

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001598-MR

DEANGELA HARRIS STANLEY

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JOHN R. ADAMS, JUDGE
ACTION NO. 01-CR-00843

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: BUCKINGHAM, GUIDUGLI and SCHRODER, JUDGES.

BUCKINGHAM, JUDGE: DeAngela Stanley appeals from a judgment of the Fayette Circuit Court imposing a sentence of six years based on a jury verdict finding her guilty of possession of cocaine while in possession of a firearm and possession of drug paraphernalia while in possession of a firearm. We affirm.

After using a confidential informant to carry out a controlled purchase of crack cocaine from Stanley, the Lexington Metro Police Department procured a search warrant and searched

Stanley's residence on July 12, 2001. The officers seized several containers laced with crack cocaine, digital scales with cocaine powder residue, approximately 450 baggies in three 150-count boxes, \$910 in cash, a bank deposit slip in the amount of \$16,126.81, and a 9-mm pistol. Several additional items, including multiple copies of CDs, multiple copies of videotapes, and articles of clothing not in Stanley's size were also located by the police during their search. Each item was still packaged and tagged as it would be in a store. However, none of the items were seized by the police.

As a result of the evidence seized during the search of Stanley's residence, she was charged in an indictment with trafficking in a controlled substance while in possession of a firearm, trafficking in a controlled substance, and possession of drug paraphernalia with a firearm. However, the second charge was dismissed because of the Commonwealth's failure to locate the confidential informant for trial.

At trial, the jury was instructed to consider a variety of charges, including trafficking in a controlled substance, possession of a controlled substance, possession of drug paraphernalia, and facilitation to trafficking in a controlled substance. The jury was further instructed to consider whether each of the aforementioned charges should be

"gun enhanced" pursuant to KRS¹ 218A.992. The jury subsequently found Stanley guilty of possession of a controlled substance while in possession of a firearm and possession of drug paraphernalia while in possession of a firearm. She was sentenced to five years on the first charge and one year on the second charge, with the sentences to run consecutively. However, the six-year sentence was probated for a five-year period on various conditions, including that Stanley serve six months in the county jail. This appeal followed.

Prior to the trial, Stanley filed a motion *in limine* to exclude from evidence the receipt for the bank deposit in excess of \$16,000. Because there was no proof as to the holder of the account number or as to the source of the money, the trial court granted Stanley's motion and ruled that the deposit receipt was inadmissible.

During the trial testimony of police detective Eddie Hart, he removed the receipt from a sealed evidence envelope and advised the jury as to what it was. Further, he testified that the receipt was seized during a search of Stanley's residence. Stanley's attorney objected to the testimony and requested the trial court to admonish the jury to disregard Detective Hart's reference to the evidence. The trial court admonished the jury

¹ Kentucky Revised Statutes.

as requested. However, Stanley's attorney did not request a mistrial.

Stanley's first argument on appeal is that the trial court erred in not granting a mistrial after the \$16,126.81 cash deposit receipt was inadvertently brought to the attention of the jury. In support of her argument, Stanley cites Morgan v. Commonwealth, Ky., 809 S.W.2d 704 (1991). However, that case is distinguishable because the defendant's attorney therein moved the court for a mistrial.

A party seeking a mistrial must timely ask the court to grant him or her such relief. West v. Commonwealth, Ky., 780 S.W.2d 600, 602 (1989), citing Jenkins v. Commonwealth, Ky., 477 S.W.2d 795 (1972). Therefore, since Stanley's attorney failed to move for a mistrial, any claimed error in this regard was not preserved.

We have the authority to consider Stanley's argument and grant relief if we deem it appropriate pursuant to RCr² 10.26. That rule provides that an unpreserved error may be reviewed and appropriate relief granted where a manifest injustice has resulted from the claimed error. West, 780 S.W.2d at 602. However, Stanley is not entitled to such relief herein. The cash receipt could obviously have been interpreted by the

² Kentucky Rules of Criminal Procedure.

jury as evidence of proceeds from drug transactions. However, since Stanley was not convicted of a trafficking charge but was convicted only of a possession charge, we conclude that no manifest injustice resulted.

