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RENDERED: AUGUST 27, 2009
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2008-SC-000100-MR

CHRISTOPHER HILL — APPELLANT

V.

ON APPEAL FROM MASON CIRCUIT COURT
HONORABLE STOCKTON B. WOOD, JUDGE
NO. 07-CR-00032

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING IN PART AND REVERSING IN PART

Appellant, Christopher John Hill, challenges his convictions for multiple counts of trafficking in a controlled substance and for being a persistent felony offender (PFO). He claims that the trafficking convictions violated the proscription on double jeopardy and that the Commonwealth failed to prove his PFO conviction. Finding no double jeopardy violation but agreeing that the PFO evidence was insufficient, the judgment of the circuit court is affirmed in part and reversed in part.

I. Background

Appellant's convictions stem from a series of drug transactions with David Hartsell, a paid informant for the Buffalo Trace Narcotics Task Force. Over the course of a week in January 2007, Hartsell performed three controlled buys on behalf of the task force. In each instance, Hartsell purchased $40

worth of crack cocaine from Appellant. The buys occurred on January 19, 23, and 25.[1]

Appellant was subsequently indicted in Mason County for three counts of first-degree trafficking in a controlled substance, possession of drug paraphernalia, and for being a first-degree persistent felony offender (PFO). At a jury trial, he was found guilty on all counts. The Mason Circuit Court later imposed a sentence of twenty years in prison.[2]

This appeal, therefore, is as a matter of right. Ky. Const. § 110(2)(b).

II. Analysis

A. Double Jeopardy

Appellant claims that his conviction for multiple counts of trafficking in a controlled substance violates the proscription on double jeopardy because his "trafficking" constituted a single course of conduct. Appellant did not raise this issue at trial, but "[a]s this Court has repeatedly held, double jeopardy claims fall under the palpable error rule because this Court does not want to let stand a conviction possibly tainted by double jeopardy." Cardine v. Commonwealth, 283 S.W.3d 641, 651 (Ky. 2009) (internal quotation marks and brackets omitted).

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[1] Appellant's counsel spends most of the Statement of the Case in the brief discussing whether the evidence showed that Appellant sold the drugs, implying that it was actually another person. She goes so far as to state, "Hill hopes someday to prove it was someone else Hartsell bought drugs from three times that week, and not he." However, the arguments actually presented in the brief only go to whether there was sufficient evidence to prove Appellant's PFO status and whether Appellant's multiple convictions violate the bar on double jeopardy.

[2] The jury's verdict was for a PFO-enhanced sentence of ten years on each trafficking count, all to run consecutively. However, Appellant received only twenty years in prison because of the statutory cap in KRS 532.080(6)(b).

A double jeopardy violation "does not occur when a person is charged with two crimes arising from the same course of conduct, as long as each statute 'requires proof of an additional fact which the other does not.'" Commonwealth v. Burge, 947 S.W.2d 805, 809 (Ky. 1996) (quoting and readopting Blockburger v. United States, 284 U.S. 299, 304 (1932), as the appropriate test); see also KRS 505.020(1) ("When a single course of conduct of a defendant may establish the commission of more than one offense, he may be prosecuted for each such offense."). This test is used to evaluate the charging of two different crimes (e.g., trafficking and possession of a controlled substance) for the same course of conduct.

However, "the Blockburger test is insufficient where, as here, the concern is not multiple charges under separate statutes, but rather successive prosecutions for conduct that may constitute the same act or transaction." Rashad v. Burt, 108 F.3d 677, 679 (6th Cir. 1997); see also Little v. Commonwealth, 272 S.W.3d 180, 185 (Ky. 2008) (noting "the rule prescribed in Blockburger is not implicated" where the question was whether the conviction was based on a course of conduct or separate transactions). In a situation like this one, the analysis focuses not on different elements, since multiple counts of the same crime will obviously have the same elements, but on whether the counts actually arise from a single course of conduct or from separate transactions. See Welborn v. Commonwealth, 157 S.W.3d 608, 612 (Ky. 2005) ("The real question is whether it was the individual acts which are prohibited, or the course of action they constitute. If it is the individual acts, then each act is punishable separately, but if it is a single course of conduct, there is only

one punishment."). Thus, the question here is whether multiple sales of a controlled substance separated by only a short time constitute a single course of conduct or are separate transactions.

