IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
JULY SESSION, 1996

FILED

February 12, 1997

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,	)	
	)	No. 03C01-9601-CC-00037
Appellee	)	
	)	CARTER COUNTY
vs.	)	
	)	Hon. Arden L. Hill, Judge
ROY MCCAMEY,	)	
	)	(Poss. of Contraband
Appellant	)	in a penal facility)

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OPINION FILED: _____

REVERSED AND REMANDED

David G. Hayes
Judge

OPINION

The appellant, Roy McCamey,[1] appeals the judgment entered by the Carter County Criminal Court approving a jury verdict finding the appellant guilty of possession of contraband in a penal facility.[2] Tenn. Code Ann. § 39-16-201 (1991). The appellant submits two issues for our review: first, whether his conviction, which was based upon "aiding and abetting the possession of contraband of another," can stand when the only action on his part occurred after the crime of possession of contraband in a penal facility had been completed; second, whether the trial court erred in denying the appellant's request for a special jury charge defining the term "possession."

For reasons explained below, the judgment of the trial court is reversed.

I. Background

On July 23, 1993, Billy Heaton, a correctional officer at the Carter County Work Camp in Roan Mountain, was performing a routine check in the North Wing dormitory of the corrections facility.[3] At approximately 11:20 p.m., Heaton observed "Inmate [Donald] McMahan" sitting on bed number seven, which was not McMahan's assigned bed.[4] The appellant was sitting directly across from McMahan on bed number eight.[5] Heaton noticed "something on [McMahan's]

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[1]In the technical record, the appellant's surname is also spelled "McAmey." Consistent with the practice of this court, we adhere to the spelling of the appellant's surname in the charging instrument.

[2]Donald McMahan was indicted, along with the appellant, on July 8, 1994, by the Carter County Grand Jury. McMahan was charged with possession of contraband in a penal institution and assault. The appellant was charged only with aiding and abetting possession of contraband.

[3]Heaton testified that the dormitory is a "military type layout, open dormitory, thirty-five beds."

[4]"Lights out" at the correctional facility is 10:30 p.m.

[5]The beds are situated approximately two feet apart. Each bed has a nightstand and a footlocker at its end. There are no partitions between the beds.

lap," which he suspected was contraband. As Heaton approached the two men, the appellant stated "Here's Heaton." With this warning, McMahan "made a quick movement to put [the item he had on his lap] underneath the bed." Heaton ordered McMahan to surrender the item, but McMahan "reached down and got it and got up."

McMahan attempted to flee the area with the item, but Heaton grabbed McMahan from behind "in a bear hug" and again demanded the item. At this time, the appellant grabbed the item from McMahan and started running. Heaton released McMahan, at which time McMahan hit Heaton in the "jaw area." Heaton then pursued the appellant.[6] The appellant ran to the other side of the dormitory unit and laid the object underneath the night stand at bed twenty-seven. Heaton recovered the item, a 5 X 7 photo frame, which was partially covered with a green leafy material. Heaton suspected that the material was marijuana and delivered the substance to Sergeant Carnett for testing.

Using a prepackaged test kit, Carnett determined that the substance was marijuana. David Holloway, a forensic chemist with the Tennessee Bureau of Investigation's Crime Laboratory, confirmed Carnett's test result and calculated that the confiscated marijuana weighed 4.5 grams.

II. Analysis

We begin our review with the indictment and the offense alleged.

The indictment reads as follow:

> . . . **ROY McCAMEY** on or about the 23d day of July, 1993 . . . did **aid and assist**, as defined in Section 39-11-402 of the Tennessee

[6]Heaton testified that, since it was unlikely that an inmate would successfully flee the area, his main priority was to take possession of the contraband.

> Code Annotated, Donald McMahan, in the unlawful possession of contraband, to wit: Marijuana, a Schedule VI Controlled Substance, in a penal institution, by preventing an officer of the Carter County Workcamp from apprehending the contraband, in violation of Section 39-16-201 of the Tennessee Code Annotated. . . .

Although no objection was raised at the trial level concerning the offense charged in the indictment, it is obvious from a reading of the record that confusion existed as to the actual offense charged. This issue first surfaced during the appellant's motion for judgment of acquittal at the close of the State's proof. It resurfaced during a review of the trial court's proposed jury instructions. The State argued that the indictment charged the appellant with the crime of aiding and abetting possession of contraband in a penal institution.[7] The trial court agreed with this position. However, we are compelled to note that our criminal code contains no such crime. With the adoption of the 1989 Criminal Code, our legislature abolished the common law distinctions between principles, accessories before the fact, and aiders and abettors.[8]

On appeal, the State, recognizing the dilemma presented, contends that the indictment charges the appellant with possession of contraband in a penal institution under the theory of criminal responsibility for the conduct of another.

