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Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-002351-MR

ROBERT B. TAYLOR, SR. — APPELLANT

v.

APPEAL FROM MONTGOMERY CIRCUIT COURT
HONORABLE BETH LEWIS MAZE, JUDGE
ACTION NO. 06-CR-00236

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; WINE, JUDGE; BUCKINGHAM, SENIOR JUDGE.

WINE, JUDGE: Robert B. Taylor, Sr. ("Taylor") appeals from a judgment of conviction by the Montgomery Circuit Court finding him guilty of promoting contraband in the first degree. He argues that the trial court erred by denying his motion to suppress the marijuana found on him at the time of his jailing and by denying his motion for a directed verdict due to the lack of evidence that he

voluntarily attempted to introduce contraband into a detention facility. We find no basis for relief on the first issue and conclude that the second issue is not preserved for review. Furthermore, we find that the "voluntary act" element of the offense is satisfied when a defendant knowingly brings contraband into a detention facility, notwithstanding the fact that the defendant's entry into the facility is involuntary. Hence, we affirm the conviction.

Except where noted, the relevant facts of this action are not in dispute. During the evening hours of October 28, 2006, two Mount Sterling police officers responded to a report of disorderly conduct at the Choices Bar. Upon arriving, the owner of the bar told Officer Ed Catchings ("Officer Catchings") that the woman who caused the disturbance was outside. Officer Jimmy Daniels ("Officer Daniels"), who had remained outside, noticed two men sitting in a car in the parking lot. The vehicle was not running, had no lights on, and had tinted windows. It was later determined that Blake Owens ("Owens") was sitting in the driver's seat, and Taylor was sitting in the front passenger seat.

Officer Daniels approached the vehicle to speak with the occupants. When Owens opened the window, Officer Daniels detected a strong smell of burning marijuana. Officer Catchings approached the passenger side of the vehicle and also smelled marijuana coming from the car.

The officers asked Owens and Taylor to step out of the car. When Taylor got out, Officer Catchings noticed marijuana residue on his shirt. Officer Catchings gave Taylor a field sobriety test, which indicated that Taylor was under

the influence of intoxicating substances. Consequently, Officer Catchings placed Taylor under arrest for public intoxication.

There is a dispute whether either officer advised Taylor of his right to remain silent. However, the parties agree that after Officer Catchings conducted a pat-down search, he asked Taylor whether he had any more marijuana on him. Officer Catchings states that he informed Taylor that he could be subject to a felony charge if he took marijuana into the jail. Taylor replied that he did not have any marijuana. Officer Daniels also asked Taylor if he had any marijuana on him, and Officer Catchings repeated the warning to Taylor when they arrived at the jail.

During the strip search at the jail, the jail officer found a small plastic packet of marijuana tucked in Taylor's buttocks. As a result, Taylor was charged with promoting contraband in the first degree, public intoxication, and possession of marijuana. Thereafter, the grand jury indicted Taylor for promoting contraband in the first degree. The possession of marijuana charge was dismissed in the District Court.

Prior to trial, Taylor moved to suppress the marijuana, arguing that the officers' questions to him violated his right against self-incrimination and that he did not have a duty to implicate himself in criminal conduct by disclosing the marijuana. The trial court denied the motion, and the matter proceeded to a jury trial. As an explanation for why he told arresting officers he had no contraband, Taylor testified at trial that he forgot he had marijuana in his back pocket. However, once inside the jail he remembered he had marijuana and decided to hide

it between his "butt cheeks." Taylor further testified it was not his intention to smuggle the marijuana into the facility, but rather to hide it until he had the opportunity to destroy it. The jury found Taylor guilty of promoting contraband and sentenced him to one year of imprisonment. This appeal followed.

As an initial matter, both Taylor's trial counsel and his appellate counsel appear to conflate the suppression and directed verdict issues. Suppression of evidence is warranted when the state obtains evidence in violation of a defendant's constitutional rights. But even if the officers failed to advise Taylor of his right to remain silent, the Commonwealth is not seeking to use any statement by Taylor against him. Furthermore, Taylor does not challenge the propriety of the stop, the arrest, or the search which revealed the marijuana. Simply put, Taylor states no basis to suppress the marijuana.

The more significant question is whether Taylor's failure to inform the officer that he had the marijuana was sufficient to support the jury's finding that he "knowingly introduced dangerous contraband into a detention facility" in violation of Kentucky Revised Statutes (KRS) 520.050. We agree with the Commonwealth that the trial court's ruling on Taylor's pretrial suppression motion does not preserve the issue as it relates to the sufficiency of the evidence on a motion for a directed verdict. At trial, Taylor moved for a directed verdict at the close of the Commonwealth and defense cases. But he argued only that the Commonwealth had not proven that marijuana is dangerous contraband.[1] A

[1] For purposes of KRS 520.050, the term "dangerous contraband" includes, among other things, "any quantity of marijuana." KRS 520.010(3).

general motion for a directed verdict is not the proper method of challenging the sufficiency of the evidence on a particular issue. *Anastasi v. Commonwealth*, 754 S.W.2d 860, 862 (Ky. 1988). The defendant moved unsuccessfully for an instruction for possession of marijuana.

