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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000364-MR

JULIE BERNICE STONE

APPELLANT

v. APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE CRAIG Z. CLYMER, JUDGE
ACTION NO. 03-CR-00020

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: COMBS, CHIEF JUDGE; McANULTY, JUDGE; MILLER, SENIOR JUDGE.¹

MILLER, SENIOR JUDGE: Julie Bernice Stone (Stone) brings this appeal from a "Final Judgment/Sentence of Probation" entered by the McCracken Circuit Court on February 3, 2004, sitting without jury. Stone was found guilty of the indicted offenses of felony first-degree possession of cocaine, first offense,² and

¹ Senior Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

² Kentucky Revised Statutes 218A.1415, a class D felony.

misdemeanor resisting arrest.³ She was sentenced to concurrent sentences of two years and ninety-days, respectively, and given credit for 102 days served with the remainder of the sentence probated for two years. Before us, Stone argues that she was denied due process by the introduction of other crimes/bad character evidence in violation of Kentucky Rules of Evidence (KRE) 404 and that the trial court erred in not directing a verdict of acquittal on the resisting arrest charge.

We review questions of fact under the clearly erroneous standard of Kentucky Rule of Civil Procedure (CR) 52.01. Bronk v. Commonwealth, 58 S.W.3d 482, 486 (Ky. 2001); Rodriguez v. Commonwealth, 87 S.W.3d 8, 10 (Ky. 2002). The trial court's application of law is reviewed *de novo*. Rehm v. Clayton, 132 S.W.3d 864, 866 (Ky. 2004). We conclude that the findings of the trial court are supported by substantial evidence and there was a correct application of law. Thus, we affirm.

It is undisputed that Stone was out walking in the city of Paducah after midnight in November, 2002, when a sheriff's deputy saw her get into the passenger side of a car, driven by a male. Because the car had pulled to the wrong side of the street to allow Stone's entry, the deputy made a traffic stop, assisted by a city police officer who pulled up at the

³ Kentucky Revised Statutes 520.090, a class A misdemeanor.

same time. After the stop, the driver exited the car and failed a field sobriety test.

Riding along with the police officer that evening was a female "citizen police officer" who testified that she saw Stone, while still seated in the car, take a green cigarette package out of her pocket and put it under her leg; and when exiting the car, take another package of cigarettes from the car's ashtray. Stone disputed this testimony and instead testified that she held up a package of cigarettes to the police to show that it was not a threat, took out a cigarette, and put the pack back in her pocket. When the car's cigarette lighter did not work, she testified that she sat back in the seat.

The officers and the "citizen police officer" testified that Stone was writhing away from the officers when they removed her from the car; that Stone did not want to be handcuffed; and that Stone tried to spin away from the officers while being handcuffed.

Once the occupants were out of the car, a search revealed an uncrushed empty flip-top box of Parliament cigarettes in the passenger seat where Stone had been sitting. The cellophane wrapper was off the box and it contained a rock of crack cocaine. Both the driver and Stone denied ownership of the cocaine.

Once arrested, on the way to the jail, it is undisputed that Stone cursed the officers. Additionally, she refused to sit down once they got to the jail.

On appeal, Stone initially argues a denial of due process and a fair trial⁴ by the introduction of other crimes/bad character evidence. Stone claims that the Commonwealth failed to give notice of the introduction of this evidence under KRE 404(c); that there was no basis for introducing this evidence under KRE 404(b); that the prejudicial value outweighed the probative value; and that any error was not harmless.

Specifically, Stone alleges error in the introduction of certain testimony during her cross-examination. The prosecutor's cross-examination of Stone elicited clarification as to her direct testimony, specifically what she had done and where she was directly before she was arrested. Stone testified that she got dropped off by her employer at her brother's house and then because no one had a car she decided to walk to visit a friend, Dawson. Although Stone answered affirmatively to the prosecutor's inquiry as to whether the friend's place was the same place called "The Set," Stone elaborated that just because The Set had a bad reputation did not mean that she had a bad reputation because she only went there to visit a friend of her

⁴ Violations of the Sixth and Fourteenth Amendments to the United States Constitution and Sections Two, Three, Seven and Eleven of the Kentucky Constitution.

dad's, and because he was not there she stayed long enough to order one beer, which she did not finish. Stone's counsel objected to the line of questioning about The Set, arguing that it was irrelevant to the issue of possession of cocaine or resisting arrest and instead was being used by the prosecutor to imply that Stone was somewhere that she should not be. The trial court overruled the objection, concluding that showing where Stone was prior to her arrest was relevant to show she had access to cocaine.

