

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-000757-MR

TONY ALLEN MARSEE

APPELLANT

v. APPEAL FROM BELL CIRCUIT COURT
HONORABLE JAMES L. BOWLING, JR., JUDGE
INDICTMENT NO. 01-CR-00131

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

** ** * * *

BEFORE: DYCHE, JOHNSON, AND PAISLEY, JUDGES.

DYCHE, JUDGE. On April 15, 2001, at around 2:15 a.m., Tony Allen Marsee left the Wal-Mart store in Middlesboro, Kentucky, with over \$1,000.00 of unpaid for merchandise. Marsee abandoned the shopping cart with the stolen goods in the parking lot and began walking on U.S. Highway 25E. Marsee was apprehended by the police and charged with Theft by Unlawful Taking Over Three Hundred Dollars, Criminal Trespass in the Third Degree, Possession of Marijuana, and Alcohol Intoxication. A Bell

County Grand Jury indicted Marsee as charged but added the status offense of Persistent Felony Offender in the Second Degree.

The matter was set for trial on October 30, 2001. On that date it was continued until December 20, 2001, when it was again continued until February 26, 2002. Marsee was tried on that date. Other than having the trespass count dismissed, Marsee was convicted as charged, receiving a sentence of six years' imprisonment plus \$100.00 in fines. Marsee appeals.

Appellant's first argues that the trial court erred in denying counsel's motion to continue. Although he cites the proper rule of criminal procedure and applicable case law regarding the standard of review, Marsee fails to demonstrate that the matter was complex, that he was denied the benefit of competent counsel, or that he suffered any identifiable prejudice. Eldred v. Commonwealth, Ky., 906 S.W.2d 694, 699 (1994). We find neither clear error nor abuse of discretion in the trial court's denial of the motion to continue. Dishman v. Commonwealth, Ky., 906 S.W.2d 335 (1995).

Marsee secondly contends that the imposition of a \$100.00 fine for Alcohol Intoxication, First Offense (KRS 222.202(1)), was unauthorized by statute. Again we disagree. KRS 222.990(1) permits fines of "not less than \$25.00" for the

first offense. The \$100.00 fine imposed did not exceed the limit contained in KRS 222.990(2) for subsequent offenses, and we hold that the matter of the fine was indeed "resolved in favor of lenity" towards Marsee. See Commonwealth v. Colonial Stores, Inc., Ky., 350 S.W.2d 465, 467 (1961).

The judgment of the Bell Circuit Court is affirmed.

PAISLEY, JUDGE, CONCURS.

JOHNSON, JUDGE, CONCURS IN RESULT ONLY.

BRIEF FOR APPELLANT:

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