

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001304-MR

JAMES "AGAR" HEMBREE

APPELLANT

APPEAL FROM BELL CIRCUIT COURT
v. HONORABLE JAMES L. BOWLING, JR., JUDGE
ACTION NO. 02-CR-00102

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: BARBER, BUCKINGHAM, AND JOHNSON, JUDGES.

BUCKINGHAM, JUDGE: James M. Hembree appeals from a judgment of the Bell Circuit Court wherein he was convicted of possession of a controlled substance and was sentenced to one year in prison. The issue is whether the evidence was sufficient to support the jury's verdict. We believe it was, and thus affirm.

During the afternoon hours of Sunday, February 24, 2002, Hembree was driving his vehicle in Bell County and was pulled over by police officers who had received a report about a

blue sport utility vehicle.¹ The officer who was following directly behind Hembree testified that Hembree was weaving and almost hit the right side of a bridge that he crossed. The officer testified that Hembree's eyes were red and glassy and that his speech was slurred. The officer gave several field sobriety tests, and he testified that Hembree passed only one. Therefore, he arrested Hembree for the offense of DUI.

Because Hembree had apparently not been drinking, he was taken to a local hospital and asked to give a blood and urine sample. Hembree voluntarily gave a blood sample, but he indicated that he was unable to urinate. Because Hembree did not give a urine sample, the officer marked "refused" on the citation. Hembree was then transported to the Bell County Jail.

During the intake procedure at the jail, Hembree was asked by a deputy jailer if he had any drugs on him. He responded that he did not. The deputy jailer then took Hembree to the detoxification cell and searched him. No other prisoners were in the cell at that time. When Hembree removed his shoes and socks, a cellophane bag containing three Oxycontin pills fell to the floor while the deputy jailer was examining one of the socks. The pills proved to contain oxycodone, a Schedule II narcotic.

¹ We are unable to discern the nature of the report from the record.

Hembree was indicted by a Bell County grand jury on four charges: DUI, driving from side-to-side on highway, first-degree possession of a controlled substance, and possession of controlled substance not in original container. Prior to trial, the charges of driving from side-to-side on highway and possession of controlled substance not in original container were dismissed by the Commonwealth.

A jury trial was held on the charges of DUI and first-degree possession of a controlled substance. The evidence at trial indicated that an analysis of Hembree's blood revealed no alcohol or drugs. The jury acquitted him of the DUI charge but found him guilty of the possession charge. It recommended a sentence of one year, and on April 7, 2003, the court sentenced Hembree to one year in prison pursuant to the jury's verdict. This appeal followed.

Hembree argues on appeal that he never possessed the pills found in the detoxification cell and that the court should have granted his motion for a directed verdict at the close of the evidence. He testified at the trial that the pills did not belong to him, and he suggested that the pills may have fallen out of one of the cigarette packs that was in the cell and that he was examining while the deputy jailer was searching his

socks.² Hembree asserts that it makes no sense that he would have brought the pills into the jail with him because he had ample time to dispose of them when he was left alone by the officer at the hospital. Both Hembree and his daughter testified that he was outside of the officer's presence at the hospital for significant periods of time. In short, he argues that he never had actual physical possession of the pills and did not have immediate and knowing control over them.

In support of his argument, Hembree cites Paul v. Commonwealth, 765 S.W.2d 24 (Ky.App. 1988). Our review of that case, however, shows that the facts therein are clearly distinguishable from those in this case. In Paul, the defendant was not in actual possession of the marijuana. In this case the officer testified that the pills were recovered from Hembree's socks that had been on his feet.

The standard for a directed verdict is as follows:

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

² Hembree testified that he had asked the deputy jailer if he could keep the stamps from the Marlboro packages that were in the cell because he mails the stamps in for prizes once he collects enough of them.

jury questions as to the credibility and weight to be given to such testimony.

Commonwealth v. Benham, 816 S.W.2d 186, 187 (Ky. 1991). "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." Id. See also Pate v. Commonwealth, 134 S.W.3d 593, 596-97 (Ky. 2004).

In this case the deputy jailer stated that he was positive that the pills fell from Hembree's socks. "Possession" for purposes of KRS Chapter 218A includes both actual and constructive possession. Pate, 134 S.W.3d at 598. This is a case of actual possession and not constructive possession. The deputy jailer testified that Hembree actually had the pills in his possession. The testimony was sufficient to overcome the directed verdict motion, and the credibility of the testimony was within the province of the jury. See Benham, supra. In short, the trial court correctly denied Hembree's directed verdict motion, and the evidence was sufficient to support the verdict.

The judgment of the Bell Circuit Court is affirmed.

ALL CONCUR.

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