

Commonwealth Of Kentucky

Court Of Appeals

NO. 2002-CA-001110-MR

RONALD EARL BOCK

APPELLANT

v. APPEAL FROM LOGAN CIRCUIT COURT
HONORABLE TYLER L. GILL, JUDGE
INDICTMENT NO. 01-CR-00159

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING
** ** * * * * *

BEFORE: EMBERTON, CHIEF JUDGE; KNOPF AND SCHRODER, JUDGES.

KNOPF, JUDGE: On September 17, 2001, a Logan County Grand Jury indicted Ronald Earl Bock, on ten counts which included manufacturing methamphetamine,¹ possession of anhydrous ammonia,² first-degree trafficking of methamphetamine,³ first-degree possession of methamphetamine,⁴ first-degree wanton

¹ KRS 218A.1432(1)(A), with firearm enhancement, KRS 218A.992.

² KRS 250.991(2).

³ KRS 218A.1412, with firearm enhancement, KRS 218A.992.

⁴ KRS 218A.1415, with firearm enhancement.

endangerment,⁵ tampering with physical evidence,⁶ possession of drug paraphernalia,⁷ first-degree fleeing and evading,⁸ possession of handgun by convicted felon,⁹ and being a persistent felony offender in the second degree.¹⁰ Following a trial, the jury found Bock guilty of trafficking methamphetamine, possession of methamphetamine, second-degree wanton endangerment, and possession of drug paraphernalia. Because the jury found no firearm enhancements, the trial court dismissed the handgun-possession charge. The trial court also dismissed the conviction for possession of methamphetamine due to double jeopardy concerns. In addition, the court issued a directed verdict in favor of Bock on the charge of first degree fleeing/evading. The jury fixed Bock's total sentence at fifteen years, which the trial court imposed.

On appeal, Bock argues that the trial court erred in denying his motion for directed verdict on the charge of possession of drug paraphernalia, in allowing the Commonwealth to present certain rebuttal testimony, and in allowing the jury

⁵ KRS 508.060.

⁶ KRS 524.100.

⁷ KRS 218A.500(2).

⁸ KRS 520.095(1)(b)(2).

⁹ 527.040.

¹⁰ KRS 532.080.

to review trial testimony outside of the presence of the parties. Finding no error, we affirm Bock's conviction.

Bock first argues that there was insufficient evidence to support the conviction of possession of drug paraphernalia. He claims that he could not have possessed the items found in the garage and the automobile because he did not own either item. He points out that he did not own the automobile in which the paraphernalia was found or the garage where the automobile was parked. He claims then that he only possessed the methamphetamine packets found on his person and the trial court thus should have issued a directed verdict in his favor for the charge of possession of drug paraphernalia.

A well-established rule for directed verdict is re-stated in Commonwealth v. Benham,¹¹ as follows:

On 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. For the purpose of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but reserving to the jury questions as to the credibility and weight to be given to such testimony.

On appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for

¹¹ Ky., 816 S.W.2d 186 (1991).

a jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal. [Commonwealth v.] Sawhill. [Ky., 660 S.W.2d 3 (1983)].¹²

Given the evidence presented at trial, the Commonwealth presented sufficient evidence for the jury to find that Bock possessed the paraphernalia. Bock was arrested on these charges on August 9, 2001, after the Kentucky State Police received a tip from Janice Stevens that there was a methamphetamine lab in operation on her garage. Detective Kevin Bibb and several other officers responded to the property. Detective Bibb first entered the garage and found Bock mixing liquid between two glass containers. The officers arrested Bock and the other individuals on the property before surveying the scene. A number of materials were found in the garage and inside an automobile parked in the garage. These materials consisted of several items that could be used to manufacture methamphetamine including methamphetamine base and chemicals in different stages of production, tubing, jars, basters, filter papers, spray cans, lithium batteries, table salt, binoculars, propane cylinders, Sudafed-type medicine packs, and syringes. Several coolers present in the garage tested positive for anhydrous ammonia. A loaded gun was also found on the hood of the car in the garage.

¹² Id. at 187.

At trial, Bock provided his explanation of these events. He and several friends were working on a car at Tommy Carneal's house. While there, Stevens invited the group to come back to her house for what she referred to as some "home brew." They all agreed and drove to Stevens's property, which consisted of a trailer and a detached garage. Once they arrived, Stevens secretly called the police. She then asked Bock to help her clean the garage. Bock stated that Stevens was making excuses to keep him in the garage with her. At some point during this time, Stevens gave Bock four packets of methamphetamine, which he placed in the waistband of his pants. Then, Paula Wilson brought Bock a sandwich and glass of water. Both Stevens and Wilson then returned to the trailer and left Bock alone.

