

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001676-MR

WILLIAM A. MACK

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE REBECCA OVERSTREET, JUDGE
ACTION NO. 02-CR-01148

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

** ** * * *

BEFORE: BUCKINGHAM, DYCHE, AND SCHRODER, JUDGES.

DYCHE, JUDGE: William A. Mack appeals a judgment of the Fayette Circuit Court from a jury verdict convicting him of trafficking in a controlled substance first degree, misdemeanor possession of drug paraphernalia and persistent felony offender first degree and sentencing him to fourteen years' imprisonment. We affirm.

On the morning of August 29, 2002, Jeanetta Burns woke Mack, her grandson, from the couch in the den of her house and told him to move into the guest room so she could vacuum. Mack got up and moved three pairs of shoes and garbage bags containing personal belongings into the guest room.

Law enforcement officers arrived shortly thereafter and were admitted to the residence by Ms. Burns. When the officers asked to speak to Mack, Ms. Burns informed them that he was asleep. She then went to the guest room and woke him. (The officers testified that Ms. Burns told them that Mack was asleep in "his room," a statement Ms. Burns disputed.)

Mack signed a consent to search form for the bedroom, and Ms. Burns signed a consent to search form for the remainder of the house. Found beneath the couch in the den were loaded and unloaded guns and ammunition. Seized from the bedroom where Mack was sleeping when the officers arrived were Mack's wallet from a night stand near the bed; a total of \$1833.00 in cash from the night stand and under the mattress; a camera bag in a dresser drawer containing both 12.5 grams of crack cocaine and digital scales with crack residue; and several plastic baggies (some with corners removed and some with corner ends tied) in a trash can. Also found in the guest room was a mask, Mack's driver's license listing the residence as his address, and a photo album containing pictures of Mack and others. Mack

explained at the scene that the money was earned from working and he used the mask when cutting grass at the Marriott.

On November 2, 2002, Mack was indicted for first degree trafficking in a controlled substance with a firearm (KRS 218A.1412, 218A.992), possession of a handgun by a convicted felon (KRS 527.040), possession of drug paraphernalia with a firearm (KRS 218A.500, KRS 218A.992), and as a first degree persistent felony offender (KRS 532.080).

At trial, Mack's sister testified that she, her child, and her boyfriend stayed in the guest bedroom the night before the search. She stated that her boyfriend, who by the time of the trial was deceased from a shoot-out with the police during a robbery, was both a user and a seller and always had cocaine in his possession. She testified that her boyfriend put cocaine in the dresser drawer in the guest bedroom and that she put the guns and ammunition and a mask in a bag under the couch in the den. She also indicated that Mack usually slept on the couch in the den and that he was asleep on the couch that morning when she left.

The jury convicted Mack of lesser charges of felony first degree trafficking in a controlled substance and misdemeanor possession of drug paraphernalia, and as a first degree persistent felony offender. Mack was sentenced in

accordance with the jury's recommendation to fourteen years' imprisonment. This appeal followed.

First, Mack contends that he was entitled to a directed verdict of acquittal. He asserts that the Commonwealth failed to prove that he had constructive possession of the evidence as he was not the only person with access to the rooms where the evidence was found. We disagree.

On motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. Commonwealth v. Benham, Ky., 816 S.W.2d 186, 187 (1991). 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. Id. For the purpose of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but must reserve for the jury questions as to the credibility and weight to be given to such testimony. Id. On appellate review, the test of a directed verdict is that if, under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then is the defendant entitled to a directed verdict of acquittal. Id. Using the above standard, we believe that it was not clearly unreasonable for the jury to find Mack guilty based upon the evidence as a whole.

Mack was convicted of first degree trafficking in a controlled substance and misdemeanor possession of drug paraphernalia. Trafficking is defined by KRS 218A.1412(1):

A person is guilty of trafficking in a controlled substance in the first degree when he knowingly and unlawfully traffics in: a controlled substance, that is classified in Schedules I or II which is a narcotic drug; a controlled substance analogue; lysergic acid diethylamide; phencyclidine; a controlled substance that contains any quantity of methamphetamine, including its salts, isomers, and salts of isomers; gamma hydroxybutyric acid (GHB), including its salts, isomers, salts of isomers, and analogues; or flunitrazepam, including its salts, isomers, and salts of isomers.

