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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-000147-MR

COMMONWEALTH OF KENTUCKY — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE ERNESTO M. SCORSONE, JUDGE
ACTION NO. 14-CR-00037

MICHAEL DONNELL MAUPIN — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: CLAYTON, MAZE, AND THOMPSON, JUDGES.

MAZE, JUDGE: The Commonwealth appeals from the Fayette Circuit Court Order Granting Judgment of Acquittal following Appellee, Michael Maupin's, trial and conviction for Failure to Comply with Sex Offender Registration and being a Persistent Felony Offender (PFO). The Commonwealth argues that there was

sufficient evidence to support the jury's decision to convict Maupin and that the trial court impermissibly invaded the province of the jury in ordering acquittal.

We agree with the Commonwealth that there was sufficient evidence presented at trial not only to send the case to the jury, but to render a guilty verdict reasonable. Therefore, we reverse and remand.

Background

Michael Maupin is a convicted sex offender and is required under Kentucky law to register with the Kentucky Sex Offender Registry (hereinafter "the Registry"). This registration includes providing his current residence or residences to authorities in the Fayette County Office of Probation and Parole. On January 13, 2014, a Fayette County grand jury indicted Maupin on one count of failing to comply with this requirement and on one count of being a PFO in the first degree.

The charges against Maupin arose from events occurring between September 18 and October 16, 2013. At that time, Maupin was registered with the Registry as residing at two addresses: the Catholic Action Center, which provides meals and daytime activities for Lexington's homeless, and the Community Inn which provides beds and nighttime accommodations.

During the evening of October 16, 2013, Deputy Antoine Palmer visited the Community Inn in an attempt to locate Maupin. However, he was unable to do so, as Maupin's name was not on the sign-in sheet for that evening. Deputy Palmer sought a warrant, and Maupin was arrested and indicted.

At Maupin's October 13, 2014 jury trial, the Commonwealth called Officer Elizabeth Smith, who testified to Maupin's sex offender status and most recent registration information, including his two listed residences. The Commonwealth also called Deputy Palmer and Jenny Ramsey, director of both the Catholic Action Center and the Community Inn. Ramsey testified that volunteers largely staff the Community Inn, and patrons secure a place for the night by lining up and signing in at a designated hour; however, patrons can come and go as they please.

During Ramsey's testimony, the Commonwealth introduced sign-in sheets from September 18 through October 16, 2013. These sheets reflected that Maupin signed in under the name "Michael Maupin" on just two occasions during that period. However, Maupin testified that he either signed in under the initials for his Islamic name, Michael Aleem Waleed,[1] or had others sign him in to secure him a place in the shelter if he was not there when it opened. To corroborate his testimony, Maupin pointed to the initials "M.A.W.," which appeared on every sign-in sheet during the period in question except those days where the name "Michael Maupin" appeared. Maupin theorized that, on the days where his actual name appeared, he asked volunteers or other patrons to sign him in. However, the initials "M.A.W." appeared on the sign-in sheets for October 28, 29, 30, and 31, 2013, days on which Maupin admitted he was in jail and not at the Community Inn.

[1] Officer Smith testified that Maupin had not previously provided this alias to Probation and Parole as required under Kentucky law.

At the close of the Commonwealth's case and all proof, Maupin asked the trial court for a directed verdict. After Maupin renewed his motion, the trial court stated its reservations concerning the Commonwealth's case; however, it overruled Maupin's motion and sent the case to the jury. After deliberating, the jury returned a verdict of guilty as to both charges and recommended a five-year sentence, enhanced to ten years' imprisonment due to Maupin's conviction as a PFO. The trial court set a date of December 4, 2013, for Maupin's sentencing.

On October 20, 2014, Maupin filed a Motion for Judgment of Acquittal Notwithstanding the Verdict or New Trial pursuant to RCr[2] 10.24. At the December 4 hearing, the trial court granted Maupin a new trial, stating:

> As a matter of justice I think a new trial would be appropriate. I think, quite frankly, I think the Commonwealth's case - I had expressed some doubts at trial and I think in reviewing even after the defense and everybody testified I still have doubts as to just whether that should've gone to trial or not.

The trial court issued an order to this effect five days later; however, the Commonwealth moved the court for specific findings of fact. The trial court entered a revised order dated January 9, 2015, which stated that "[t]he proper relief in this case is not a new trial but in fact a judgment of acquittal pursuant to RCr 10.24. … [T]he Commonwealth's case did not suffice to support a reasonable juror's conclusion that the Defendant was guilty beyond a reasonable doubt." As specific examples of the Commonwealth's insufficient evidence, the trial court stated that

[2] Kentucky Rules of Criminal Procedure.

> [t]he evidence as to the attendance records at the Community Inn was equivocal at best. Ms. Jenny Ramsey's testimony created genuine doubt as to the significance of the signup sheet. The Sheriff's singular visit to the Community Inn in search of the Defendant did not justify a finding of guilt beyond a reasonable doubt.

