

Commonwealth Of Kentucky

Court of Appeals

NO. 2000-CA-000843-MR

MARK ANTHONY RAY

APPELLANT

v. APPEAL FROM KNOX CIRCUIT COURT
HONORABLE LEWIS B. HOPPER, JUDGE
ACTION NO. 99-CR-00087

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

** ** * * * * *

BEFORE: BUCKINGHAM, McANULTY, AND TACKETT, JUDGES.

McANULTY, JUDGE. Mark Anthony Ray appeals a judgment from the Knox Circuit Court convicting him of trafficking in marijuana over five pounds while in possession of a firearm and other, misdemeanor charges and sentencing him to fifteen years in prison. We affirm.

On June 5, 1999, while on patrol, Trooper Jason O'Bannon of the Kentucky State Police responded to a complaint regarding a possible DUI suspect in a white vehicle with North

Carolina temporary tags. At around 6:15 p.m., Trooper O'Bannon located the vehicle on Highway 25E around Bailey's Switch in Knox County. After the trooper observed the vehicle cross over the center line, he initiated a traffic stop. At the time the trooper turned on his blue lights, the video was triggered so the entire stop was preserved on videotape. The trooper placed Appellant under arrest after Appellant failed all the field sobriety tests. The trooper also arrested the passenger in Appellant's car. The trooper conducted a pat down search of Appellant and found several tablets of suspected Xanax in appellant's pocket.

After the trooper placed Appellant in the police car, he and a deputy sheriff conducted a search of Appellant's vehicle. They discovered several bricks of marijuana weighing 11 pounds in a black plastic bag in the back seat of the car. Under the plastic bag in the back seat, they found six rifles. The trooper could not remember whether the rifles were loaded or not. The rifles did not belong to Appellant, and they were returned to their rightful owner prior to the trial.

Appellant did not testify at trial. At the close of the Commonwealth's case, Appellant made a motion for directed verdict on the basis of insufficient evidence that Appellant was in possession of any guns at the time the trooper pulled him over. Moreover, Appellant argued that if there was any evidence

of the guns, there was not any evidence that the guns were workable. Finding the video and the testimony of the officer enough to take the possession of firearms charge to the jury, the trial court denied the motion.

A jury found Appellant guilty on the charge of trafficking in marijuana over 5 pounds (KRS 218A.1421), possession of a controlled substance third degree (KRS 218A.1417), and operating a motor vehicle while under the influence of intoxicants (KRS 189A.010). Additionally, the jury found Appellant guilty of being in possession of a firearm at the time of the commission of these offenses which subjected him to an enhanced penalty pursuant to KRS 218A.992.

Appellant presents three arguments on appeal. First, Appellant argues that the Commonwealth produced insufficient evidence to convict Appellant of trafficking in marijuana over five pounds while in possession of a firearm when the weapons found were unloaded rifles, and the officers found no ammunition on Appellant, his passenger or in the car. Second, Appellant argues that the trial court erred in failing to instruct the jury that under KRS 218A.992, more than mere possession of a firearm is necessary for enhancing the offense. Finally, Appellant argues that the trial court erred in failing to sustain Appellant's objection to improper argument during the sentencing phase after the prosecutor asked the jury to consider

that Appellant had exercised his right to a trial in imposing the maximum sentence on Appellant. Because we find that Appellant did not properly preserve the first two issues for appeal and we find that the trial court did not err in overruling Appellant's objection to the Commonwealth's argument in the sentencing phase, we affirm.

Before we can reach the merits of Appellant's claims, we must find that the issues have been properly preserved for review. "A motion for a directed verdict shall state the specific grounds therefor." CR 50.01.

The purpose of the rule is to apprise fairly the trial judge as to the movant's position and also to afford opposing counsel an opportunity to argue each ground before the judge makes his ruling. The attention of the trial judge can then be focused on possible reversible errors which might otherwise be obscure with only a general motion for a directed verdict.

Gulf Oil Corp. v. Vance, Ky., 431 S.W.2d 864, 865 (1968). The grounds articulated by Appellant were as follows: 1) the Commonwealth presented no proof that there were firearms; and 2) if the Commonwealth did meet its burden of proving that there were firearms, the Commonwealth presented no proof that the firearms were workable.

On appeal, Appellant argues that the Commonwealth presented no evidence of a nexus between the unloaded rifles in the car Appellant was driving and the drug trafficking charges.

In addition, Appellant argues that with no ammunition for the rifles, they were useless as a means to protect the marijuana, Appellant or the codefendant from competitors in the market or from law enforcement. Based on Commonwealth v. Montague, Ky., 23 S.W.3d 629 (2000), we believe these arguments on appeal are substantively different from the specific grounds in support of a directed verdict that Appellant asserted at trial.

Appellant's theory at trial was simply that the Commonwealth failed to prove that Appellant had any firearms, and if he did have firearms, that they were workable firearms. Appellant did not assert that the Commonwealth failed to prove any nexus between the firearms and Appellant's drug trafficking activity. Because Appellant did not preserve this specific ground for appeal, we do not reach the merits of this argument.

Appellant's second argument is the trial court erred in failing to instruct the jury that, under KRS 218A.992, more than mere possession of a firearm is necessary for enhancing the offense. Pursuant to RCr 9.54(2);

[n]o party may assign as error the giving or the failure to give an instruction unless the party's position has been fairly and adequately presented to the trial judge by an offered instruction or by motion, or unless the party makes an objection before the court instructs the jury, stating specifically the matter to which the party objects and the ground or grounds of the objection.

Appellant concedes that this issue has not been preserved, but asserts that this is palpable error that affected Appellant's substantial rights. The substantial error rule of RCr 10.26 is inapplicable because Appellant is basing this argument of erroneous jury instructions on a theory that he failed to assert at trial, namely that the firearms were not connected to the drug trafficking offense.

Finally, Appellant argues that the trial court erred in failing to sustain Appellant's objection to improper argument during the sentencing phase after the prosecutor asked the jury to consider that Appellant had exercised his right to a trial in imposing the maximum sentence on Appellant. "[A] criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone, for the statements or conduct must be viewed in context; only by so doing can it be determined whether the prosecutor's conduct affected the fairness of the trial." United States v. Young, 470 U.S. 1, 105 S. Ct. 1038, 84 L. Ed. 2d 1, 9-10 (1985). See also Smith v. Commonwealth, Ky., 734 S.W.2d 437, 452 (1987). Thus, we are tasked with considering the impact of the prosecutor's remarks during the penalty phase balanced against those of the defense counsel during the penalty phase. See Smith, 734 S.W.2d at 452.

In Appellant's penalty phase, defense counsel asked the jury to consider when recommending sentencing that a police

officer testified that Appellant had been forthright, candid and fully cooperative. In response, the prosecutor instructed the jury to add two or three more years to its sentence recommendation on the trafficking charge "'cause he's never really accepted responsibility. We've had to fight him every step to get to this point. I ask that you take that into consideration." Defense counsel objected; however, defense counsel did not express his concern that he believed the Commonwealth was asking the jury to punish Appellant for exercising his right to a jury trial. The trial court overruled the objection, stating in front of the jury, that the prosecutor's statement went to Appellant's cooperation. Considering the context, we do not believe the prosecutor's conduct affected the fairness of the penalty phase. Appellant urged the jury to fix the confinement at the minimum sentence, 10 years, and the Commonwealth recommended the maximum, 20 years. The jury fixed the confinement at 15 years. We do not accept the appellant's contention that this sentence was directly attributable to the prosecution's vague comment on Appellant's cooperation.

Judgment affirmed.

ALL CONCUR.

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