As used in this case, "traffic" is defined in KRS 218A.010(28) as "to manufacture, distribute, dispense, sell, transfer, or possess with intent to manufacture, distribute, dispense or sell a controlled substance." Additionally, KRS 218A.500 defines possession of drug paraphernalia as the possession of equipment, such as scales, used in packaging controlled substances. To prove constructive possession the Commonwealth must present evidence which establishes that the contraband was subject to the defendant's dominion and control. Hargrave v. Commonwealth, Ky., 724 S.W.2d 202, 203-04 (1986). The general rule for possession of illicit drugs is that possession need not be exclusive, so that two or more persons may be in possession of the same drug at the same time, and this possession does not

necessarily have to be actual physical possession. Franklin v. Commonwealth, Ky., 490 S.W.2d 148, 150 (1972).

The evidence in this case established that Mack lived at the house owned by his grandparents. Mail and his driver's license seized by police in the room where he was sleeping listed the house as his residence. He was also physically present in the bedroom where the evidence was seized by the police. His wallet was on the night stand and \$1833.00 in cash was found both on the nightstand and under the mattress. He admitted that the money was his. A bag containing 12.5 grams of crack cocaine and digital scales containing cocaine residue was located in the dresser drawer in the bedroom. The trash can in the bedroom contained baggies with corners removed or tied. Testimony indicated that cash, baggies, scales with drug residue, and the amount of crack cocaine seized were indicative of trafficking.

In Clay v. Commonwealth, Ky. App., 867 S.W.2d 200 (1993), the defendant was found guilty of constructive possession of cocaine in a house she owned and in which she lived and used the rooms where the cocaine was found. The defendant in Clay was found to be in constructive possession despite evidence at trial that another person present in the house at the time of the search claimed the cocaine was his and that the defendant knew nothing about it. Id. at 202.

As in Clay, with all of the facts taken together in the light most favorable to the Commonwealth it was not unreasonable for a jury to believe that Mack had constructive possession of the evidence and was guilty of trafficking and possession of drug paraphernalia. The circuit court correctly denied the motion for directed verdict.

Next, Mack contends that the circuit court erred by not granting a mistrial due to the introduction of alleged prejudicial testimony indicative of Mack's status. At a bench conference prior to the beginning of trial, counsel for Mack questioned the Commonwealth as to how the probation and parole officer at the scene was going to testify without identifying that Mack was on probation or parole. The Commonwealth stated that four probation and parole officers arrived at the residence that morning asking for consent to search the residence. All officers in the case were instructed that they were not going to be asked why they were at the residence and that they were only to be identified as "officers," not "parole officers." Mack's counsel agreed with this approach.

During opening statement Mack's counsel suggested that Ms. Burns would testify that she told Mack to go into "a" bedroom, not "his" bedroom. The Commonwealth's witnesses were later to testify that Ms. Burns said Mack was in "his" bedroom. During direct examination of Ms. Burns the following occurred:

Commonwealth: Did the officers, when they arrived, did they ask you where your grandson was?

Ms. Burns: Yes they did.

Commonwealth: And where did you tell them?

Ms. Burns: That he was asleep.

Commonwealth: OK, did you tell them that your grandson was asleep in his bedroom?

Ms. Burns: No I didn't, I told them that he was asleep.

Following this testimony, Mack's mistrial motion was overruled and no admonition or further relief was requested.

The next error asserted by Mack occurred during the direct examination of Officer Compston:

Commonwealth: Officer Compston, we are here today based on the events of August 29th of last year. On that date, did you and other officers go to a residence at 759 Maple Avenue?

Officer Compston: Yes we did.