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[7]The following illustrates the State's theory of the case and the confusion as to the offense charged by the indictment:

> **GENERAL FINNEY:** . . . Officer Heaton testified he saw the contraband, Defendant McCamey took it and assisted, and was assisting in eluding with the contraband. He was aiding and assisting the defendant McMahan in the case, and that is what he is charged with. Not in possession of marijuana but aiding and assisting in the possession of contraband in a penal facility.
> . . .
> **MR. STREET:** Well, that's fine, Your Honor, but - - but my client is not charged with possession.
> **GENERAL FINNEY:** That's correct.
> **THE COURT:** He's charged with aiding and abetting possession.
> **GENERAL FINNEY:** That's correct.
> **MR. STREET:** Correct.

[8]In 1989, our legislature enacted Tenn. Code Ann. § 39-11-402 (1990), criminal responsibility for the conduct of another. This section simply restates the principle of criminal liability that one is liable for his own conduct and applies this principle to situations in which the conduct involved may be that of another or a combination of the conduct of another and one's own conduct. Procedurally, there is little distinction between the common law "aider and abettor" and the 1989 "aider" under criminal responsibility for the conduct of another. From a substantive perspective, however, there are distinctions. For example, under the common law, the accused's presence was necessary for conviction as an aider and abettor, while under criminal responsibility, this fact is unnecessary.

Indeed, the indictment makes reference to the criminal responsibility provision, Tenn. Code Ann. § 39-11-402. Assuming this to be the correct charge, we note that the trial court did not charge the jury under this theory. In fact, the record reflects that the jury was instructed under the law that existed prior to the adoption of the 1989 Criminal Code. At trial, the appellant repeatedly argued to the court and jury that the indictment did not charge the crime of possession of contraband in a penal facility. Indeed, during closing argument, appellant's counsel, on several occasions, conceded that the appellant had possession of the contraband. Although conceding the appellant's possession, he argued that this fact did not establish the appellant's guilt of aiding and assisting McMahan's possession of contraband.

If the State's position on appeal is correct, then we are confronted with the fact that the appellant's counsel argued his client's guilt to the jury. This leads us to the unmistakable conclusion that the principal players in this case were not "singing from the same sheet of music."

On appeal, the appellant insists that his conviction cannot stand because it is based upon a legal impossibility. Specifically, the appellant, relying upon the allegations of the indictment, argues that the indictment does not charge him with possession of contraband. Rather, it charges that the appellant aided and assisted Donald McMahan's unlawful possession. The appellant contends that McMahan's possession of contraband was "completed" upon his seizure by the officer. The appellant asserts that his involvement in this crime followed completion of McMahan's crime, and, therefore, it is legally impossible for the appellant to have aided and assisted in McMahan's possession. Our criminal code does not recognize the legal defense of "legal impossibility." See § 39-11-203. See also Bandy v. State, 575 S.W.2d 278, 279-280 (1979); State v. Barton, 626 S.W.2d 296, 297 (Tenn. Crim. App. 1981); State v. McCoy (C.C.A. No. 979

(Tenn. Crim. App. at Knoxville, March 30,1987).

Again, the appellant does not deny his possession of the contraband following McMahan's seizure, nor that this action could have exposed him to other criminal charges such as accessory after the fact. He simply argues that his conduct does not implicate him in the crime of aiding and assisting McMahan's possession. The State argues that the proof in the record supports the appellant's conviction based upon the presence of both constructive and actual possession of the contraband.[9]

Next, the State alleges that the indictment contains the necessary language to charge the appellant with the crime of possession of contraband in a penal institution.[10] Tenn. Code Ann. § 39-16-201(a)(2) provides that:

> It is unlawful for any person to . . . knowingly have in his or her possession any [weapons, ammunition, explosives, intoxicants, legend drugs, or any controlled substances] while present in any state, county or municipal institution where prisoners are quartered or under custodial supervision without the express written consent of the chief administrator of the institution.

Clearly, the draftsman of the indictment failed in his attempt to state the facts constituting the offense in ordinary and concise language. See Tenn. Code Ann. § 40-13-202 (1990). The language of the indictment, in effect, imports notice of two different factual bases upon which to charge the appellant with possession of marijuana: (1) the appellant's constructive possession of the marijuana by "aid[ing] and assist[ing]" Donald McMahan's possession; and (2) a charge based upon the appellant's actual possession of the marijuana "by preventing an officer of the Carter County Workhouse from apprehending the contraband."

