

Commonwealth Of Kentucky

Court of Appeals

NO. 2001-CA-000711-MR

PATRICIA MORRIS

APPELLANT

v. APPEAL FROM CLINTON CIRCUIT COURT
HONORABLE EDDIE C. LOVELACE, JUDGE
ACTION NOS. 00-CR-00045 & 00-CR-00045-1

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

** ** *

BEFORE: BARBER, COMBS AND KNOPF, JUDGES.

BARBER, JUDGE: Patricia Morris appeals from a judgment and sentence entered March 5, 2001, by the Clinton Circuit Court. Morris was convicted of two counts of possession of a controlled substance first-degree.¹ She received a sentence of one year on each count, ordered to run concurrently. We affirm.

On June 8, 2000 police executed a search warrant for the home Morris shared with her husband David Morris. The search warrant affidavit was based on information from a

¹ Kentucky Revised Statutes (KRS) 218A.1415.

confidential informant that David Morris was selling oxycontin from the residence. The warrant was executed by Albany Police Officers Johnny Garner, Mark Bell, and Chris Asberry; Clinton County Sheriff Kay Riddle and Clinton County Deputy Sheriff Rick Riddle. Officer Garner headed the investigation.

The search resulted in the seizure of numerous items, including several glass and plastic vials, other drug paraphernalia and two hand-rolled cigarette butts. Based on the evidence discovered in the home, Morris and her husband were arrested. On June 15, 2000, Officer Garner personally delivered the items to the Kentucky State Police Crime Lab. Forensic testing showed one of the plastic tubes to contain cocaine and one of the glass tubes to contain methamphetamine. The cigarette butts were found to contain marijuana. On August 21, 2000, Morris was indicted for one count of first-degree possession of a controlled substance, methamphetamine and one count of first degree possession of a controlled substance, cocaine. A trial was held on January 12, 2001. The jury found Morris guilty of both counts and recommended a sentence of one year on each count. The jury recommended the sentences run concurrently for a total of one year imprisonment. On March 5, 2001, the trial court imposed the jury-recommended sentence.

On appeal, Morris argues that: 1) the trial court erred in failing to grant a directed verdict; 2) improper chain

of custody; and 3) reversible error resulted from prosecutorial misconduct.

Morris argues that she was entitled to a directed verdict because the prosecution failed to prove that she knowingly possessed a controlled substance and because the Commonwealth failed to establish a chain of custody.

The standard for directed verdict is as follows:

On a 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.²

KRS 218A.1432 states in pertinent part:

(1) A person is guilty of manufacturing methamphetamine when he knowingly and unlawfully:

(a) Manufactures methamphetamine; or

(b) Possesses the chemicals or equipment for the manufacture of methamphetamine with the intent to manufacture methamphetamine.

In order to prove its case the Commonwealth was required to show that Morris knowingly possessed the chemicals or equipment with the intent to manufacture methamphetamine. Lewis testified that the box contained the equipment constituting a two-stage gas generator for the red phosphorous

² Commonwealth v. Benham, Ky., 816 S.W.2d 186, 187 (1991).

method of methamphetamine production. Constructive possession may be established by a showing that the drugs were subject to a defendant's dominion or control.³ Officer Garner testified that Sheriff Riddle and Deputy Sheriff Riddle discovered the drug paraphernalia in the master bedroom of the residence. Sheriff Riddle then called Officer Garner into the room. Sheriff Riddle testified that he personally seized the vials, which later tested positive for the drugs. He also testified that women's clothing and other items in the room indicated to him that an adult female occupied the bedroom where the search was conducted. Sheriff Riddle testified that he found the paraphernalia at the head of the bed and that to the best of his recollection there were shelves on the bed. He stated that he picked the items up, laid them on a dresser and then called Officer Garner into the bedroom. When cross-examined, Sheriff Riddle stated that, "most of it was on the top of the dresser and the head of the bed." He also testified that he didn't recall finding anything in the dresser but that it was all on top. In conflict with Sheriff Riddle's testimony was that of Morris' sister, Tammy Butler. She testified that the headboard in the master bedroom of Morris' home did not have shelves and that there was not a flat surface on top capable of holding the vials. The defense introduced the picture of a rounded, and

³ Hargrave v. Commonwealth, Ky., 724 S.W.2d 202, 203 (1986) citing Rupard v. Commonwealth, Ky., 475 S.W.2d 473, 475 (1972).

