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Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-001697-MR

CATON KAMIL JONES — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE PAMELA R. GOODWINE, JUDGE
ACTION NOS. 12-CR-00136

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
REVERSING

** ** ** ** **

BEFORE: COMBS, LAMBERT, AND THOMPSON, JUDGES.

COMBS, JUDGE: Caton Jones appeals the judgment of the Fayette Circuit Court convicting him of engaging in organized crime. After our review of the record and law, we reverse the conviction.

On September 15, 2011, Detective Kevin Duane of the Lexington Metro Police Department was contacted by an employee at the Sprint store

on Nicholasville Road. A group of men had arrived at the store together, and they all purchased Blackberry phones. The employees were suspicious that the men were homeless and had executed two-year contracts in order to receive the phones at a discounted price. They suspected that the men were going to sell the phones with no intention of honoring their contracts to pay the monthly telephone bills. Detective Duane was unable to meet up with the group of men at the Nicholasville Road location, but he followed them to another wireless service store on Leestown Road. He missed them again. Finally, Detective Duane was contacted by an employee at the Hamburg Sprint store, which the group of men had just entered.

When Detective Duane arrived at Sprint, he watched Dennis Liford purchase two Blackberry phones. Liford executed a two-year service contract for each phone. As Liford exited the store, Detective Duane pulled him aside. Liford was forthcoming with information. He had been staying at the Hope Center, a shelter for the homeless. That morning, as he stood outside, a man and woman approached him and asked him if he would like to earn money by purchasing cell phones. Liford and three other men were either residents or volunteers at the Hope Center. They rode with the couple in a van and travelled to several wireless retail stores in Lexington, taking turns purchasing phones with two-year service contracts. The man and woman provided the men from the Hope Center with cash for the purchase of

the phones. After the men signed the contracts and left the stores, they gave the phones to the couple in exchange for twenty dollars per phone.

Detective Duane followed Liford back to the van, and Liford identified Jones as the man who had given him the money and driven the van; the woman with him was Salena Anderson.[1] Jones was very cooperative with Detective Duane. He consented to a search of the van, where Detective Duane discovered several phones, receipts, and service contracts. Jones also agreed to accompany Detective Duane to police headquarters where he corroborated Liford's account of the events. Jones had come to Lexington from Michigan for the purpose of recruiting people to purchase the phones at a discounted price. After the men purchased the phones from the wireless retailers, Jones would sell them to someone in Michigan for a profit. The phones were models that can be used internationally, and there is a lucrative black market for them.

Detective Duane charged Jones with engaging in a criminal syndicate. Jones was tried by a jury on July 12, 2012. The Commonwealth presented Detective Duane, several Sprint employees, and three of the men who participated in the phone transactions with Jones. The Sprint employees testified that they personally lost income when customers failed to pay for their service contracts. Additionally, when a bill is unpaid, the normal practice is for the account to be handled by Sprint's collections department.

[1] Anderson was charged along with Jones. However, she never appeared in court to answer the charges.

They also testified that they could have stopped the transactions with the men whom they deemed suspicious. A regional security manager for Sprint testified that when phones are obtained at a discounted price, but the bills are not paid, Sprint suffers a significant financial loss. The phones are sold with a subsidy that is ordinarily recovered by Sprint over the life of the contract.

Not believing that he had committed a crime, Jones represented himself and did not testify or present witnesses. He merely argued to the jury that he had not committed the elements of the crime of engaging in a criminal syndicate. Nonetheless, the jury found him guilty. On August 31, 2012, the court sentenced Jones to a sentence of five-years' incarceration, probated for five years. This appeal follows.

We first note that the Commonwealth urges us not to consider Jones's arguments because the brief does not include statements of preservation. While we agree that the brief should contain statements of where error was preserved, we will nonetheless proceed to address the merits of the arguments in this case. Kentucky Rule[s] of Civil Procedure (CR) 76.12(4)(c)(v). We have reviewed the trial, and the dispositive error was preserved throughout the proceedings. Furthermore, the Commonwealth has not submitted a flawless brief. It argues a theory different from that which it prosecuted at trial and presented to the jury. It does not address the dispositive error: whether the elements of the crime of engaging in a criminal syndicate were present.

