

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-002084-MR

LLOYD SILL

APPELLANT

v. APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE JULIE REINHARDT WARD, JUDGE
ACTION NO. 13-CR-00070

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: J. LAMBERT, STUMBO, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Lloyd Sill brings this appeal from a November 4, 2013, judgment of the Campbell Circuit Court adjudicating him guilty of receiving stolen property over \$10,000, first-degree possession of a controlled substance, possession of drug paraphernalia and with being a persistent felony offender in the first degree. Sill was sentenced to a total of fifteen-years' imprisonment. We affirm.

In November 2012, Scott Yerkes, a construction worker, reported that his 2011 Ford F-250 truck had been stolen outside his shop in Cincinnati. On December 5, 2012, Campbell County Police observed Sill and a female, Tiffany Cranmo, walking into the Campbell County Detention Center in Newport, Kentucky. Cranmo walked back outside the facility to talk on the phone while Sill visited a female inmate. After Sill finished his visit, an officer approached Sill in the visitor area of the detention center. Sill was subsequently searched and had in his possession the keys to Yerkes' stolen truck, a photo copy of Yerkes' credit card, and approximately \$4,000 in cash. Another officer approached Cranmo outside the facility, and she led officers to the stolen vehicle. Despite the alarm system being activated, another woman, Donna Orick, was in the vehicle. Orick appeared to be under the influence of narcotics. The stolen truck was searched and a baggie containing heroin, syringes, and a coke can were found. Cranmo said that she, Orick, and Sill had all used heroin that day and that Sill drove them to the detention center in the stolen vehicle. Additional facts will be set forth in the opinion as necessary.

Sill was indicted in the Campbell Circuit Court upon one count each of receiving stolen property over \$10,000, first-degree possession of a controlled substance, possession of drug paraphernalia, and with being a persistent felony offender in the first degree. Sill entered a plea of not guilty. The Commonwealth offered a plea bargain which provided that in exchange for Sill's guilty plea it would recommend three-years' imprisonment and forfeiture of approximately

\$4,000 as restitution.¹ Sill originally accepted the plea agreement but later rejected it because of the restitution provision. A jury trial ensued. Sill was adjudicated guilty of the indicted charges and was sentenced to a total of fifteen-years' imprisonment. This appeal follows.

Sill contends that the trial court erred by not requiring the Commonwealth to be bound by the terms of the plea agreement and by not allowing Sill to plead guilty under those terms. Sill specifically asserts that he agreed to the material terms of the plea offer, a three-year sentence of imprisonment in exchange for his guilty plea, and the Commonwealth should be held to the terms of the offer.

It is within the trial court's discretion to accept or reject a guilty plea. Kentucky Rules of Criminal Procedure (RCr) 8.08. Upon appellate review, we will not disturb the trial court's decision to accept or reject a guilty plea unless the trial court clearly abused its discretion. *Skinner v. Com.*, 864 S.W.2d 290 (Ky. 1993). An abuse of discretion occurs if the trial court's decision was "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Com. v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

A plea agreement is a binding contract between the Commonwealth and the defendant and is governed by basic contract law principles. *Elmore v. Com.*, 236 S.W.3d 623 (Ky. App. 2007) (citing *Hensley v. Com.*, 217 S.W.3d 885 (Ky. App. 2007)); *Com. v. Morseman*, 379 S.W.3d 144 (Ky. 2012). When a plea

¹ Approximately \$4,000 cash in Sill's possession had been confiscated by the Commonwealth at the time of his arrest in 2012.

agreement is accepted by a defendant, it becomes binding upon the Commonwealth subject only to the trial court's approval, and the defendant is entitled to receive the benefit of the bargain. *Elmore*, 236 S.W.3d 623 (citing *Putty v. Com.*, 30 S.W.3d 156 (Ky. 2000)). However, an acceptance that alters the terms of an offer is actually a rejection and a counteroffer. *Casner v. Oldham*, 279 SW2d 252 (Ky. 1995); 17 C.J.S. *Contracts* § 54 (2015).

