

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-002238-MR

DAVID WAYNE SPRINGER

APPELLANT

v. APPEAL FROM MUHLENBERG CIRCUIT COURT
HONORABLE DAVID H. JERNIGAN, JUDGE
ACTION NO. 01-CR-00123

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING
** ** * * * * *

BEFORE: DYCHE, McANULTY, and POTTER¹, JUDGES.

DYCHE, JUDGE: David Wayne Springer appeals from a jury verdict convicting him of first-degree promoting contraband and second-degree persistent felony offender. Having reviewed Springer's arguments and finding no error, we affirm.

On July 26, 2000, Springer moved into a cell in the upper level of Building D, Dorm 1, of the Green River Correctional Complex. On August 1, 2000, David Prow moved in

¹Senior Status Judge John Potter sitting as Special Judge by Assignment of the Chief Justice pursuant to Section 110 (5) (b) of the Kentucky Constitution.

with Springer. On January 30, 2001, at about 7:30 p.m., prison guard Carl Behringer noticed Prow walking with a limp. Suspecting that Prow was carrying a carton of cigarettes, Behringer called for a search of Springer and Prow's cell. Behringer and three other guards performed the search. During the search, Springer returned to the cell. Eventually, the guards searched Springer's locker. Under the lip under the front of a metal shelf in the locker, the guards found a rolled cigarette. The substance inside the cigarette was later determined by testing to be marijuana.

On June 1, 2001, Springer was indicted for first-degree promoting contraband (KRS² 520.050) and first-degree persistent felony offender (KRS 532.080). Following a jury trial, Springer was convicted of first-degree promoting contraband and second-degree persistent felony offender. He was sentenced to a total of five years imprisonment. This appeal followed.

First, Springer contends that he was entitled to a directed verdict. On motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. Commonwealth v. Benham, Ky., 816 S.W.2d 186, 187 (1991). 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

²Kentucky Revised Statutes.

given. Id. For the purpose of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but reserve for the jury questions as to the credibility and weight to be given to such testimony. Id. On appellate review, the test of a directed verdict is if, under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then is the defendant entitled to a directed verdict of acquittal. Id.

The evidence presented at trial, viewed in the light most favorable to the Commonwealth, discloses that it was not clearly unreasonable for the jury to find Springer guilty. The cigarette was found concealed in Springer's locker; evidence was presented regarding Springer's exclusive control of the locker; evidence was presented to the effect that the cigarette had not yellowed and, therefore, was not a cigarette which had been left in the locker by a previous inmate; and, finally, Springer asked a guard who the Arat was who told on him and why the guards didn't just flush the cigarette down the toilet, statements which the jury may have concluded were inculpatory. In light of this evidence, Springer was not entitled to a directed verdict.

Next, Springer contends that the trial court erred by permitting a guard to testify regarding the age of the marijuana cigarette to the effect that rolling paper yellows over time, and that the cigarette found in Springer's locker had not yellowed. Springer contends that the guard was not qualified as an expert

to testify regarding the change of color of cigarette paper and that the testimony did not meet the standards for admission of scientific evidence pursuant to Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993).

A review of the guard's testimony discloses that the Commonwealth did not seek to qualify the guard as an expert and seek introduction of the evidence as scientific expert witness testimony. Rather, the Commonwealth sought introduction of the testimony based exclusively upon the guard's experience of having observed new and old marijuana cigarettes in conjunction with his experience as a prison security guard. If a witness is not testifying as an expert, he may provide testimony in the form of opinions or inferences if the opinions and inferences are rationally based on his perceptions. KRE³ 701. A lay witness's opinion based on his/her own personal knowledge or perceptions is admissible. KRE 701(a); KRE 602; Mills v. Commonwealth, Ky., 996 S.W.2d 473, 488 (1999); Young v. Commonwealth, Ky., 50 S.W.3d 148, 170 (2001). Here, the guard testified regarding his prior experience with new and old marijuana cigarettes:

Commonwealth: Let me ask it another way, officer. Have you had occasion to see hand rolled cigarettes utilizing this wrapping paper that had been rolled not recently?

Witness: Yes.

³Kentucky Rules of Evidence.

Commonwealth: And based upon your observations, are you able to state that time does change this condition and appearance of the paper?

Witness: Yes.

Commonwealth: And specifically the coloring of it?

Witness: Yes.

Commonwealth: And you are aware of the coloring of a C this type of paper when it's brand new and out of the package?

Witness: It's clear white.

Commonwealth: And over the period of time, what happens to that color, if you know, based upon your own observations?

. . . .

Witness: I seen it. They do turn a yellowish color.

