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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001737-MR

CHARLES E. COOPER III

APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE THOMAS B. WINE, JUDGE
ACTION NO. 03-CR-002645

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION AFFIRMING

** ** * * *

BEFORE: BARBER AND JOHNSON, JUDGES; MILLER, SENIOR JUDGE.¹

BARBER, JUDGE: On March 16, 2003, Appellant, Charles E. Cooper, III, visited the Oxmoor Mall in Louisville, Kentucky, and entered the Gymboree store. Appellant allegedly entered into a rear storage room that contained an office, took items from employees' purses, and then left the store upon discovery by an employee. Appellant was indicted on October 13, 2003 on one

¹ Senior Judge John D. Miller sitting as Special Judge by assignment of the Chief Judge pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

count of burglary in the third degree and for being a persistent felony offender in the first degree. Appellant filed a motion to dismiss the burglary in the third degree charge on April 7, 2004. This motion was not heard by the court because Appellant accepted a plea agreement from the Commonwealth. Appellant agreed to plead guilty to persistent felony offender in the second degree and conditionally plead guilty to the charge of burglary in the third degree, pursuant to RCr 8.09. The trial court entered judgment on the guilty plea on April 20, 2004, but preserved Appellant's right to appeal the sole issue of the burglary in the third degree charge. Subsequently, Appellant was sentenced by judgment entered July 26, 2004 to a total of six years on the charges, but was granted probation for five years. This appeal followed.

Appellant asks us to determine whether his alleged acts fit within the definition of burglary in the third degree. Interpretation of statutes is a matter of law, and proper judicial function. Keeton v. City of Ashland, 883 S.W.2d 894, 896, (Ky.App. 1994), review denied; see also, Floyd County Bd. of Educ. v. Ratliff, 955 S.W.2d 921, 925, (Ky. 1997).

Kentucky Revised Statute 446.080(1) states "All statutes of this state shall be liberally construed with a view to promote their objects and carry out the intent of the legislature, and the rule that statutes in derogation of the

common law are to be strictly construed shall not apply to the statutes of this state and (2) there shall be no difference in the construction of civil, penal, and criminal statutes." See Hoy v. Kentucky Indus. Revitalizations Auth., 907 S.W.2d 766, 768, (Ky. 1994), (quoting Commonwealth v. Shivley, 814 S.W.2d 572, 573, (Ky. 1991)). Also, the cardinal rule of statutory construction is that intention of legislature should be ascertained and given effect. Commonwealth, Cabinet for Human Resources, Interim Office of Health Planning and Certification v. Jewish Hosp. Healthcare Services, Inc., 932 S.W.2d 388, 390, (Ky.App. 1996), (citing Delta Air Lines, Inc. v. Comm. Revenue Cabinet, 689 S.W.2d 14 (Ky. 1985)). We next turn to the Penal Code for direction on how to interpret its statutes.

Kentucky Revised Statute 500.030 states "All provisions of this code shall be liberally construed according to the fair import of their terms, to promote justice, and to affect the objects of the law." Also, Kentucky Revised Statute 500.100 states "The commentary accompanying this code may be used as an aid in construing the provisions of this code." See Cooper v. Commonwealth, 550 S.W.2d 478, 479-480 (Ky. 1977). Based on the foregoing, we will interpret the statute liberally considering the intentions of the General Assembly.

Kentucky Revised Statute 511.040(a) states that "A person is guilty of burglary in the third degree when, with the

intent to commit a crime, he knowingly enters or remains unlawfully in a building." The commentary for all burglary statutes is contained in the commentary of KRS 511.020, burglary in the first degree. The relevant sections of said commentary as are follows:

"Burglary in the third degree:" This offense, as defined in KRS 511.040, is the basic burglary crime . . . The crime must be committed in a 'building,' defined in KRS 511.010 in such a way as to include all structures in which people lodge, work, or otherwise conduct business. With this definition, burglary is designed to encompass all unlawful intrusions which are accompanied by alarm and danger to occupants. . . .

[A] burglar must 'knowingly enter or remain unlawfully in a building.' This requirement, as it is defined in KRS 511.090, is intended to accomplish the following:

(i) It eliminates 'breaking' as an element of the offense of burglary. At common law this requirement served no legitimate purpose and only complicated the law. . . .

(iii) It expands the traditional burglary offense through a provision that any person who enters property under privilege may still commit an offense to burglary if he remains on that property beyond the termination of his privilege. . . .

Finally, after a showing that an accused knowingly entered or remained unlawfully in a building, a conviction of burglary in the third degree is appropriate

only upon proof that his intrusion was with intent to commit a crime. . . .

The provisions of this chapter, by eliminating 'breaking' as an element of burglary, provide a general change in direction. . . .

The [prior] statutory burglary offense were more like crimes seeking to protect against the theft of property than crimes seeking to deal with the danger that accompanies an unlawful intrusion into a place where people live and work. The new provisions change this. . . ." (Official Commentary to KRS 511.020).

The statutes contain other essential definitions.