Stanley's second argument is that the trial court erred when it refused to grant her a directed verdict on the issue of whether the offenses could be enhanced due to possession of a firearm. When the officers entered Stanley's residence and searched the premises, they discovered a 9-mm pistol on top of a computer tower under a computer desk. There was testimony that the pistol was within arm's length of Stanley when the arrest was made. However, that testimony was subsequently attacked on cross examination.

A drug offense penalty may be enhanced if the defendant had constructive possession of a firearm. Houston v. Commonwealth, Ky., 975 S.W.2d 925, 927 (1998). KRS 218A.992 requires only a nexus between the crime committed and the possession of the firearm. Commonwealth v. Montague, Ky., 23 S.W.3d 629, 632 (2000). Such proof reduces or eliminates the risk of infringing upon an individual's constitutional right to bear arms without lessening the legitimate penal purpose of the statute. Id. Considering the testimony regarding the proximity of the pistol to Stanley when the officers entered the residence, we conclude that it was not clearly unreasonable for

the jury to find her guilty. Thus, she was not entitled to a directed verdict of acquittal. See Commonwealth v. Benham, Ky., 816 S.W.2d 186, 187 (1991).

Stanley's third argument relates to testimony given by police sergeant James Ensminger. Sergeant Ensminger testified as to his extensive experience working drug cases and the intricacies of drug trade practices in and around the Lexington area. Among other things, he testified concerning the manner in which crack cocaine is manufactured, how go-betweens are used in drug transactions, and the various techniques used by police officers to prevent drug trafficking.

RCr 9.22 requires a litigant to contemporaneously object to an alleged error in order to preserve the issue for appeal. Stanley's attorney failed to raise any objection to Sergeant Ensminger's testimony. Thus, any claim to error was waived. Furthermore, in light of the fact that Stanley was not convicted of drug trafficking, we fail to see how she could be prejudiced by any error in this regard. Thus, we find no palpable error under RCr 10.26. At any rate, we conclude that the testimony was admissible. See Sargent v. Commonwealth, Ky., 813 S.W.2d 801, 802 (1991); KRE³ 701 and 702.

³ Kentucky Rules of Evidence.

Stanley's fourth argument is that the trial court erred when it refused to exclude evidence of two marked \$20 bills that were seized as a part of the \$910 in cash during the search of the residence. The two marked bills were used by the confidential informant to carry out the controlled drug buy. Stanley argues on appeal that the admission of this evidence "rendered a mockery of her constitutional right to confront her accuser."

We find no error in this regard. First, although the drugs themselves were not allowed to be introduced into evidence due to the unavailability of the confidential informant, the money was nevertheless admissible. Second, Stanley could not have been prejudiced by the admission of this evidence since the second count of the indictment was dismissed and since she was not convicted of the trafficking offense but was convicted of only a possession offense.

Stanley's fifth argument is that the trial court erred when it allowed police sergeant Jack Dawson to testify that multiple copies of CD's, multiple copies of videotapes, and articles of clothing in their original packages and not in Stanley's size were discovered by the officers during the search of the residence. Any claimed error in this regard was waived due to the failure of Stanley's attorney to raise an objection. See RCr 9.22. Furthermore, we find no manifest injustice which

would allow relief pursuant to RCr 10.26. Although the items were evidence which would indicate that Stanley was trading drugs for merchandise, Stanley was not convicted of drug trafficking but only of drug possession.

Stanley's sixth argument is that the court erred when it declined to grant a mistrial "due to the cumulative effect of introduction of speculative, prejudicial, and inadmissible evidence." See Funk v. Commonwealth, Ky., 842 S.W.2d 476 (1993). As we found no specific errors, cumulative error did not occur. See Wilson v. Commonwealth, Ky., 836 S.W.2d 872 (1992).

The judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

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