RENDERED: October 3, 2003; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-000714-MR

PATRICK SLOSS — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE BARRY WILLETT, JUDGE
ACTION NO. 98-CR-002873

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION

AFFIRMING

** ** ** ** **

BEFORE: COMBS, AND McANULTY, JUDGES; JOHN D. MILLER, SENIOR JUDGE.[1]

McANULTY, JUDGE. Patrick Sloss (hereinafter appellant) appeals his conviction in the Jefferson Circuit Court for possession of a firearm by a convicted felon and being a persistent felony offender in the second degree. Appellant was tried by the court without a jury. Appellant challenges the sufficiency of the

[1] Senior Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

evidence of constructive possession of a pistol in the van in which he was riding. In addition, appellant challenges the constitutionality of the statute prohibiting possession of a firearm by a convicted felon. We affirm.

Appellant first argues that there was insufficient evidence to show that he was in constructive possession of the firearm in this case. 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. Commonwealth v. Benham, Ky., 816 S.W.2d 186, 187 (1991). The evidence showed that appellant was sitting in the front passenger seat of a van which was blocking the flow of traffic on a street. He was drinking from a bottle and talking to a pedestrian on the street. The van was driven by appellant's cousin, and it was owned by a third person. Two police officers pulled up to the van. As one of the officers approached the van, he observed appellant bend down toward the floorboard of the van, and then sit up again. Appellant then exited the van, threw a beer to the ground and ran away. The other officer pursued appellant and caught him.

The first officer subsequently looked into the passenger compartment where appellant had been sitting. He observed a pistol on the floor, visible from the outside of the

van. It had been placed against the raised platform which was the base for the passenger seat. The passenger seat of the van was separated from the driver's side by a console that covered the engine and extended back about three-quarters of the length of the front seats. The officer said this made it unlikely that the weapon could have shifted or been kicked from the driver's side to the passenger side.

Appellant argues that there was insufficient evidence that he knowingly possessed the weapon under a constructive possession theory. He argues that the Commonwealth had to establish that he had "dominion and control" over the pistol, not just over the area in which the object was found. We disagree. We believe that in a case of constructive possession, the fact that the accused had dominion and control over a particular area demonstrates the fact that he could have dominion and control over the objects in that area. Houston v. Commonwealth, Ky., 975 S.W.2d 925 (1998). It has been held sufficient if the weapon is in plain view and easily accessible. Id. at 929. In the case at bar, the weapon was certainly within reach of appellant. Additionally, he had superior dominion and control over that area than the other person in the van. We certainly agree that there was sufficient evidence of constructive possession to support the conviction.

Appellant further contends that there was not sufficient evidence of a culpable mental state. He argues that the court had to find, in addition to dominion and control, that he possessed knowledge that the weapon was there. The definition of "knowingly" in KRS 501.020(2) states: "A person acts knowingly with respect to conduct or to a circumstance described by a statute defining an offense when he is aware that his conduct is of that nature or that the circumstance exists." Appellant argues that the facts of the case did not establish that he knowingly had possession of the pistol. We disagree.

The evidence was that it was on the floor of the van on the passenger side and could be observed from outside the vehicle. The officer testified it would have been directly under the passenger's legs. The evidence showed that because of the console and seats it was not possible that the weapon inadvertently slid there from some other part of the van. Because of the way the seats were made, it could not have been physically located under the seat. Thus, the court could have fairly concluded that the weapon was visible to appellant. Finally, the court could consider the fact that appellant bent down over the seat right when the police arrived. The court could draw the inference that appellant's movements at that time were out of concern with the placement of the weapon in the van. Considering all of the circumstances, therefore, we believe

there was sufficient evidence that appellant knowingly had a weapon within his dominion and control while in the van.

Appellant next argues that the offense of possession of a firearm by a convicted felon violates the Bill of Rights of the Kentucky Constitution. Appellant acknowledges that he did not preserve this error by raising it in the trial court below. However, he argues that we must ignore that failure to preserve because his challenge is based on the Kentucky Constitution. Appellant asserts that the statute has no effect because § 26 of the Kentucky Constitution states that any statute that violates any part of the Kentucky Constitution is void. Further, the courts have held that any action taken pursuant to such a statute is "a nullity." City of Henderson v. Lieber's Ex'r., 175 Ky. 15, 192 S.W. 830, 831 (1917). Appellant apparently derives from this that review of such a statute is mandated. He argues further that the judiciary has no authority to refuse review, stating, "the Court of Justice cannot interpose a procedural rule like RCr 9.22 to give continued effect to a statute that is void ab initio."

The Kentucky Supreme Court has clearly stated that any error, even allegations of constitutional error, may be waived by failure to raise the issue. Brown v. Commonwealth, Ky., 780 S.W.2d 627, 630 (1989); Hoy v. Kentucky Indus. Revitalization Authority, Ky., 907 S.W.2d 766 (1995). We find inapposite

appellant's attempts to assert a lack of judicial authority. The "source of the [Supreme] Court's rule making power is firmly rooted within the Constitution." Smothers v. Lewis, Ky., 672 S.W.2d 62, 64 (1984), citing § 116 of the Kentucky Constitution's Judicial Article. In addition to the Court's Constitutional rule making power, the Court is also vested with certain "inherent" powers to do that which is reasonably necessary for the administration of justice within the scope of its jurisdiction. Craft v. Commonwealth, Ky., 343 S.W.2d 150 (1961). Moreover, the result of failure to preserve is not a decision to keep the statute in effect, but to decline to review where the litigant has waived the issue by failing to bring it correctly before the court. Massie v. Persson, Ky. App., 729 S.W.2d 448, 453 (1987), overruled on other grounds by Conner v. George W. Whitesides Co., Ky., 834 S.W.2d 652 (1992). Thus, we may justly declare this issue non-reviewable.

We note, moreover, that appellant's argument that the statute must be reviewed because it is void ab initio is undercut by the case he cites which held that the statute at issue is constitutional. Eary v. Commonwealth, Ky., 659 S.W.2d 198 (1983). In addition, the Commonwealth correctly points out that appellant did not notify the Attorney General of his constitutional challenge as required by CR 24.03 and KRS 418.075(1). The rule is clear that in an action concerning the

constitutionality of a statute, the Attorney General shall be given notice and an opportunity to be heard. Maney v. Mary Chiles Hosp., Ky., 785 S.W.2d 480 (1990).

For the foregoing reasons, we affirm the judgment of the Jefferson Circuit Court.

COMBS, JUDGE, CONCURS.

MILLER, SENIOR JUDGE, CONCURS IN RESULT ONLY.

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