Kentucky Revised Statute 511.010 defines, in relevant part, "building" as follows: "Building, in addition to its ordinary meaning, means any structure, vehicle, watercraft, or aircraft: (b)Where people assemble for purposes of business . . . **Each unit of a building consisting of two (2) or more units separately secured or occupied is a separate building.**"

(Emphasis added.) The term "enters or remains unlawfully" is defined in KRS 511.090(1) as "A person 'enters or remains unlawfully' in or upon premises when he is not privileged or licensed to do so. Kentucky Revised Statute 511.090(3) further provides that **"A license or privilege to enter or remain in or upon premises which are only partly open to the public is not a license or privilege to enter or remain in or upon a part of the premises which is not open to the public."** (Emphasis added.)

Commentary exists for this statute also. The commentary for KRS 511.090 provides in relevant part:

“‘Enters or remains unlawfully’ is an essential element of each offense of burglary. The provisions of this section make the element more understandable. The first subsection is self-explanatory. . . . The third subsection provides that a person who is lawfully on one portion of some premises or in one part of a building may commit an offense of burglary or trespass by entering or remaining unlawfully on another portion or in another part.” (Official Commentary to KRS 511.090).

We now turn to Appellant’s argument that his alleged actions did not rise to the level of burglary in the third degree.

Appellant argues that he did not “enter or remain unlawfully in” the Gymboree as required under KRS 511.040(1). Appellant claims that KRS 511.090(3) does not apply because the store room was open to the public. There are no Kentucky cases directly on point with this issue. The Appellant relies primarily upon a case out of Kansas, which we will examine in a moment. The Commonwealth cites to several cases throughout the country. Two of those are particularly similar to the facts we have before us.

The Commonwealth directs us to Hawaii v. Vowell, 837 P.2d 1308 (Haw. Ct. App. 1992), review denied, 843 P.2d 144 (table) (1992). In this case, a former employee of a nightclub

entered into back rooms inhabited by the owner (a bedroom and bathroom) and attacked her while the owner was in the shower. There were no postings on either door and the door the former employee entered was unlocked. The court found her guilty of burglary in the first degree.

The court found burglary in the first degree was committed when "(1) a person intentionally enters or remains unlawfully in a building, with intent to commit therein a crime against a person or against property rights, and: (b) intentionally, knowingly, or recklessly inflicts or attempts to inflict bodily injury on anyone in the course of committing the offense; . . ." Id. at 309, (citing Haw. Rev. Stat. 708-810). Hawaii has two statutory definitions related to burglary that are identical to Kentucky's. Hawaii Revised Statute 708-800 defines "building" to include "any structure. . . .; each unit of a building consisting of two or more units separately secured or occupied is a separate building." Id. at 311, (citing Haw. Rev. Stat. 708-800). This same statute defines "enter or remain unlawfully" as when a person enters or remain unlawfully in or upon premises when he is not licensed, invited, or otherwise privileged to do so. Id. at 311. It continues that a license or privilege to enter or remain in a building which is only partly open to the public is not a license or privilege to enter or remain in that part of the building which is not open to the

public. Id. at 312. The court affirmed the burglary charge because under the Hawaiian Penal Code the back rooms constituted a "building" not open to the public, which defendant was not privileged to enter. Another jurisdiction with similar burglary statutes is Colorado.

In Colorado v. Ridenour, 878 P.2d 23 (Col. Ct. App. 1994), review denied (Col. 1994), a defendant threatened another customer to help him to gain access to a movie theater manager's office so that he could rob it. He did in fact rob the office. Surprisingly, the defendant had purchased a movie ticket prior to the theft. During appeals, defendant argued that he could not be convicted of burglary because the manager's office was a public place and he had a right to be there as a ticket purchaser. The court disagreed.

Colorado Revised Statute 18-4-201(3) defined "unlawful entry" as when a person who, regardless of his intent, enters or remains in or upon premises which are at the time open to the public does so with license and privilege. . . . A license or privilege to remain in a building which is only partly open to the public is not a license or privilege to enter or remain in that part of the building which is not open to the public. Id. at 26. Colorado appellate courts had also defined the term "open to the public" as premises which would cause a reasonable person to believe no permission to enter or remain is required.

Colorado v. Bozeman, 624 P.2d 916, 918, (Colo. App. 1980). Colorado law also provided, by statute, the definition of a "separate building." Colorado Revised Statute 18-4-201(2) stated a separate building means each unit of a building consisting of two or more units separately secured or occupied. The court affirmed the conviction because the manager's office was a part of the building not open to the public. There are also other jurisdictions which have upheld a burglary conviction under similar circumstances. See Evans v. Texas, 677 S.W.2d 814 (Tx. Ct. App. 1984) and New Mexico v. Sanchez, 735 P.2d 536 (N.M. 1987). We will now turn to Appellant's argument.

In support of his claim, Appellant directs us to Kansas v. Hall, 3 P.3d 582 (Kan. Ct. App. 2000). In that case, the defendant was found not guilty of burglary when he stole merchandise from a K-mart store room. The court reasoned that the building was open to the public at the time of the crime and therefore no burglary could occur because he had authority to enter the building which housed the storeroom. Id. at 586. In Kansas, criminal statutes are to be strictly construed in favor of the accused. Id. at 585. There is additional reasoning for this ruling in Kansas v. Hall, 14 P.3d 404 (Kan. 2000).