As the Commonwealth points out, this Court has already addressed this issue in Gray v. Commonwealth, 979 S.W.2d 454 (Ky. 1998), overruled in part on other grounds by Morrow v. Commonwealth, 77 S.W.3d 558 (Ky. 2002). In Gray, the defendant also claimed that his multiple convictions for trafficking based on multiple sales to the same person—in that case, on the same day, less than 30 minutes apart—violated double jeopardy. This Court held that the sales were separate and distinct transactions, and not part of a continuing course of conduct:

> In the case at bar, the second transaction . . . did occur on the same date as the first and did involve the same type of substance, cocaine. Yet the second transaction occurred at a different time and resulted in the transfer of a separate quantity of cocaine. As such, the second transaction was separate and distinct and did not result in an unconstitutional prosecution.

Id. at 455.

Appellant failed to mention Gray in his Brief. He admitted the error in his Reply Brief, and argues that Gray should be overruled based on the argument presented in his Brief about the rule of lenity. "The rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them." United States v. Santos, 128 S.Ct. 2020, 2025 (2008).

Appellant argues that the statutory definition of "trafficking" is ambiguous and thus lenity requires that the term be read broadly to mean a continuing course of conduct, rather than a single transaction. For purposes

of the controlled substance chapter of the Kentucky Revised Statutes, "'[t]raffic' . . . means to manufacture, distribute, dispense, sell, transfer, or possess with intent to manufacture, distribute, dispense, or sell a controlled substance . . ." KRS 218A.010(40). Appellant claims that "to sell" in this context means (or at least could mean) the general practice of selling "on a regular, continuing basis, not a single transaction."

This reading of the definition of trafficking, however, is simply incorrect, at least as it applies to the "to sell" portion of the statute, and this Court concludes there is no ambiguity. "To sell" implies an act of sale, that is, the transfer for a price of property to another person. A single sale can consist of the transfer of multiple pieces of property to a single person, which, if illegal, would not necessarily give rise to multiple offenses. See Commonwealth v. Grubb, 862 S.W.2d 883, 884 (Ky. 1993) ("A single sales transaction between the same principals at the same time and place which violates a single statutory provision does not justify conviction or a sentence for separate crimes, even though more than one item of a controlled substance (of the same schedule) is involved."). The transfer of multiple pieces of property to multiple persons constitutes multiple sales, and therefore multiple transactions. In fact, one of the cases cited by Appellant implicitly recognized this concept, when it noted in a slightly different context that "when it comes to the matter of an actual sale, it would seem that the total quantity of the same class of goods passed to one purchaser in one sale would be one commodity, regardless of the number of packages involved." Commonwealth v. Colonial Stores, Inc., 350 S.W.2d 465, 467 (Ky. 1961). But the fact that the participants in the transfers

are the same does not mean that only a single transaction occurs when the transfers are separated in time and involve discrete items of property (e.g., separately packaged quantities of drugs).

This Court has consistently interpreted other statutes and other factual situations to mean that a series of acts that are readily distinguishable is not a course of conduct for double jeopardy purposes. For example, this Court upheld multiple assault convictions for repeated shots fired into one police officer, separated by mere moments, because "[t]here was a sufficient break in the conduct and time so that the acts constituted separate and distinct offenses." Welborn, 157 S.W.3d 608, 612 (Ky. 2005). Multiple acts of sexual assault related to a single victim can support multiple convictions, even though they "occurred in a brief period of time with the same victim and in a continuum of force . . . ." Van Dyke v. Commonwealth, 581 S.W.2d 563, 564 (Ky. 1979); see also Williams v. Commonwealth, 178 S.W.3d 491, 494-95 (Ky. 2005) (upholding multiple convictions for use of a minor in a sexual performance where each is related to one of a group of photographs found together).

These cases have two things in common. First, the illegal behavior addressed in them can be broken down into multiple discrete acts. Second, the statutes in question are not aimed specifically at a continuing course of conduct that takes place over time, the classic example of which is failure to pay child support. See KRS 505.020 cmt. (describing the offense of nonsupport as a continuing course of conduct).

This Court previously read the trafficking statutes in this manner in Gray, and sees no reason to interpret them differently now. Despite Appellant's claim that the definition of "trafficking" is ambiguous, the meaning of the statute is clear, at least when it is based on a sale. A trafficking sale is a discrete event where a participant transfers a quantity of drugs for money to another participant. The transfer of a separate quantity of drugs after a break in time, even after only a few minutes, is a different transaction and is not part of the same course of conduct as the first, at least for purposes of the sale portion of the trafficking statute.[3] Because there is no ambiguity in the trafficking statute, there is no call for application of the rule of lenity. Appellant's multiple convictions therefore did not violate the bar on double jeopardy.

