

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2004-CA-000577-MR

MERVIN DUNN

APPELLANT

v. APPEAL FROM LETCHER CIRCUIT COURT  
HONORABLE SAMUEL T. WRIGHT, III, JUDGE  
INDICTMENT NO. 02-CR-00007

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

\*\* \*\* \* \* \*

BEFORE: HENRY AND VANMETER JUDGES; MILLER, SENIOR JUDGE.<sup>1</sup>

HENRY, JUDGE: On September 12, 2001, Trooper Ronnie Long, then an undercover officer of the Kentucky State Police, and John J. Walters, Jr., a cooperating witness, went to Mervin Dunn's residence in Letcher County to try to buy drugs and alcohol from Dunn. When they arrived Dunn sold Walters a twelve-pack of Budweiser beer, four Lortab tablets and eight Xanax tablets for \$50.00 cash while Trooper Long looked on. During a search of

---

<sup>1</sup> 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 KRS 21.580.

the residence after the arrest, police found thirteen more cases of beer, \$1,300.00 cash and a quantity of marijuana. This additional evidence was suppressed before trial on Dunn's motion. Dunn was charged with trafficking in a controlled substance in the second degree for the Lortab tablets, trafficking in a controlled substance in the third degree for the Xanax tablets, trafficking in marijuana, and trafficking in alcoholic beverages in local option territory.

The trial court granted the Commonwealth's motion to dismiss the marijuana charge on the morning of trial. Prior to commencement of the trial Dunn moved for dismissal of the alcohol trafficking charge on the grounds that the actual twelve-pack of beer involved in the transaction had been commingled with other beer while being held in evidence and that without the introduction of the twelve-pack, the Commonwealth could not prove Dunn's guilt beyond a reasonable doubt. This motion was denied, and the case proceeded to jury trial on the two charges of trafficking in controlled substances and the charge of trafficking in alcoholic beverages. At the close of the Commonwealth's case Dunn moved for directed verdicts on all counts, alleging insufficient evidence.

On appeal, Dunn argues that the trial court erred by denying his motion to dismiss the charge of trafficking in alcoholic beverages and by denying his motions for directed

verdict. Dunn moved for a directed verdict on the charge of trafficking in alcoholic beverages on the same grounds for which he had earlier moved for dismissal. He moved for a directed verdict on the drug trafficking charges because the Commonwealth did not submit proof of the drug content of each individual tablet Dunn sold to Walters. Because the chemist at the Kentucky State Police Crime Lab selected random tablets and tested them instead of testing all the tablets involved in the transaction, Dunn argues that the evidence was insufficient to sustain a conviction.

Dunn's first argument on appeal, that the trial court erred by denying his motion to dismiss the charge of trafficking in alcoholic beverages, is without merit. The Kentucky Supreme Court recently reaffirmed longstanding precedent that "...the authority to dismiss a criminal complaint before trial may only be exercised by the Commonwealth, and the trial court may only dismiss via a directed verdict following a trial". Commonwealth v. Isham, 98 S.W.3d 59, 62 (Ky. 2003); See also Commonwealth v. Hamilton, 905 S.W.2d 83, 84 (Ky.App. 1995).

At the close of the Commonwealth's case and again at the close of all the evidence, Dunn's counsel moved for a directed verdict on the same grounds; that is, that the Commonwealth could not prove its case beyond a reasonable doubt

without introducing the actual twelve-pack of beer involved in the transaction. The motion was denied.

When considering a motion for directed verdict:

.....the 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. Commonwealth v. Benham, 816 S.W.2d 186, 187 (Ky. 1991).

As long as there was other evidence sufficient to support Dunn's conviction, the Commonwealth's failure to produce the contraband is not a fatal flaw. In Graves v. Commonwealth, 17 S.W.3d 858 (Ky. 2000), the Kentucky Supreme Court sustained the defendant's conviction for trafficking in cocaine even though no cocaine was seized or introduced at trial. Id. at 862. "Conviction can be premised on circumstantial evidence of such nature that, based on the whole case, it would not be clearly unreasonable for a jury to find guilt beyond a reasonable doubt". Id. In this case the evidence included testimony of a state trooper who witnessed the transaction. The motion for directed verdict on this ground was properly denied.

Dunn was also denied a directed verdict on the drug trafficking charges. The analyst at the crime lab randomly selected one of the Lortab and two of the Xanax tablets to test, leaving three untested Lortab and six untested Xanax tablets to

be admitted into evidence. The testing process consumes the tablets. Dunn argues that because the tablets admitted into evidence were never tested, those tablets were not proved to contain controlled substances, and the evidence was therefore insufficient to sustain a verdict.

In Taylor v. Commonwealth, 984 S.W.2d 482 (Ky.App. 1998), the issue before this court was "...whether the state is required to test samples from all individual portions of a controlled substance when the charge against the defendant relates to a certain amount of a controlled substance." Id. at 484. We held that chemical testing of only a sample of the seized marijuana plants was sufficient to sustain a conviction for trafficking in all the plants. The facts in Taylor are directly analogous to the facts in this case. The tablets of each type bore identical markings, they were similar in appearance, they were all in the same location, and the substances tested proved to contain controlled substances. The evidence was sufficient to sustain a guilty verdict as to both Lortab and Xanax. As in Dunn's argument about the twelve-pack of beer, a conviction can be based on circumstantial evidence, even if the contraband itself is not introduced in evidence. Graves v. Commonwealth at 862.

In Dunn's brief other issues are lumped in with his directed verdict arguments including that Walters was not

searched by the state police prior to the drug transaction, and that the police made an audiotape of the transaction but failed to produce it at trial. These issues were not stated as grounds for a directed verdict and they are therefore not preserved for our review. A motion for directed verdict must state the specific grounds for the motion. CR<sup>2</sup>50.01; Daniel v. Commonwealth, 905 S.W.2d 76, 79 (Ky. 1995). Finding no error, we affirm.

ALL CONCUR.

BRIEF FOR APPELLANT:

James W. Craft, II  
Whitesburg, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo  
Attorney General

Jeffrey A. Cross  
Assistant Attorney General  
Frankfort, Kentucky

---

<sup>2</sup> Kentucky Rules of Civil Procedure.