

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-000833-MR

KEITH DRAPER

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE GEOFFREY P. MORRIS, JUDGE
ACTION NO. 02-CR-002620

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: COMBS, TACKETT, and VANMETER, Judges.

COMBS, JUDGE. Keith Draper appeals from the judgment of the Jefferson Circuit Court in which he was convicted of the misdemeanor offenses of wanton endangerment in the second degree, carrying a concealed deadly weapon, and resisting arrest. He argues that the evidence was insufficient to sustain the convictions and that the trial court erred in denying his motion for a directed verdict of acquittal. Finding no error, we affirm.

On September 19, 2002, Ergenia Booker observed Draper approaching her mother's home, where several family members and friends were attending a wake for Booker's brother. Problems had previously arisen between Draper and the Coward side of the Booker family. The Cowards, the Bookers, and Draper all reside in the Clarksdale Housing Project in Louisville. Although it was a warm day, Booker noticed that Draper was wearing a trench coat. She testified that Draper pulled two weapons -- a handgun and a crossbow -- from underneath the coat. He pointed them at the family gathering while shouting, "Coward family, I'm not scared of you." While she attempted to get the children indoors, someone called the police.

Officer Ryan Scanlon, working undercover in plain clothes in an unmarked vehicle, was the first officer to arrive at the scene. Officer Scanlon testified that Draper met the description of the person who had terrorized the Coward family. Although Draper was no longer wearing a trench coat or carrying the crossbow, the officer saw the butt of a handgun sticking out of the pocket of Draper's trousers. The officer identified himself to Draper as a police officer; he instructed Draper to take his hands out of his pockets and ordered him to drop to the ground. Draper refused the officer's command, shouting that he "knew his rights." Officer Scanlon repeated his demands several times, but Draper refused to comply. After backup officers

arrived, Officer Scanlon managed to wrestle Draper to the ground and to disarm him. Draper was arrested and was later indicted on charges of first-degree wanton endangerment, resisting arrest, and carrying a concealed deadly weapon.

At trial, Draper's attorney persuaded the jury that his client's conduct did not rise to the level of extreme indifference to the value of human life necessary to support a conviction of first-degree wanton endangerment. Draper was acquitted on that charge. However, the jury found him guilty of the lesser-included offense of second-degree wanton endangerment and of the remaining two misdemeanors charged in the indictment.

After the jury returned its verdict, Draper and the Commonwealth reached an agreement on his sentence. A convicted felon, Draper agreed to waive jury sentencing, to accept three (3) concurrent terms of twelve (12) months in jail, and to forego his right to appeal his conviction. In exchange, the Commonwealth promised not to take a position on the issue of probation. Before releasing the jury, the trial court conducted a careful colloquy with Draper to insure that he understood that the jury could recommend a lesser sentence, a fine only, or both jail time and a fine. The trial court questioned Draper to ascertain if he desired to waive his right to a direct appeal as to his conviction. After conferring with his counsel, Draper stated that he was satisfied that there were no issues to appeal

and that he desired that the court accept the terms of the agreement that he had reached with the Commonwealth.

However, before the sentencing hearing, Draper had a "falling-out" with his trial counsel. His new attorney informed the court that Draper wished to appeal his conviction. The trial court sentenced Draper to twelve (12) months in jail, probated the sentence for a period of two (2) years, and signed an order allowing Draper to appeal *in forma pauperis*. Because the court could not place Draper under the supervision of a probation officer while his appeal was pending, it stayed the order of probation pursuant to RCr¹ 12.76(4), and permitted him to remain free on his own recognizance. This appeal followed.

Draper argues that he is entitled to a reversal of his convictions due to an insufficiency of evidence to support any of the misdemeanors. He contends that there was no proof that the pellet gun which he was carrying was capable of causing harm to anyone. Moreover, he claims that by removing the compressed air from the gun, the Commonwealth destroyed his potential defense that the gun was not operable. He points out that police did not recover the crossbow or the trench coat that he was allegedly wearing. Finally, he maintains that even though he did not comply with Officer Scanlon's requests to fall to the

¹ Kentucky Rules of Criminal Procedure.

ground and to remove his hands from his pockets, he did not run from the police officer.

The Commonwealth has not addressed the merits of Draper's appeal. It argues instead that Draper is bound by his agreement to waive his right to appeal. After examining the record, we agree that Draper knowingly and voluntarily waived any right to appellate review of his conviction. See, Johnson v. Commonwealth, Ky., 120 S.W.3d 704 (2003).

Along with his waiver, Draper has also failed to preserve any issue concerning the sufficiency of the evidence for this Court's review. Draper's motion for a directed verdict was based solely on the alleged insufficiency of the evidence as it related to the charge of first-degree wanton endangerment. However, he conceded that there was sufficient evidence to allow the jury to consider whether he was guilty of the lesser-included offense of second-degree wanton endangerment. Moreover, he did not ask for a directed verdict on the charges of carrying a concealed deadly weapon or of resisting arrest.

Generally, this Court will not address issues raised for the first time on appeal. Regional Jail Authority v. Tackett, Ky., 710 S.W.2d 225 (1989). Despite Draper's waiver and preservation problems, we have reviewed the entire record. We conclude that the merits of Draper's appeal do not warrant a

different outcome. See, Commonwealth v. Benham, Ky., 816 S.W.2d 186, 187 (1991).

Thus, the judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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