

RENDERED: SEPTEMBER 4, 2009; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-000506-MR

AUBREY WAYNARD BAKER

APPELLANT

v. APPEAL FROM WEBSTER CIRCUIT COURT
HONORABLE C. RENE' WILLIAMS, JUDGE
ACTION NO. 04-CR-00074

COMMONWEALTH OF KENTUCKY

APPELLEE

AND

NO. 2008-CA-001632-MR

AUBREY BAKER

APPELLANT

v. APPEAL FROM WEBSTER CIRCUIT COURT
HONORABLE C. RENE' WILLIAMS, JUDGE
ACTION NO. 07-CR-00109

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: NICKELL, STUMBO, AND WINE, JUDGES.

STUMBO, JUDGE: In this consolidated proceeding, Aubrey Waynard Baker appeals from two criminal judgments of the Webster Circuit Court each reflecting a jury verdict of guilty on one count of flagrant nonsupport. Baker argues that he was entitled to a directed verdict of acquittal at the conclusion of each trial, and maintains that the second indictment constituted a violation of his constitutional right to be free from double jeopardy. For the reasons stated below, we affirm the judgments on appeal.

On December 16, 2004, Baker was indicted by the Webster County grand jury on one count of flagrant nonsupport. It was alleged that Baker failed to pay court-ordered child support to his former wife in violation of KRS 530.050 for the period beginning on January 30, 2003, and ending November 30, 2004. The matter proceeded to a jury trial on December 1, 2005, which resulted in Baker's conviction. Baker appealed to this Court, which reversed the conviction and remanded the matter to Webster Circuit Court. Baker was re-tried on January 31, 2008, and again convicted on one count of flagrant nonsupport. He was sentenced to one year in prison.

On November 14, 2007, Baker was charged under a second indictment with another count of flagrant nonsupport. This indictment alleged that Baker's flagrant nonsupport occurred during the period beginning on December 1, 2004, and ending October 31, 2007. Trial on the indictment was conducted on July

28, 2008, resulting in a guilty verdict and sentence of four years in prison. This appeal followed.

Baker prosecuted an appeal from each of the criminal judgments; said appeals having now been consolidated by order of this Court. Baker argues that at the conclusion of each trial, the circuit court improperly failed to sustain his motion for a directed verdict of acquittal. Relying on the same argument in each case, Baker notes that the burden rested with the Commonwealth to offer evidence that he was reasonably able to pay child support for the benefit of his minor children, and that the Commonwealth failed to meet that burden. While acknowledging that testimony was adduced from his former wife Patricia, as well as from Peggy Hedges of the Child Support Office, that they knew of no reason why Baker could not work and pay child support, he contends that this testimony was not sufficient to meet the Commonwealth's burden and that it had an affirmative duty to demonstrate his ability to work. Baker also points out that he testified that he had several medical conditions from having been shot, that he had lost several jobs due to incarceration, that his truck did not run and that he had to live with his father for lack of income. In sum, he maintains that the Commonwealth failed to meet its burden of proving that he had the ability to work and pay child support, and that as such he was entitled to directed verdicts at the close of each of the two trials.

KRS 530.050(2) states that,

A person is guilty of flagrant nonsupport when he persistently fails to provide support *which he can reasonably provide* and which he knows he has a duty to provide by virtue of a court or administrative order to a minor or to a child adjudged mentally disabled, indigent spouse or indigent parent and the failure results in:

(a) An arrearage of not less than one thousand dollars (\$1,000); or

(b) Six (6) consecutive months without payment of support . . . (emphasis added).

Thus, the primary elements of flagrant nonsupport are 1) the persistent failure to pay, 2) despite reasonable ability to do so and 3) notice of the duty to pay. *Id.*

The Commonwealth argues that a jury may reasonably infer from the totality of the evidence and from all of the facts adduced at trial that Baker had the ability to engage in employment and to pay child support. We find this argument persuasive. The Commonwealth notes that Baker was in his early to mid-40s during the time periods in question, and maintains that there is no evidence of record establishing that he had any physical limitations or disabilities rendering him incapable of gainful employment. The Commonwealth points out that the evidence at trial revealed Baker's work history, which included 18 years as a coal miner, followed by employment at Dana Corporation, MBC Meredith, Town and Country Ford, and two temporary employment agencies. It relies on this employment history spanning over two decades as a basis for what it maintains was the jury's reasonable inference that Baker was able to engage in employment and pay the court-ordered child support.