Commonwealth: You've seen that there and specifically at the

Witness: Yes, inmates all the time leave old cigarettes around and you can see.

Because the guard was testifying from his own observations and from his personal experience as a prison security guard, and because his opinions and inferences concerning the aging of a marijuana cigarette were rationally based upon his perceptions, the testimony was admissible.

Next, Springer contends that the trial court erred when it excluded evidence that Springer passed a drug test administered two days after discovery of the cigarette. Following a pretrial motion by the Commonwealth, the trial court excluded the evidence as irrelevant; however, Springer argues that the evidence was relevant because a test result indicating

that Springer had not recently used marijuana implies that he did not possess any either.

KRE 402 sets out the general rule that all relevant evidence is admissible and evidence which is not relevant is inadmissible. KRE 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." KRE 403 provides the following exception to KRE 402:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of undue prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence.

A trial judge's decision with respect to relevancy of evidence under KRE 401 and 403 is reviewed under an abuse of discretion standard. Commonwealth v. English, Ky., 993 S.W.2d 941, 945 (1999). The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. Id. (citing 5 Am.Jur.2d Appellate Review ' 695 (1995) and Kuprion v. Fitzgerald, Ky., 888 S.W.2d 679, 684 (1994)).

KRS 520.050(1)(b) provides that a person is guilty of first-degree promoting contraband when, being a person confined in a detention facility or a penitentiary, he knowingly makes, obtains, or possesses dangerous contraband. In this case, the contraband was marijuana. Whether Springer had previously used

marijuana or had marijuana in his system was not an element of the crime, and was not relevant to Springer's guilt under the statute. Further, the introduction of the drug test results may have confused the jury. The trial court did not abuse its discretion by excluding the evidence.

Next, Springer contends that the trial court erred by not requiring the Commonwealth to choose between an administrative prison discipline hearing and criminal prosecution.

One of the factors of legal jeopardy is being placed on trial before a court of competent jurisdiction on an indictment or information sufficient to sustain a conviction. Hunt v. Commonwealth, Ky., 338 S.W.2d 912 (1960); Hughes v. Commonwealth, 131 Ky. 502, 115 S.W. 744, 31 L.R.A., N.S., 693 (1909); Yager v. Commonwealth, Ky., 407 S.W.2d 413, 416 (1966). The punishment meted to Springer by the prison officials was a disciplinary measure which did not constitute legal jeopardy. Yager at 416. It follows that Springer was not subjected to double jeopardy, and it was proper for Springer to be subjected to both administrative discipline proceedings and criminal prosecution.

Next, Springer contends that the trial court erred by not excluding various statements he made to a guard two days after the discovery of the marijuana. While waiting to perform a drug test, Springer began talking to the guard. Springer brought up that he didn't see why the warden was so strict about drugs;

that he didn't see why a guard doesn't simply flush down the toilet something as small as the cigarette found in this case; asked the guard who the Arat@was, and stated that he knew who the Arat@was. Springer contends that the statements should have been excluded as irrelevant.

While not direct admissions of guilt, the statements were relevant in that they tended to show that Springer's concern two days after the incident was not with being wrongfully charged with possession of the marijuana, but, rather, that his concern was with why he wasn't given a break by the guards and a concern with who Aratted@on him. The statements are reflective of Springer's consciousness of guilt, and the trial court did not abuse its discretion by permitting the guard to repeat the statements.

Next, Springer contends that the trial court erred by not granting a mistrial after a guard violated a pretrial order by mentioning the results of a field test on the marijuana. Prior to trial, the trial court granted a motion by the defense to exclude the results of a field test which determined that the substance in the cigarette was, in fact, marijuana. Nevertheless, during the direct testimony for the prosecution of guard Carl Behringer, the following exchange occurred:

Commonwealth: Did you have an opportunity to observe any of the contents of that particular cigarette?

Witness: Yes. We did. I had Officer Thomas remove a small amount of the substance from the tightly rolled cigarette and put it in a test kit.

Defense Counsel objected and moved for a mistrial. The standard for reviewing the denial of a mistrial is abuse of discretion. Clay v. Commonwealth, Ky. App., 867 S.W.2d 200, 204 (1993). "A mistrial is appropriate only where the record reveals 'a manifest necessity for such an action or an urgent or real necessity.'" Id. at 204 (quoting Skaggs v. Commonwealth, Ky., 694 S.W.2d 672 (1985)); Bray v. Commonwealth, Ky., 68 S.W.3d 375, 383 (2002). Here, the witness, unsolicited and without fault of the Commonwealth, inadvertently referred to the field test. However, the guard did not state what the results of the test were, and any prejudice associated with the brief mention of the test was minimal. There was no manifest necessity for a mistrial as a result of the guard's reference to the field test, and the trial court did not abuse its discretion by refusing to grant a mistrial.