In this case, the record reflects that on March 19, 2013, the evening before Sill's trial was set to begin, the parties contacted the trial court and reported that a plea agreement had been reached. Based upon this information, the court contacted members of the jury pool and told them not to report for duty the next day. Then, on the morning of March 20, 2013, the day of the scheduled trial, the parties appeared and informed the court they were ultimately unable to reach a plea agreement. The parties stated to the court that the Commonwealth had offered Sill a three-year sentence of imprisonment and forfeiture of approximately \$4,000 for payment of restitution in exchange for his guilty plea. The trial court questioned counsel and Sill concerning the plea agreement. Sill informed the court that he did not accept the plea agreement because of the restitution provision. At the time of rejecting the offer, Sill did not make a counteroffer to the Commonwealth. The trial court cautioned Sill not to base his acceptance or rejection of the plea agreement upon payment of restitution. The trial court stated that restitution was a separate issue and that if a guilty plea were entered restitution would be addressed

at a later date. The court also noted that the next available trial date was May 28, 2013.

During the hearing on March 20, 2013, at the request of defense counsel, the court announced it would take a short recess to allow counsel an opportunity to speak with Sill. No new plea agreement was reached during the recess. Following the recess, the Commonwealth requested the court to revisit its suppression ruling of March 18, 2013, that precluded the Commonwealth from introducing certain evidence due to the Commonwealth's late disclosure to defendant. As the trial was now continued until May 28, 2013, the Commonwealth argued there was no prejudice to Sill, and that the potential evidence should not be subject to the trial court's blanket exclusion. The court agreed and ruled that no prejudice would result as the trial date was continued. At that point, defense counsel announced that Sill wished to accept the Commonwealth's plea offer, a recommended three-year sentence of imprisonment and forfeiture of approximately \$4,000 for payment of restitution. The Commonwealth responded that the offer was off the table upon Sill's rejection the night of March 19, 2013.

The trial court then heard from both parties and ultimately concluded that Sill had rejected the Commonwealth's plea offer of three-years' imprisonment with forfeiture of approximately \$4,000 for restitution the night before. The court believed that Sill rejected the offer when he refused to agree to the payment of restitution. Sill's rejection of the Commonwealth's offer was further evidenced in court on March 20, upon Sill's initial statement to the court that he would not pay

restitution and would not accept the plea offer that included forfeiture of approximately \$4,000 that had previously been confiscated upon his arrest. Although strongly disputed by counsel for Sill, the trial court ultimately determined that the Commonwealth did not extend a new offer to Sill after he rejected the original plea offer, nor had Sill made a counteroffer to the Commonwealth. Therefore, the court concluded there was no plea agreement for the court to consider.

We have carefully and extensively reviewed the videotaped proceedings of March 20, 2013, and do not believe that the trial court abused its discretion by concluding that there was no plea offer by the Commonwealth for Sill to accept. Sill plainly rejected the Commonwealth's original offer by his own words at the hearing on March 20, 2013. The record does not contain evidence compelling a finding that the Commonwealth intended to conditionally keep the offer open for acceptance after Sill's rejection of it. Thus, we conclude that the circuit court properly concluded that Sill rejected the Commonwealth's plea offer and that there was no subsequent or continuing plea offer by the Commonwealth thereafter.

Sill next argues that the trial court erred by granting the Commonwealth's motion to permit the introduction of material evidence at trial previously suppressed by its order of March 18, 2013, pursuant to RCr 7.24.

RCr 7.24 governs discovery and inspection of evidence and specifically provides, in relevant part:

If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule or an order issued pursuant thereto, the court may direct such party to permit the discovery or inspection of materials not previously disclosed, grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, or it may enter such other order as may be just under the circumstances.

RCr 7.24(9). In sum, RCr 7.24(9) gives the trial court discretion to act in one of the following ways:

1) [D]irect the discovery be had; 2) grant a continuance; 3) prohibit the abusing party from introducing evidentiary material not disclosed; or 4) enter such other order, which is just under the circumstances.

