RENDERED: February 4, 2005; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001496-MR

JAMES BRANDON HILL — APPELLANT

v.

APPEAL FROM CARROLL CIRCUIT COURT
HONORABLE STEPHEN BATES, JUDGE
ACTION NO. 03-CR-00036

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
REVERSING

** ** ** ** **

BEFORE: JOHNSON, KNOPF, AND SCHRODER, JUDGES.

JOHNSON, JUDGE: James Brandon Hill has appealed from a final judgment entered by the Carroll Circuit Court on July 1, 2003, following a jury verdict finding him guilty of the offense of tampering with physical evidence.[1] Having concluded that Hill was entitled to a directed verdict of acquittal on the charge of tampering with physical evidence and that the jury should have been instructed on attempted tampering with physical evidence, we reverse his conviction and one-year prison sentence. We

[1] Kentucky Revised Statutes (KRS) 524.100.

further conclude that the imposition of a $1,000.00 fine on Hill was not authorized by law.

On March 10, 2003, Hill was indicted by a Carroll County grand jury for tampering with physical evidence and the status offense of being a persistent felony offender in the second degree (PFO II).[2] At a jury trial held on June 6, 2003,[3] the undisputed facts revealed that in February 2003, Hill was out of jail on bond on a pending charge of possession of a firearm by a convicted felon. As a requirement of his bond, Hill was to submit to drug screening through periodic urine tests to be given at the Carroll County Detention Center. Hill underwent a urine test on February 3, 2003, which indicated that he had traces of marijuana in his system. Carroll County Jailer Mike Humphrey notified the Commonwealth's Attorney of the positive result and a bond revocation hearing was scheduled for February 24, 2003, in the Carroll Circuit Court.

At that hearing, a special judge continued the bond revocation hearing until the regularly sitting circuit judge returned to the bench and ordered Hill to submit to another urine test that day. Jailer Humphrey informed Lieutenant Tony Meadows of his staff at approximately 10:00 a.m. that Hill would soon be arriving for the purpose of providing a urine sample.

[2] KRS 532.080(2).

[3] On the morning of trial, the PFO count was dismissed on motion by the Commonwealth.

The distance between the courthouse and the detention center is about a five-minute walk. However, Hill did not arrive for the drug test until around 1:30 p.m., approximately three and one-half hours after leaving the courtroom, prompting Lt. Meadows to perform a pat-down search of Hill. The search revealed a brown prescription bottle tucked inside the waistband of Hill's pants, which appeared to contain urine. The liquid from the prescription bottle was poured into a container, sealed, and sent to the lab for testing. The test results indicated that the substance was urine and it contained no trace of drugs.

After discovering the bottle in Hill's pants, Lt. Meadows conducted a strip search of Hill, placed him in a holding cell, and advised him to provide another urine sample. In accordance with the policy and procedure of the detention center, Lt. Meadows accompanied Hill while he produced another urine sample. The urine was collected in a container and the sample was sent to the lab. This sample collected from Hill tested positive for marijuana.

While Hill was being confined on February 24, 2003, following the discovery of the prescription bottle, he was informed of his rights and agreed to talk. During the interrogation, Hill admitted that the bottle found in his waistband contained urine he had obtained from an eight-year-old

boy and that he intended to use the boy's urine, not his own, for the urine test.

Following the Commonwealth's presentation of evidence, Hill moved the trial court for a directed verdict of acquittal. He asserted that since the boy's urine in the prescription bottle had not been transferred from the prescription bottle to the container used for shipment to the lab, that he had only attempted to fabricate the evidence and that he could not be convicted of tampering with physical evidence.

The Commonwealth responded that the evidence showed that Hill had come to the detention center with the intention of submitting urine for a urine test that was not his own. The Commonwealth stated that since the fabricated urine sample was intended to be used in an official proceeding, all of the elements of the offense of tampering with physical evidence were proven. The trial court denied Hill's motion.[4]

Hill then requested a jury instruction for attempted tampering with physical evidence on the ground that he was apprehended prior to pouring the boy's urine from the prescription bottle into the testing container. Hill noted that under the testing procedures a urine sample must be in the authorized testing container to be sent to the lab. The trial

[4] Hill did not present any evidence, and he renewed his motion for a directed verdict of acquittal, which was denied again.

court denied Hill's request for an instruction on attempt, stating that the evidence only supported a conviction for tampering with physical evidence.

The jury returned a verdict of guilty of tampering with physical evidence and recommended a prison sentence of one-year, the statutory minimum. The jury did not recommend that Hill, who was indigent, be fined. However, when the final judgment was entered on July 1, 2003, Hill's sentence included a $1,000.00 fine in addition to imprisonment. This appeal followed.

Hill's first contention is that the trial court erred when it denied his motion for a directed verdict of acquittal. Our Supreme Court in Commonwealth v. Benham,[5] set forth the standard for review of a motion for a directed verdict of acquittal:

> 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 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.

[5] 816 S.W.2d 186 (Ky. 1991).

> On appellate review, 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, only then the defendant is entitled to a directed verdict of acquittal.[6]

Tampering with physical evidence is found in KRS 524.100 and states:

> (1) A person is guilty of tampering with physical evidence when, believing that an official proceeding is pending or may be instituted, he:
>
> (a) Destroys, mutilates, conceals, removes or alters physical evidence which he believes is about to be produced or used in the official proceeding with intent to impair its verity or availability in the official proceeding; or
>
> (b) Fabricates any physical evidence with intent that it be introduced in the official proceeding or offers any physical evidence, knowing it to be fabricated or altered.
>
> (2) Tampering with physical evidence is a Class D felony.

