

SUPREME COURT OF KENTUCKY

Commonwealth of Kentucky v. James Patrick Rodefer

189 S.W.3d 550 (Ky. 2006) · No. 2004-SC-0635-DG · Decided April 20, 2006

SUMMARY

The Supreme Court of Kentucky held that a jury instruction improperly allowed conviction for first-degree trafficking based on possession with intent to transfer, an alternative not included in the statutory definition of trafficking. The Court nevertheless concluded that the instructional error was not palpable because Rodefer's own testimony supported conviction under the statutory transfer alternative. The court reversed the Court of Appeals and reinstated the Fayette Circuit Court judgment.

CASE DETAILS

COURT	Supreme Court of Kentucky
WRITING FOR THE COURT	Cooper, J.; Graves, J.; Johnstone, J.; Roach, J.; Scott, J.; Wintersheimer, J.
JURISDICTION	Kentucky
DECIDED	April 20, 2006
DOCKET	2004-SC-0635-DG
DISPOSITION	reversed
PROCEDURAL POSTURE	Following a jury conviction in Fayette Circuit Court, the Court of Appeals affirmed the misdemeanor convictions but reversed and remanded Rodefer's first-degree trafficking conviction for a new trial based on an erroneous jury instruction. The Supreme Court of Kentucky granted discretionary review.
STANDARD OF REVIEW	Unpreserved instructional error is reviewed for palpable error under RCr 10.26. Palpable error must affect substantial rights, result in manifest injustice, and seriously affect the fairness, integrity, or public reputation of judicial proceedings.
PRECEDENTIAL VALUE	Published Kentucky Supreme Court opinion; precedential
PARTIES	Commonwealth of Kentucky v. James Patrick Rodefer

TOPICS

- jury instructions
- statutory interpretation
- preservation of error
- appellate procedure
- criminal procedure

PRACTICE AREAS

criminal procedure

statutory interpretation

jury instructions

appellate procedure

QUESTIONS PRESENTED

1. Whether the trial court's first-degree trafficking instruction improperly authorized conviction based on possession of cocaine with intent to transfer.
2. Whether the unpreserved instructional error constituted palpable error requiring reversal and a new trial.

HOLDINGS

1. The trial court erred by instructing the jury that it could convict Rodefer of first-degree trafficking based on possession of cocaine with intent to transfer, because KRS 218A.010(34) defines trafficking to include possession with intent to manufacture, distribute, dispense, or sell, but does not include possession with intent to transfer.
2. The erroneous trafficking instruction did not constitute palpable error because Rodefer's own testimony established that he had shared the cocaine with an accomplice, supporting conviction under the statutory transfer alternative, and the error therefore did not result in manifest injustice.
3. The words of the trafficking statute must be given their plain meaning, and the inclusion of a term in one statutory provision and its exclusion from another strongly indicates purposeful legislative choice.

KEY QUOTATIONS

"The General Assembly had the prerogative to include the term transfer in the "possess with intent" language of the statute but chose not to do so." (553)

"Inclusion of a word in one part of a statute and exclusion in another is a strong indicator of legislative intent, thus leading the Court to believe that the exclusion was purposeful." (553)

"A palpable error is one which affects the substantial rights of a party and which has resulted in manifest injustice." (553)

FACTUAL BACKGROUND

Police received information that a burglary and theft of Oxycontin were planned at a CVS Pharmacy in Lexington and confirmed that the building had a structural crack. During surveillance, officers observed Rodefer and two accomplices at approximately 5:00 a.m.; Rodefer repeatedly struck a nearby business's window with a sledgehammer, and the group fled when officers approached. After Rodefer's arrest, a search incident to arrest found a crack pipe, 1.02 grams of crack cocaine, 16.46 grams of powder cocaine, and \$1,146 in cash. Rodefer testified that the cocaine was his and that he had shared it with an accomplice.

PROCEDURAL HISTORY

Rodefer was convicted by a Fayette Circuit Court jury of first-degree trafficking in a controlled substance, attempted third-degree burglary, possession of burglary tools, possession of drug paraphernalia, and being a first-degree persistent felony offender, receiving a total sentence of ten years. The Kentucky Court of Appeals

affirmed the misdemeanor convictions but reversed and remanded the trafficking conviction. The Supreme Court of Kentucky held that the instruction was erroneous but not palpable error and reinstated the circuit court's final judgment.

DISPOSITION

reversed

CASES CITED

- Commonwealth v. Whitmore, 92 S.W.3d 76, 82 n. 3 (Ky. 2002)
- Executive Branch Ethics Commission v. Stephens, 92 S.W.3d 69, 73 (Ky. 2002)
- Brock v. Commonwealth, 947 S.W.2d 24, 28 (Ky. 1997)

OPINION

PER CURIAM.

189 S.W.3d 550 (2006) COMMONWEALTH of Kentucky, Appellant, v. James Patrick RODEFER, Appellee. No. 2004-SC-0635-DG. Supreme Court of Kentucky. April 20, 2006. *551 Gregory D. Stumbo, Attorney General, State Capitol, Brian T. Judy, Cabinet for Health and Family Services, Office of Legal Services, Frankfort, Counsel for Appellant.

V. Gene Lewter, Fayette Co. Legal Aid, Inc., Lexington, Counsel for Appellee. OPINION OF THE COURT Following a trial by jury in the Fayette Circuit Court, Appellee, James Patrick Rodefer, was convicted of trafficking in a controlled substance in the first degree, criminal attempt to commit burglary in the third degree, possession of burglary tools, possession of drug paraphernalia, and of being a first degree persistent felony offender.

He was sentenced to a total of ten (10) years imprisonment. The Court of Appeals affirmed the misdemeanor convictions but reversed and remanded for a new trial Rodefer's conviction of trafficking in a controlled substance in the first degree.