Stallard v. McDonald, 826 S.W.2d 840, 842 (Ky. App. 1992). The sanction for a violation of RCr 7.24 is well-within the trial court's discretion. *Id.* And, the trial court's decision is reviewed for an abuse of discretion. *Id.*

In the case *sub judice*, the trial court originally issued a blanket exclusion that applied to certain evidence tendered late by the Commonwealth, pursuant to its suppression order entered March 18, 2013. The court was concerned that admission of such evidence would unduly prejudice Sill because there was not sufficient time for defense counsel to prepare or respond. That order was entered when the trial was scheduled to begin on March 20, 2013. Once the trial was rescheduled to May 28, 2013, the prejudice to Sill was no longer present. Thus, we do not believe the trial court abused its discretion in permitting the admission of the evidence at the later trial date.

Finally, Sill argues that at trial, the circuit court erred by giving Jury Instruction No. 4, regarding the receipt of stolen property, in that it violated his constitutional right to a unanimous verdict. Sill specifically asserts that the instruction given to the jury contained multiple theories upon the crime of receiving stolen property.²

Section 7 of the Kentucky Constitution mandates that a unanimous verdict must be reached by a jury of twelve individuals in criminal trial. *Wells v. Com.*, 561 S.W.2d 85 (Ky.1978). Where a jury instruction allows a finding of guilt upon alternative theories, the Commonwealth must introduce evidence sufficient to find defendant guilty beyond a reasonable doubt upon each alternative theory. *See Smith v. Com.*, 366 S.W.3d 399 (Ky. 2012). And, a flawed jury instruction only implicates the constitutional mandate of unanimity where “it is reasonably likely that some members of the jury actually followed the erroneously inserted theory in reaching their verdict.” *Travis v. Com.*, 327 S.W.3d 456, 463 (Ky. 2010). Thus, there must exist a “reasonable possibility” that the jury was misled before the constitutional requirement of unanimity is violated. *Id.* at 463.

In this case, the questionable instruction given to the jury stated that the jury would find Sill guilty of receiving stolen property of \$10,000 or more if the jury believed beyond a reasonable doubt that:

A) . . . [Sill] received, retained, disposed, or had possession of a vehicle which belonged to [victim];

² The stolen property in question was the truck stolen from Scott Yerkes in November 2012.

B) That said vehicle had been stolen from [victim] and the Defendant knew or had reason to believe that it had been stolen when he received, retained, disposed, or had possession of it;

C) That he did not receive, retain, dispose, or have possession of the vehicle with the intention of restoring it to its rightful owner;

AND

D) That when the Defendant received, retained, disposed, or had possession of the vehicle, it had a value of \$10,000 or more.

Sill's Brief at 12-13. Sill specifically maintains that the language "received, retained, disposed, or had possession" violated the unanimity requirement because there was "a reasonable possibility that some of the jurors actually relied upon the erroneous theories . . . in reaching their verdict." Sill's Brief at 15. Sill admits that the unanimity of the jury verdict was not preserved for appellate review.

Accordingly, Sill requests that this Court review the issue under the palpable error standard of RCr 10.26. Thereunder, an alleged error must prejudice the substantial rights of the defendant and result in a manifest injustice. *Nichols v. Com.*, 142 S.W.3d 683 (Ky. 2004).

The evidence presented at trial established that at the time of his arrest in December 2012, Sill was in possession of the truck, he had on his person the keys to the truck, and that Sill had driven the truck to the detention center where he was taken into custody. Yerkes testified that the truck was worth \$50,000. There was certainly sufficient evidence presented at trial that Sill "received, retained,

disposed or had possession” of the stolen truck, and its value was in excess of \$10,000. As the Commonwealth introduced sufficient evidence to demonstrate that Sill could be guilty beyond a reasonable doubt under each of these theories, there was no error in the instruction.

Taken together with all the reasonable inferences therefrom, we conclude that the Commonwealth introduced sufficient evidence to support a jury’s finding of guilt upon all four theories, thus the constitutional mandate of a unanimous verdict was not violated. Additionally, Sill failed to demonstrate that this alleged error was prejudicial to his substantial rights that resulted in manifest injustice.

RCr 10.26; *Travis*, 327 S.W.3d 456.

For the foregoing reasons, the judgment of the Campbell Circuit Court is affirmed.

ALL CONCUR.

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