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Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-002335-MR

ORLANDO SAXTON — APPELLANT

v.

APPEAL FROM GRAVES CIRCUIT COURT
HONORABLE TIMOTHY C. STARK, JUDGE
ACTION NO. 06-CR-00195

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; STUMBO, JUDGE; GUIDUGLI,[1] SENIOR JUDGE.

STUMBO, JUDGE: Orlando Saxton appeals from a criminal judgment reflecting a jury verdict of guilty on three counts of first-degree trafficking in a controlled substance and one count of trafficking within 1,000 yards of a school. Saxton argues that the Commonwealth failed to prove that he knew that he sold drugs

[1] Senior Judge Daniel T. Guidugli sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

within 1,000 yards of a school; that he was entrapped; and, that the trial court improperly prevented him from impeaching a prosecution witness. For the reasons stated below, we affirm the judgment on appeal.

On June 30, 2006, the Graves County grand jury indicted Saxton on three counts of first-degree trafficking in a controlled substance and one count of trafficking in a controlled substance within 1,000 yards of a school. The indictment arose from events occurring on January 6, 2006, and January 25, 2006, when Saxton sold marijuana and cocaine to Saxton's aunt, Anna Saxton, and her fiancé Henry Island. Anna and Henry had agreed to act as informants and to purchase the substances from Saxton in a hotel room being monitored by police officers of the Pennyrile Narcotics Task Force. The hotel was located within 1,000 yards of a school, and the transactions were videotaped.

Trial on the charges was conducted on May 31, 2007, resulting in a guilty verdict on all counts. Saxton received a sentence of five years in prison on each of the three Class C trafficking counts, plus one year on the Class D charge of trafficking within 1,000 yards of a school, to be served consecutively for a total term of imprisonment of 16 years. This appeal followed.

Saxton now argues that the trial court erred in failing to sustain his motion for a directed verdict at the close of the evidence. He maintains that the Commonwealth failed to prove an element of the offense of trafficking within 1,000 yards of a school; to wit, that no proof was offered that Saxton knew he was within 1,000 yards of a school at the time of the sale. He claims that the trafficking

near a school statute is not a strict liability offense, and that a defendant is guilty of the crime only if he is aware of his physical proximity to the school at the time he traffics in a controlled substance. He seeks an order vacating the conviction and remanding the matter for trial on the lesser included offense of trafficking in marijuana.

We find no error on this issue. Saxton was convicted of violating KRS 218A.1411, which states that,

> Any person who unlawfully traffics in a controlled substance classified in Schedules I, II, III, IV or V, or a controlled substance analogue in any building used primarily for classroom instruction in a school or on any premises located within one thousand (1,000) yards of any school building used primarily for classroom instruction shall be guilty of a Class D felony, unless a more severe penalty is set forth in this chapter, in which case the higher penalty shall apply. The measurement shall be taken in a straight line from the nearest wall of the school to the place of violation.

Contrary to Saxton's claim, KRS 218A.1411 does not require the actor to "knowingly" traffic in a controlled substance within 1,000 yards of a school in order to be convicted of the offense. That is to say, there is no requirement that a conviction for violation of KRS 218A.1411 arises from proof that the actor knew the sale was conducted in proximity to a school. Rather, KRS 218A.1411 is silent as to *mens rea*. It merely requires proof of the unlawful transaction of a controlled substance or controlled substance analogue (i.e., fake drugs) within 1,000 yards of a school.

We are further persuaded that a requirement of *mens rea* is not imparted to KRS 218A.1411 by the application of any provisions of the Kentucky Penal Code. As the Commonwealth properly notes, KRS 501.050(1) requires proof of a mental state (intentionally, knowingly, wantonly or recklessly) for felonies set out in the Kentucky Penal Code, KRS Chapter 500, et seq. The offense of trafficking within 1,000 yards of a school is not a provision of the Kentucky Penal Code, and KRS 501.050(1) is not applicable. Since the clear language of KRS 218A.1411 does not set out the mental state of "knowingly" as an element of the offense, and because we find that no other statutory provision imparts to KRS 218A.1411 the requirement of proof of a mental state, we find no error on this issue.