Commonwealth v. Benham, 816 S.W.2d 186 (Ky. 1991), sets forth the standard for reviewing motions for a directed verdict. It states that,

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.

Id. at 187. 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 is the defendant entitled to a directed verdict of acquittal. *Id.* In the matter at bar under the evidence as a whole, it was not clearly unreasonable for the jury to conclude that Baker was capable of engaging in employment and paying court-ordered child support, and the circuit court properly so found.¹

Baker also argues that he was subjected to double jeopardy when he was retried on remand under the first indictment, and then subjected to an additional prosecution when the second indictment was handed down. He maintains that the Fifth Amendment to the United States Constitution, Section 13 of the Kentucky Constitution and KRS 505.020 operate to protect him from multiple prosecutions for the same offense. This argument is based on his contention that his failure to pay child support over a period of several years is a

¹ Inexplicably, in addressing the double jeopardy argument on page 15 of Baker's appellate brief (Case No. 2008-CA-001632), Baker's counsel states at Footnote 13 that, "Mr. Baker does not offer the defense of inability to pay."

single act which was not properly subject to more than one indictment and prosecution. He maintains that if multiple prosecutions are allowed in flagrant nonsupport actions, it will create an endless cycle of nonsupport resulting in incarceration, which itself would cause additional nonsupport and more incarceration.

KRS 505.020(1)(c) states that,

When a single course of conduct of a defendant may establish the commission of more than one (1) offense, he may be prosecuted for each such offense. He may not, however, be convicted of more than one (1) offense when: . . . The offense is designed to prohibit a continuing course of conduct and the defendant's course of conduct was uninterrupted by legal process, unless the law expressly provides that specific periods of such conduct constitute separate offenses.

The commentary to KRS 505.020(1)(c) supports the claim that flagrant nonsupport is a single course of conduct rather than a series of separate offenses occurring each time a child support payment was not made. As such, it is not subject to multiple prosecutions unless one of the statutory exceptions applies. The commentary states that,

Subsection (1)(c) provides for the third exception to the general proposition. This exception applies to offenses which seek to proscribe a continuing course of conduct. *An example would be the offense of nonsupport of a dependant*, which is committed when a parent intentionally fails to provide support for his child when able to so provide. With this type of offense, subsection (c) limits the number of convictions of an offender to one unless it can be shown that: the offender's conduct was interrupted by legal process . . . (emphasis added).

The determinative question then is whether Baker's course of conduct was "interrupted by legal process," thus allowing for the issuance of the second indictment and resultant prosecution and conviction. This question must be answered in the affirmative. As the Webster Circuit Court and the Commonwealth properly note, "legal process" may include an "arrest warrant, an indictment, or an arraignment." *Fulcher v. Commonwealth*, 149 S.W.3d 363, 377 (Ky. 2004).

Baker's course of conduct was interrupted by the first indictment and resultant prosecution, successful appeal, remand and retrial. Were it not for these legal processes, Baker would have a strong argument that KRS 505.020(1)(c) and the constitutional provisions from which it is derived would operate to bar multiple prosecutions for the same course of conduct. In the matter at bar, however, Baker's course of conduct was terminated by the first indictment, prosecution and conviction, and a separate course of conduct ensued thereafter. To find otherwise, would give Baker and others similarly situated a "free pass" not to pay child support after being convicted for flagrant nonsupport. Because KRS 505.020(1)(c) expressly provides for serial prosecutions when an unlawful course of conduct is interrupted by legal process, and as a matter of public policy preventing a defendant from having a "free pass" not to pay child support after a conviction for flagrant nonsupport, we must conclude that the Webster Circuit Court properly denied Baker's motion to dismiss the second indictment.

For the foregoing reasons, we affirm the orders of the Webster Circuit Court denying Baker's motions for directed verdicts and seeking to dismiss the second indictment on the grounds of double jeopardy.

ALL CONCUR.

BRIEFS AND ORAL ARGUMENT
FOR APPELLANT:

Steven J. Buck
Assistant Public Advocate
Department of Public Advocacy
Frankfort, Kentucky

Daniel Sherman
Greenville, Kentucky

BRIEFS FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

David W. Barr
Assistant Attorney General
Office of Criminal Appeals
Office of the Attorney General

ORAL ARGUMENT FOR
APPELLEE:

David W. Barr
Frankfort, Kentucky