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Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001109-MR

DAVID MORROW APPELLANT

v.

APPEAL FROM MCCREARY CIRCUIT COURT
HONORABLE PAUL E. BRADEN, JUDGE
ACTION NO. 03-CR-00066-002

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS and LAMBERT, Judges; and SHAKE,[1] Senior Judge.

COMBS, JUDGE: David Morrow appeals from his conviction of complicity to commit first-degree trafficking in a controlled substance in the McCreary Circuit Court. After carefully examining the record and the law, we affirm.

[1] Senior Judge Ann O'Malley Shake sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

The Commonwealth and Morrow present contradictory versions of the facts. However, it is undisputed that in 2002, the Kentucky State Police (KSP) conducted a raid on the residence of Henry Tapley. They discovered a quantity of pills for which he did not have prescriptions; they also found several firearms. Because Tapley did not have a prior record and was quite active in the drug trade, KSP offered him the opportunity to work with them as an informant. In order to avoid going to prison, Tapley accepted KSP's offer. Detective Billy Correll set up a camera in Tapley's garage where he customarily conducted drug deals. Detective Correll monitored the transactions from inside Tapley's residence. At some point, KSP began paying Tapley one hundred dollars for each felony case that resulted from his work.

The parties agree that in March 2003, Tapley contacted Morrow, a McCreary County resident who was then serving as a deputy jailer in Whitley County. Tapley and Morrow knew each other through a mutual friend, a mechanic. Both men tinkered with old cars as a hobby. Morrow claims that Tapley called his home many times a day and even parked in front of his home for hours at a time. However, Tapley testified that their contact was much more casual. They agree that most of their conversation was about old cars -- until Tapley told Morrow that he was suffering from back pain. He inquired if Morrow had any pills. Morrow told Tapley that he did not have anything. Tapley then asked if anything was available from Morrow's brother Ernie, who was suffering from cancer. Morrow replied that Tapley would have to talk to Ernie himself.

Regardless of the discrepancies as to the number of times that Morrow and Tapley talked, it is undisputed that on March 28, 2003, Morrow and Ernie together went to Tapley's residence. Ernie sold Tapley seventeen (17) OxyContin pills for thirty-five dollars ($35.00) each, totalling five hundred ninety-five dollars ($595.00). The transaction was recorded by the camera in Tapley's garage.

In July 2003, Morrow and Ernie were indicted by a grand jury. Ernie eventually pled guilty to trafficking. In 2004, a jury convicted Morrow of complicity to trafficking. In 2009, the Supreme Court of Kentucky ordered the McCreary Circuit Court to hold a new trial because it had not given the jury instructions regarding entrapment. A second trial was held in 2010. Morrow's defense was dual in nature. He contended both that he was entrapped and that he was ignorant of the drug sale until after it had occurred.

Morrow alleged that he was entrapped because he and his wife had previously sued McCreary County -- successfully. He claimed that several county employees – including some involved in law enforcement – sought retaliation. He contended that Tapley would have had no other reason to initiate contact with him. Morrow testified that he could not trust any of McCreary County's law enforcement officers. Therefore, he decided to collect information independently about Tapley's drug activities. He asserted that he had urged Ernie merely to talk to Tapley but not actually to sell anything. Morrow stated that during the visit, he had only looked at a car in Tapley's garage and that he had helped Tapley to calculate six hundred divided by thirty-five. He claimed not to know that Ernie

had sold pills to Tapley until after they left. Morrow said that he did not report anything to the authorities because such a disclosure necessarily would have implicated his brother.

Rejecting Morrow's testimony, the jury found him guilty. He received a sentence of ten-years' incarceration. This appeal follows.

Morrow's first argument is that the court erred by denying his motion for a directed verdict because the Commonwealth did not present sufficient evidence to overcome his claim that he was entrapped. Kentucky Rule[s] of Criminal Procedure (RCr) 10.24 allows a defendant to make a motion for a directed verdict if the Commonwealth has not presented enough evidence to support a conviction. On appeal of such a motion for a directed verdict, an appellate court must determine whether there was enough evidence of substance for a reasonable juror to believe beyond a reasonable doubt that the defendant was guilty. If not, a directed verdict was warranted and should have been granted by the trial court. *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991).

Kentucky Revised Statute[s] (KRS) 505.010 provides as follows:

> (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.

Morrow asserts that the evidence supported his claim of entrapment instead of the Commonwealth's charge of complicity against him to commit first-degree trafficking. His argument is based solely on his testimony relating to the alleged conspiracy against him. Morrow claims that Tapley was the instrument of those whom he perceived to be his enemies as a result of the previous litigation involving McCreary County. He argues that Tapley, acting as an informant for KSP, met the statutory definition of "a person acting in cooperation with a public servant …."

