

Commonwealth of Kentucky
Court of Appeals

NO. 2003-CA-000694-MR

JAMES ROBERT BUSH

APPELLANT

v. APPEAL FROM BELL CIRCUIT COURT
HONORABLE JAMES L. BOWLING JR., JUDGE
ACTION NO. 02-CR-00005

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

** ** * * * * *

BEFORE: COMBS, TACKETT, AND VANMETER, JUDGES.

VANMETER, JUDGE: James Robert Bush appeals from a jury verdict convicting him of two counts of first-degree promoting contraband. Bush contends that he was entitled to a directed verdict because there was insufficient evidence to convict him of the charges. For the reasons herein stated, we affirm.

On November 2, 2001, Bush was arrested for driving under the influence by a Kentucky State Police Officer. The officer transported Bush to the Bell County Jail. Mike Bailey,

a deputy jailer, booked Bush into the jail, searched him, and put him into the "drunk tank," a room where prisoners are placed to give them time to sober up before being placed into the general population.

About four hours later Deputy Paul Hundley prepared to move Bush from the drunk tank to an upstairs cell. Bush was wearing civilian clothing and part of Hundley's responsibility was to change him into a jail uniform. According to Hundley's testimony he asked Bush if he had anything he wanted to take upstairs. Bush then searched through his clothes several times. About the fourth time through, Bush reached into his watch pocket, pulled out what appeared to be a cellophane package, and put it in his mouth. At this point, Hundley called deputy jailer Bailey into the booking room. Hundley and Bailey attempted to persuade Bush to remove and turnover the item he had placed in his mouth; however, Bush refused to cooperate. Hundley and Bailey called Jailer Jimmy Hoskins at home. Hoskins told Bush that it would be in his best interests to give up the item he had placed in his mouth. Bush persisted in his refusal.

Sometime later, Hundley excused himself for the restroom. Bailey called Hundley back because Bush had thrown something under a bench. Underneath the bench the deputy jailers recovered two cellophane bags. Kentucky State Police Crime Lab testing showed that material in one cellophane wrapper

was Alprazolam, or Xanax, which is a Schedule IV narcotic. The other cellophane wrapper contained marijuana.

On January 7, 2002, Bush was indicted for two counts of first-degree promoting contraband (KRS 520.050); third-degree possession of a controlled substance (KRS 218A.1417); and possession of marijuana (KRS 218A.1422(2)).

Prior to trial, the possession charges were dismissed. A jury trial was held on January 14, 2003. At trial, Bush admitted that he had two cellophane wrappers, but alleged that he had gotten them "from within the walls of the jail." At the conclusion of the trial the jury found Bush guilty of two counts of first-degree promoting contraband, and recommended a sentence of one year imprisonment on each count, to run consecutively. On March 4, 2003, the trial court entered final judgment and sentence consistent with the jury's verdict and sentencing recommendation. This appeal followed.

The only issue Bush raises on appeal is that the trial court erred by failing to grant a directed verdict on the promoting contraband charges. Bush argues that he was entitled to a directed verdict on the basis that the Commonwealth failed to prove beyond a reasonable doubt that he knowingly introduced contraband into the Bell County Jail. Bush concedes that this issue is not properly preserved because trial counsel failed to move for a directed verdict at the conclusion of all the

evidence, but requests that we review this argument as palpable error pursuant to RCr 10.26.

In *Commonwealth v. Benham*, Ky., 816 S.W.2d 186, 187 (1991), the court stated the standard for a directed verdict, as follows:

On a motion for a 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.

The standard for appellate review of a denial of a motion for a directed verdict based on insufficient evidence is if under the evidence as a whole, it would not be clearly unreasonable for a jury to find the defendant guilty, he is not entitled to a directed verdict of acquittal. *Id.*; *Commonwealth v. Sawhill*, Ky., 660 S.W.2d 3, 4-5 (1983).

KRS 520.050(1) provides, *inter alia*, that "[a] person is guilty of promoting contraband in the first degree when . . . [h]e knowingly introduces dangerous contraband into a detention facility. . . ." Under the definitions to KRS Chapter 520, "dangerous contraband" is defined to include "any controlled substances, . . . and any quantity of marijuana." KRS 520.010(3). Bush contends that the Commonwealth failed to prove

that he introduced the contraband into the jail facility.¹ His theory is that he did not introduce the contraband into the jail but, rather, obtained the substances within the walls of the jail after he was booked into the facility.

In *Bussell v. Commonwealth, Ky.*, 882 S.W.2d 111, 114 (1994), the court held that "[c]ircumstantial evidence is sufficient to support a criminal conviction as long as the evidence taken as a whole shows that it was not clearly unreasonable for the jury to find guilt." Furthermore, it is well-settled that a jury may make reasonable inferences from circumstantial evidence. *Dillingham v. Commonwealth, Ky.*, 995 S.W.2d 377, 380 (1999); *Blades v. Commonwealth, Ky.*, 957 S.W.2d 246, 250 (1997).

Bush admits that he was in possession of the controlled substances at the jail. Upon drawing all fair and reasonable inferences from the evidence in favor of the Commonwealth, we believe that sufficient circumstantial evidence was proven for a jury to have inferred that Bush brought the contraband into the facility rather than obtained it within the walls of the jail.

At the time he was asked to change into prison clothes for the move upstairs, Bush removed the contraband from his watch pocket and placed it in his mouth. Bush testified that he

¹ While KRS 520.050(1)(b) prohibits possession of dangerous contraband, Bush was charged and the jury was instructed under KRS 520.050(1)(a).

obtained the contraband from "within the walls of the jail." However, on cross-examination, when asked from whom he had obtained the contraband, Bush refused to identify the party. When asked what his intentions were of having the substances in the jail, Bush replied that his "intentions was [sic] to not get caught with it." Thus, in support of his theory that he had obtained the contraband within the walls of the jail, Bush provided only a vague and incomplete explanation.

In the absence of a complete and forthright explanation concerning how he had obtained the contraband from within the walls of the jail, the jury could reasonably infer that Bush was not being truthful regarding how he obtained the contraband, and that he himself had introduced the contraband into the jail facility. As such, Bush was not entitled to a directed verdict, and, further, there was no palpable error pursuant to RCr 10.26.

The judgment of the Bell Circuit Court is affirmed.

ALL CONCUR.

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