B. The PFO Evidence

Appellant claims that the evidence of his age at the time of one of his felonies was insufficient to support his PFO conviction. One of the elements of first-degree PFO is that the defendant must have two prior felony convictions and "[t]hat the offender was over the age of eighteen (18) years at the time the offense[s] w[ere] committed . . . ." KRS 532.080(3)(b). The Commonwealth

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[3] A different result might come for a defendant prosecuted under the possession aspect of the trafficking statute because possession, by its very nature, is a status that continues over a course of time, and thus could be considered a continuing course of conduct. For this reason, possession of contraband, so long as the possession is uninterrupted by legal process, can only give rise to a single offense. See Fulcher v. Commonwealth, 149 S.W.3d 363, 376 (Ky. 2004) ("[U]ninterrupted possession of the same contraband over a period of time is but one offense constituting a continuing course of conduct, precluding convictions of multiple offenses for possession of the same contraband on different dates.").

presented evidence of two prior felony convictions, one of which was in Alabama. Appellant claims that the documentation of the Alabama conviction contains no reference to when the crime was committed and thus that it is impossible to determine whether he was 18 at the time of the crime. Appellant raised this issue at trial, and thus preserved it for appellate review, by moving for a directed verdict at the close of the evidence. Appellant does not claim insufficiency of the evidence as to the other elements of first-degree PFO, including the existence of the second felony, thus the only question is whether the Commonwealth proved he was 18 at the time of the Alabama theft.

The documentation of the Alabama conviction showed that Appellant was born on June 20, 1969, meaning he turned 18 on June 20, 1987. It also showed that he was indicted for felony theft of a "1988 Celebrity" on April 27, 1990, pleaded guilty on October 5, 1990, and was sentenced on November 1, 1990. The documents also show that in May 1990 he filed "youthful offender application," which was investigated and then denied.

Nothing in these documents shows directly when the Alabama theft occurred. At most, they show directly that the crime could have occurred no earlier than when the 1988 Chevrolet Celebrity was released. But no evidence of the date of release of that car was introduced at trial.

When the issue was raised at the PFO stage of the trial, the judge said that in his experience, 1988 car models usually came out in September or October of the previous year, making it unlikely for Appellant to have stolen the

car prior to his 18th birthday in June 1987.[4] The Commonwealth's argument to the jury focused on this set of proposed inferences, along with the assertion that the denial of the youthful offender petition meant that Appellant must have been over 18 at the time of the Alabama crime.

The test for a directed verdict at trial requires the Court to "draw all fair and reasonable inferences from the evidence in favor of the Commonwealth" and then determine "[i]f the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty . . . ." Commonwealth v. Benham, 816 S.W.2d 186, 187 (Ky. 1991). And on appeal, "the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt . . . ." Id. Thus, a directed verdict is not proper where reasonable inferences from the evidence would support a guilty verdict. This Court has repeatedly held the direct proof of the elements of PFO is unnecessary and that reasonable inferences from the available evidence are sufficient. See Moody v. Commonwealth, 170 S.W.3d 393 (Ky. 2005); Shabazz v. Commonwealth, 153 S.W.3d 806 (Ky. 2005); Martin v. Commonwealth, 13 S.W.3d 232 (Ky. 1999); Kendricks v. Commonwealth, 557 S.W.2d 417 (Ky. 1977).[5] However, a jury presented with circumstantial evidence must still be able to arrive at the elements of the crime through

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[4] The trial judge did not mention his conclusions in this regard to the jury. Appellant's Brief discusses whether the judge's statements constitute judicial notice and whether such would be proper, but it is not necessary to address this issue since the jury was not informed of the judge's statement.

[5] This Court at one time held that direct evidence was required in Hon v. Commonwealth, 670 S.W.2d 851 (Ky. 1984), which overruled Kendricks. But in Martin, this Court returned to the standard laid out in Kendricks and overruled Hon.

reasonable inferences, not great intuitive leaps or guesses. And the jury must believe their inferential conclusions beyond a reasonable doubt.

In Kendrick and Moody, this Court faced a situation similar to this one, i.e., with no direct evidence of when the defendant committed a prior felony. In both cases, there was evidence of the defendant's birth date and when the judgments were entered in the prior felonies, and the Court stated that the jury could have inferred the defendants' ages at the time of the commission of the felonies from these facts. See Kendrick, 557 S.W.2d at 419-20; Moody, 170 S.W.3d at 397-98 (relying in part on Kendrick). That, however, is where the similarities end. Both cases are readily distinguishable from this one.