The second complaint concerns a question as to the identity of the person named "Dawson" that she went to visit at The Set - was it James Dawson, Junior, the person who had been convicted of cocaine trafficking? She explained that she went to see James Dawson, Senior, a friend of her dad's, and that she had nothing to do with James Dawson, Junior. Stone's counsel made no objection to this question.

Despite Stone's failure to object in one instance and in the other failing "to make 'known to the court the action (s)he desires the court to take or (her) objection to the action of the court . . .'", (West v. Commonwealth, 780 S.W.2d 600, 602 (Ky. 1989), citing Kentucky Rules of Criminal Procedure (RCr) 9.22), we first address whether the above evidence constitutes KRE 404(b) evidence. KRE 404 states in pertinent part:

(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible:

- (1) If offered for some other purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident; or
- (2) If so inextricably intertwined with other evidence essential to the case that separation of the two (2) could not be accomplished without serious adverse effect on the offering party.

The Commonwealth argues that the evidence is not other crimes, wrongs, or acts at all, and in any event, was precipitated by Stone's testimony placing her character and drug past at issue in the case.

We must agree with the Commonwealth that the fact that Stone visited a place with, as Stone characterized it, a "bad reputation," is not evidence of other crimes, wrongs or acts. Additionally, although not objected to by Stone, the questioning with regard to which Dawson she was visiting that evening was resolved in her favor by her answer that she did not have anything to do with the Dawson who was the convicted cocaine trafficker.

Because the evidence is not KRE 404(b) evidence, Stone was not entitled to notice. KRE 404(c) requires pretrial notice if the prosecution intends to introduce evidence pursuant to KRE 404(b) as a part of its case in chief. Because the evidence

does not violate KRE 404(b), then KRE 404(c) simply does not apply.

Stone further argues, regardless of the relevance of the testimony, that the prejudicial effect outweighed any probative value. We disagree, but in any event, Stone's testimony itself dilutes this argument. Several times during her testimony Stone spontaneously admitted prior drug use and a prior conviction for possession of drug paraphernalia.

Stone next contends that the trial court erred by failing to direct a verdict of acquittal on the resisting arrest charge. Initially, we note that in Morrison v. Trailmobile Trailers, Inc., 526 S.W.2d 822, 823 (Ky. 1975), the Kentucky Supreme Court stated:

It is fundamental that only juries return verdicts and that in all actions tried upon the facts without a jury or with an advisory jury the court finds facts. CR 52.01.

The court went on to state that CR 41.02(2), which authorizes dismissal in an action tried without a jury, is complementary to CR 50.01, which authorizes a motion for a directed verdict in a jury trial. Regardless, we do not find a motion of either type alleging insufficient evidence either at the close of the Commonwealth's evidence or at the close of all of the evidence, and thus this issue is unpreserved for our review. Cf Baker v. Commonwealth, 973 S.W.2d 54, 55 (Ky. 1998).

Despite, however, the lack of preservation, we will consider this issue because insufficient evidence to support a conviction affects the substantial due process rights of a defendant and amounts to palpable error under RCr 10.26. See Perkins v. Commonwealth, 694 S.W.2d 721, 722 (Ky.App. 1985).

Pursuant to Kentucky Revised Statutes (KRS) 520.090:

- (1) A person is guilty of resisting arrest when he intentionally prevents or attempts to prevent a peace officer, recognized to be acting under color of his official authority, from effecting an arrest of the actor or another by:
 - (a) Using or threatening to use physical force or violence against the peace officer or another; or
 - (b) Using any other means creating a substantial risk of causing physical injury to the peace officer or another.

The arresting officer testified that when arrested, Stone did not want the handcuffs placed on her and began pulling, struggling and spinning away. According to him, she did not try to strike, harm or cause injury to him but was just trying to get away from the handcuffs. Testimony from the "citizen police officer" revealed that when Stone refused to get out of the car she swung her arms. When the officers finally got her out of the car she began swinging her arms again, jerking away from the officers and telling the officers to get their hands off of her. The trial court made a finding that, while Stone's actions were not egregious, they did fit the statute in that Stone used some force against the officers during the arrest.

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 is the defendant is entitled to a directed verdict of acquittal. Commonwealth v. Benham, 816 S.W.2d 186, 187 (Ky. 1991). A review of the evidence presented in this case clearly indicates that the findings of the trial court are supported by substantial evidence and there was a correct application of law.

For the foregoing reasons, the judgment of the McCracken Circuit Court is affirmed.

ALL CONCUR.

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