

RENDERED: APRIL 23, 2004; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-000515-MR

MYRANA SHORES

APPELLANT

v. APPEAL FROM WHITLEY CIRCUIT COURT
HONORABLE JERRY D. WINCHESTER, JUDGE
ACTION NO. 02-CR-00087

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: COMBS, KNOPF, AND McANULTY, JUDGES.

KNOPF, JUDGE: Myrana Shores appeals from a January 14, 2003, jury verdict from the Whitley Circuit Court that convicted her of possession of a controlled substance in the first degree.

On appeal, Shores argues that the evidence presented by the Commonwealth was not sufficient to support her conviction. Specifically, she argues that the Commonwealth failed to prove she knowingly possessed the oxycontin found in her vehicle. Further, she argues that the jury instruction

regarding possession was insufficient since it did not require the jury to find that she unlawfully possessed the oxycontin. Finding that the evidence was sufficient, this Court affirms.

On July 8, 2002, a Whitley County Grand Jury indicted Shores for trafficking in a controlled substance in the first degree. The indictment alleged that Shores possessed for the purpose of sale or transfer one hundred forty-two (142) oxycontin pills, which contained oxycodone, a Schedule II narcotic pain-killer. On January 9, 2003, Shores proceeded to a jury trial. The facts, as they developed at trial, are as follows. On or about June 1, 2002, Burchell Smith went to Hamilton, Ohio because he had an appointment to see his physician regarding his back. While driving north on I-75, he encountered Myrana Shores and her cousin, Patricia Carter along the roadside. At that time, Smith was dating Shores. After speaking with the women, Smith continued on to Ohio, and Shores and Carter followed him in Shores' vehicle. According to Smith, they booked a room in a motel near Hamilton, Ohio. Then, Smith went, by himself, to his doctor's appointment. While there, he received a prescription for one hundred fifty (150) oxycontin pills. Smith filled his prescription at a drug store in Hamilton and went back to the motel.

During cross-examination, Smith testified that he and Shores quarreled that night because Shores wished to go out

dancing. Eventually, the three went to bed, but the next morning, June 2, 2002, Smith awoke to find that Shores had left and his medication was missing. However, Carter, Shores' cousin, was still there. Smith and Carter immediately left the motel in pursuit of Shores. Smith intercepted Shores near Cincinnati but failed to stop her. Smith continued to chase Shores south along I-75 but lost her near Dry Ridge, Kentucky. According to Smith, he continued south. When he drew near Corbin, Kentucky, he stopped and told a police officer that Shores had stolen his oxycontin.

Later that day, Officer Moore of the Corbin Police Department spotted Shores' vehicle along I-75 and stopped her. Moore spoke with Shores and explained that he stopped her due to Smith's claim. According to Moore's testimony, Shores made no statements regarding the oxycontin, but she did give him consent to search her vehicle. In the front passenger seat of Shores' vehicle, Moore found two syringes in a flowered cloth bag. Also in the front passenger seat, Moore found an aspirin bottle in a black bag that contained one hundred forty-two (142) oxycontin pills. Lieutenant Helton, the narcotics officer for the Corbin Police Department arrested Shores for trafficking in a controlled substance in the first degree. Helton testified that Shores told him that she was unaware that she had Smith's

oxycontin. Helton testified that he charged Shores with trafficking based solely on the large number of pills found.

In addition, Smith further testified that he carried a pocketbook that had a zipper. He testified that, while at the motel, his pocketbook was beside the bed along side at least one other bag that had a zipper. According to Smith, being sleepy, he reached down, unzipped a bag and placed his medication inside, which implies that he inadvertently and mistakenly placed his medication in Shores' bag. However, he testified that his oxycontin was still in its original container when he placed it inside the bag and that he never removed it from its original container.

At one point, Smith testified that he did not know if Shores knew that she had his oxycontin. Yet, he testified reluctantly that he thought she had stolen his medication. He testified that he told the police that Shores had stolen his medication in order to convince them to stop Shores. He felt it was necessary to stop her because he was afraid that she would overdose on his oxycontin. He testified that Shores had her own prescription for oxycontin because she had cancer. Yet, he testified that he was afraid that she would overdose on his pills alone because she only had his. According to Smith, he and Shores had reconciled by the time of the trial, at least to

some degree. In addition, he stated that he was mistaken about the incident.

The jury convicted Shores of possession of a controlled substance in the first degree, a lesser included offense of the trafficking charge. The trial court followed the jury's recommendation and sentenced Shores to three years in the state penitentiary. Now, Shores appeals her conviction to this Court as a matter of right.

