

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-002741-MR

WILLIAM MCDANIEL

APPELLANT

v. APPEAL FROM WOODFORD CIRCUIT COURT
HONORABLE JULIA HYLTON ADAMS, JUDGE
INDICTMENT NO. 02-CR-00034

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: HENRY AND VANMETER, JUDGES; BUCKINGHAM,¹ SENIOR JUDGE.

HENRY, JUDGE: William McDaniel appeals his conviction for possession of a firearm by a convicted felon. For the reasons stated below, we affirm his conviction.

On July 24, 2002, peace officers discovered a loaded .38-caliber Smith and Wesson handgun in a nightstand in the master bedroom of McDaniel's residence, as well as a box of .38-caliber ammunition in his car.² Ordinarily, these facts standing

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

² The indictment indicates that an assault rifle was also in McDaniel's residence. But, as the Commonwealth dismissed the charge relating to this

alone would not form the basis of a criminal charge. But, as it happens, McDaniel is convicted felon. Consequently, the Grand Jury charged him with possession of a firearm by a convicted felon. See KRS³ 527.040.

At trial, the uncontroverted proof showed that McDaniel was the sole resident of the house in which the handgun was discovered, that McDaniel was a convicted felon, and that he has not received either a pardon or a federal firearms-possession dispensation from the Secretary of the United States Treasury.⁴ McDaniel's defense was that he was not present at his house at the time the handgun was discovered and that no witness testified to seeing the handgun in McDaniel's actual possession.

On appeal, McDaniel does not challenge the search of his residence or the seizure of the handgun, but rather assigns three other claims of error. First, he contends that the circuit court allowed the introduction of irrelevant and prejudicial evidence. Second, he claims that the circuit court failed to conduct a hearing regarding his complaints about his appointed counsel. Third, he contends that the circuit court erred in disallowing his collateral challenge to his 1989 criminal-trespass conviction. We review evidentiary claims for

second weapon prior to trial, it adduced no evidence regarding the rifle at trial.

³ Kentucky Revised Statutes.

⁴ See KRS 527.040(1)(b).

abuse of discretion. See Barnett v. Commonwealth, 979 S.W.2d 98, 103 (Ky. 1998). And, we review all questions of law de novo. See Brown v. Commonwealth, 40 S.W.3d 873, 875 (Ky.App. 1999).

In the circuit court the peace officer who discovered the handgun in McDaniel's nightstand, Lt. Sullivan, also testified (1) that McDaniel was "considered to be dangerous," and (2) that the handgun was loaded with hollow-point and Teflon-coated bullets. McDaniel objected to this testimony, and we agree that Lt. Sullivan's unsolicited characterization of McDaniel as "dangerous" as well as his solicited description of the type of ammunition found in the handgun are irrelevant and possibly inflammatory. Indeed, under KRS 527.040, neither a defendant's propensity for violence nor the type of ammunition he uses are elements of the crime of possession of a firearm by a convicted felon.

Nevertheless, we need not decide whether the circuit court erred in admitting Lt. Sullivan's extraneous statements because we find that at most, they constitute harmless error. Under both RCr⁵ 9.24 and KRE⁶ 103, even the erroneous introduction of evidence is not grounds for reversal unless the error probably affected the outcome of the trial. See Abernathy

⁵ Kentucky Rules of Criminal Procedure.

⁶ Kentucky Rules of Evidence.

v. Commonwealth, 439 S.W.2d 949, 952 (Ky. 1969) overruled on other grounds by Blake v. Commonwealth, 646 S.W.2d 718, 719 (Ky. 1983). And here, in light of the overwhelming and uncontroverted proof that McDaniel, a convicted felon, kept a handgun in the nightstand by his bed, we find that the possibly inflammatory testimony from Lt. Sullivan did not affect the jury's verdict. See Commonwealth v. McIntosh, 646 S.W.2d 43, 45 (Ky. 1983) (finding error harmless due to overwhelming weight of evidence). The fact that no witness actually put the gun in McDaniel's hand is of no moment because constructive possession by keeping a gun in his residence is sufficient to establish guilt. See Johnson v. Commonwealth, 90 S.W.3d 39, 42 (Ky. 2002). Thus, as the jury was not presented with a close case, we find that admission of the dubious portions of Lt. Sullivan's testimony were not likely to have affected the outcome.

Next, we reject McDaniel's contention that the circuit court should have held a hearing on his complaints about appointed counsel because it is factually spurious. Indeed, our review of the pre-trial record shows that, while McDaniel frequently complained about a lack of communication with his appointed counsel, each time McDaniel so complained, the circuit court specifically addressed and assuaged McDaniel's concerns. Consequently, as the record establishes that the circuit court did in fact entertain McDaniel's numerous complaints in open

court, his request for yet another hearing on the matter is without merit.

Finally, we agree with the circuit court's ruling that, as a matter of law, McDaniel is prohibited from collaterally attacking the validity of his 1989 criminal-trespass conviction as a defense to the present charge of possession of a firearm by a convicted felon. This case is about McDaniel's possession of a handgun on July 22, 2004, not his 15-year old criminal-trespass conviction. And, KRS 527.040, only requires the Commonwealth to prove the fact of a defendant's prior conviction, not its validity. Cf. Grace v. Commonwealth, 915 S.W.2d 754, 755-56 (Ky.App. 1996). In any event, the time for McDaniel to challenge the validity of his criminal-trespass conviction by appeal or post-conviction motion has long since run. See CR⁷ 76.12 (setting forth time for taking appeal); see also CR 60.02 and RCr 11.42 (setting forth time limits for initiating collateral attacks). Consequently, the circuit court correctly refused to entertain McDaniel's collateral challenge to his 1989 criminal-trespass conviction as a defense to the firearm possession charge. Accordingly, the judgment of the Woodford Circuit Court is affirmed.

⁷ Kentucky Rules of Civil Procedure.

ALL CONCUR.

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