The critical issue in this case was whether Bock possessed the paraphernalia. Possession can be either actual or constructive. In order to prove constructive possession, it must be shown that the contraband was subject to the individual's dominion and control.¹³ Proof that a defendant has possession and control of a vehicle is evidence to support a conviction for constructive possession of contraband found within the vehicle.¹⁴ As discussed below, several witnesses

¹³ Burnette v. Commonwealth, Ky., 31 S.W.3d 878, 881 (2000).

¹⁴ Id. at 877-78 (Citing Leavell v. Commonwealth, Ky., 737 S.W.2d 695 (1987)).

testified that Bock exercised significant control over the automobile. Therefore, there was sufficient evidence to warrant submission of the drug-paraphernalia charge to the jury.

Furthermore there was additional evidence to support the jury's finding that Bock possessed the drug paraphernalia found in the garage. Detective Bibb testified that Bock threw a jar of liquid at him when he entered the garage. Although contradicted by Bock, the jury could reasonably infer that the jar was paraphernalia used in the manufacturing process and was in Bock's actual possession. Given the evidence it was not unreasonable for the jury to find Bock guilty of possession of paraphernalia. Thus, the trial court did not err in denying Bock's motion for a directed verdict.

Bock further contends that the inconsistent verdicts also demonstrate that he was entitled to a directed verdict. He argues that it was inconsistent for the jury to acquit him of manufacturing methamphetamine, possession of anhydrous ammonia, and possession of a firearm, all items that were found in the same areas as the paraphernalia, but then convict him of possession of the paraphernalia. However, the objection to an inconsistent verdict must be raised while the jury is still empanelled, when the court can review the verdict and ask the jury for clarification or further deliberation. Bock did not

raise this issue while the jury was still available and therefore he waived the objection.¹⁵

Bock further contends that the inconsistent verdict should be evaluated in the context of sufficiency of the evidence.¹⁶ Nonetheless, the evidence was sufficient to support each verdict. Consequently, the trial court properly denied the motion for directed verdict.

Bock next argues that the trial court improperly allowed the Commonwealth to present certain rebuttal testimony regarding his use of the automobile found in the garage. During trial, the Commonwealth presented evidence to establish that Bock had dominion and control over the automobile and the items found inside the automobile. Helen Grishman testified that she was the registered owner of the car, but it had been in possession of her son-in-law, David Carneal. She testified that Carneal had sold the car to Bock, and that she had seen Bock driving it around town. Jan Stevens also testified that Bock drove the car to her residence on the night of the raid. However, Bock testified that while he did borrow the car from Carneal on occasion, he did not purchase the car. He also testified that he did not drive the car to Stevens's that night.

¹⁵ Breathitt Funeral Home v. Neace Ky., 437 S.W.2d 490, 492 (1969).

¹⁶ See Commonwealth v. Harrell, Ky., 3 S.W.3d 349 (1999).

He claimed that the car was already in Stevens's garage when he arrived. Wilson also testified that Bock did not drive the car to Stevens's that night, but rather rode in Stevens's car along with Wilson. Following Bock's testimony, the Commonwealth presented rebuttal testimony from Heather Noe and Dwayne Alldred. Noe, Carneal's ex-wife and Grishman's daughter, testified that Carneal had sold the car to Bock. Alldred, a former roommate of Bock, testified that Bock drove the automobile prior to August of 2001.

Bock argues that the Commonwealth did not have any proper reason for presenting this rebuttal testimony, but only used it to have the last word with the jury. He claims that he was unfairly prejudiced by the Commonwealth's use of the rebuttal testimony. Consequently, he contends that the trial court abused its discretion by allowing this testimony.

We find this argument to be without merit. The trial court has great discretion in determining when rebuttal evidence will be allowed.¹⁷ When there is no clear showing of arbitrariness or an abuse of discretion the trial court's ruling will not be disturbed.¹⁸ In evaluating a claim of abuse of discretion, both the circumstances surrounding the evidence and

¹⁷ RCr 9.42.