what appears to be flat, headboard. Butler also testified that there was a dresser to the right side of the bed in close proximity to the bed. Sheriff Riddle was then called back to testify. The prosecutor showed him the picture of the headboard. He stated, "That's the bed I thought was in Lisa's house. I got them mixed up, I guess. That's the bed in Patricia's house. I searched them both, one right beside the other." When asked if there was a possibility the items could have been on the dresser sitting next to the bed, the Sheriff replied, "It was dark in there. It could have been something sitting on the side of it, but it was at the head of the bed." When questioned further, the Sheriff stated that he was certain that the items were in plain view. He admitted that he could have gotten the trailers mixed up because they were "set out the same" but that he was sure of the items he retrieved in Patricia Morris' home. Sheriff Riddle further testified that the search warrant at Morris' sister's home was a separate search warrant executed on a different day and that the evidence in question came from the search of Morris' home.

Whether the evidence was found on a shelf on the headboard or the dresser next to the bed, the Sheriff insisted that they were found in Morris' bedroom in plain view. A reasonable juror could conclude from this evidence that the vials were found in plain view in Morris' bedroom and she

therefore had constructive possession of them. As such, it was not error for the trial court to submit the case to the jury. "Credibility and weight of the evidence are matters within the exclusive province of the jury."⁴ The defense vigorously attacked the credibility of Sheriff Riddle and Officer Garner as to exactly where the items were found. It was for the jury to believe or disbelieve their testimony.

Morris also argues that she was entitled to a directed verdict because the Commonwealth failed to establish a complete chain of custody of the evidence. Our review of the record shows that the chain of custody was established. Sheriff Riddle testified that he found the items in the bedroom and called Officer Garner to the room. As chief investigator, Officer Garner took immediate control of all the items. He placed the items in a bag and tied the bag closed. He then placed the bag in the trunk of his car. Officer Garner testified that he took the bag to the police station and checked it into the locked evidence room, to which only two other individuals had keys. Officer Garner further testified that to his knowledge no other drugs were being stored in the evidence room at the time. Officer Garner testified that he personally took the bag from the room a week later, placed the items in an envelope, sealed

⁴ Commonwealth v. Smith, Ky., 5 S.W.3d 126, 129 (1999) citing Estep v. Commonwealth, Ky., 957 S.W.2d 191, 193 (1997) and Benham, 816 S.W.2d 186 (1991).

the envelope and initialed the tape. Officer Garner further testified that at the time of trial the items were in the same condition as when he first seized them at Appellant's home and when he retrieved them from the evidence room. The forensic chemist from the Kentucky State Police Crime Lab testified that he received the sealed envelope from Officer Garner and that he tested three of the items. The chemist testified that there was no indication that the items had been tampered with or that any of the materials had been mixed.

Appellant claims that the items "had mysteriously been placed in another bag and been sealed and marked by some unknown person." The record refutes this claim. Officer Garner testified that he took the items from the bag and placed them in the envelope, sealed the envelope, marked the envelope, and hand-delivered it to the lab. Appellant also claims that, "the judge and jury never knew who found what." Again, the record refutes this claim, in that Sheriff Riddle testified that he found the vials and turned them over to Officer Garner. Appellant speculates that because of the method of storage prior to delivery of the items to the lab, tampering could have resulted. In ruling on the admissibility of the evidence, the trial court correctly stated that, even with respect to substances which are not clearly identifiable or distinguishable, "it is unnecessary to establish a perfect chain

of custody or to eliminate all possibility of tampering or misidentification, so long as there is persuasive evidence that "the reasonable probability is that the evidence has not been altered in any material respect."⁵ If persuasive evidence is presented, then any gaps are a question of weight and credibility for the jury.⁶ The record contains persuasive evidence that the evidence was tamper free. It was for the jury to decide the weight to be given the evidence and therefore, Morris was not entitled to a directed verdict.

Morris next argues that reversible error occurred when the prosecutor made improper comments inferring that Morris would sell drugs to the high school students next door. Morris states that this issue is preserved for appeal by counsel's contemporaneous objection. The Commonwealth submits that the argument is not properly preserved for appellate review. We agree with the Commonwealth. A thorough review of the record establishes that the first reference to the proximity of Morris' residence to the high school was in the Commonwealth's opening statement. The reference was made three times, to which defense counsel made no objection. Finally, during closing argument, the prosecutor stated that, "this drug activity was taking place a stone's throw from Clinton County High School." Again defense

⁵ *Robovsky v. Commonwealth*, Ky., 973 S.W.2d 6, 8 (1998).