Next, Springer contends that the prosecutor engaged in misconduct in his closing argument by misstating the burden of proof and by arguing outside the record insofar as he urged the jury to conclude that the substance in the cigarette was marijuana because defense counsel failed to ask for an independent expert to evaluate the substance. Specifically, Springer objects to the following statements delivered by the prosecutor in his closing argument:

So from the date of this report, March 22 of this year, everyone knew that a qualified forensic chemist employed by the Kentucky State Police has examined this substance and determined scientifically that this substance

was, in fact, marijuana. Point being is anyone, and Mr. Allen [defense counsel] is a well skilled attorney and he knows what he can do and what could he do, but go out and get someone that's professionally capable and competent to examine and look and say no, it's not. Well, duh, why was that not done, because there's no doubt straight up that that in fact is marijuana.

Springer concedes that no objection to the statements was made at trial and that the issue is unpreserved. We therefore review the issue pursuant to RCr⁴ 10.26 under the standards for palpable and substantial error. The requirement of manifest injustice as used in RCr 10.26 means that the error must have prejudiced the substantial rights of the defendant in that, as a result of the error, a substantial possibility exists that the result of the trial would have been different. Partin v. Commonwealth, Ky., 918 S.W.2d 219, 224 (1996); Schaefer v. Commonwealth, Ky., 622 S.W.2d 218 (1981); Castle v. Commonwealth, Ky. App., 44 S.W.3d 790, 793-794 (2000).

Attorneys are granted wide latitude during closing argument. Tamme v. Commonwealth, Ky., 973 S.W.2d 13, 39 (1998), cert. denied, 525 U.S. 1153 (1999). When reviewing allegations of error in closing argument, "[t]he required analysis, by an appellate court, must focus on the overall fairness of the trial, and not the culpability of the prosecutor . . . A prosecutor may comment on tactics, may comment on evidence, and may comment as

⁴Kentucky Rules of Criminal Procedure.

to the falsity of a defense position." Slaughter v. Commonwealth, Ky., 744 S.W.2d 407, 411-12 (1987) (internal citation omitted). Reversal is only justified when the alleged prosecutorial misconduct is so egregious as to render the trial fundamentally unfair. Partin v. Commonwealth, supra at 224.

The closing statements of the prosecutor did not render the trial fundamentally unfair and there is not a reasonable possibility that but for the comments the outcome of the trial would have been different.

Next, Springer contends that the trial court erred by excluding mention of his administrative punishment from both the guilt phase and penalty phase of the trial. In a pretrial motion, the Commonwealth moved to exclude any mention in either the guilt phase or the penalty phase of the fact that Springer had been punished administratively for possession of the marijuana cigarette. The trial court granted the motion as to the guilt phase; however, the trial court further stated, "I'm going to ask that this issue be brought back up before the penalty phase. I'm not quite convinced that it should be barred in the penalty, so I'll listen to you at that time." For some reason, the issue was not brought back up at the penalty phase.

Because of the questionable relevance, the trial court did not abuse its discretion by barring use of the evidence in the guilt phase. Springer did not bring the issue back up prior to the penalty phase and the issue is unpreserved. We are

persuaded that exclusion of the evidence from the penalty phase was not palpable error. No manifest injustice occurred as a result of the exclusion of the evidence. Springer was convicted of a Class D felony and as a second-degree persistent felony offender. Under these circumstances, the five-year sentence imposed by the jury was the minimum possible sentence, so the introduction of the evidence into the penalty phase could not have lowered Springer's sentence. See KRS 532.060; KRS 532.080(5).

Next, Springer contends that the expert called by the Commonwealth to testify that the substance contained in the cigarette was, in fact, marijuana, did not have the proper credentials to qualify as an expert. Charles Mac Cann was called by the Commonwealth to testify that he had tested the cigarette found in Springer's locker, and that the cigarette contained marijuana. Springer challenged the qualifications of Cann to testify as an expert; however, the trial court ruled that Cann was qualified as an expert.

KRE 702 provides that "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." "It is within the discretion of the trial judge to decide the qualifications of expert witnesses, and such

a ruling is seldom disturbed on appeal." Gentry v. General Motors Corp., Ky. App., 839 S.W.2d 576, 578 (1992); Murphy by Murphy v. Montgomery Elevator Co., Ky. App., 957 S.W.2d 297, 298 (1997). "[T]he initial decision as to whether a witness is a qualified expert and the limits of his expertise are matters within the sound discretion of the trial court." Commonwealth v. Craig, Ky., 783 S.W.2d 387 (1990), overruled on other grounds by Dyer v. Commonwealth, Ky., 816 S.W.2d 647, 654 (1991); Cormney v. Commonwealth, Ky. App., 943 S.W.2d 629, 634 n.2 (1996).

