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Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-001790-MR

DONNA PLANK — APPELLANT

v.

APPEAL FROM ROWAN CIRCUIT COURT
HONORABLE BETH LEWIS MAZE, JUDGE
ACTION NO. 17-CR-00031

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: MAZE, NICKELL, AND K. THOMPSON, JUDGES.

MAZE, JUDGE: This appeal arises from a Rowan Circuit Court judgment convicting the appellant, Donna Plank (Plank), on the charges of tampering with physical evidence and persistent felony offender in the second degree (PFO II). On appeal, Plank argues that the trial court erred in its denial of her motion for directed verdict regarding the tampering charge. Upon review, it is apparent that

the Commonwealth produced more than a mere scintilla of evidence of Plank's guilt and therefore, we affirm the judgment of conviction.

Background

Since September 4, 2015, Donna Plank was successfully under the supervision of the Rowan County Probation and Parole Office. On the date of her arrest, March 10, 2017, between the hours of 8am and 10am, Probation Officers Ann Walton and Heather Eldridge made a visit to the home shared by Plank and her parents. Plank's mother, Anna Plank (Anna), answered the door. Upon entering the home, Officers Walton and Eldridge waited in the basement of the house while Anna went to wake her daughter. Anna testified at trial that Plank had experienced trouble sleeping the night of March 9, 2017, due to a severe migraine headache. There is no dispute that Plank had legal prescriptions for topiramate (anti-seizure medication), Seroquel, Klonopin, Imitrex, and Phenergan. She consumed all of these prescriptions on the eve of her March 10 arrest. Many of these medications act as sedatives to induce sleep. As such, Plank took several minutes to stir from her bed and come from her room. She testified at trial to feeling groggy immediately after being woken. After dressing herself, Plank proceeded to step directly from her bedroom to the kitchen.

When entering the kitchen, Officer Walton came upon Plank sitting in a chair and drinking a glass of water. Walton informed her that she would be

performing a field drug test. Plank had been subject to drug tests in the past as a condition of her probation. Officer Walton accompanied Plank to the bathroom where a standard urine test was administered. Plank produced a sample without issue, as she had done in the past. Officer Walton proceeded to administer her field tests; one of which being a test for Suboxone, and the other being a 10-panel drug test which tested for illicit substances ranging from THC to amphetamines. Plank tested positive for use of amphetamines, which she immediately disputed.

At that point, Officer Walton called Officer Eldridge into the bathroom to confirm her interpretation of the readings. Admitting that field drug tests are not always 100% accurate, Officer Walton informed Plank that their office would submit the field-tested sample for lab testing. She proceeded to hand Plank the specimen container and a lab vial in which to pour her sample for further testing. Walton gave clear instructions as to the proper way to transfer the sample from its original container to the test vial and testified at trial that Plank seemed to be sufficiently alert and receptive to instruction.

Officer Walton and Officer Eldridge stood to the side of Plank as she began to pour her sample from the original specimen container into the lab test vial over the bathroom sink. After filling the test vial with a considerable amount of her sample, Plank proceeded to turn both containers upside down thus disposing of the urine in the sink. Further, she turned on the sink faucet, flushing the sample

down the drain. Plank allegedly followed this action by saying, "oops," although there is some contention as to whether this statement was made in good faith.

Believing this to be an instance wherein Plank had committed a felony, thereby violating her probation, the Officers confined her to handcuffs and escorted her to their vehicle for transit to the local detention center. Once at the detention center, Plank requested another drug test which read negative for use of any illegal substances.

Plank was charged with tampering with physical evidence and was subject to a jury trial on September 25, 2017. At trial, Plank moved the court to grant a directed verdict. The court denied the motion for directed verdict, and the jury found Plank guilty of tampering with physical evidence. Thereafter, as a consequence of her past felony conviction, the jury found Plank guilty of PFO II. The jury sentenced Plank to one year for tampering with physical evidence, enhanced to five (5) years by virtue of her PFO II status. This appeal follows.