Commonwealth: Can you tell us what happened once you arrived at that residence - who did you speak with first?

Officer Compston: Well we knocked on the door and Ms. Burns the grandmother came to the door. Officer Martin spoke with the grandmother and told her who we were and that we would like to talk to Mr. Mack. At that time she advised that he was in his room asleep.

After a bench conference on counsel's motion for a mistrial, Mack's counsel agreed to the following curative questioning:

Commonwealth: Officer Compston, were you originally at that residence at 759 Maple for the purpose of arresting Mr. Mack?

Officer Compston: No we were not.

Then later, during defense counsel's cross examination of Officer Martin, the following occurred:

Defense Counsel: Did you talk with Antonio Mack on that day?

Officer Martin: Yes.

Defense Counsel: He didn't claim ownership of anything that was found, any of the contraband or the guns. He denied ownership of any of that?

Officer Martin: He didn't deny or accept ownership of either one from what I can recall. He got frustrated and was just saying take me back downtown I'm ready to go back.

Again, the mistrial motion was overruled and no admonition or further relief was requested. During guilt phase deliberations, the jury asked why the police were at the Burns' residence and the circuit court responded that the court could not answer the question.

The standard for reviewing the denial of a mistrial is abuse of discretion. Clay, supra. "A mistrial is appropriate only where the record reveals 'a manifest necessity for such an action or an urgent or real necessity.'" Id. at 204 (quoting Skaggs v. Commonwealth, Ky., 694 S.W.2d 672 (1985)); Bray v. Commonwealth, Ky., 68 S.W.3d 375, 383 (2002). Here, there was no direct testimony as to Mack's status. The Commonwealth was successful in not revealing the specific type of officers who arrived at the residence or why the officers were at the residence. Counsel for Mack did not request any admonitions but

did request and receive a curative question and answer which revealed that the officers were not at the residence to arrest Mack. In Bray, supra, although several officers made a reference to the defendant's presence on a most-wanted television broadcast, the appellate court found no error in the denial of a motion for mistrial. Mack has cited no persuasive authority warranting manifest necessity for a mistrial in a case where there is no direct reference to the defendant's status as a prior misdemeanant or felon. There was no abuse of discretion in the denial of the motion for a mistrial.

Mack lastly argues that it was palpable error pursuant to Rule of Criminal Procedure (RCr) 10.26 for the penalty phase of his trial to begin at 11:00 p.m. with the jury returning a verdict after 1:00 a.m. Mack fails to cite any controlling or persuasive authority warranting review by this court under the palpable error standard as stated in Jackson v. Commonwealth, Ky. App., 717 S.W.2d 511, 513 (1986):

The crucial question then becomes whether the unpreserved error is of such a magnitude that to leave it unaddressed would work a manifest injustice on the appellant. RCr 10.26. As the standard of this rule has been explained, if upon consideration of the whole case the reviewing court does not conclude that a substantial possibility exists that the result would have been any different, the error complained of will be held to be nonprejudicial.

Of the four counts upon which Mack was indicted, three were presented to the jury and one was dismissed on motion of the Commonwealth. He was found guilty of a lesser felony on count one and of a lesser misdemeanor on count three, leaving only the felony to be enhanced pursuant to count four, PFO I. Instead of recommending a minimum or maximum sentence on each charge, the jury's sentences were eight years on the felony enhanced to fourteen years as a PFO I and eight months on the misdemeanor. In Keller v. Commonwealth, 230 Ky. 815, 20 S.W.2d 998 (1929), the court found no abuse of discretion in submitting a murder case to the jury at midnight. Night sessions were also not found to be prejudicial in Smith v. Commonwealth, Ky., 375 S.W.2d 242, 244 (1964); Anderson v. Commonwealth, Ky., 353 S.W.2d 381, 386 (1962); and Cassell v. Commonwealth, 248 Ky. 579, ___, 59 S.W.2d 544, 549 (1933). Mack has not shown any prejudicial error amounting to manifest injustice which would warrant our review.

The judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

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