question from July 26, 2000, through August 1, 2000; and (5) Franklin had visited the stockyard prior to the sale, which presented Franklin with the opportunity to have observed Williams's bull. However, the Commonwealth points out that there was other evidence that the trial court could rely on in making an inference that Franklin disposed of the bull knowing that the bull had been lost. Evidence of record included testimony from Williams that the bull was a white-faced Simmental crossbreed that also had white under part of its body, that Bishop and Franklin both told Williams that Franklin's cattle had been taken to a stockyard in Mt. Sterling instead of Paris, that Franklin had an opportunity at the Paris stockyard to view his cattle that were to be auctioned, and that after Williams told Franklin that his bull may have been sent to auction with Franklin's cattle by mistake that Franklin made no attempt to investigate this claim.

The trial judge, as the fact-finder, heard the witnesses testify and he was in the best position to judge their credibility. In finding Franklin guilty, the trial judge summarized the evidence and his findings as follows:

Between the time that Traveler strayed onto the Franklin property, was there ample opportunity for Mr. Franklin and his employee to have seen Traveler mixed in with the herd and to have realized that they had somehow come into control of that property before it was sold[?] The testimony is that the bull was missing July 26th, I believe, sometime between that time and the time it was taken to the Stockyards, did Mr. Franklin have an opportunity, should he have seen the cow—or the bull, I'm sorry, I don't want to call him a cow and affect his sensibility, or on the August 1st delivery to the Stockyards, the August 3rd deadline, did they have an opportunity to notice that this white-faced cow was in their consignment of wholly black cattle. That's frankly where I hang up. Up until now, this could have been a happenstance sort of thing. This cow, this bull could [have] gotten mixed in the herd and very innocently, probably, have been sold without anybody knowing it. But I find it stretches my sense of credulity, I believe is the word that has been used here today, to believe that Mr. Franklin had that many opportunities, and his employee had that many opportunities to know that there was not a stranger in the herd, there, that must have stuck out like a sore thumb. And I believe that somewhere in those three opportunities lasting some five or six days, that somebody should have noticed that this all black herd had a white-faced cow in it, which it undoubtedly did.

These things about telling Mr. Williams that the cows were being sold in Mt. Sterling when in fact they were being sold in Paris, not knowing that there were two additional, or at least one additional cow in the herd, no[t] knowing when they got the check that the check was probably way too much for the number of cattle that they had consigned, all these things make me believe that somebody knew that these cattle were

not Mr. Franklin's cattle, and were lost and mislaid.

Who knew this and what effect does it have on these charges? Well, I don't think there's any conclusion other than Mr[.] Franklin must have known. To believe that he visited the Stockyards twice concerning the consignment of the cattle, to believe that he had these cattle on his pasture less than a week before he was taking them to the Stockyards to sell, and to believe that he had not noticed that one of them was not his, couldn't have been his, is just impossible for me to swallow.

So I believe Franklin Franklin is guilty of the offense of Receiving Property Over \$300 in Value.

Our standard of review of a trial court's denial of a motion for a directed verdict of acquittal is well-established:

On a 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 [fact-finder] to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given. For the purposes of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but reserving to the [fact-finder] questions as to the credibility and weight to be given to such testimony.

On appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a [fact-finder] to find guilt, only then the defendant is entitled to a directed verdict of acquittal.⁵

⁵ Commonwealth v. Benham, 816 S.W.2d 186, 187 (Ky. 1991).

"[I]n evaluating whether or not a directed verdict should have been granted in cases involving circumstantial evidence," a different standard is not required.⁶ A conviction may be based upon circumstantial evidence when the evidence taken as a whole is of such character that a reasonable person would be justified in concluding that a person is guilty beyond a reasonable doubt.⁷ Thus, based on the evidence previously discussed, we conclude that the evidence was sufficient to support the trial court's finding of Franklin guilty of receiving stolen property.

Based on the foregoing, the judgment and sentence of the Bourbon Circuit Court is affirmed.

ALL CONCUR.

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⁶ Commonwealth v. Collins, 933 S.W.2d 811, 815 (Ky. 1996).

⁷ Bussell v. Commonwealth, 882 S.W.2d 111, 114 (Ky. 1994).