Standard of Review

On appeal, Plank argues that the trial court erred in not granting her motion for directed verdict, on the grounds that the Commonwealth failed to produce more than a mere scintilla of evidence of her conscious object to impair the availability of the physical evidence here for use in an official proceeding. On appellate review, the test of a directed verdict is that a reversal is only proper if,

under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt. *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991) (citing *Commonwealth v. Sawhill*, 660 S.W.2d 3, 4-5 (Ky. 1983)). Any questions as to the credibility and weight to be given to the evidence are reserved for the jury. *Id*. Further, the circumstantial nature of evidence will not preclude the case from being heard by a jury so long as guilt beyond a reasonable doubt could be determined in light of that evidence. *Id*. When deciding on a motion for directed verdict in criminal cases, all evidence should be "viewed in the light most favorable to the Commonwealth." *Id*. The court is obligated to draw all reasonable inferences in favor of the Commonwealth and presume all evidence to be true. *Id*. Finally, to ultimately withstand a motion for directed verdict, the Commonwealth must produce more than a "mere scintilla of evidence" of the defendant's guilt. *Id*. at 188.

Analysis

The single issue on appeal is whether the Commonwealth produced more than a mere scintilla of evidence of Plank's intent to impair the availability of physical evidence in an official proceeding. Plank's argument being, that she had no such intent and there is insufficient evidence to suggest that she did. To settle this dispute, we look to the statutory definition of tampering with physical evidence, as well as this state's position on the unique nature of test samples

extracted from the human body. This determines how the element of intent might be applied to this case in conjunction with whether the Commonwealth has adequately produced more than a mere scintilla of evidence of Plank's intent.

Kentucky maintains a straightforward statutory definition of what it means to tamper with physical evidence. KRS[1] 524.100(1)(a) provides:

> (1) A person is guilty of tampering with physical evidence when, believing that an official proceeding is pending or may be instituted, he:
>
> > (a) Destroys, mutilates, conceals, removes or alters physical evidence which he believes is about to be produced or used in the official proceeding with intent to impair its verity or availability in the official proceeding[.]

The legislature broadly defines physical evidence as "any article, object, document, record, or other thing of physical substance." KRS 524.010(6). Bodily fluids which would yield scientifically reliable test results are distinct irreplaceable articles of physical evidence. It is of no dispute that extraneous bodily fluids, once extracted, are indeed physical evidence. *Page v. Commonwealth*, 149 S.W.3d 416, 421 (Ky. 2004). Such extractions are of physical substance and are considered to yield unique test results because of the constant state of change which exists in the chemical composition of the body. *Id.*

[1] Kentucky Revised Statutes.

Therefore, due to this constant state of fluctuation, each sample is to constitute a separate item of physical evidence.

In this case, Plank was in violation of KRS 524.100 on the merit of her actions alone; she destroyed the sample by pouring it down the sink and flushing it away with running water. Plank's urine sample clearly constituted physical evidence. The sample was not only very clearly a thing of physical substance, but it was extraneous of her body the time of its disposal. Although Plank requested a second test, the distinct and irreplaceable nature of the first test sample would have rendered a second test essentially meaningless in terms of reversing the destruction of evidence. No subsequent test could have been considered identical for the purpose of achieving a scientifically reliable test result, her attempt to replicate the evidence was moot. Additionally, due to her probation status, circumstance would indicate that she could have believed little else would follow her noncompliance or criminal act other than an official proceeding.

Notwithstanding the implications of her actions, Plank argues that she lacked the requisite intent to impair the availability of her urine sample in an official proceeding. The element of intent is most often established by the Commonwealth with circumstantial evidence. *Commonwealth v. O'Conner*, 372 S.W.3d 855, 857 (Ky. 2012). While it is exceedingly rare for the prosecution to secure direct proof of a defendant's thoughts, intent to impair the availability of

physical evidence is most easily indicated by its unconventional treatment. *Commonwealth v. Henderson*, 85 S.W.3d 618, 620 (Ky. 2002). Additionally, conventional treatment in one situation may not constitute conventional treatment in another. *Id*. For example, one might be expected to treat particular objects differently when they are alone, as opposed to when they are engaged in a police chase. When a defendant disposes of or conceals physical evidence in an unconventional manner, this will typically be considered sufficient evidence of intent to be presented to a jury.