Moreover, we find no basis to disturb the trial court's ruling even if this issue had been adequately preserved. In support of his position, Taylor relies heavily on a factually similar case rendered by the Ohio Court of Appeals, *State v. Sowry*, 155 Ohio App. 3d 742, 803 N.E.2d 867 (Ohio App. 2004). As in the present case, the defendant in *Sowry* was charged with attempting to introduce a controlled substance into a detention facility. The Ohio Court of Appeals found that the state had failed to prove the statutory elements of the offense because Sowry did not voluntarily attempt to introduce the controlled substance into the jail, but was involuntarily taken to jail when he was arrested. The Court also found that Sowry did not have a duty to incriminate himself by revealing that he had a controlled substance on his person. *Id.* at 746.

The rule in *Sowry* has been followed in subsequent, nonpublished decisions by other panels of Ohio's intermediate appellate courts.[2] Likewise, the *Sowry* analysis has been followed in a few other jurisdictions. *See State v. Eaton*,

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[2] *State v. Pettiford*, 2006 WL 3334024 (Ohio App. 2006); and *State v. Conley*, 2006 WL 136131 (Ohio App. 2006). In both *Pettiford* and *Conley*, the courts endorsed the *Sowry* rule in principle, but distinguished that case because the officers advised the defendant of the consequences of taking a controlled substance into a detention facility. However, in other not-to-be-published cases, the Ohio courts made no distinction for advising the defendant of potential consequences. *State v. Cargile*, 2008 W.L. 2350644 (Ohio App. 2008).

143 Wash. App. 155, 177 P.3d 157 (Wash. App. 2008) (*review pending,* 164 Wash. 2d 1013, 195 P.3d 88 (Wash. 2008)); *State v. Cole*, 164 P.3d 1024, 1027 (N.M. App. 2007); and *State v. Tippetts*, 43 P.3d 455, 459-60 (Or. App. 2002).

However, the *Sowry* analysis has been rejected in other jurisdictions. *See State v. Alvarado*, 2008 WL 5382417 (Ariz. App. 2008); *State v. Carr*, 2008 WL 4368240 (Tenn. Crim. App. 2008); *People v. Ross*, 76 Cal. Rptr. 3d 477, 480, 162 Cal. App. 4th 1184, 1189 (Cal. App. 2008); *State v. Winsor*, 110 S.W.3d 882, 886-88 (Mo. App. 2003); *Brown v. State*, 89 S.W.3d 630, 633 (Tex. Crim. App. 2002); and *State v. Canas*, 597 N.W.2d 488, 496-97 (Iowa 1999) *abrogated in part on other grounds by State v. Turner*, 630 N.W.2d 601 (Iowa 2001).

We decline to follow the analysis of *Sowry* and similar cases. The central premise of *Sowry* is that criminal liability is based upon either a voluntary act or an omission to perform an act or duty that the person is capable of performing. The courts following this rule have found that a person who is under arrest is not acting voluntarily, but is being taken involuntarily to jail. Courts have further found that a person under arrest has no duty to waive his right against self-incrimination by disclosing that he has drugs on his person.

However, this interpretation tends to confuse the voluntariness of the underlying act with the voluntariness of the culpable mental state. Kentucky defines a "voluntary act" to mean "a bodily movement performed consciously as a result of effort or determination and includes the possession of property if the actor was aware of his physical possession or control thereof for a sufficient period to

have been able to terminate it." KRS 501.010(3). The statutory requirement that an act be voluntary is simply a codification of the common-law requirement of *actus reus*, a wrongful act and not merely wrongful thoughts. *Alvarado*, 2008 WL 5382417 at 4.

KRS 520.050 states a person is guilty of promoting contraband when he "knowingly introduces dangerous contraband into a detention facility. . . ." The statute's language is not ambiguous. It does not require the person intentionally take the contraband into the facility. All that is required is for the defendant to know he has contraband on his person and, with that knowledge, take the contraband into the facility. Although Taylor was involuntarily taken to the jail, Officer Catchings repeatedly advised him of the consequences of bringing drugs into the jail. Having been advised of the consequences, Taylor chose to enter the jail knowing that he had marijuana on his person. The jury elected to disregard Taylor's explanation that he forgot he had marijuana on his person when he was taken to the detention facility. Thus, we conclude that the Commonwealth has proven both a voluntary act and a culpable mental state.

Furthermore, we disagree with the *Sowry* analysis that this interpretation of the statute violates Taylor's right against self-incrimination. "The criminal process includes many situations which require a defendant to make difficult judgments regarding which course to follow. . . . Sometimes the choices faced by a defendant may have the effect of discouraging the exercise of constitutional rights but that does not mean such choices are prohibited." *Canas*,

597 N.W.2d at 496. Taylor was not required to divulge anything. But, likewise, his Fifth Amendment privilege does not shield him from the consequences of having marijuana in his possession when he entered the jail. Consequently, we find no reason to set aside Taylor's conviction.

Accordingly, the judgment of conviction by the Montgomery Circuit Court is affirmed.

ALL CONCUR.

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