¹⁸ Pilon v. Commonwealth, Ky., 544 S.W.2d 228, 231 (1976).

the proof itself must be considered.¹⁹ Nonetheless, the Commonwealth should not be permitted to take undue advantage of the defendant by withholding important evidence until near the close of the trial and then introducing it in the guise of rebuttal evidence.²⁰

In this case, however, Bock has failed to show that the Commonwealth obtained an unfair advantage by withholding the testimony until rebuttal. During its case-in-chief, the Commonwealth presented testimony that Bock had exercised significant control over the automobile both before and on August 9, 2001. Bock sought to distance himself from the automobile by denying that he had purchased the car or driven it more than occasionally. The Commonwealth was entitled to present additional testimony to contradict Bock's assertions. Moreover, there is no indication that the Commonwealth acted in bad faith. Hence, the trial court did not err in allowing the rebuttal testimony.

Finally, Bock asserts that the trial court erred by allowing the jury to view testimony in the jury room and outside of the presence of Bock and counsel. During deliberations, the jury returned to the courtroom and asked for the transcript of

¹⁹ Ruppee v. Commonwealth, Ky., 821 S.W.2d 484, 487 (1991).

²⁰ Gilbert v. Commonwealth, Ky., 633 S.W.2d 69, 71 (1982). (*Citing Lucas v. Commonwealth*, 302 Ky. 512, 195 S.W.2d 90, 92 (1946)).

Bock's testimony. In the presence of Bock and counsel for both sides, the court explained that a written transcript was not available, but the court would allow the jury to view the video of Bock's testimony. The court told the jury they could move the television into the jury room in order to review the taped testimony. Neither Bock nor the Commonwealth objected to this arrangement.

In the absence of a timely and specific objection during trial, the issue is not preserved for review.²¹ However, an unpreserved issue may be reviewed if it presents a palpable error that affects the substantial rights of the parties and results in manifest injustice.²² When determining if manifest injustice occurred the reviewing court, upon consideration of the entire case, "must conclude that a substantial possibility exists that the result would have been different in order to grant relief."²³ In other words, the court must determine whether there was a substantial possibility that the jury's verdict would have been different if the error had not occurred.

Bock argues that the trial court's error was so egregious that no showing of such prejudice is required. In

²¹ RCr 9.22. See also West v. Commonwealth, Ky., 780 S.W.2d 600, 602 (1989).

²² RCr 10.26.

²³ Partin v. Commonwealth, Ky., 918 S.W.2d 219, 224 (1996).

support, he relies on Lett v. Commonwealth.²⁴ In Lett, the jury, after it had begun its deliberations, asked to hear the court reporter read a portion of a witness's statement. The trial court agreed to the request, but did not notify defense counsel prior to allowing the jury to hear the evidence. The former Court of Appeals found reversible error even though there was no allegation of prejudice.

After the jury retires for deliberation, if there be a disagreement between them as to any part of the evidence, . . . they must require the officer to conduct them into court. Upon their being brought into court, the information required must be given in the presence of, or after notice to, the counsel of the parties. (citing 249 Criminal Code of Practice).

It has been recognized since time immemorial, under the common law, the federal and our Constitution, that when one is charged with a felony the trial must be had in the presence of the accused, and that the accused has the right to be heard by himself and counsel. The Code provision makes it quite plain that if there be disagreement as to evidence--which must have existed here, else no reason for the request--any elucidation must not be had without notice to counsel. The reason is obvious, and particularly applicable here, where the witness had given contradictory testimony. It is beyond our power to make a rational guess as to the effect of the failure to have re-read the contradictory evidence.²⁵

²⁴ 284 Ky. 267, 144 S.W.2d 505 (1940).

²⁵ Id. at 509.

In Mills v. Commonwealth,²⁶ our Supreme Court emphasized that Lett stands for the proposition that reversible error occurred when portions of witnesses' statements were allowed into the jury room during deliberation without prior notice to the defense. In Mills, the error was even more egregious because the interview tapes were never heard by the jury during trial.²⁷ Similarly, in Wright v. Premier Elkhown Coal Co.,²⁸ the trial court allowed the jury to have written reports of defense expert witnesses. This Court found reversible error since the jurors may have given more weight to the written testimony.²⁹

In the current case, as opposed to Lett or Mills, the jury was brought into open court to make the request in front of Bock and counsel. Bock received notice of the jury's request and he did not object to the viewing of the testimony in the jury room. Furthermore, unlike the facts presented in Wright, the jury merely reviewed the testimony which Bock had given in the courtroom during trial. Under the circumstances, the jury viewing Bock's testimony in this way did not affect his substantial rights.

²⁶ Ky., 44 S.W.3d 366 (2001).

²⁷ Id. at 372.

²⁸ Ky. App., 16 S.W.3d 570 (2000).

²⁹ Id. at 572.

Accordingly, the judgment of conviction by the Logan Circuit Court is affirmed.

ALL CONCUR.

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