Jones first argues that his conviction is invalid because KRS 506.120(2) is unconstitutional. We are unable to address this argument because KRS 418.075(1) provides as follows:

> In any proceeding which involves the validity of a statute, the Attorney General of the state shall, ***before judgment is entered***, be served with a copy of the petition, and shall be entitled to be heard, and if the ordinance or franchise is alleged to be unconstitutional, the Attorney General of the state shall also be served with a copy of the petition and be entitled to be heard.

(Emphasis added). The Supreme Court has recently reiterated that the notification requirement is mandatory. *Grider v. Commonwealth*, 404 S.W.3d 859, 861 (Ky. 2013). The record in this case does not include any notification that Jones wanted to contest the constitutionality of KRS 506.120. Therefore, we are prohibited from addressing the issue. *Grider, supra*.

Jones makes a variety of other arguments in his brief. One is dispositive; the others are redundant or unsupported by legal authority. Because we are reversing, in the interest of judicial economy, we will address that one pertinent argument.

Jones claims that the Commonwealth did not present sufficient evidence to support the charge of engaging in a criminal syndicate. Therefore, he contends that the trial court erred in denying Jones's motion for a directed verdict.

A directed verdict removes an issue from a jury's consideration.

> 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.

Commonwealth v. Benham, 816 S.W.2d 186, 187 (Ky. 1991). In criminal cases, unless the Commonwealth proves "***each element*** of a charged crime, . . . a motion for a directed verdict by the defendant ***must*** be properly entertained." *Williams v. Commonwealth*, 721 S.W.2d 710, 712 (Ky. 1986). (Emphases added). On appeal, our standard of review is as follows:

> if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal. . . . [T]here must be evidence of substance, and the trial court is expressly authorized to direct a verdict for the defendant if the prosecution produces no more than a mere scintilla of evidence.

Commonwealth v. Benham, 816 S.W.2d at 187-88.

Jones was charged pursuant to Kentucky Revised Statute[s] (KRS) 506.120:

> (1) A person, with the *purpose to establish or maintain* a criminal syndicate or to facilitate any of its activities, shall not do any of the following:

(a) Organize or participate in organizing a criminal syndicate or any of its activities;

(b) Provide material aid to a criminal syndicate or any of its activities, whether such aid is in the form of money or other property, or credit;

(c) Manage, supervise, or direct any of the activities of a criminal syndicate, at any level of responsibility;

(d) Knowingly furnish legal, accounting, or other managerial services to a criminal syndicate;

(e) Commit, or conspire or attempt to commit, or act as an accomplice in the commission of, any offense of a type in which a criminal syndicate engages on a continuing basis;

(f) Commit, or conspire or attempt to commit or act as an accomplice in the commission of, any offense of violence;

(g) Commit, or conspire or attempt to commit, or act as an accomplice in the commission of bribery in violation of KRS Chapters 518 or 521, or KRS 119.205, 121.025, 121.055, 524.070, 156.465, 45A.340, 63.090, 6.080, 18A.145, or 244.600;

(h) Commit, or conspire or attempt to commit, or act as an accomplice in the commission of more than one (1) theft of retail merchandise with the intent to resell the stolen merchandise; or

(i) Acquire stolen retail merchandise for the purpose of reselling it where the person knew or should have known that the merchandise had been stolen.

(2) Whoever violates this section is guilty of engaging in organized crime, which shall be a Class B felony, unless the offense involves only the theft or acquisition of retail merchandise for the purpose of reselling it, in which case it shall be a Class C felony.

(3) As used in this section, "criminal syndicate" means five (5) or more persons, or in cases of merchandise theft from a retail store for the purpose of reselling the stolen merchandise, two (2) or more persons, collaborating to promote or engage in any of the following on a continuing basis:

(a) Extortion or coercion in violation of KRS 514.080 or 521.020;

(b) Engaging in, promoting, or permitting prostitution or human trafficking in violation of KRS Chapter 529;

(c) Any theft offense as defined in KRS Chapter 514;

(d) Any gambling offense as defined in KRSR 411.090, KRS Chapter 528, or Section 226 of the Constitution;

> (e) Illegal trafficking in controlled substances as prohibited by KRS Chapter 218A, in intoxicating or spirituous liquor as defined in KRS Chapters 242 or 244, or in destructive devices or booby traps as defined in KRS Chapter 237; or
> (f) Lending at usurious interest, and enforcing repayment by illegal means in violation of KRS Chapter 360.

Jones contends that the Commonwealth did not prove that his actions satisfied the elements of engaging in a criminal syndicate. We agree.