We granted discretionary review and now reverse the Court of Appeals and reinstate the judgment of the Fayette Circuit Court. On July 2, 1999, Lexington police received information that a burglary was going to be committed at 5:00 a.m. on July *552 3, 1999, at a CVS Pharmacy on New Circle Road.

The information provided to the police stated that there was a large crack present in the structure of the building and that the perpetrators were planning to gain entry through the crack and steal the drug Oxycontin. Sergeant Scott Blakely proceeded to CVS and found the crack in the building. Later that night, several officers conducted a surveillance on the location, waiting for the crime to occur.

At approximately 5:00 a.m., Rodefer and two accomplices arrived at CVS. The officers observed Rodefer repeatedly strike a window of a nearby business with a sledge hammer in an apparent attempt to gain access to that building. Subsequently, the officers converged on the perpetrators, and all three fled the scene. Two of the suspects managed to escape, but Rodefer was apprehended by Detective Phillip Harrison.

Officer Gary Murphy was dispatched to the scene to transport Rodefer to jail. Murphy performed a search incident to a lawful arrest and found Rodefer to have in his possession a "crack pipe," a tin can containing 1.02 grams of crack cocaine, a baggie containing 16.46 grams of powder cocaine, and \$1,146.00 in cash. This appeal stems from a faulty jury instruction given at trial.

Appellee, who initially appealed to the Court of Appeals, concedes that he did not properly preserve the error for appellate review. Nevertheless, the Court of Appeals determined that the error was palpable, RCr 10.26, in that it allowed the jury to convict Rodefer pursuant to a theory not supported by law.

The pertinent parts of the jury instructions given at trial are as follows: "Traffic" Means to distribute, dispense, sell, transfer, or possess with the intent to distribute, dispense, sell, or transfer a controlled substance. You will find the Defendant guilty of First-Degree Trafficking in a Controlled Substance under this Instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following A. That in this county on or about July 3, 2002 and before the finding of the Indictment herein, he had in his possession a quantity of cocaine; AND B. That he knew the substance so possessed by him was cocaine; AND C. That he had the cocaine in his possession wit[h] the intent to sell, transfer, dispense, or distribute to another.

(Emphasis added.) Rodefer correctly asserts that the above instruction allowed the jury to convict him of trafficking in the first degree if the jury found that he possessed cocaine with the intent to transfer to another. KRS 218A.1412(1) provides that a person is guilty of trafficking in a controlled substance in the first degree when he knowingly and unlawfully traffics in a controlled substance.

"Traffic" is defined in KRS 218A.010(34) as "to manufacture, distribute, dispense, sell, transfer, or possess with intent to manufacture, distribute, dispense, or sell a controlled substance." (Emphasis added.) Noticeably absent from this statutory definition is the "possessed with intent to transfer" language in the trial court's instruction.

The Commonwealth contends that the words "transfer" and "distribute" are interchangeable. "Transfer" is defined in KRS 218A.010(35) as "to dispose of a controlled substance to another person without consideration and not in furtherance of commercial distribution." Just as "transfer" is defined, so, too, are "manufacture," "distribute," "dispense," and "sell."

KRS *553 218A.010(16), (10), (8), (31). If the General Assembly had deemed the word "transfer" to be interchangeable with "distribute," it likely would not have gone to such lengths to differentiate between those words by providing separate definitions.

In *Commonwealth v. Whitmore*, 92 S.W.3d 76 (Ky.2002), the concurring opinion pointed out that "[t]he [G]eneral [A]ssembly has not defined 'possession with the intent to transfer' as trafficking." *Id.* at 82 n. 3. (Keller, J., concurring).

We agree, as the text of the statute is clearly without any language defining trafficking as "possession with the intent to transfer." "The words of the statute are to be given their plain meaning unless to do so would constitute an absurd result." *Executive Branch Ethics Com'n v. Stephens*, 92 S.W.3d 69, 73 (Ky.2002).

The General Assembly had the prerogative to include the term transfer in the "possess with intent" language of the statute but chose not to do so. Inclusion of a word in one part of a statute and exclusion in another is a strong indicator of legislative intent, thus leading the Court to believe that the exclusion was purposeful.

Therefore, we hold that it was error for the trial court to include the aforementioned language in the instructions that were given to the jury. Although we agree with the Court of Appeals that the instruction given in this case was improper, we disagree with its conclusion that it constituted palpable error. A palpable error is one which affects the substantial rights of a party and which has resulted in manifest injustice.

RCr 10.26. "[T]he error must seriously affect the fairness, integrity or public reputation of judicial proceedings." *Brock v. Commonwealth*, 947 S.W.2d 24, 28 (Ky. 1997). Here, Rodefer was arrested and found to be in possession of an abnormally large amount of cash and illegal drugs.

In his brief to this Court, Rodefer argues that the drugs were strictly for personal use, but the jury obviously disbelieved his testimony. Rodefer further admitted that the cocaine was his, and that he "shared" the cocaine with one of his two accomplices on the night of the crime.

Thus, his own testimony would have supported a conviction of trafficking under the "transfer" alternative of KRS 218A.010(34), though not under the "possession with intent to [traffic]" alternative. In view of Appellant's own testimony that he, in fact, committed the offense of which he was convicted, albeit by an alternative method, we conclude that the faulty instruction did not result in manifest injustice, much less seriously affect the fairness, integrity, or public reputation of judicial proceedings.

Accordingly, we reverse the decision of the Court of Appeals, and reinstate the final judgment of the Fayette Circuit Court. COOPER, GRAVES, JOHNSTONE, ROACH, SCOTT, and WINTERSHEIMER, JJ., concur. LAMBERT, C.J., not sitting.

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