The Commonwealth now appeals from the revised order granting a judgment of acquittal.

Standard of Review

As both parties point out, our standard of review on appeal from a judgment of acquittal or directed verdict is well-settled. In *Commonwealth v. Benham*, the Kentucky Supreme Court clearly and concisely stated the directed verdict standard on appellate review:

> 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.

816 S.W.2d 186, 187 (Ky. 1991). "If the totality of the evidence is such that the trial judge can conclude that reasonable minds might fairly find guilt beyond a reasonable doubt, then the evidence is sufficient, albeit circumstantial,' and the case should be submitted to the jury." *Debruler v. Commonwealth*, 231 S.W.3d

752, 761 (Ky. 2007) (quoting *Hodges v. Commonwealth*, 473 S.W.2d 811, 813-14 (Ky. 1971)).

Analysis

The Commonwealth's sole allegation of error on appeal is that the trial court was incorrect in concluding that, under the *Benham* analysis, the record lacked sufficient evidence to send the case to the jury. Instead, according to the Commonwealth, the trial court impermissibly weighed the evidence and judged the credibility of the witnesses. On appeal, we look almost exclusively to the findings of the trial court and the particular items of evidence upon which it relied for its conclusion that the Commonwealth provided insufficient evidence to support the jury's conclusion of guilt beyond a reasonable doubt.

Pursuant to KRS[3] 17.510, the Commonwealth was required to prove that Maupin was a convicted sex offender, that he changed his residence from that which he registered with the Registry, and that he did so without reporting the change to authorities. Before proceeding through an analysis of these factors, we pause to consider the impact of Maupin's homelessness on this case and a key ruling by our Supreme Court which attempted to address that impact in this very context.

As the dissent correctly observes, our homeless do not enjoy the stability others enjoy and even take for granted. Certain portions of Kentucky's

[3] Kentucky Revised Statutes.

Sex Offender Registry Act, including the broad definition of "residence,"[4] indicate that the General Assembly may have taken for granted that a sex offender would have a home or established residence when it drafted KRS 17.500, *et seq*. Indeed, where a homeless person sleeps may very well change on a daily basis. We are not ignorant of this; nor is our Supreme Court.

In *Tobar v. Commonwealth*, the Court addressed the challenge that compliance with the statute poses for homeless sex offenders given the fluid and unpredictable reality of homelessness. In response to that reality, the Court stressed that "the focus of KRS 17.510(10)(a) is not that the sex offender have an address, but that any *change* in address be reported to the proper authorities." *Tobar v. Commonwealth*, 284 S.W.3d 133, 135 (Ky. 2009) (emphasis in original). It follows that violation of the statute's reporting requirement hinges not on whether a sex offender is at his, or a, registered residence at all times, but on whether he made an unreported change in the place "where [he] sleeps." KRS 17.500(7).

Likewise, in proceeding with our analysis, our focus is not on whether the evidence sufficiently established Maupin's mere absence from the Community Inn, but on whether the evidence presented tended to show that he did in fact make

[4] KRS 17.500(7) defines a registrant's "residence" as "any place where a person sleeps. For the purposes of this statute, a registrant may have more than one (1) residence. A registrant is required to register each new residence address." Maupin argued at oral argument that, to the extent the "vague" statutory definition of "residence" played a role in the trial court's decision at trial, this was an error for the General Assembly to fix, not the courts. We agree.

the change in residence, or "the change in his living situation," emphasized in *Tabor*. 284 S.W.3d at 136 (citation omitted).

In light of the statutory elements and the appropriate standard announced in *Benham*, the trial court was required to make several inferences in favor of the Commonwealth, even if it believed that evidence and testimony to be conflicted or lacking in strength. From the conflict between the testimonies of Deputy Palmer, Director Ramsey, and Maupin, the trial court was required to infer that Maupin was not the "M.A.W." listed on the sign-in sheets. From the same testimony, the trial court was required to infer that the only two nights Maupin spent at the Community Inn during the period in question were the two nights his name appeared on the sign-in sheets.

Therefore, we conclude that it was not unreasonable for a juror to conclude from the evidence that Maupin stayed at an undisclosed, unreported "residence" for all but two days during the time period in question, thereby violating the law and the conditions of his sex offender registration. The trial court and Maupin took specific issue with the import of Deputy Palmer's single failure to locate Maupin at the Community Inn. We agree that this fact, by itself, would be insufficient to establish a "change" in residence or living situation under KRS 17.510 and *Tabor*. We also agree with the dissent that KRS 17.510 does not require a sex offender to be at his registered residence at all time. *Tobar* says as much in pointing out that the statute punishes a failure to report a change in living situation, not a mere absence from a registered residence. 284 S.W.3d at 135. The

Commonwealth's evidence in this case sufficiently alleged both, not merely the latter.