The Kansas Supreme Court cites the concurrence in the Kansas Court of Appeals opinion and states that the Kansas Legislature should consider revising the Kansas burglary statute

so that it treats the subparts of a structure as separate structures within the Kansas burglary statute. Id. at 406, (citing Kansas v. Hall, 3 P.3d 582, 586, (Kan. Ct. App. 2000)). The applicable burglary statute was K.S.A. 21-3715 which stated in relevant part "Burglary is knowingly and without authority entering into or remaining within any: . . . (b) building, manufactured home, mobile home, tent or other structure which is not a dwelling, with intent to commit a felony, theft or sexual battery therein; . . ." The Kansas legislature provided no additional definitions for building in the state's statutes.

The court also explains why their ruling differed from that of other jurisdictions, including Hawaii and Colorado. In discussing State v. Vowell, the court states "We note that unlike our statute, the Hawaii statute treats subparts of a building as separate buildings." Id. at 407. In discussing various Colorado cases, the court notes the difference is the "enters unlawfully" or "remains unlawfully" definition because Colorado's statute states that a license or privilege to enter or remain in a building that is only partly open to the public is not a license or privilege to enter or remain in that part of the building that is not open to the public. Id. In other words, the statutory definitions applicable to the burglary statutes in those jurisdictions were significantly different than that of the Kansas statute.

Another case with similar facts is Arabie v. Alaska, 699 P.2d 890 (Alaska Ct. App. 1985). In that case, the defendant went to the back of a store into a walk-in cooler not open to the general public and attempted to steal beer by leaving through a rear door. He was stopped by a store employee. Defendant appealed his conviction arguing he did not "enter or remain unlawfully in a building."

The court found in order to "enter or remain unlawfully" a defendant had to enter or remain in or upon premises . . . when the premises . . . , at the time of the entry of remaining, is not open to the public and when the defendant is not otherwise privileged to do so. . . ." Id. at 892, (citing Alaska Stat. 11.46.350(a)). The purpose of the "open to the public" clause was to bring the law of burglary closer to its common law ancestor. Id. at 893-894. Alaska Revised Statute 11.81.900(b)(3) stated a building, in addition to its usual meaning, includes any propelled vehicle or structure adapted for overnight accommodation of person or for carrying on business; when a building consists of separate units, including apartment units, offices, or rented rooms, each unit is considered a separate building. Id. at 892. The Alaska statutes did not distinguish buildings that were only partially open to the public. Id. at 894 n.8. The court reversed the defendant's conviction because the entire store building was

open to the public when the defendant entered and neither the walk-in cooler nor the rear storage area could be considered a separate building under the statutory definition. Id. at 895.

Based on the various jurisdictions, we believe the courts which have found that an individual can burglarize a portion of a public building are more in sync with Kentucky's statutes. We believe the General Assembly specifically enacted KRS 511.090(3) to deal with this exact situation. Therefore, we believe Appellant was properly charged with burglary in the third degree.

However, Appellant argues that the store room was open to the public because it had no identification to the contrary. As such, Appellant states KRS 511.090(3) does not apply. Even assuming we accepted this argument, there is case law which would support a burglary conviction in this instance.

Kentucky Revised Statute 511.090(2) applies to situations concerning privilege and license in the context of premises open to the public. Kentucky Revised Statute 511.090(2) states "A person who, regardless of his intent, enters or remains in or upon premises which are at the time open to the public does so with license or privilege unless he defies a lawful order not to enter or remain personally communicated to him by the owner of such premises or other authorized person." The Kentucky Supreme Court has held that "implicit in this

statute is the concept that license or privilege expires once the person commits an act inconsistent with the purposes of the business. A license to be on the premises terminates when one commits criminal acts." Bowling v. Commonwealth, 942 S.W.2d 293, 307, (Ky. 1997). The Kentucky Supreme Court ruled as such despite commentary to the statute stating the second subsection "eliminates the possibility of prosecuting an individual for burglary when he enters a building that is open to the public, despite his intention to commit a crime." Official Commentary to KRS 511.090. The court's ruling appears to contradict the purpose of the statute. However, failure of the legislature to amend a judicially interpreted statute strongly implies legislative agreement with the interpretation. Rye v. Weasel, 934 S.W.2d 257, 262, (Ky. 1996). With this proposition in mind, the moment Appellant took items not belonging to him from the rear storage room, his license to be at the premises would have terminated. Therefore, Appellant could have properly been charged with burglary in the third degree even if we designated the rear store room as being open to the public.

For the reasons set forth above, we believe the facts were sufficient to charge Appellant with burglary in the third degree. Therefore, we affirm the Jefferson County Circuit Court's conviction and sentence.

MILLER, SENIOR JUDGE, CONCURS.

JOHNSON, JUDGE, CONCURS IN RESULT ONLY.

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