The Commonwealth theorized that Jones had participated in a criminal syndicate to commit the underlying crime of theft by deception pursuant to KRS 514.040. Additionally, the Commonwealth relied on the retail theft crime definition of a *criminal syndicate*: two or more persons collaborating to resell stolen merchandise on a continuing basis. KRS 506.120(3). On appeal, the Commonwealth argues that Jones collaborated with the homeless individuals, relying on the definition of a *criminal syndicate* as being comprised of five or more members. *Id.*

Our Supreme Court has explained the proof required for engaging in a criminal syndicate in great detail. *Parker v. Commonwealth*, 291 S.W.3d 647, 675-77 (Ky. 2009). Parker had been a member of the Crips gang, and he was convicted of engaging in a criminal syndicate for the purpose of drug trafficking. The Supreme Court reversed that conviction, holding that the Commonwealth had not proven the charge with requisite specificity. *Id*. at 677. We are persuaded that the same situation exists here.

The Court held that after the Commonwealth has proven collaboration between/among participants, it must prove that the activity was sustained ***on a continuing basis***. *Id*. at 675. "In order to prove the activity occurred on a continuing basis, '[t]he Commonwealth . . . ***must*** show by the proof what the jury could infer from the evidence as ***intent to collaborate*** on a continuing basis.'" *Id*. (quoting *Commonwealth v. Phillips*, 655 S.W.2d 6, 9 (Ky. 1983)).

In *Parker*, the Supreme Court held that although the Commonwealth produced evidence that the Crips had more than five members, it did not point to anything specific to prove that Parker had collaborated with any of them on a continuing basis. Their witness testified about one instance of trafficking in which Parker had involvement with only three members of the Crips. Thus, the Supreme Court reversed the criminal syndication conviction. *Id*. at 677.

Similarly, in the case before us, the Commonwealth presented witnesses who testified about Jones's activity on one particular day – and only on one day. The three men[2] who had purchased phones for Jones testified that they were involved with him for only one transaction. The Commonwealth provided Jones's statement in which he said he had made two trips to Lexington to buy phones. However, there was no proof that

[2] The record showed that four men were questioned along with Jones on the day of the purchases. However, only three could be located to testify at trial.

Jones had collaborated with another specific individual both times or that Jones or any other participant intended to continue the practice. In fact, the participants testified – and Jones stated in arguments – that after they learned that law enforcement viewed this activity to be criminal, they abandoned this course of action and never intended to perform it again.[3] The Commonwealth alluded to Anderson in arguments. However, the Commonwealth has not shown any proof that Jones and Anderson collaborated on a continuing basis to commit theft by deception. Therefore, like the *Parker* court, we conclude that we must reverse Jones's conviction.

We recognize that the cell-phone purchasing scheme is a new twist and that both the law enforcement officers and the trial court had virtually no legal guidance or precedent. The trial court was open-minded and cautious in this case and did its best to address a novel situation. In conducting our research, we were unable to find much guidance from other jurisdictions in the criminal context. However, wireless mobility corporations have filed many civil actions against dealers in these schemes. The defendants in the lawsuits have conducted large-scale sales of fraudulently obtained phones. *See T-Mobile USA, Inc. v. Ataricom, Inc*., 2009 WL 3233542 (N.D. Texas, Sept. 14, 2009); *T-Mobile USA, Inc. v. Terry*, 862 F.Supp.2d 1121 (W.D. Wash. 2012); *TracFone Wireless, Inc. v. Dixon*, 475 F.Supp.2d 1236 (M.D.

[3] We note that KRS 506.120(1) emphasizes the *mens rea* that Jones claims he utterly lacked: "a person, ***with the purpose*** to establish or maintain a criminal syndicate …, shall not do any of the following …." (Emphasis added).

Fla. 2007); *AT&T Mobility LLC v. S & D Cellular, Inc.,* 2009 WL 3233814 (C.D. Cal., Sept. 23, 2009).

There is indeed a large black market thriving on the sale of fraudulently obtained phones. Jones was a small player; yet, properly charged, he might have been convicted of committing a crime in the Commonwealth. In this case, all of the phones were purchased and paid for. The service contracts alone were compromised. More fitting to the scheme in this case is KRS 514.065, which penalizes theft of phone services and devices.