In addition to Deputy Palmer's testimony, the Commonwealth presented evidence, in the form of sign-in sheets and testimony, tending to show that Maupin changed his residence, as it is broadly defined in KRS 17.500, to another location or locations for nearly a month without reporting the change to authorities. Despite its apparent misgivings concerning the "significance" of this evidence, there was sufficient evidence tending to show that Maupin changed his residence without reporting it; and this fact precluded a judgment of acquittal.

Furthermore, the trial court's statements and reasoning in its Revised Order Granting Judgment of Acquittal evinces its assumption of the jury's exclusive task of weighing the evidence and judging the credibility of testimony. In its order, the trial court stated that Ramsey's testimony shed doubt on the "significance" of the sign-in sheets. Overall, the trial court concluded that the Commonwealth's evidence concerning the sign-in sheets was "equivocal at best." While testimony concerning the method and accuracy of the sign-in sheets did conflict, such a conflict was for the jury, not the trial court, to resolve. Despite the trial court's express belief that the evidence concerning the sign-in sheets was "equivocal at best," given the sufficiency of the evidence as a whole, it was for the jury, and the jury alone, to determine the credibility and weight of the evidence. Though the Commonwealth's case was not open-and-shut, and while Kentucky's Sex Offender Registry Act does not ideally address itself to the facts of this case,

circumstances did not permit the trial court to take the question of Maupin's guilt away from the jury.

Conclusion

The Commonwealth met its low burden under *Benham* in this case. Therefore, a judgment of acquittal was inappropriate. The January 9, 2015 Revised Order Granting Judgment of Acquittal is reversed and remanded for reinstatement of Maupin's conviction and for sentencing.

JUDGE CLAYTON CONCURS

JUDGE THOMPSON DISSENTS AND FILES SEPARATE OPINION.

THOMPSON, JUDGE, DISSENTING: Respectfully, I dissent. The trial court heard the evidence and observed the witnesses. It was in the best position to determine whether the Commonwealth presented evidence sufficient for a reasonable jury to find Maupin guilty beyond a reasonable doubt.

In *Tobar v. Commonwealth*, 284 S.W.3d 133, 136 (Ky. 2009), the Court rejected a constitutional challenge to KRS 17.510(10)(a) on the basis of vagueness as it applies to homeless defendants. The Court held that "KRS 17.510(10)(a) does not criminalize being homeless. It simply criminalizes a failure to register by a registered sex offender upon a change in their residence address." *Id*.

KRS 17.500 defines residence "as any place where a person sleeps." While I do not quarrel with the requirement that all sex offenders register his or her

residential address, the prosecution and courts must distinguish between absence from a place given as a "residence address" and a change in that address. In the case of a homeless person, this cautionary statement is particularly true because shelter living does not enjoy the daily predictability of a permanent residence. On any given night, a "resident" may be turned away on the basis of occupancy capacity.

. As stated in *Tobar*, "KRS 17.510 is designed to fulfill a public purpose by tracking where sex offenders live. The key to fulfilling this purpose is making sure that registered sex offenders report to the proper authorities whenever they change their residence address." *Id*. at 135. The statute does not require that a sex offender be at their residence address at all times. In other words, it is not work release or home incarceration. "[T]he focus of KRS 17.510(10)(a) is not that the sex offender have an address, but that any *change* in address be reported to the proper authorities." *Id*.

The trial court properly found the evidence did not prove beyond a reasonable doubt that Maupin changed his address. Maupin gave two registration addresses. The first was a day shelter, the Catholic Action Center, and the second was the Community Inn, a night shelter. Jerry Ramsey testified regarding the in-take procedures followed at the Community Inn, which housed over 100 individuals.

At 7 p.m., the Inn opens at which time a line has already formed for entry. At check-in, individuals do not have to show identification and could sign in under any name. Additionally, the individuals were free to leave and return. The check-in procedure was not a purported means to identify a specific person at the Inn but was a means to determine the number of people on any given night. The trial court properly found that the sign-in sheets were insufficient evidence upon which a jury could reasonably find that Maupin changed his residence address.

This was not a case where Maupin's probation or parole officer attempted to determine whether Maupin changed his address. In fact, probation and parole officer Elizabeth Smith testified she had never visited the Catholic Action Center or the Community Inn to look for Maupin. The charge against Maupin was filed after Deputy Palmer visited the Inn on one occasion looking for Maupin. There was no testimony as to the extent of the deputy's search of the multifloored Inn to look for Maupin. Deputy Palmer's conclusion that Maupin was not at the Inn was primarily based on the sign-in sheets, which the trial court properly concluded had minimal probative value. Moreover, the deputy could not even recall the time of day he visited the Inn.

The evidence in this case was weak as to whether Maupin was or was not at the Inn when Deputy Palmer arrived. However, Maupin's absence was not even the element the Commonwealth was required to prove. Totally missing from the evidence was any proof that Maupin changed his residence address. At best, it

merely indicated that he may not have been at the Inn at the precise time of the deputy's visit. Such evidence alone was insufficient to support a conviction under KRS 17.510(10)(a). I would affirm.

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