

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000588-MR

GORDON WADE

APPELLANT

v. APPEAL FROM MONTGOMERY CIRCUIT COURT
HONORABLE BETH LEWIS MAZE, JUDGE
CIVIL ACTION NO. 00-CR-00076

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: MINTON, SCHRODER, AND TAYLOR, JUDGES.

MINTON, JUDGE: Gordon Wade appeals his conviction for being a convicted felon in possession of a firearm arguing that the Commonwealth failed to prove at trial that he had physical possession of a firearm. After reviewing the record, we find that the Commonwealth introduced sufficient evidence to satisfy a reasonable juror beyond a reasonable doubt that Wade, a convicted felon, had constructive possession of a firearm. This evidence was enough to support the conviction. Thus, we affirm the judgment.

Several officers of the Mt. Sterling Police Department were dispatched to the Carousel Lounge in response to a report that a man inside the bar had a gun. Upon the officers' arrival at the bar, a female behind the counter stated, without prompting, "He's back there," pointing to a room at the rear of the bar. When the officers entered that rear room, Wade was the only person present, seated in a booth with his back to the officers.

The officers ordered Wade to put his hands up, but he refused to do so. Instead, Wade made furtive movements with his left arm and shoulder. When the officers again ordered Wade to put his hands up where they could be seen, he responded by again making furtive arm movements. Eventually, after making more arm movements, Wade raised his hands where the officers could see them. At that point, an officer approached Wade from an angle so as to better determine if Wade had taken something off his person and placed it on the seat, as suggested by his prior arm movements. When the officer got near Wade, he noticed an automatic handgun lying on the seat, inches from Wade.

The trial court originally granted Wade's motion to suppress the handgun. But we reversed and remanded that decision.¹ On remand, a jury found Wade guilty of being a felon

¹ See Commonwealth v. Wade, 2001-CA-000839, rendered February 8, 2002 (Trial Court Record, pp. 94-100). The Kentucky Supreme Court denied

in possession of a firearm (namely, a handgun); and Wade was sentenced to eight years' imprisonment.² Wade then filed this appeal.

On appeal, Wade contends that the evidence was insufficient to support the guilty verdict. In other words, Wade contends that the trial court erred by not granting his motion for a directed verdict.

A trial court should only grant a directed verdict if the Commonwealth does not submit evidence "sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty[.]"³ All "fair and reasonable inferences from the evidence" must be drawn in favor of the Commonwealth; and the court "must assume that the evidence for the Commonwealth is true," while "reserving to the jury questions as to the credibility and weight" of the evidence.⁴ On 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

discretionary review in November 2002. See Wade v. Commonwealth, 2002-SC-0202D (Trial Court Record, p. 93).

² Trial Court Record, p. 166.

³ Commonwealth v. Benham, 816 S.W.2d 186, 187 (Ky. 1991).

⁴ *Id.*

acquittal.”⁵ Finally, a conviction may properly be based upon circumstantial evidence “when that evidence is of such character that reasonable minds would be justified in concluding that the defendant was guilty beyond a reasonable doubt.”⁶

Bearing those principles in mind, we turn to the evidence adduced against Wade. In order to convict Wade of being a felon in possession of a firearm, the Commonwealth was required to show that Wade had been previously convicted of a felony and that he possessed a firearm.⁷ Wade does not dispute that he has been previously convicted of a felony. He contends that the Commonwealth did not show that he had possession of a firearm.⁸

The Commonwealth did not show that Wade actually possessed the firearm. Rather, the Commonwealth proceeded under the legally permissible alternate theory of constructive possession.⁹ “Constructive possession exists when a person does not have actual possession but instead knowingly has the power

⁵ *Id.*

⁶ Thacker v. Commonwealth, 115 S.W.3d 834, 839 (Ky.App. 2003).

⁷ See Johnson v. Commonwealth, 90 S.W.3d 39, 42 (Ky. 2002). See also Kentucky Revised Statutes (KRS) 527.040.

⁸ KRS 527.040(2) provides for an increased sentence if the firearm possessed by the convicted felon is a handgun. Wade concedes that the firearm in question is a handgun.

⁹ Johnson, 90 S.W.3d at 42 (“Possession may be proven through either actual possession or constructive possession.”).

and intention at a given time to exercise dominion and control of an object, either directly or through others.'"¹⁰

To support its constructive possession theory, the Commonwealth showed that: officers responded to a call about someone possessing a gun at the Carousel Lounge; that when they arrived on the scene, an employee directed them toward the back room, where Wade alone was present; Wade twice failed to raise his hands when ordered to do so by the officers, instead making furtive and suspicious movements with his arm (which the officers believed to be consistent with his taking something off his person and placing it in the seat); that a small handgun was lying on the seat in plain view, only inches from Wade; and that the handgun found near Wade matched the description of a handgun Wade's mother had earlier reported as stolen.¹¹ Such an accumulation of evidence, circumstantial though it may be, was enough to satisfy a reasonable juror that Wade had constructive possession of the handgun. Thus, the trial court correctly denied Wade's motion for a directed verdict, meaning that Wade's conviction must be affirmed.

For the reasons discussed in this opinion, the judgment of the Montgomery Circuit Court is affirmed.

¹⁰ *Id.* (quoting United States v. Kitchen, 57 F.3d 516, 520 (7th Cir. 1995)). See also KRS 500.080(14) (defining possession as having "actual physical possession or otherwise to exercise actual dominion or control over a tangible object.").

¹¹ See Trial Court record, p. 82.

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