⁶ *Id.*

counsel failed to object. While defense counsel did finally object, it was in response to the following argument:

When we have methamphetamines in our home with our children, it is time to say enough is enough. The Community is going to be watchings [sic] what happens here. Everyone is wanting to know, if our community now safe? [sic] Is enough enough? Are we going to try to stand up for our children our grandchildren. I have cases...

The transcript of the trial establishes that this objection came some two pages after the prosecutor stated the location of Morris' home in relation to the high school.⁷ As such, we agree with the Commonwealth that this issue is unpreserved. However, we may consider an unpreserved error pursuant to RCr⁸ 10.26, if we deem it to be "palpable". Palpable error is error that affects the substantial rights of the defendant and results in manifest injustice. In determining whether an error is palpable, "an appellate court must consider whether on the whole case there is a substantial possibility that the result would have been any different."⁹ In Young v. Commonwealth¹⁰ the Kentucky Supreme Court outlined appellate review of whether an error resulted in manifest injustice:

⁷ The record on appeal contains of a transcript of the proceedings. However, the content of the bench conferences was not recorded.

⁸ Kentucky Rules of Criminal Procedure.

⁹ Commonwealth v. Pace, Ky., 82 S.W.3d 894, 895 (2002) citing Commonwealth v. McIntosh, Ky., 646 S.W.2d 43, 45 (1983).

¹⁰ Ky., 25 S.W.3d 66, 74-75 (2000).

An appellate court's review of alleged error to determine whether it resulted in "manifest injustice" necessarily must begin with an examination of both the amount of punishment fixed by the verdict and the weight of evidence supporting that punishment. Other relevant factors, however, include whether the Commonwealth's statements are supported by facts in the record and whether the allegedly improper statements appeared to rebut arguments raised by defense counsel. Finally, we must always consider these closing arguments "as a whole" and keep in mind the wide latitude we allow parties during closing arguments.

As stated previously, the evidence against Morris, while not overwhelming, was sufficient for the jury to conclude she was in possession of the controlled substances. Morris received the minimum sentence on both charges. The statements were supported by the testimony of Officer Garner as to the location of the residence. The trial court instructed the jury two separate times that arguments of counsel were not evidence. As a whole, we cannot say the comments by the prosecutor resulted in manifest injustice, warranting the setting aside of the jury verdict.

Morris' final argument is that the prosecution violated Morris' constitutional right to remain silent. During closing argument the prosecutor stated:

We see a mother who with a serious drug problem and a husband who comes in here and takes the Fifth Amendment. I assume she will be taking the Fifth at his trial. It's a sad day.

Even if we were we to conclude that the comment by the prosecutor was an indirect comment on Morris' right to remain silent, "not every reference to a defendant's failure to testify constitutes reversible error."¹¹ In Dillard the Court applied a harmless error analysis. The court focused on whether the reference was brief and isolated, whether the jury was properly instructed as to the defendant's right to remain silent and whether the focus of the improper comment was to draw attention to the fact that the defendant did not testify. Id. In the case sub judice, the reference was brief and isolated. The jury was instructed as follows:

Every citizen charged with a crime has a right to remain silent at trial. This is because it is not the citizen's responsibility to prove herself innocent of any crime. Patricia Morris has not testified in this trial as was her right. You shall not draw any inference of guilt from her choice. You shall not allow her choice to prejudice her in any way. If you use her choice not to testify in any manner, you will have violated your oath that you have taken as jurors.

The focus of the statement by the prosecutor was not to comment on Morris' right to remain silent but rather to respond to comments made by the defense in closing arguments. Defense counsel stated during closing argument that, "They know who the outlaw is. The outlaw took the stand, took the Fifth and they

¹¹ Dillard v. Commonwealth, Ky., 995 S.W.2d 366, 374 (1999).

have not enough proof to take this woman from her child." The prosecutor's comment was an attempt to show that David Morris' invocation of his Fifth Amendment rights did not absolve Patricia Morris of guilt, as suggested by the defense. If in error at all, the comment was harmless beyond a reasonable doubt.

ALL CONCUR.

BRIEF FOR APPELLANT:

Dennis Stutsman
Assistant Public Advocate
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Albert B. Chandler III
Attorney General of Kentucky
Frankfort, Kentucky

Tami Allen Stetler
Assistant Attorney General
Frankfort, Kentucky