

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2001-CA-001828-MR

HARRY DOUGLAS POWELL

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE SHEILA R. ISAAC, JUDGE  
ACTION NO. 01-CR-00215

COMMONWEALTH OF KENTUCKY

APPELLEE

AND

NO. 2001-CA-002387-MR

HARRY DOUGLAS POWELL

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE JOHN R. ADAMS, JUDGE  
ACTION NO. 01-CR-00624

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING  
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BEFORE: BARBER, DYCHE, AND TACKETT, JUDGES.

TACKETT, JUDGE: Harry Douglas Powell appeals from the judgment of the Fayette Circuit Court finding him guilty of possession of

drug paraphernalia, second offense, and possession of cocaine. The court sentenced Powell to two years and six months in prison, probated for five years, on condition of completion of the Drug Court program. Powell argues on appeal that there was insufficient evidence to convict him of the possession of cocaine charge, that charging both possession of cocaine and paraphernalia constituted double jeopardy, and that he was denied a fair trial by the use of improper arguments by the prosecutor. We affirm.

Powell was arrested during the course of an investigation of suspected drug activity on Third Street in Lexington, Kentucky. He was found in a tent, allegedly purchasing cocaine from another person. When he was arrested, a police officer, Detective Smoot, seized Powell from behind and observed him drop or throw a pipe onto the ground. Powell was charged with possession of drug paraphernalia, and later possession of cocaine for the residue in the pipe.

At trial, Powell argued that the pipe was not his, and that even if it had been in his possession he had no knowledge of the residue inside it. The jury convicted Powell, and this appeal followed.

Powell argues that it violates the double jeopardy clause of the U.S. Constitution to charge him with both possession of drug paraphernalia and possession of cocaine.

However, it is clear under Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed.2d 306 (1932), double jeopardy does not occur when each charge requires proof of a separate fact that the other does not. Powell argues that the Blockburger test is not met because proving that a pipe is drug paraphernalia requires that the prosecution show that the pipe was used to inhale or otherwise ingest controlled substances into the body. The Commonwealth made specific reference to the cocaine residue as proof that the pipe was drug paraphernalia. However, this is not a double jeopardy violation, as the statute prohibiting possession of drug paraphernalia requires that an object be used, intended for use, or designed for use to inhale or otherwise ingest controlled substances into the body, which is significantly broader than Powell suggests. Powell could have been found guilty of possession of drug paraphernalia even if there were no cocaine residue in the pipe, because the prosecution could have shown that the pipe was intended or designed for use to inhale controlled substances. Therefore, no double jeopardy violation occurred.

Next, Powell argues that there was insufficient evidence to convict him of possession of cocaine, and that he was entitled to a directed verdict on that charge because the Commonwealth could not prove knowing possession. Under Commonwealth v. Benham, Ky., 816 S.W.2d 186 (1991), the standard

of review we must apply is whether under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt. We conclude that it was not unreasonable for a jury to find guilt on the possession of cocaine charge. If the jury concluded from the evidence that the pipe belonged to Powell, the jury could infer that Powell was aware of the residue in the pipe, Powell's denial of knowledge notwithstanding. In addition, contrary to Powell's argument, possession of residue alone has been held by the Kentucky Supreme Court to support a charge of possession of cocaine. Bolen v. Commonwealth, Ky., 31 S.W.3d 907 (2000). Powell was not entitled to a directed verdict on that charge.

Powell next argues that references to the substances found at the scene as cocaine, allegedly being sold by Nannie Brown and not in Powell's possession, unfairly prejudiced him and may have misled the jury regarding what Powell was actually charged with. However, it is clear from the totality of the evidence before us that the jury was aware that Powell was not charged with the possession of those substances. If any error occurred in permitting the Commonwealth to refer to those substances as cocaine when there was no evidence adduced to show that those items were tested and proven to be cocaine, it was harmless, as it was clear that Powell was not charged with possession of those items.

Finally, Powell argues that he was unfairly prejudiced by the use of an improper golden rule argument by the Commonwealth. First, we must note that Powell did not object to this argument, which was made during the Commonwealth's closing statement. Therefore, we must review this matter under Rule of Criminal Procedure 10.26. In his closing remarks, the Commonwealth's attorney stated, "I don't want to get into what this city's coming to if we can't believe a police officer who takes an oath to tell the truth." Powell claims that this kind of argument seeks to elevate police officers' credibility above that of all other witnesses. However, we conclude that no manifest injustice occurred from the use of this argument. It was Powell, in his closing argument, who first questioned the credibility of the police officer. Admittedly, Powell argued that Detective Smoot, the only witness who actually saw Powell with the pipe, was mistaken about what he saw, and did not argue that Smoot was lying about seeing the pipe fall to the ground. Nevertheless, we conclude that the Commonwealth's comment was not so egregious as to constitute palpable error affecting the outcome of the trial. The comment simply does not render the trial fundamentally unfair, which is the standard we must apply in this circumstance. Therefore, we must affirm the trial court.

For the foregoing reasons, the judgment of the Fayette  
Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

V. Gene Lewter  
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BRIEF FOR APPELLEE:

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