As stated above, in any criminal case, the Commonwealth must produce more than a mere scintilla of evidence to survive a motion for directed verdict. *Sawhill*, 660 S.W.2d at 4-5. This is to say that the evidence of guilt presented by the Commonwealth must be evidence of substance. *Benham*, 816 S.W.2d at 187-88. The sufficiency of this evidence hinges upon whether it could induce a rational fact-finder to determine guilt beyond a reasonable doubt. *Smith v. Commonwealth*, 361 S.W.3d 908, 920 (Ky. 2012). In *Smith*, the Court held that the Commonwealth had produced more than a mere scintilla of evidence where the corroborative testimony of multiple witnesses indicated the defendant's guilt. *Id*. Therefore, where the Commonwealth has made a substantive showing of guilt through corroborating articles of evidence, there will typically be more than a mere scintilla of evidence. Such evidence, as well as any subsequent rebuttal, is to be

subject to determinations of weight and credibility by the jury. *Sawhill*, 660 S.W.2d at 4-5.

We find that the Commonwealth produced circumstantial evidence supporting the conclusion that Plank intended to impair the availability of her urine sample in an official proceeding. Plank sought to rebut this evidence by testifying she always disposed of her samples by pouring them down the drain, and in her groggy state became confused as to what she was supposed to do in that very instant. However, it should be noted that the drain in which she typically disposed of her sample was the one leading from the toilet. Any attempt to conflate a toilet and a sink should not be entertained, as one would hardly expect to conflate their general usage. Furthermore, according to Plank's own testimony, her mental fog did not meaningfully persist in the course of events prior to or immediately following the administration of her drug test. To the contrary, Officer Walton went on to describe Plank as alert and attentive. Given the circumstances, Plank's disposal of the sample in question was unconventional. In the off chance that an individual might pour urine down the drain of her bathroom sink, she would certainly not be expected to do so. Furthermore, a reasonable person would not dispose of her urine sample down the drain, in the presence of her probation officer after receiving a positive drug test, and being told that the sample would be sent to the lab for testing.

Despite the circumstantial evidence of Plank's intent to impair the availability of her sample, evidence also exists to support a contrary conclusion. Immediately following the disposal of the sample, Plank insisted on the administration of another field test. At trial, Officer Walton stated that she refused to administer a second drug test because it was irrelevant for her to do so as Plank had just committed a felony in front of her. However, Officer Walton was not entitled to provide her own legal conclusion as to the relevance of Plank's request to take a second drug test. *Tamme v. Commonwealth*, 973 S.W.2d 13, 32 (Ky. 1998). Therefore, Officer Walton's conclusions did not conclusively establish Plank's intent by simply naming subsequent circumstantial evidence irrelevant.

Although there is conflicting evidence in this case, the Commonwealth has produced more than a mere scintilla of evidence to show that Plank had the requisite intent to impair the availability of evidence necessary to withstand a motion for directed verdict. The Commonwealth presented circumstantial evidence of Plank's unconventional treatment of the evidence in question, as well as the corroborating testimony of Officer Walton and Officer Eldridge. Similar to *Smith*, the amalgamation of this evidence could have led a reasonable juror to find guilt beyond a reasonable doubt. Although Plank's rebuttal contains evidence which might be likened to direct proof of her intent, this rebuttal is not so exculpatory as to render the Commonwealth's argument

objectively defeated. Therefore, however relevant Plank's evidence might be, it does not effectively nullify the evidence produced by the Commonwealth. Because the Commonwealth produced more than a mere scintilla of evidence at trial, the totality of the evidence would most appropriately be weighed and accredited by the jury. Consequently, the trial court did not err by denying Plank's motion for a directed verdict.

Conclusion

Accordingly, Plank's conviction on the charge of tampering with physical evidence, and the enhanced PFO II charge is affirmed.

NICKELL, JUDGE, CONCUR.

K. THOMPSON, JUDGE, DISSENTS WITHOUT FILING SEPARATE OPINION.

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