At the time Cann performed that test, he was a forensic chemist with the Kentucky State Police Lab in Madisonville. While no longer in that position at the time of trial, he had held the forensic chemist job for a two-year period. Cann received a double major from Western Kentucky University in chemistry and environmental science. After joining the State Police, he received six months of in-house training in the identification of drugs, and then received additional training from various other places, including a drug enforcement agency seminar. During his two years with the State Police, Cann devoted all of his time to the examination of controlled substances. Further, Cann had testified in previous court cases as an expert witness on approximately four or five occasions. When asked how many different examinations of controlled substances he had performed, Cann responded, ~~All~~ All I can say is thousands.@

In light of Cann's education, training, and experience, the trial court did not abuse its discretion in qualifying Cann as an expert witness.

The judgment of the Muhlenberg Circuit Court is affirmed.

McANULTY, JUDGE, CONCURS.

POTTER, SPECIAL JUDGE, DISSENTS.

Respectfully, I dissent. Springer should have been permitted to introduce evidence that two days after the marijuana cigarette was found in his cell a drug screen indicated that he had not been using marijuana.

The trial court excluded the evidence on the grounds that it was not relevant since Springer was charged with the possession of, but not the use of, marijuana. While the test result would have been highly relevant had he been charged with using marijuana it nonetheless had probative value on the charge of possession. Springer's defense was that the cigarette belonged to someone else. All else being equal, the item found, one marijuana cigarette, is less likely to belong to someone who has not smoked marijuana for some period of time than someone who has smoked marijuana recently or someone about whom nothing is known. Therefore the evidence was relevant.

The trial judge did not find the evidence relevant under KRE 401 and then exclude it under KRE 403 because its prejudicial value outweighed its probative value; it found the

evidence irrelevant. The majority, holding that it was not an abuse of discretion to exclude the evidence, upholds the trial court.

The majority cites *Commonwealth v. English, Ky.*, 993 S.W. 2d (1999) for the proposition that a trial judge's decision with respect to the admissibility of evidence under both KRE 401 and 403 is reviewed under an abuse of discretion standard. That case dealt with evidence that was not excluded under KRE 403 and the abuse of discretion standard was applied only to the court's ruling under KRE 403. It should be kept in mind that in every case in which a trial court has made a ruling under KRE 403 it has of necessity made a previous ruling under KRE 401.

A review of other cases employing an abuse of discretion standard reveals that the vast majority applies the rule only to rulings under KRE 403. *Barnett v. Commonwealth*, 979 S.W.2d 98 (Ky. 1998); *Brock v. Commonwealth*, 947 S.W.2d 24 (Ky. 1997); *Partin v. Commonwealth*, 918 S.W.2d 219 (Ky. 1996); *Simpson v. Commonwealth*, 889 S.W.2d 781 (Ky. 1994); *Sanborn v. Commonwealth*, 754 S.W.2d 534 (Ky. 1988); *Rake v. Commonwealth*, 450 S.W.2d 527 (Ky. 1970). However, treatises and the 1992 Study Committee Notes to the KRE indicate that appellate courts could employ an abuse of discretion standard in reviewing decisions under KRE 401, Lawson, Ky. Evid. Law Handbook, Sec. 205, Part III (1993); Study Committee Notes to the KRE, Rule 401 (1992), and statements to this effect have appeared in recent cases. For

example, in *Love v. Commonwealth*, 55 S.W. 816, 822 (Ky. 2001) the court stated, ^{AA} trial judge's decision with respect to relevancy of evidence under KRE 401 and 403 is reviewed under an abuse of discretion standard.[@] However, that case and the two cases it cites for this proposition dealt with ruling under KRS 403.

Numerous cases exist that reverse or affirm a trial court's ruling related to the relevancy of evidence without mentioning an abuse of discretion standard. *Rogers v. Commonwealth*, 992 S.W.2d 183 (Ky. 1999); *Turner v. Commonwealth*, 914 S.W.2d 343 (Ky. 1996).

Therefore, I do not believe that under current Kentucky Law rulings as to relevancy under KRE 401 are to be reviewed under an abuse of discretion standard.

Believing the evidence to be relevant, I would reverse.

BRIEF FOR APPELLANT:

David T. Eucker
Assistant Public Advocate
Department of Public Advocacy
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Albert B. Chandler III
Attorney General of Kentucky

Elizabeth A. Heilman
Assistant Attorney General
Frankfort, Kentucky