

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001519-MR

RICKY R. NELSON

APPELLANT

v. APPEAL FROM BELL CIRCUIT COURT
HONORABLE JAMES L. BOWLING, JR., JUDGE
ACTION NO. 01-CR-00165

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

** ** * * *

BEFORE: BUCKINGHAM, GUIDUGLI AND SCHRODER, JUDGES.

GUIDUGLI, JUDGE. Ricky Nelson (hereinafter "Nelson") appeals from a judgment and sentence pursuant to jury verdict entered by the Bell Circuit Court finding him guilty of several criminal offenses and sentencing him to twelve (12) years' imprisonment. We affirm.

On July 25, 2001, a Bell County Grand Jury indicted Nelson on numerous drug related charges following the search of Nelson and his residence on December 8, 2000. Nelson entered a

not guilty plea and the matter was scheduled for a trial by jury on May 21, 2002. At that time, the Commonwealth dismissed several criminal charges and proceeded to trial on the following charges: (1) possession of a controlled substance, first degree (oxycontin) (KRS 218A.1415); (2) possession of marijuana (KRS 218A.1422(2)); (3) possession of drug paraphernalia, second offense (KRS 218A.500(2)); (4) possession of a controlled substance, third degree (xanax) (KRS 218A.1417); and (5) unlawful transaction with a minor, second degree (KRS 530.065). The jury returned a guilty verdict as to each count and sentenced Nelson to five (5) years on two of the felonies and two (2) years on one felony, and recommended the time run consecutive for a total of twelve (12) years. The jury also recommended a twelve-month sentence on each of the two misdemeanor offenses and that time was to run concurrent with the felony charges. Nelson appeals from the jury verdict and twelve years sentence.

On appeal, Nelson raises four (4) issues which he contends requires reversal of his convictions. First, he argues that the trial court erred when it permitted sentencing on the misdemeanor offenses to be held at the same time as the felony offenses. By allowing such to occur during the truth-in-sentencing phase of the trial, the jury was aware of Nelson's prior criminal convictions prior to sentencing him on the

misdemeanor offenses. While truth-in-sentencing is permitted prior to felony sentencing, the Kentucky Legislature and the Courts have not opted to permit such disclosure in misdemeanor cases. KRS 532.055(1). Nelson concedes that the issue has not been preserved but argues that this Court should review it under RCr 10.26, the palpable error rule. Citing Newton v. Commonwealth, Ky.App., 760 S.W.2d 100 (1988) and Commonwealth v. Philpot, Ky., 75 S.W.3d 209 (2002), Nelson contends palpable error occurred as to his sentencing on the misdemeanor charges. While we agree that the court erred by permitting the jury to hear evidence of Nelson's prior criminal history, the circumstances of this case vary greatly from either case cited above and hence, we find any error herein harmless and not palpable. In this case, the jury had already determined Nelson guilty of all five criminal offenses - three of which were felonies and two misdemeanors. Any misdemeanor sentence imposed in this case was required to run concurrent with the felony sentences imposed. In fact, the two twelve (12) month sentences were ordered to run concurrent with Nelson's twelve years' imprisonment imposed by the jury on his felony convictions. Thus, any sentence imposed on the misdemeanor offenses (whether one day or 12 months) was to run concurrent with the felony sentences imposed and any error was harmless error in that Nelson would not serve any additional time in prison on his

misdemeanor convictions. The Kentucky Supreme Court set forth the proper procedure to be followed in the sentencing phase of trials involving convictions of both felony and misdemeanor offenses, (see Philpot, supra, at 218), and although the circuit court herein failed to follow the proper procedure, Nelson suffered no actual harm and thus any error was harmless.

Nelson next argues that the trial court erred concerning the instructions given relative to the possession of drug paraphernalia charges. Again, the issue was not preserved at trial. In fact, after reviewing the proposed instructions Nelson's counsel stated, "yes, it looks good to me. No objections to the instructions." Also, it should be noted that Nelson did not submit proposed instructions of his own at trial. RCr 9.54(2) states:

No party may assign as error the giving or the failure to give an instruction unless the party's position has been fairly and adequately presented to the trial judge by an offered instruction or by motion, or unless the party makes objection before the court instructs the jury, stating specifically the matter to which the party objects and the ground or grounds of the objection.