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[9]Constructive possession by the appellant occurred prior to McMahan's seizure by the guard and actual possession by the appellant occurred from the point at which the appellant grabbed the marijuana and fled.

[10]The indictment alleges possession of contraband in a penal institution on or about July 23, 1993. The statute, at the time of the offense, did not include the term "penal institution." The statute was amended to include this term effective July 1, 1994.

Additionally, when these two theories of criminal liability are read simultaneously, the language of the indictment infers the culpability of the appellant as an accessory after the fact. See Tenn. Code Ann. § 39-11-411 (1991).[11] Nonetheless, for the reasons stated below, we find it unnecessary to address the sufficiency of the indictment.

Again, if the State's theory of the appellant's criminal liability was based upon Tenn. Code Ann. § 39-11-402, clearly, the trial court did not charge this theory to the jury. The court instructed on "Aiding and Abetting." There was no objection entered to the court's failure to instruct the jury on the criminal responsibility for the conduct of another. Nor was the issue raised on motion for new trial. Usually, the appellant's failure to object or note this issue would preclude review on appeal. See Tenn. R. App. P. 3(e) and 36(a). However, this instruction was central to the State's theory, i.e., the appellant's responsibility for McMahan's actions. Cf. State v. Bowen, No. 01C01-9303-CC-00076 (Tenn. Crim. App. at Nashville, March 30, 1994 (Tipton, J., concurring) (because trial court refused to instruct jury on criminal responsibility, evidence insufficient to support defendant's convictions for burglary). Moreover, the jury was instructed on law inapplicable to this case. Under these circumstances, we conclude that it is necessary to review this issue in order to ensure that substantial justice is done. See Tenn. R. Crim. P. 52(b). "A trial court has the duty to give a complete charge of the applicable law to the facts of the case and the defendant has a constitutional right to have every issue of fact raised by the evidence and material to his defense submitted to the jury upon proper instruction by the court." State v. Stoddard, 909 S.W.2d 454, 460 (Tenn. Crim. App. 1994) (citations omitted); see also State v. Staggs, 554 S.W.2d 620, 626 (Tenn. 1977). Accordingly, the trial court's failure to instruct the jury concerning criminal

[11] "A person is an accessory after the fact who, after the commission of a felony, with knowledge or reasonable ground to believe that the offender has committed the felony, and with the intent to hinder the arrest, trial, conviction or punishment of the offender . . . provides or aids in providing the offender with any means of avoiding arrest, trial, conviction or punishment." Id.

responsibility for the conduct of another was error.

Additionally, the appellant argues that the trial court committed error in denying the following requested instruction on possession:

> There are two types of possession recognized in the law: Actual possession and constructive possession. A person who knowingly has direct physical control over an object at a given time is then in actual possession of it. A person who, although not in actual possession, knowingly has both the power and intention at any given time to exercise dominion and control over an object is then in constructive possession of it.

This requested instruction contains language identical to that found in T.P.I. Crim. No. 31.05. A trial court may only refuse a requested instruction when the jury charge as given fully and fairly states the applicable law. Again, the trial court had the duty to give a complete charge of the law applicable to the facts of the case. State v. Mize, No. 03C01-9405-CR-00163 (Tenn. Crim. App. at Knoxville, Sept. 22, 1995) (citing State v. Brown, 836 S.W.2d 530 (Tenn. 1992); State v. Harbison, 704 S.W.2d 314 (Tenn.), cert.denied, 476 U.S. 1153, 106 S.Ct. 2261 91986); see also Tenn. Code Ann. § 40-18-110). The trial court's instructions to the jury completely omitted any instruction on "possession," although "possession" is an essential element of the offense of possession of contraband in a penal institution. In view of the proof developed at trial, we find error in the court's failure to give this requested instruction. See State v. Cravens, 764 S.W.2d 754, 756 (Tenn. 1989) (The court should describe and define all of the elements of the indicted offense in its instructions to the jury.). Thus, the court's failure to instruct on the element of possession is error so plain as to require reversal. See State v. Ogle, 666 S.W.2d 58, 60 (Tenn. 1984); Tenn. R. Crim. P. 52(b).

Considering the entire record, we conclude that the impact of the combined errors deprived the appellant of a fair trial and, more probably than not, affected the judgment in this case. Tenn. R. App. P. 36(b). Accordingly, the

judgment of conviction is reversed. We remand this case to the trial court for further proceedings as necessary.

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DAVID G. HAYES, Judge

CONCUR:

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JOE B. JONES, Presiding Judge

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WILLIAM M. DENDER, Special Judge