On appeal, Shores argues that the Commonwealth presented insufficient evidence to support her conviction for possession of a controlled substance in the first degree. Shores cites KRS 218A.1415, which sets forth two elements for possession of a controlled substance in the first degree: 1) that the substance be possessed knowingly and 2) that it be possessed unlawfully. Shores contends that the Commonwealth failed to prove that she knowingly possessed Smith's oxycontin. She argues that Smith testified that he placed the oxycontin in a black bag that was near the bed. And he testified, "I knowed she had them, but I didn't know that she knowed she had them." Shores reminds this Court that Lieutenant Helton testified that she told him that she was not aware that she had Smith's oxycontin. Furthermore, she reminds this Court that she never confessed either. According to Shores, these facts show she did not knowingly possess Smith's oxycontin.

Shores argues that she could not have possessed the oxycontin constructively either since constructive possession requires knowledge. She refers this Court to KRS 501.020(2), which states:

a person acts knowingly with respect to conduct or a circumstance where he is aware that his conduct is of that nature or that the circumstance exists.

Shores contends that the Commonwealth failed to prove constructive possession because it did not present additional evidence that she was aware that she possessed the oxycontin. Shores cites case law from various other states to support this proposition. Moreover, she argues that while at the motel in Ohio she did not have exclusive control of the black bag in which the oxycontin was found. Since the Commonwealth failed to present additional evidence, beyond the fact that Smith's oxycontin was found in her vehicle, it failed to prove the element of knowledge as set forth in KRS 218A.1415.

Shores also argues that the jury instruction regarding possession of a controlled substance instruction in the first degree was not proper. The instruction read:

If you do not find the Defendant guilty under Instruction No. 1, you will find the Defendant guilty of First-Degree Possession of a Controlled Substance under this Instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:

A. That in this county on or about June 2, 2002, and before the finding of the Indictment herein, she had in her possession a quantity of Oxycodones;

AND

B. That she knew the substance so possessed by her was Oxycodones.

Shores concedes that in most jury trials this instruction would be adequate. However, she argues that she had a prescription for oxycontin, which made it legal for her to possess. According to Shores, the instruction was not sufficient because it did not require the jury to find that she possessed Smith's oxycontin unlawfully. She argues that the instruction should have read:

A. . . . she had in her possession a quantity of oxycodones **not prescribed to her**

AND

B. That she knew the substance so possessed by her was oxycodones **not prescribed to her.**

In Commonwealth v. Benham,¹ the Supreme Court of Kentucky succinctly restated the rule regarding directed verdicts:

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.

¹ Ky., 816 S.W.2d 186, 187-188 (1991).

As the facts set forth above reveal, the Commonwealth presented incontrovertible evidence that Smith's oxycontin was found concealed in an aspirin bottle inside Shores' vehicle. The Supreme Court of Kentucky has held that, "[t]he person who owns or exercises dominion or control over a motor vehicle in which contraband is concealed is deemed to possess the contraband."²

Even aside for this presumption there was evidence introduced at trial which supported findings that Shores was aware she possessed Smith's oxycontin and possessed it unlawfully. Smith testified that he placed his medication in a bag that was beside the bed at the motel. This testimony appears to support Shores' contention that she was unaware that she had Smith's oxycontin. However, Smith testified that when he placed this medication in the bag, it was still in its original container, and he testified that he did not remove it from its original container. Yet, Officer Moore testified that he found the oxycontin in Shores' vehicle in a black bag and it was in an aspirin bottle. The jury could reasonably and logically conclude that Shores placed Smith's oxycontin in the aspirin bottle in an attempt to conceal it. The jury could logically infer that Shores was aware that she possessed Smith's

² Leavall v. Commonwealth, Ky., 737 S.W.2d 695, 697 (1987), quoting United States v. Vergara, 687 F.2d 57 (5th Cir. 1982).

oxycontin and did so unlawfully since it was concealed in an aspirin bottle. Given the evidence as it developed a trial, the jury reasonably concluded that Shores was guilty of possession of a controlled substance. Thus, the trial court did not err when it denied Shores' motions for directed verdict.

This Court is not persuaded by Shores' argument that the jury instruction for possession was improper. "The function of instructions in this jurisdiction is only to state what the jury must believe from the evidence (and in a criminal case, beyond a reasonable doubt) in order to return a verdict in favor of the party who bears the burden of proof."³ Smith testified on direct examination that Shores had a prescription for oxycontin. This appears to support Shores' argument. However, Smith testified that he was afraid that Shores would overdose on his oxycontin not hers because she only had his medication in her possession at the time. From Smith's testimony, one could reasonably infer that Shores did not have a prescription for oxycontin on June 2, 2002. Furthermore, Shores never presented any evidence that she had a prescription nor did she present any evidence or even argue that the oxycontin found in her vehicle was hers. Since Shores never raised this as a defense, the fact that she may have had a prescription for oxycontin was

³ Webster v. Commonwealth, Ky., 508 S.W.2d 33, 36 (1974).

irrelevant. Even if she had a prescription for oxycontin it did not legally entitle her to possess Smith's oxycontin.

For the foregoing reasons, this Court affirms Shores' conviction for possession of a controlled substance in the first degree.

ALL CONCUR.

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