Our research reveals that KRS 514.065 has never been used in any appellate opinions or trial documents. That indeed appears to be the statute under which a conviction might have been sustained. However, the Commonwealth opted to charge and prosecute under the broader criminal syndicate statute, KRS 506.120, whose elements have not been met.

Perhaps law enforcement will utilize KRS 514.065 with respect to schemes for obtaining cell phones – unless and until more specific legislation is passed to address the activity at issue in this case. However, the elements of the statute regarding a criminal syndication were not satisfied in this case.

The judgment of the Fayette Circuit Court is reversed.

LAMBERT, JUDGE, CONCURS.

THOMPSON, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

THOMPSON, JUDGE, DISSENTING: Respectfully, I dissent.

Although the facts in this case are unique, there was nevertheless a theft committed and, more importantly, a criminal syndicate as defined in KRS 506.120.

I will not recite KRS 506.120 in its entirety: The majority has accurately done so. However, because it is pivotal to this case, it is beneficial to reiterate KRS 506.120(3):

> As used in this section "criminal syndicate" means five (5) or more persons, or, in cases of merchandise theft from a retail store for the purpose of reselling the stolen merchandise, *two (2) or more persons*, collaborating to promote or engage in any of the following on a continuing basis[.]

(Emphasis added). Although not expressly stated, by implication, the majority agrees with the Commonwealth the manner in which these cell phones were obtained constituted the theft of merchandise from a retail store and Jones's intent was to resell the stolen cell phones. Therefore, to constitute a criminal syndicate, only Jones and one other person had to collaborate to promote or engage in the cell phone scam. There was more than sufficient evidence to establish Jones was involved in a criminal syndicate.

On September 15, 2011, Detective Duane received a call from a Sprint employee advising there was a group of people in town driving a van with Michigan license plates involved in the same cell phone scam. A

surveillance video showed a female accompanying a homeless man into the store. During the day, Detective Duane received numerous calls from other stores regarding the same scam but each time he arrived, the suspects were gone.

Later in the day, Detective Duane received a call from a Sprint store manager that a suspicious man was completing a cell phone transaction. Detective Duane arrived at the store and questioned the man, Liford, who identified Jones as the man who gave him money to purchase the phone. At that point, Detective Duane approached Jones and Anderson and, with consent, searched the van. As the majority correctly states, inside the van Detective Duane discovered several phones, receipts, and service contracts. Additionally, he found a handwritten budget detailing hotel, food, gasoline and other costs. Upon questioning, Jones admitted he drove from Detroit to Frankfort and engaged in the same scam and spent a period of two weeks committing the cell phone scam in Lexington. There was testimony from the homeless men involved that Jones and Anderson drove them to the stores and supplied the money to purchase the phones.

In *Commonwealth v. Phillips*, 655 S.W.2d 6, 9 (Ky. 1983), our Supreme Court interpreted KRS 506.120(3) and explained the Commonwealth is not required to "show that each participant collaborating in the scheme collaborated with or even was aware of the collaboration of the other participants." The Court further explained the Commonwealth's

standard of proof that the collaboration was on a continuing basis, which it termed as "indefinite." The Court concluded: "The Commonwealth is not held to proving any specific number of incidents or any element of time, but must show by the proof what the jury could infer from the evidence as intent to collaborate on a continuing basis." *Id*.

I disagree with the majority that the Commonwealth has not pointed to proof Jones and Anderson collaborated on a continuing basis to commit theft by deception. As revealed by my restatement of the evidence, there was abundant testimony Jones and Anderson had, on numerous occasions, solicited homeless men to carry out their cell phone scam. The facts here differ greatly from the case relied upon by the majority, *Parker v. Commonwealth,* 291 S.W.3d 647 (Ky. 2009). Notably, the Court's review was limited by the defects in the Commonwealth's brief and it so stated:

> It is well-settled that an appellate court will not sift through a voluminous record to try to ascertain facts when a party has failed to comply with its obligation under Kentucky Rules of Civil Procedure (CR) 76.12(4)(d)(iv) (in the case of an Appellee's brief) to provide specific references to the record. So we will not undertake in the task of reviewing the approximately twenty videotapes that Parker's trial record consumes to determine if the Commonwealth introduced sufficient evidence to withstand Parker's motion for a directed verdict on the criminal syndication charge.

Id. at 676 (Footnotes omitted).

In contrast, with specificity, the Commonwealth has cited to the evidence in the record sufficient to withstand a motion for directed verdict. I would affirm.

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