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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2017-CA-000389-MR

NIKI ALLEN

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE PAMELA R. GOODWINE, JUDGE
ACTION NO. 16-CR-01103-001

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE, D. LAMBERT, AND J. LAMBERT, JUDGES.

LAMBERT, D., JUDGE: Niki Allen appeals the judgment of conviction entered against her by the Fayette Circuit Court. In this appeal, Allen argues that the trial court improperly denied her motion to dismiss the indictment against her, pursuant to the immunity provisions of KRS 218A.133. Having reviewed the record, we

conclude that Allen was not entitled to immunity, and likewise the dismissal of the indictment. Accordingly, we affirm.

I. FACTUAL AND PROCEDURAL HISTORY

On November 6, 2016, Allen was at her home at 1829 Hisle Way in Lexington, while speaking to George Roe in Florida. The two abruptly lost their connection, and upon finding himself unable to get Allen back on the line, Roe called Lexington emergency dispatch. Roe reported that her speech had been slurred and he suspected she may have overdosed on Xanax. Roe described the home as being somewhere on Hisle Way, but could not provide greater detail.

Allen's husband, Deznik Allen, met Lexington police and firefighters at the door. Deznik refused to allow them inside, insisting that Allen was not home, as well as challenging the veracity of the report of an overdose. The first responders entered the home over Deznik's objections and found Allen, who claimed she had fallen down the stairs rather than overdosed, in an upstairs bedroom. Along the way, however, officers noticed substances later identified as heroin, fentanyl, and marijuana, sitting out in plain view. Allen did not receive or need any emergency medical treatment, and in fact refused all treatment.

Officers arrested Allen and Deznik for possession of controlled substances. Both were later indicted. Allen moved to dismiss the indictment, pursuant to the newly-enacted provisions of KRS 218A.133, which exempts

certain individuals from being charged with possession of controlled substances when medical assistance is required to deal with an overdose. The trial court conducted a hearing on the motion, at which neither side called any witnesses. The trial court denied the motion, opining that while Roe had called for medical assistance for the benefit of another person, the statute required him to either be physically present or have more information than he relayed to the dispatchers in order for the exemption to apply. The trial court further opined that the exemption required medical attention to have actually been rendered before it may apply.

Though Allen expressed an intent to file a motion to suppress the fruits of the warrantless entry and search, she ultimately decided to enter a guilty plea, conditioned on the right to the instant appeal.

II. ANALYSIS

A. THE TRIAL COURT DID NOT ERR IN DENYING ALLEN’S MOTION TO DISMISS THE INDICTMENT

It is well-settled that, except in certain very narrow circumstances, trial courts lack the “authority to weigh the sufficiency of the evidence prior to trial or to summarily dismiss indictments in criminal cases.” *Buckler v.*

Commonwealth, 515 S.W.3d 670, 672 (Ky. App. 2016) (quoting *Commonwealth v. Bishop*, 245 S.W.3d 733, 735 (Ky. 2008)). Exceptions to this general rule include: the unconstitutionality of the statute under which the defendant is charged

(*Commonwealth v. Hayden*, 489 S.W.2d 513 (Ky. 1972)), instances of severe prosecutorial misconduct (*Commonwealth v. Hill*, 228 S.W.3d 15 (Ky. App. 2007)), defective grand jury proceedings leading to the indictment (*Partin v. Commonwealth*, 168 S.W.3d 23 (Ky. 2005)), a facially deficient indictment (*Thomas v. Commonwealth*, 931 S.W.2d 446 (Ky. 1996), incompetency of the defendant (*Commonwealth v. Miles*, 816 S.W.2d 657 (Ky. App. 1991)), or a more recent development, a statutory authorization for trial courts to do so based on immunity (*See Rodgers v. Commonwealth*, 285 S.W.3d 740 (Ky. 2009)).

The instant situation falls into the last category in that list. KRS 218A.133(2) provides:

(2) A person shall not be charged with or prosecuted for a criminal offense prohibiting the possession of a controlled substance or the possession of drug paraphernalia if:

(a) In good faith, medical assistance with a drug overdose is sought from a public safety answering point, emergency medical services, a law enforcement officer, or a health practitioner because the person:

1. Requests emergency medical assistance for himself or herself or another person;
2. Acts in concert with another person who requests emergency medical assistance; or
3. Appears to be in need of emergency medical assistance and is the individual for whom the request was made;

(b) The person remains with, or is, the individual who appears to be experiencing a drug overdose until the requested assistance is provided; and

(c) The evidence for the charge or prosecution is obtained as a result of the drug overdose and the need for medical assistance.

This provision, passed in 2015 as part of “the Heroin Bill,” immunizes individuals from prosecution in the circumstances described therein.

Allen argues that the trial court incorrectly interpreted the statute as including requirements which are not found in the text, and urges this Court to provide guidance as to the proper interpretation. Because statutory construction is an issue of law rather than fact, we apply a *de novo* standard of review to the trial court’s decision. *Rhodes v. Commonwealth*, 417 S.W.3d 762 (Ky. App. 2013).

When interpreting a statutory provision, courts must liberally construe the language to promote the statute’s objective. KRS 446.080(1). The cardinal rule of statutory construction is to give effect to the legislative intent.

Commonwealth, Cab. for Human Res., Interim Office of Health Planning and Certification v. Jewish Hosp. Healthcare Serv., Inc., 932 S.W.2d 388, 390 (Ky. App. 1996). The clear intent of the legislature in passing KRS 218A.133 is to curb overdose deaths by encouraging overdose victims or those physically with them to seek medical assistance. It is with that purpose in mind that we interpret the language quoted above.

By its own terms, the immunity provision contains three elements which must all be satisfied before a defendant is entitled to statutory immunity and consequent dismissal of an indictment.

The first of these elements is the good faith seeking of emergency medical assistance for a drug overdose. The legislature gives us three scenarios to identify individuals it sought to immunize: 1) when a caller seeks aid for himself or another person, 2) when the caller acts in concert with another individual to seek aid for the overdose victim, or 3) when the person for whom aid is sought appears to need emergency medical assistance. Though Roe was ignorant of the true nature of why he lost contact with Allen, he did act in good faith when he sought aid for another person by reaching out to emergency services. The first element of the immunity provision is satisfied under these facts.

The second element requires the caller to either remain with the overdose victim until medical assistance is provided, or to be the overdose victim. The legislature intentionally selected the phrasing “remains with” in this provision, and giving that phrase the plain meaning of the words, we interpret that language to require the caller to be physically present in close proximity to the overdose victim. This interpretation conforms to the legislative purpose, as a person who is present when emergency responders arrive will likely be able to provide information that a potentially unconscious overdose victim cannot, thus facilitating

treatment and presumably increasing the odds of a positive medical outcome. This element is not satisfied here, where Roe was not physically present with the person he believed to have been suffering from a drug overdose, nor did Allen make the call seeking aid for herself. Allen, in fact, refused medical assistance from emergency responders at the scene.

The third element requires that law enforcement obtain the evidence supporting the charge as the result of the call for help. Both parties conceded the satisfaction of this element.

Given that Allen cannot show satisfaction of every element of the immunity provision, we cannot conclude the trial court erred in denying her motion to dismiss the indictment against her.

III. CONCLUSION

Having determined the language of KRS 218A.133(2)(b) requires a person who seeks emergency medical attention on behalf of an overdosing third party to be physically present until such aid is rendered, we cannot conclude that the trial court erred in determining all elements of the immunity provision had not been satisfied. Finding no error, we affirm the trial court's order.

ALL CONCUR.

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