

RENDERED: AUGUST 20, 2004; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001090-MR

ANTONIO LAMONT FISHER

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JOHN R. ADAMS, JUDGE
ACTION NO. 02-CR-01259

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: COMBS, CHIEF JUDGE; DYCHE, JUDGE; AND EMBERTON, SENIOR
JUDGE.¹

COMBS, CHIEF JUDGE: Following a jury trial, Antonio Fisher was
convicted of first-degree possession of a controlled substance
(cocaine) and second-degree persistent felony offender (PFO),
resulting in a sentence of three years on the underlying offense

¹ Senior Judge Thomas Emberton sitting as Special Judge by assignment of the
Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and
KRS 21.580.

-- enhanced to five years on PFO II. On appeal, he argues the sole issue of whether evidence of cocaine as a Schedule II narcotic was sufficiently proven at trial. We affirm.

While conducting narcotics surveillance on the streets of Lexington, city police detectives observed Fisher extending an outstretched hand to a man who was walking a dog. Fisher testified that he was merely gesturing to the man to restrain the dog. However, the detectives testified that the outstretched hand contained something. They testified that as their unmarked police car pulled up beside Fisher, he quickly put his hand in his pocket and walked away. After circling the block, the detectives passed by Fisher again. At this time, he was walking with another male toward a liquor store.

Parking next to a truck, the detectives quickly exited. Not knowing that they were police, Fisher testified that he feared that they were going to beat him up. The detectives claimed that upon seeing them, Fisher threw a plastic baggie into a nearby yard -- an act which Fisher denied. The detectives recovered the baggie and conducted a field test, which revealed cocaine.

Fisher was arrested for trafficking in cocaine. His companion was released after a search revealed nothing. While Fisher initially denied any connection to the cocaine, he later told the detectives that "the stuff" was not real.

At trial, the parties stipulated (and the jury heard): (1) that the chain of custody of the baggie recovered at the scene was intact and (2) that testing by the Kentucky State Police Laboratory chemist revealed that it contained 2.85 grams of off-white solid, which tested as containing cocaine base -- a Schedule II narcotic.

On appeal, Fisher argues that no evidence was submitted by the Commonwealth at trial to demonstrate that cocaine was classified as a Schedule II narcotic at the time of the offense. Thus, he contends that the evidence was insufficient to support the conviction. We disagree; therefore, we affirm the trial court.

Preliminarily, we note that this issue has not been preserved for appellate review. Fisher was indicted for trafficking in cocaine. Although he moved for a directed verdict at the close of the Commonwealth's proof, he attacked the sufficiency of the evidence of trafficking, arguing in the alternative that the Commonwealth should more correctly have charged him with mere possession. At the close of the evidence, Fisher renewed his motion generally for a directed verdict based on sufficiency of the evidence. He did not object to any of the jury instructions as given, including the possession instruction. However, he did request an additional instruction on criminal attempt to traffic.

At no time did he argue that the Commonwealth had failed to introduce evidence that cocaine was a Schedule II narcotic at the time of the offense; nor did he argue that the Commonwealth had a duty to establish that fact of timing in order to satisfy an element of the offense of trafficking. His motion for a directed verdict did not suffice to preserve this argument, which should have been made prior to the close of evidence. "A motion for directed verdict is not the proper method of challenging the sufficiency of the evidence on a particular issue." *Anastasi v. Commonwealth*, Ky., 754 S.W.2d 860, 862 (1988).

Regardless of the preservation problem, Fisher's substantive argument lacks merit. He contends that as an element of the possession, the Commonwealth was required to prove that cocaine was a Schedule II controlled substance on the date of the offense. KRS² 218A.1415 provides in pertinent part that a person is guilty of possession of a controlled substance in the first degree when he knowingly and unlawfully possesses a controlled substance that is classified in Schedule II. Fisher stipulated at trial that the State Police Laboratory chemist tested and found that the baggie contained cocaine base, a Schedule II narcotic. This evidence was presented to the jury.

² Kentucky Revised Statutes.

The statute makes no allusion to proof of the classification of the substance as of the date of the offense.

Jacobs v. Commonwealth, Ky., 551 S.W.2d 223 (1977), is dispositive of this issue. Jacobs was convicted of possession of a Schedule II controlled substance. On appeal, Jacobs argued that KRS 218A.070 required the Commonwealth to prove that the substance had not been rescheduled on the date of the offense due to the following pertinent language: "(u)nless otherwise rescheduled by regulation of the (state board of health) the controlled substances listed in this section are included in schedule II." *Id.* at 225. In rejecting that argument, the court held that "an enactment of the legislature is presumed valid and effective unless clearly shown otherwise. . ." *Id.*, (citing *Commonwealth v. Robinson*, 192 Ky. 374, 233 S.W. 791 (1921)). The court also noted that the defendant had the responsibility to raise the issue by introducing evidence indicating the drug had been "otherwise" rescheduled. *Id.*

At trial, Fisher did not raise or offer proof on this issue. On appeal, he has cited no dispositive authority requiring the Commonwealth to bear the burden of proof on this issue, nor has he presented any evidence that cocaine was not classified under Schedule II on the date of the offense. On appellate review, the test of a directed verdict is whether -- under the evidence as a whole -- it would be clearly

unreasonable for a jury to find guilt. *Commonwealth v. Benham*,
Ky., 816 S.W.2d 186, 187 (1991). It was not clearly
unreasonable for a jury to have found Fisher guilty of
possession of cocaine.

The judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Irvin J. Halbleib
Louisville, Kentucky

BRIEF FOR APPELLEE:

A.B. Chandler III
Attorney General of Kentucky

Tami Allen Stetler
Assistant Attorney General
Frankfort, Kentucky