

RENDERED: December 23, 2004; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2004-CA-000770-MR

DANTE MCGINNIS

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JAMES M. SHAKE, JUDGE
ACTION NO. 03-CI-001768

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

** ** * * * * *

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

MILLER, SENIOR JUDGE: Dante McGinnis appeals from a judgment of the Jefferson Circuit Court entered upon a jury verdict convicting him of, among other things, one count of possession of a firearm by a convicted felon as set forth in Kentucky Revised Statutes (KRS) 527.040, and sentencing him to seven

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 KRS 21.580.

years in prison. McGinnis contends that the trial court erred by permitting the Commonwealth to introduce evidence concerning the testing of the firearm to determine whether it was capable of being fired. We affirm.

On April 16, 2003, Officer James Kaufling was on foot patrol in Parkway Place, a federal housing project, when he observed McGinnis near building 12 throwing dice with a large roll of cash in his hand. McGinnis observed the officer and began to walk away. Officer Kaufling asked McGinnis to stop, but McGinnis began to run away. Kaufling pursued McGinnis and observed him reach in the waistband of his pants and throw a .38 caliber pistol to the ground. McGinnis was eventually apprehended by Kaufling. A search incident to arrest yielded 5 dice and \$860.00 in cash on the appellant's person. Parkway Place is a no trespass locale. McGinnis did not live at Parkway Place and had no legal reason to be there.

On July 15, 2003, McGinnis was indicted for possession of a firearm by a convicted felon, tampering with physical evidence, third-degree criminal trespass, and loitering.

Prior to trial Officer Kaufling took the pistol to the firing range and, at his request, the firing range supervisor fired the pistol to test whether it was capable of firing. It was. At trial, Officer James Kaufling was called as a witness by the Commonwealth. When Kaufling began to testify concerning

the results of a test firing of the pistol, McGinnis objected on the basis that he had not been informed concerning the results of the test. The trial court overruled McGinnis' objection and permitted Officer Kaufling to continue to testify that the weapon was capable of being fired based upon the test firing.

McGinnis contends that the trial court erred by permitting testimony regarding the test firing because the Commonwealth had not disclosed the results of the test to him. Specifically, McGinnis argues that the Commonwealth was under an obligation to disclose the results of the test firing pursuant to the provision of Ky. Rule Crim. P. (RCr) 7.24(1), which requires the Commonwealth to disclose to a defendant, among other things, the results of scientific tests or experiments made in connection with the particular case. McGinnis argues that the test firing of the pistol falls within the scope of this provision. On July 24, 2003, the trial court had entered a pretrial order which, among other things, required the Commonwealth to "comply with the Rules of Criminal Procedure regarding discovery."

The Commonwealth did not violate the "scientific tests or experiments" provision of RCr 7.24 by not providing the results of the test to McGinnis. The test firing of a pistol cannot be construed as a "scientific test or experiment." The use of the term "scientific" connotes evidence requiring the use

of an expert. See Kentucky Rules of Evidence (KRE) 702. ("If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." (Emphasis added)).

Further, scientific evidence has been defined as "evidence that draws its convincing force from some principle of science, mathematics and the like." Commonwealth v. Miller, 367 Pa.Super. 359, 363, 532 A.2d 1186, 1188 (1987) (*quoting* State v. Brown, 297 Or. 404, 407, 687 P.2d 751, 754 (1984)); Commonwealth v. Apollo, 412 Pa.Super. 453, 457, 603 A.2d 1023, 1025 (1992). The test firing of a pistol does not fall within the scope of this definition. Any physically able layperson is capable of test firing a pistol to determine if it is capable of firing. No principles of science, mathematics and the like are implicated in the determination. Nor is the need for expert testimony. We accordingly must reject McGinnis' position that the Commonwealth violated the discovery order by not providing him with the results of the test.

McGinnis also contends that since the firing range supervisor rather than Kaufling himself fired the pistol,

Kaufling's testimony concerning the results of the test was hearsay.

On cross-examination Kaufling clarified that the firing range supervisor, not he, fired the gun. Defense counsel did not object, nor did he pursue how Kaufling knew the test results - by witnessing the test firing or by being told about the result by the firing range supervisor. Kaufling did not repeat any out of court statement made by the firing range supervisor.

In summary, Kaufling testified that he checked the gun out of the evidence locker, took it to the firing range, had the firing range supervisor test fire the gun, and returned the gun to the evidence locker the same day. The implication of his testimony was that he observed the test firing, not that he absented himself while the firing range supervisor performed the test and thereafter learned about the test result from statements made by the supervisor.

Kaufling's testimony, it appears, was not based upon any statement made to him by the firing range supervisor; rather, the clear implication is that his testimony was based upon his personal observation of the test firing, in which case Kaufling's testimony was not based upon hearsay. See KRE 801(c).

In any event, McGinnis did not raise this objection at trial, and the issue is unpreserved. This court will not consider errors raised for the first time on appeal. Robinson v. Commonwealth, Ky. App., 572 S.W.2d 606, 608 (1978). Nor was there palpable error pursuant to RCr 10.26.

For the foregoing reasons the judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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