Saxton next argues that he was entrapped into committing the offense of trafficking within 1,000 yards of a school. While acknowledging that it was his decision to engage in the trafficking of controlled substances, he maintains that the police authority's choice to conduct the "controlled buys" at a hotel within 1,000 yards of a school was not accidental and was done for the improper purpose of adding an additional offense to the charges. He directs our attention to *Wyatt v. Commonwealth*, 219 S.W.3d 751 (Ky. 2007), and notes that the record contains no evidence that he has in the past, nor would in the future, engage in trafficking within 1,000 yards of a school. Again, he seeks an order vacating his conviction and remanding the matter for trial on the lesser included offense of trafficking in marijuana.

By Saxton's own admission, this argument is not preserved for appellate review, and we cannot conclude that it rises to the level of palpable error. Even if it were preserved, we would find no error. KRS 505.010 states that,

> (1) A person is not guilty of an offense arising out of proscribed conduct when:
>
> (a) He was induced or encouraged to engage in that conduct by a public servant or by a person acting in cooperation with a public servant seeking to obtain evidence against him for the purpose of criminal prosecution; and
>
> (b) At the time of the inducement or encouragement, he was not otherwise disposed to engage in such conduct.
>
> (2) The relief afforded by subsection (1) is unavailable when:
>
> (a) The public servant or the person acting in cooperation with a public servant merely affords the defendant an opportunity to commit an offense . . . .

Saxton has acknowledged the responsibility for trafficking in controlled substances, stating in his written argument that "Defendant's ill-fated decision to sell drugs was his own." It is clear from the record and the entirety of the circumstances surrounding this matter that the Pennyrile Narcotics Task Force merely afforded Saxton the opportunity to commit the offense at issue, and that Saxton's choice both to sell controlled substances and to do so within 1,000 yards of a school rested solely with Saxton. Thus, even if this issue were preserved - which Saxton acknowledges it is not - we would find no error.

Lastly, Saxton argues that the trial court erred in preventing him from impeaching the Commonwealth's key witness, Henry Island, on a matter directly

related to Island's credibility. On cross-examination, Island acknowledged that he had been an occasional drug user, that he was paid for acting as a confidential informant, and that he was a convicted felon. He also stated that he did not receive unspecified "government aid." The trial court was later asked by counsel for Saxton to review welfare records which may have indicated that Island had received welfare in the past.[2] According to the Commonwealth, these records were reviewed by the trial court *in camera*, whereupon the court declined to allow Saxton to use the records to impeach Island's credibility.

We find no error in the trial court's failure to allow Saxton to claim at trial that Island received "government aid" in the past, thus impeaching Island's credibility by refuting his statement that he received no such aid. The trial court determined that this matter was immaterial to the charges against Saxton, and that it would merely serve to "confuse the issues" and distract the jury. Island acknowledged on the witness stand that he was a drug using convicted felon and paid informant. Demonstrating to the jury that Island either intentionally or inadvertently misstated that he allegedly once received government aid would do little to impeach Island's credibility given what the jury already knew about him. "It is generally recognized that a witness may not be impeached with respect to a matter which is irrelevant and collateral to the issues in the action." *Simmons v. Small*, 986 S.W.2d 452 (Ky. App. 1998), *quoting Commonwealth v. Jackson*, 281 S.W.2d 891, 894 (Ky. 1955); *see also*, *Eldred v. Commonwealth*, 906 S.W.2d 694,

[2] The content of these documents, if any, is not revealed in the appellate record.

705 (Ky. 1995). Island's alleged receipt of government aid, and his denial of same, was irrelevant and collateral, and there is no reasonable basis for concluding that the outcome of the trial would have been different had Island's credibility been impeached on this issue. Accordingly we find no error.

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

ALL CONCUR.

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