However, the Commonwealth presented sufficient evidence for a juror to believe beyond a reasonable doubt that Morrow intended to aid Ernie and Tapley in their transaction. First, Morrow alleged that Ernie did not have a clear, coherent mind in March 2003 due to his cancer and the required medications. He claimed that Ernie was impaired to the point of being unable to engage in cognizable conversation. Nonetheless, he also claimed that he trusted Ernie to be alone with Tapley in the garage for his purported investigative purposes. Furthermore, Morrow testified that he knew that Tapley wanted to obtain pills from Ernie and that Tapley and Ernie were not acquainted for any other purpose. Yet, he still took Ernie to meet with Tapley. A reverse entrapment scenario can be deduced from Morrow's reasoning.

The jury watched the surveillance video recording from the meeting in Tapley's garage, which revealed that Morrow was present during the discussion of the price of the pills. Morrow worked out some figures on a piece of paper.

Before Morrow left the room, Ernie reached into his pocket, and it appears that a bag of pills was already sitting on a cooler that the men used as a table. Additionally, Tapley testified that Morrow arranged the time for the sale and alluded to previous drug dealings in which they had engaged. Morrow was unable to explain why he did not contact law enforcement agencies such as the Drug Enforcement Agency or U.S. Marshals, which had jurisdiction in McCreary County – entities that had not been involved in the Morrows' local lawsuit against McCreary County officials.

Morrow urges us not to consider the Commonwealth's evidence because Tapley was discredited for admitting to having committed dishonest acts. However, witness credibility is a matter to be determined by the jury. *Speck v. Bowling*, 892 S.W.2d 309, 313 (Ky. App. 1995). The jury was provided evidence that supported Morrow's claim that he was entrapped and the Commonwealth's countervailing charge that he acted knowingly and intentionally. It was within the exclusive purview of the jury to determine which of the contradictory versions of events was true. Therefore, the trial court correctly overruled Morrow's motion for a directed verdict.

Morrow also argues that the trial court erred by allowing Tapley to testify that he had previously bought drugs from Morrow. Kentucky Rule[s] of Evidence (KRE) 404(b) prohibits admission of evidence of "other crimes, wrongs or acts . . . to prove the character of a person in order to show action in conformity therewith." It provides an exception, however, if the evidence is offered for "proof of motive,

opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident[.]" KRE 404(b)(1). We will not reverse a trial court's findings regarding the admissibility of evidence unless it abused its discretion. *Matthews v. Commonwealth*, 163 S.W.3d 11, 19 (Ky. 2005). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

As discussed earlier, Morrow's defense was that he was entrapped. In its opinion, the Supreme Court of Kentucky observed that Morrow presented sufficient evidence for the inducement prong of the definition of entrapment. Tapley was an informant who received pay for bringing about arrests, and he had initiated the contact with Morrow. Although the exact numbers of attempted interactions are disputed, the parties agree that Tapley was persistent in his efforts to engage Morrow and Ernie. *Morrow v. Commonwealth*, 286 S.W.3d 206, 209-10 (Ky. 2009).

The Supreme Court went on to explain that once the inducement prong was satisfied, the burden shifted to the Commonwealth to prove that Morrow "was predisposed to engage in the criminal act prior to inducement by the government or its agent." *Id.* at 210. (*quoting Wyatt v. Commonwealth* 219 S.W.3d 751, 757 (Ky. 2007)).

Although Morrow had never been arrested or convicted for drug-related crimes, Tapley testified that he had bought drugs from Morrow in the past.

This testimony was admissible under the exception in KRE 404(b)(1) to show intent and knowledge. Thus, the trial court did not abuse its discretion.

Morrow also argues that he did not receive the notice required by KRE 404(c) that Tapley's testimony was going to be admitted at trial. This appeal is taken from Morrow's 2010 trial. At the first trial, in 2004, Tapley testified that he had previously bought drugs from Morrow. That testimony was discussed by the Supreme Court in its opinion. Therefore, Morrow had actual notice sufficient to satisfy the requirements of KRE 404(c). *Crawley v. Commonwealth*, 107 S.W.3d 197, 201 (Ky. 2003).

Morrow last argues that it was error for him to receive a longer sentence after his second trial (ten years) than the one imposed after his first trial (six years). Morrow relies on *Brown v. Commonwealth*, 313 S.W.3d 577 (Ky. 2010), to argue that the initial sentence should have been the maximum sentence. In *Brown*, the Supreme Court held that a finding by a jury that the death penalty is not appropriate for a defendant amounts to an acquittal, thus rendering the death penalty unavailable as an option. However, the Supreme Court limited its holding **to death penalty cases**: "The death penalty, moreover, is the only sentence the United States Supreme Court has held implicates double jeopardy concerns." *Id*. at 595. Therefore, Morrow's argument has no basis in precedent.

We affirm the judgment of the McCreary Circuit Court.

ALL CONCUR.

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