In Kendrick, the defendant had been indicted for the previous felonies six years after he turned 18. In upholding the PFO conviction based on this earlier felony, the Court stated that "if he had been 18 at the time he committed the first offense, it is unlikely that any court would wait six years to try a person charged with a criminal offense." 557 S.W.2d at 420. However, the Court also pointed out that the defendant was 24 years old when he had pleaded guilty to the prior felony but had been in the military for 23 months beginning at age 20. Id. Thus, there was further evidence of the defendant's age at the time of the prior felony. The fact that the defendant was in the military until age 22 makes it unlikely that he had committed his crime before that time (or at least prior to his entry into the military). Thus, the Court concluded that "the totality of the evidence is such that the circumstances allowed the jury to conclude that the prior offenses were committed after Kendricks reached the age of 18." Id. (emphasis added).

In Moody, the defendant claimed insufficiency of the PFO evidence because the Commonwealth again introduced evidence indicating only the defendant's date of birth and date of conviction of the prior felonies. In response to this claim, the Court discussed that part of Kendrick about inferring the defendant's age at the time of the prior felony because it was "unlikely" that he would be prosecuted a substantial amount of time after the commission of the crime. That discussion was only dicta in Moody, however, as the judgments were not included in the appellate record and the Court thus assumed the evidence supported the judgment. 170 S.W.3d at 398. More importantly, however, the defendant took the stand in that case and testified as to when the prior felonies occurred, "thus, by [the defendant's] own testimony, the earliest felony occurred no earlier than 1990, when he was nineteen or twenty years old." Id.

In this case, the indictment in the Alabama case was returned two years and ten months after Appellant turned eighteen. No other evidence related to the Alabama conviction, when the crimes occurred, or any other circumstance was presented. This case thus presents a much closer question whether the Commonwealth presented enough evidence for a reasonable inference of Appellant's age at the time he committed the crime in Alabama than either Moody or Kendrick.

The Commonwealth now argues that the jury could have inferred the date of the crime (1) from the fact that it could also have inferred that "[i]t is true, and generally known and understood that model-year cars are released in the fall prior to their model year," (2) from the denial of the youthful offender

application, and (3) because Appellant was not indicted until 1990 and it was "unlikely" that he would have been arrested three years after the theft.

Neither the Commonwealth's claim that new car models are usually introduced in the fall of the prior year or that the denial of the youthful offender application are helpful, as both are pure speculation. There was no evidence at trial of when car models are released and it is unlikely that the release dates of cars in 1988 in general (much less the specific car in question) were common knowledge of jurors in 2007 when Appellant's PFO charge was tried. At the very least, it is not something that this Court can assume the jury was aware of in evaluating the directed verdict decision. Nor was there any evidence about the state of Alabama's law related to youthful offenders from which the jury could make any inference. Even if there had been, it would have had little meaning. While, as the trial judge correctly pointed out, "youthful offender" status is available in Alabama until age 21, see Ala. Code § 26-1-1 (recognizing age of majority as age 19, except for youthful offender statutes, for which it remains 21), the denial of an application for such status is in the discretion of the trial judge, id. § 15-19-1. Thus, Appellant could have been less than 18 and still had his youthful offender application denied.

That leaves only the possibility of an inference from the date of the conviction itself. The Commonwealth urges that under Kendrick and Moody, the jury could infer that it was unlikely that Appellant would have been prosecuted a long time after commission of the crime. Such an inference, absent some other supporting evidence like that present in both Kendrick and Moody, is unsupportable and unreasonable. Prosecutions frequently take

years to commence, especially if the identity of the offender is unknown. There simply was not enough evidence to make the inferential leap that the Commonwealth urges on the Court in this case. Thus, this Court concludes that "under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt," Benham, 816 S.W.2d at 187, because the evidence was insufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty. Thus, a directed verdict on the first-degree PFO count should have been granted.[6]

III. Conclusion

Appellant's three convictions for first-degree trafficking in a controlled substance did not violate double jeopardy. However, Appellant's conviction for being a first-degree persistent felony offender was not supported by sufficient evidence to overcome a directed verdict motion. For these reasons, Appellant's convictions for first-degree trafficking in a controlled substance is affirmed, but his conviction for being a first-degree persistent felony offender is reversed.

All sitting. All concur.

[6] This is not to say, however, that there was insufficient evidence for a second-degree PFO charge, especially since Appellant has not challenged his other felony conviction.

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