

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-000949-MR

BILLY JACK MAJOR

APPELLANT

APPEAL FROM FAYETTE CIRCUIT COURT
v. HONORABLE JOHN R. ADAMS, JUDGE
ACTION NOS. 02-CR-01199 & 03-CR-00033

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: JOHNSON, TAYLOR AND VANMETER, JUDGES.

TAYLOR, JUDGE: Billy Jack Major brings this appeal from an April 7, 2003, judgment of the Fayette Circuit Court imposing a prison sentence. We affirm.

The facts are these: On September 13, 2002, Lexington Police Officer Tony Risen observed a vehicle swerving upon the road. Officer Risen's pursuit of the vehicle ended in what turned out to be appellant's driveway. Officer Risen had noticed two passengers in the vehicle, and upon arrival to

appellant's driveway he observed both the driver and passenger doors open and appellant walking from the driver's side to the front of the vehicle. Officer Risen conducted a short interview of Eric Blake, the other passenger, who was exiting the passenger side of the vehicle when Officer Risen arrived. After interviewing Blake, he proceeded to speak with appellant. At this time he determined appellant was intoxicated, based on appellant's smell of alcohol, slurred speech, and unsteady behavior. Appellant admitted driving the vehicle. Upon asking for identification, appellant gave Officer Risen a Kentucky Identification Card (appellant's license was previously suspended for DUI) but failed to provide registration and proof of insurance. At this time, appellant changed his story and told Officer Risen he had not been driving the vehicle and could not tell him who had been driving.

Officer Risen called for another officer with a PBT (preliminary breath test machine) to assist him. Meanwhile, Officer Risen administered field sobriety tests, all of which appellant failed. Officer Dan McCracken arrived and administered the PBT. The results showed the presence of alcohol. Officer McCracken testified that appellant was confused, unsteady on his feet, and appeared intoxicated.

Officer Risen placed appellant under arrest and conducted a search of appellant's person. The search revealed a

small clear straw, the type usually used to ingest narcotics, in appellant's front pants pocket. Appellant stated he used the tube to inhale prescription medications but could not specify what medical condition required such ingestion. Officer McCracken witnessed Officer Risen take the "straw" out of appellant's pants pocket. Officer Risen testified that a heavy white residue on the inside of the tube appeared to be either cocaine or methamphetamine. Jennifer Melton, Kentucky State Forensic Chemist, tested the residue and the substance was positive for both cocaine and methamphetamine.

Gloria Blake was called to the scene by her son, the vehicle's other passenger. Upon arrival, she witnessed Officer Risen take something from appellant's pocket. Ms. Blake said that she witnessed appellant driving the vehicle. Additionally, Eric Blake later testified that he had been the passenger and appellant was driving the vehicle.

Appellant was initially indicted upon first degree possession of a controlled substance (Kentucky Revised Statutes (KRS) 218A.1415), possession of drug paraphernalia (KRS 218A.500), driving under the influence, second offense with aggravator (KRS 189A.010), and operating on DUI suspended license, first offense (KRS 189A.090). Subsequently, he was further indicted for being a persistent felony offender in the second degree (KRS 532.080).

At trial, appellant moved for a directed verdict at the close of the Commonwealth's case and again at the close of all the evidence. Appellant was convicted of possession of a controlled substance in first degree, possession of drug paraphernalia, and of being a persistent felony offender in the second degree. He was sentenced to a maximum term of six years (one year for possession of a controlled substance, thirty days on possession of drug paraphernalia to run concurrent, and the one year to be enhanced to six years for being a persistent felony offender) in the state penitentiary. This appeal follows.

Appellant argues he was entitled to a directed verdict of acquittal upon the offense of possession of a controlled substance in the first degree, KRS 218A.1415. Specifically, the issue raised on appeal is whether the Commonwealth failed to prove appellant knowingly possessed a controlled substance.

The standard for when a directed verdict should be granted by a trial court is set forth in Commonwealth v. Benham, Ky., 816 S.W.2d 186, 187 (1991):

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.

In the case at bar, this Court must view the evidence in its entirety to determine if the trial court erred. Upon 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." Id. at 187. In Benham, the Court states the Commonwealth has the burden of producing more than a mere scintilla of evidence and that evidence must be of substance.

Case law is clear that residue of a controlled substance is sufficient to constitute the offense of possession. Bolen v. Commonwealth, Ky., 31 S.W.3d 907 (2000). Here, appellant contends the Commonwealth failed to prove he knowingly possessed a controlled substance. Appellant argues that residue of a controlled substance in a tube (straw) would not be so obvious to any one who possessed it.

We view appellant's argument as unconvincing. The record shows the Commonwealth produced significant evidence to prove that appellant knowingly possessed a controlled substance so that a rational trier of fact could have found him guilty beyond a reasonable doubt. Both Officer McCracken and Gloria

Blake witnessed Officer Risen take the tube (straw) from appellant's pocket. Appellant told Officer Risen he used the tube to inhale prescription medications, yet he could not identify what those medications were. Officer Risen testified the tube contained a visible heavy white residue, which later tested positive for both cocaine and methamphetamine. Methamphetamine is not dispensed in a powder form for medical use and cocaine is not typically used medicinally in powder form. Finally, both methamphetamine and cocaine are commonly ingested through the nasal passageways (via a straw).

Under appellant's argument, a defendant need only deny having knowledge of drugs in his possession to avoid prosecution for a crime. This is not, nor has it been, the law in Kentucky. Accordingly, we are of the opinion that the trial court properly denied appellant's motions for directed verdict.

For the reasons set forth above, the judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

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