Under subsection (b) of this statute, a person is guilty of tampering with physical evidence (1) if he fabricates any physical evidence with the intention that the evidence be introduced in an official proceeding; or (2) if he offers any physical evidence for introduction in an official proceeding which he knows was fabricated or altered. The Commonwealth

[6] Id. at 187.

argues that the offense of tampering with physical evidence had been completed, because the boy's urine was fabricated physical evidence and Hill intended the boy's urine to be used in the testing for the bond revocation hearing.

After drawing all fair and reasonable inferences from the evidence in favor of the Commonwealth, we must conclude that the evidence was not sufficient to induce a reasonable juror to believe beyond a reasonable doubt that Hill was guilty of tampering with physical evidence. Lt. Meadows testified that he discovered the bottle of urine in the waistband of Hill's pants. Jailer Humphrey testified that Hill admitted that he had a boy provide him with a urine sample, which he then took to the detention center for the purpose of substituting it for his own urine for the drug screening test. Thus, while Hill clearly attempted to fabricate a urine sample with the intention that the fabricated urine sample be tested for the purpose of his bond revocation hearing, he did not succeed in doing so because he was caught by Lt. Meadows before the boy's urine was placed in the test container. While Hill's urine was already physical evidence, for the boy's urine sample to become physical evidence it had to be placed in the test container for purposes of the revocation proceeding. To argue otherwise would result in the crime of tampering with physical evidence being completed upon Hill having the boy urinate in a bottle. Clearly, at that stage

of the event and at the time Hill entered the detention center with the bottle of the boy's urine, Hill was only attempting to fabricate the physical evidence to be tested for his revocation proceeding.[7] KRS 524.100(1)(b) punishes the fabrication of physical evidence with the intent that it be introduced in an official proceeding, not the intent to fabricate. Accordingly, the trial court erred by denying Hill's motion for a directed verdict of acquittal.

We also agree with Hill that the trial court erred by refusing to instruct the jury on the offense of attempted tampering with physical evidence. Hill asserts that at the time the prescription bottle containing the boy's urine was discovered, he had not completed the offense of tampering with physical evidence, even though he concedes he had performed a substantial step toward committing the offense.[8] Of course, as

[7] When the boy's urine was taken from Hill it became physical evidence, but only in support of the crime of attempting to fabricate physical evidence not for purposes the revocation proceeding.

[8] KRS 506.010 provides as follows:

> (1) A person is guilty of criminal attempt to commit a crime when, acting with the kind of culpability otherwise required for commission of the crime, he:
>
> (a) Intentionally engages in conduct which would constitute the crime if the attendant circumstances were as he believes them to be; or
>
> (b) Intentionally does or omits to do anything which, under

we previously discussed the Commonwealth contends the offense was completed upon Hill bringing the boy's urine with him to the detention center.

> the circumstances as he believes them to be, is a substantial step in a course of conduct planned to culminate in his commission of the crime.
>
> (2) Conduct shall not be held to constitute a substantial step under subsection (1)(b) unless it is an act or omission which leaves no reasonable doubt as to the defendant's intention to commit the crime which he is charged with attempting.
>
> (3) A person is guilty of criminal attempt to commit a crime when he engages in conduct intended to aid another person to commit that crime, although the crime is not committed or attempted by the other person, provided that his conduct would establish complicity under KRS 502.020 if the crime were committed by the other person.
>
> (4) A criminal attempt is a:
>
> (a) Class C felony when the crime attempted is a violation of KRS 521.020 or 521.050;
>
> (b) Class B felony when the crime attempted is a Class A felony or capital offense;
>
> (c) Class C felony when the crime attempted is a Class B felony;
>
> (d) Class A misdemeanor when the crime attempted is a Class C or D felony;
>
> (e) Class B misdemeanor when the crime attempted is a misdemeanor.

The cases of Kirkland v. Commonwealth,[9] and Cope v. Commonwealth,[10] are distinguishable from this case. In Kirkland, our Supreme Court held that a jury instruction on attempted robbery was not proper since the defendant admitted that he and another person had entered a store while armed with a gun and intending to steal money from the owner. The robbery was committed when the defendant entered the store with a gun in order to steal money from the victim even though no money was taken. In Cope, the Court held that a defendant, who escaped from the locked portion of a detention facility but not from the entire building, was not entitled to receive a jury instruction on attempted escape. Regardless of the fact that he had not escaped to the outside of the detention facility, the mere fact that he had entered an area without locked doors supported a conviction for escape, and not an instruction for attempted escape.

In this case, Hill possessed a urine sample from the boy with the intent of having it tested for a court proceeding instead of his own, but the boy's urine sample never became physical evidence because Hill was caught before he could put the boy's urine in the test container. The statute in question requires that the defendant fabricate evidence with the

[9] 53 S.W.3d 71, 76 (Ky. 2001).

[10] 645 S.W.2d 703, 704 (Ky. 1983).

intention of the evidence being introduced in an official proceeding. Hill attempted to fabricate physical evidence, but he was prevented from doing so. Thus, the evidence did not support a finding that Hill had completed the offense of tampering with physical evidence, but it did support a finding that he took a substantial step in a course of conduct intending to fabricate evidence. Thus, he was entitled to an instruction on attempt.

Hill's final argument is that the trial court erroneously imposed a $1,000.00 fine upon him in addition to his sentence of imprisonment. The Commonwealth concedes that this was error and agrees that this portion of the sentence should be reversed.[11]

Based on the foregoing, the final judgment and sentence of the Carroll Circuit Court is reversed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Richard Hoffman
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General

Carlton S. Shier, IV
Assistant Attorney General
Frankfort, Kentucky

[11] See KRS 534.030(4) and Simpson v. Commonwealth, 889 S.W.2d 781, 784 (Ky. 1994)(holding that imposition of a fine upon an indigent defendant was not authorized).