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Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001999-MR

DAVID ALLEN PARTIN — APPELLANT

APPEAL FROM BELL CIRCUIT COURT
v. HONORABLE JAMES L. BOWLING, JR., JUDGE
ACTION NO. 02-CR-00133

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DYCHE AND McANULTY, JUDGES; EMBERTON, SENIOR JUDGE.[1]

EMBERTON, SENIOR JUDGE: David Partin was convicted of three counts of first-degree wanton endangerment, resisting arrest, disorderly conduct, possession of marijuana, carrying a concealed deadly weapon, and operating a motor vehicle while under the influence for which he was sentenced to a total of four years' imprisonment. He challenges the judgment convicting

[1] Senior Judge Thomas D. 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.

him of those offenses alleging: (1) that the trial court erred in denying his motion for a directed verdict as to the wanton endangerment charges; (2) that it was error to refuse to instruct the jury on wanton endangerment in the second degree; (3) that the sentencing process was flawed in allowing the jury to consider sentencing on the misdemeanor counts concurrently with the felony counts; and (4) that the instruction on driving under the influence was improperly drafted to allow the jury to convict him under alternate theories. Because our review of the record discloses no reversible error, we affirm the judgment of the Bell Circuit Court.

Appellant's conviction stems from a confrontation with police officers in the early morning hours of September 25, 2000. Officer Scott Elder of the Bell County Sheriff's Department testified that as he was returning from a previous call, he spotted an all terrain vehicle being operated without lights on the wrong side of the road. Officer Elder stated that upon seeing the ATV, he turned his cruiser around, activated his blue lights and followed the ATV a short distance to a gated yard. The officer stated that the ATV had already entered the yard when he approached the closed gate and that he recognized appellant as the driver of that vehicle. The officer radioed for backup when appellant removed a shotgun from a rack on the ATV and pointed it at him.

Although appellant returned the shotgun to the rack at Officer Elder's instruction to put the gun down, when advised that he was under arrest, appellant turned, placed his hand in his pocket and began to walk away at a fast pace. About this time, Officers Hendrickson and Mosley of the Pineville City Police arrived at the scene and attempted to help arrest appellant. A struggle ensued, and in the course of the officers' attempt to subdue appellant, Officer Hendrickson noticed that appellant had his hand in his pocket and detected the outline of a pistol. Officer Hendrickson testified that, after appellant was sprayed with pepper spray, he was able to pull appellant's hand away from the gun and appellant was brought under control. According to the officers, a loaded .380 pistol was removed from appellant's pocket.

The jury heard testimony that appellant's speech was slurred, that he was glassy-eyed, and that he smelled strongly of alcohol. Because appellant's head was bleeding, apparently from the scuffle, the officers transported him to the local hospital for treatment. Officer Elder testified that as he was conducting a pat-down search for additional weapons prior to entering the hospital, he discovered a small quantity of marijuana. He also stated that appellant was quite unruly while awaiting treatment at the hospital.

Appellant testified at trial, denying any conduct which could result in the charges leveled against him. He stated he was on his way home, driving his ATV on a cart path with his lights on. He stated that upon entering his property and closing the gate, Officer Elder started yelling at him to come back to the gate. Appellant related that despite the facts he complied with the officer's request, did not point a shotgun at the officer, did not have a handgun or marijuana in his pocket, and was not intoxicated or unruly, the officers nevertheless hit him in the head with the butt of a gun then tackled him, causing injuries that required hospital treatment. The jury, after hearing these diametrically opposed versions of the events of that night, returned the verdict that precipitated this appeal.

Appellant first argues that the trial court erred in denying his motion for a directed verdict as to the wanton endangerment charges. The standard by which appellate courts are to review such motions is plainly set out in Commonwealth v. Benham:[2]

> 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

[2] Ky., 816 S.W.2d 186, 187 (1991).

> 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 such testimony.
>
> 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. (Citations omitted.)

With this standard in mind, we turn to appellant's contention that he was entitled to a directed verdict of acquittal on the wanton endangerment charges. The wanton endangerment charge concerning Officer Elder stemmed from the act of pointing the shotgun in the officer's direction and the charges concerning Officers Hendrickson and Mosley were predicated upon appellant's struggle with the officers while having a handgun concealed in his pants pocket. Although appellant argues that because there was no evidence that the guns were loaded or that he was about to fire the shotgun or pull the pistol from his pants pocket, there was no proof of conduct creating a substantial danger of death or serious injury as required by KRS[3] 508.060. We disagree.

There are two fatal flaws in appellant's argument. First, there was testimony from which the jury could reasonably conclude that both guns were loaded. Second, and more

[3] Kentucky Revised Statutes.

important, a contention identical to that pressed by appellant was considered and rejected by this court in Key v. Commonwealth:[4]

> We hold that the pointing of a gun, whether loaded or unloaded (provided there is reason to believe the gun may be loaded) at any person constitutes conduct that "creates a substantial danger of death or serious physical injury to another person" in violation of KRS 508.060.

Furthermore, the act of struggling with police officers with one's hand on a pistol concealed in a pocket is not likely to fall outside the Key rationale. The trial court did not err in denying the motion for directed verdict of acquittal.

Appellant's next three arguments are admittedly unpreserved, but he argues they should be reviewed under the palpable error doctrine of RCr[5] 10.26. Although the alleged errors do not rise to the level of substantial error contemplated in the rule, we will briefly address appellant's remaining contentions.

With regard to the instruction on second-degree wanton endangerment, the trial court correctly ruled that based upon appellant's defense that he had no gun whatsoever, the evidence supported only the offense of first-degree wanton endangerment or no offense at all. Thus, there was no manifest injustice in

[4] Ky. App., 840 S.W.2d 827, 829 (1992).

[5] Kentucky Rules of Criminal Procedure.

refusing to instruct on wanton endangerment in the second degree.

As to the instruction on driving under the influence, we note that the language of the instruction mirrors that set out in Cooper, Kentucky Instructions to Juries, Section 8.64A (1999). Because the record contains substantial evidence concerning appellant's demeanor and actions from which the jury could reasonably conclude that appellant's driving ability was impaired by the presence of alcohol, marijuana, or both, we find no manifest injustice in the giving of the instruction as drafted.

Finally, appellant argues that he was substantially prejudiced when the jury was allowed to consider sentences for his misdemeanor convictions at the same time as felony convictions, citing Newton v. Commonwealth,[6] and Commonwealth v. Philpot.[7] While the sentencing procedure utilized in appellant's case did not comport with the guidelines set out in those cases, appellant suffered absolutely no prejudice from the error. Appellant's misdemeanor sentences of less than one year were ordered to run concurrently with his four-year felony sentences and thus he would not serve any time in addition to his felony sentences. Furthermore, the jury had already convicted

[6] Ky. App., 760 S.W.2d 100 (1988).

[7] Ky., 75 S.W.3d 209 (2002).

appellant on the misdemeanor convictions prior to hearing evidence of his prior convictions in the sentencing phase. Under the facts of this case, no palpable error is presented.

The judgment is affirmed.

ALL CONCUR.

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