Nelson again requests that we review this alleged error under RCr 10.26 and find palpable error exists. We have reviewed the jury instructions given, the entire transcript of the trial and Nelson's arguments on appeal and find no palpable error exists

as to the jury instructions on this error. While the given instruction does not comply word for word with the proposed instruction set forth in 1 Cooper, Kentucky Instructions § 9.34A (1999), we believe they sufficiently address the elements of the crime and facts presented at trial. During the trial, Officer Mike Hensley testified that metal hand scales, a cigarette roller and some cigarette papers found at Nelson's residence are connected with the use of marijuana. In fact, during direct examination Nelson testified that while he used the scale to weigh his ginseng, he admitted that he used the rolling papers to smoke marijuana. From the direct testimony given and the reasonable conclusions that could be made relative to the evidence presented, the instructions given were proper. We find no error on this issue, especially not palpable error.

Nelson's third claim of error is that he was entitled to a directed verdict on the charge of unlawful transaction with a minor, second degree. This issue was preserved for appellate review by Nelson's motion for a directed verdict. In Commonwealth v. Benham, Ky., 816 S.W.2d 186 (1991), the Kentucky Supreme Court set forth the applicable standard of review as follows:

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 the

defendant is entitled to a directed verdict of acquittal.

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.

Id., 816 S.W.2d at 187.

The facts, as testified to at trial, indicate K.S., a 14-year-old female juvenile, was at Nelson's home on the day the police served a search warrant (having obtained information from reliable sources that Nelson was selling marijuana); that K.S. picked a marijuana joint up off the floor and had it in her possession; that Nelson knew that she obtained it at his residence and kept it in her possession and he did nothing to keep her from getting it nor did he attempt to take it away from her; and the police found it in her possession when they served the warrant. Furthermore, Officer Hensley testified that upon entering Nelson's residence K.S. had a tray full of marijuana on her lap and that another tray containing marijuana was found in the same room. Nelson, during his testimony, did not dispute that there was a substantial amount of marijuana readily

available in plain view in his residence, that he knew K.S. had obtained the "joint" at his residence and that he did nothing to prevent her from obtaining it nor did he attempt to take it from her. Nelson argues that he had no legal duty to act by removing the marijuana from K.S. and that he did not induce, assist or cause K.S. to possess the marijuana. Under the facts as presented at trial, it was not clearly unreasonable for a jury to conclude that Nelson was guilty of second-degree unlawful transaction with a minor. Nelson was not entitled to a directed verdict on this charge.

Nelson's final argument is that he was entitled to a directed verdict on the charge of possession of a controlled substance, first degree. This argument relates to his conviction for possession of the oxycontin pill. While he maintains that the issue was preserved by his motions for directed verdict, a review of the record makes it clear that his directed verdict motions addressed only the unlawful transaction with a minor charge. Specifically, at the conclusion of the Commonwealth's case, Nelson's attorney stated:

Your Honor, at this time, I move for a directed verdict as to Count IX, which is the Unlawful Transaction with a Minor in the Second Degree. There has been absolutely no testimony here today that Mr. Nelson knowingly engaged in Unlawful Transaction with a Minor. She said, she found it on the floor. He didn't dispense it out.

At the conclusion of the case, Nelson again made a motion for directed verdict stating:

Judge, the only thing, I just remembered that I need to make a motion for a directed verdict on the grounds previously stated.

While not properly preserved, we address this issue because we believe it to be meritless. Nelson argues that since there was only one oxycontin pill at the bottom of the bottle containing 24 xanax pills, and that because Nelson stated that he didn't know the bottle contained an oxycontin pill, the Commonwealth failed in its burden of showing that Nelson "knowingly and unlawfully possess(ed) a schedule I or II controlled substance." Again, the facts show that Nelson stated he found the pill bottle outside his residence, knew that it had xanax but not oxycontin, wrapped his money around the bottle, placed it in his pocket and forgot about it until the police arrived to serve a search warrant. He never denied possession of the bottle or the xanax pills, only the oxycontin pill. Under these circumstances, it was not unreasonable for the jury to conclude from the evidence that Nelson was guilty of the charge of possession of a controlled substance in the first degree. Mere possession of a controlled substance not in a prescription container is sufficient to sustain a conviction for unlawful possession of a controlled substance. Dawson v. Commonwealth,

Ky., 756 S.W.2d 935 (1988). One may be convicted even if one's possession is a constructive possession.

For the foregoing reasons, the judgment and sentence of the Bell Circuit Court is affirmed.

ALL CONCUR.

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