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Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001631-MR

ANTHONY LUMPKIN — APPELLANT

APPEAL FROM BELL CIRCUIT COURT
v. HONORABLE JAMES L. BOWLING, JR., JUDGE
ACTION NO. 03-CR-00210

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: JOHNSON, KNOPF, AND VANMETER, JUDGES.

VANMETER, JUDGE: James Anthony Lumpkin appeals from a judgment and sentence of the Bell Circuit Court in a multi-count criminal proceeding. Lumpkin contends that the trial court erred in failing to direct a verdict in his favor on the counts of second-degree burglary and any lesser-included offenses, and first-degree possession of a controlled substance. For the following reasons, we affirm.

In May 2003, Lumpkin's estranged wife, Shirley Birchfield (formerly Lumpkin), obtained a domestic violence order (DVO) ordering Lumpkin not to commit further acts or threats of abuse, not to contact or communicate with Birchfield, to remain 200 feet away from Birchfield and members of her family, and not to dispose of or damage their property. Some two months later, on the morning of July 26, Lumpkin was arrested after an altercation at Birchfield's residence. According to Lumpkin's testimony at trial, he, Birchfield, and three others spent the previous night smoking and snorting cocaine at Jennifer Smith's house. He and Birchfield left Smith's house around 7 a.m. on July 26, walked approximately four blocks to Birchfield's home, and then got into a fight about a hickey on her neck and the fact that he could not see his son.

Birchfield testified, by contrast, that on July 25 she and her two children spent the night at Smith's house. Lumpkin arrived around 5 a.m. on July 26, and the two started to argue. In order to keep the argument away from Smith and the children, Birchfield walked toward her house. The two continued to argue at Birchfield's home, which Lumpkin had entered without Birchfield's permission, and Lumpkin hit Birchfield's face and head with his fists and a clothing iron. The police were contacted and went to Birchfield's home, where they found

Birchfield standing at the door with swelling and redness in her arm and eye, as well as a mark on her forehead and a knot behind her ear. Meanwhile, Lumpkin was arrested nearby and was searched, resulting in the discovery of a straw in his left rear pocket. Upon testing, the straw was found to contain cocaine residue.

Lumpkin was indicted and a jury trial was conducted on June 17, 2004. Pursuant to the jury's verdict, the trial court ultimately adjudged Lumpkin to be guilty of criminal trespass in the first degree,[1] assault in the fourth degree,[2] violation of a Kentucky protective order,[3] terroristic threatening in the third degree,[4] and possession of a controlled substance in the first degree.[5] The court sentenced Lumpkin to concurrent terms of imprisonment of five years, twelve months, and six months. This appeal followed.

I. Burglary in the Second Degree

The jury, which was instructed as to both burglary in the second degree and the lesser-included offense[6] of criminal trespass in the first degree, ultimately found Lumpkin guilty of

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[1] KRS 511.060.

[2] KRS 508.030.

[3] KRS 403.763.

[4] KRS 508.080.

[5] KRS 218A.1415.

[6] *Rogers v. Commonwealth*, 86 S.W.3d 29, 45 (Ky. 2002).

the latter charge. On appeal Lumpkin asserts that the trial court erred in failing to direct a verdict in his favor on the burglary count and any lesser included offenses. We disagree.

A criminal defendant is entitled to a directed verdict of acquittal "if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt[.]"[7] Here, we note that as Lumpkin was indicted but not convicted of second-degree burglary, "any error in not directing a verdict on that charge is clearly harmless."[8] However, Birchfield's testimony that Lumpkin entered her home without permission, if believed, falls within the KRS 511.060(1) definition of first-degree criminal trespass, which occurs when a person "knowingly enters or remains unlawfully in a dwelling."

> [A] motion for a directed verdict of acquittal should only be made (or granted) when the defendant is entitled to a complete acquittal, that is, when looking at the evidence as a whole, it would be clearly unreasonable for a jury to find the defendant guilty, under any possible theory, of any of the crimes charged in the indictment or of any lesser included offenses.[9]

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[7] *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991).

[8] *Nichols v. Commonwealth*, 142 S.W.3d 683, 693 (Ky. 2004).

[9] *Id.* (quoting *Campbell v. Commonwealth*, 564 S.W.2d 528, 530-31 (1978)).

Clearly, as evidence was adduced to support a finding that Lumpkin was guilty of second-degree criminal trespass, he was not entitled to a directed verdict on this charge.

II. Possession of a Controlled Substance in the First Degree

Lumpkin also contends on appeal that the trial court erred in failing to direct a verdict in his favor as to the charge of first-degree possession of a controlled substance, because the "miniscule amount" of cocaine residue on the straw found on his person was insufficient to support a conviction under KRS 218A.1415. We disagree.

First, this matter was not preserved pursuant to CR 50.01, which directs that "[a] motion for a directed verdict shall state the specific grounds therefor." Although at the close of the Commonwealth's case-in-chief, Lumpkin made a "generic" motion for a directed verdict in his favor regarding the charge of first-degree possession of a controlled substance, "Kentucky appellate courts have steadfastly held that failure to [state specific grounds] will foreclose appellate review of the trial court's denial of the directed verdict motion."[10] Moreover, Lumpkin is not entitled to relief pursuant to the palpable error provision of RCr 10.26.

A person is guilty of first-degree possession of a controlled substance when he knowingly and unlawfully possesses

[10] *Pate v. Commonwealth*, 134 S.W.3d 593, 597-98 (Ky. 2004).

a controlled substance that is, *inter alia*, classified in Schedule II, such as cocaine.[11] In *Commonwealth v. Shivley,*[12] the Kentucky Supreme Court held that "cocaine residue (which is cocaine) is sufficient to entitle the Commonwealth's charge to go to a jury when there is other evidence or the inference that defendant knowingly possessed the controlled substance." Here, a witness from the Kentucky State Police Crime Laboratory testified that she tested the residue found on the straw and identified it as cocaine. Given the fact that Lumpkin testified that he spent the night before his arrest smoking and snorting cocaine, there certainly was "other evidence or the inference" that Lumpkin knowingly possessed the cocaine found on the straw.

We are not persuaded by Lumpkin's argument that his case is distinguishable from *Shivley* because the cocaine residue found on his straw was not visible and could not be weighed, whereas the amount of residue available in *Shivley* was sufficient for testing and was visible on the test tube even though it could not be accurately weighed.[13] The Supreme Court of Kentucky rejected the same argument when it was proffered in *Bolen v. Commonwealth,*[14] finding that even when the

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[11] KRS 218A.1415; KRS 218A.070(1)(d).

[12] 814 S.W.2d 572, 574 (Ky. 1991).

[13] *Id.* at 572.

[14] 31 S.W.3d 907, 909-10 (Ky. 2000).

Commonwealth's testing "revealed that a non-weighable amount of residue existing on each pipe contained the molecular structure of cocaine[,]" in *Shivley*

> this Court declared that the quantity of the controlled substance possessed is immaterial to the criminality of the act. *Id.* at 573. *See also Commonwealth v. Harrelson*, Ky., 14 S.W.3d 541, 549-50 (2000). Therefore, the existence of cocaine residue on each pipe was sufficient to support a conviction under KRS 218A.1415(1).

Likewise, the existence of cocaine residue on the straw was sufficient to support Lumpkin's conviction under KRS 218A.1415(1) in the matter now before us. No palpable error occurred.

The judgment of the Bell Circuit Court is affirmed.

ALL CONCUR.

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