

Commonwealth Of Kentucky
Court of Appeals

NO. 2004-CA-002619-MR

SENAD TOKOVIC

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE THOMAS L. CLARK, JUDGE
ACTION NO. 04-CR-01346

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: GUIDUGLI, McANULTY, AND SCHRODER, JUDGES.

GUIDUGLI, JUDGE: Senad Tokovic appeals from the November 24, 2004, judgment of the Fayette Circuit Court, in which he was found guilty of Attempting to Escape from a Penitentiary and of being a 2nd degree Persistent Felony Offender, for which offenses he received an enhanced sentence of five years. We affirm.

On November 8, 2004, the Fayette County Grand Jury indicted Tokovic on one count of Attempting to Escape from a Penitentiary¹ and on one count of being a persistent felony

¹ KRS 520.015.

offender.² This indictment superceded an earlier indictment (04-CR-01125), in which Tokovic was charged with 2nd Degree Escape, rather than attempting to escape. Tokovic, who appeared with counsel and an interpreter, entered a not guilty plea at his arraignment on November 12, and proceeded to a bench trial on November 15.

In August 2004, Tokovic was an inmate at Blackburn Correctional Complex, a minimum security prison in Lexington, Kentucky, serving a sentence for a conviction unrelated to the current case. After being incarcerated for over one year, on the morning of August 9, 2004, Tokovic missed the 7:30 a.m. inmate count. Prison officers did a back-up count, and then instituted an emergency count when they again failed to locate Tokovic. Pursuant to Blackburn's inmate handbook, which is issued to all inmates, including Tokovic, "[a]nytime the siren sounds an emergency count shall be in progress and inmates shall immediately report to their living unit for bed ID count. Inmates have a maximum of ten (10) minutes to be in their living unit at their assigned bed." When officers were still unable to locate Tokovic, the Lexington Police Department was called. A canine unit arrived, and began a search of the 450-acre prison grounds. The dog alerted on a scent 200 to 300 yards out, and shortly after 9:00 a.m., Lexington Police Department Officer

² KRS 532.080.

Shane Slark discovered Tokovic in a restricted area in tall grass behind two fences along the perimeter of the prison grounds. Tokovic was apparently lying on the ground, and sat up after Officer Slark had called out three challenges. Prison officers recovered Tokovic's inmate-issued coat, and discovered cigarettes, packs of crackers, a drink, an expired INS card, and Tokovic's resident record card with handwritten notations, including telephone numbers with "502" area codes, an address in Louisville, and a Memphis, Tennessee telephone number. Tokovic testified that he was merely smoking a cigarette before reporting to his job in the kitchen and had moved into the grassy area to escape the sunlight covering the table area where he had been sitting. He also testified that he had no plans to escape, and if he had, he would have planned his escape for 1:00 a.m. when it was dark and no one would be able to see him.

At the conclusion of the bench trial, the trial court found Tokovic guilty of attempting to escape, specifically finding that he had attempted to flee from the bounds assigned to him and had completed acts in furtherance of escape. The trial court did not find credible Tokovic's testimony that he was much closer than 200 to 300 yards away, and noted that he had crossed two fences and was found near a railroad track and an interstate highway. For this offense, the trial court sentenced him to one year, which was enhanced to five years

based upon his PFO II conviction following the penalty phase of the trial. This appeal followed.

In his brief, Tokovic argues under the palpable error rule, RCr 10.26, that the evidence the Commonwealth submitted at trial was not sufficient to support his conviction of attempting to escape. On the other hand, the Commonwealth asserts that there was sufficient evidence presented, pointing out a plethora of evidence supporting the conviction.

We note at the outset that trial counsel for Tokovic failed to move for a directed verdict at the close of the Commonwealth's case and at the end of the trial. Because the issue raised is unpreserved, we much review this matter under the palpable error rule of RCr 10.26, which provides:

A palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error.

It is clear that the palpable error rule "is not a substitute for the requirement that a litigant must contemporaneously object to preserve an error for review. . . . In determining whether an error is palpable, 'an appellate court must consider whether on the whole case there is a substantial possibility

that the result would have been any different.'"³ In the present matter, we must determine whether the trial court would have entered a directed verdict, had one been requested by counsel for Tokovic.

In Commonwealth v. Benham,⁴ the Supreme Court restated the test for a directed verdict as follows:

On motion for directed verdict, the trial 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. For the purpose of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but reserving to the jury questions as to the credibility and weight to be given to such testimony.

The test of a directed verdict on appellate review 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 acquittal."⁵ The Benham court went on to state: "[T]here must be evidence of substance, and the trial court is expressly authorized to direct a verdict for the

³ Commonwealth v. Pace, 82 S.W.3d 894, 895 (Ky. 2002).

⁴ 816 S.W.2d 186, 187 (Ky. 1991).

⁵ Id.

defendant if the prosecution produces no more than a mere scintilla of evidence.”⁶

The applicable provision of KRS 502.015, the statute under which Tokovic was convicted, provides:

- (1) A person is guilty of attempting to escape from the penitentiary when he:
 - (a) Conceals himself within the walls of the penitentiary; or
 - (b) Attempts to scale the enclosure surrounding the penitentiary; or
 - (c) Flees from whatever bounds he may be assigned, whether under guard or as a trusty; or
 - (d) Escapes from a locked cell, dormitory, hospital or other lockup in the penitentiary; or
 - (e) Escapes from one part of the penitentiary to another; or
 - (f) Does any other act in furtherance of an escape from the penitentiary; or
 - (g) Does any act or omission constituting criminal attempt under KRS 506.010.

In the present matter, the indictment specifically charged Tokovic with, and the trial court found him guilty of, violating subsection (c) (fleeing from whatever bounds he may be assigned) and (f) (doing any other act in furtherance of an escape).

⁶ Id. at 187-88.

We must agree with the Commonwealth that it offered sufficient proof to support Tokovic's conviction of attempting to escape. Tokovic was found in a restricted area where he did not have permission to be some distance away from his housing unit and near an expressway; he failed to report for the 7:30 a.m. inmate count and, more importantly, failed to report for the emergency count after the siren sounded; he did not immediately respond to Officer Slark's command to come out after the dog alerted on his location; and he was found with food, a drink, and a paper containing handwritten numbers and addresses, some for the Louisville area. Furthermore, we note that the trial court specifically found that Tokovic's testimony was not credible, a finding with which we agree.

Based upon the evidence presented, we must hold that no palpable error existed in that Tokovic was not entitled to a directed verdict. The Commonwealth submitted sufficient evidence to support the conviction, and the trial court specifically found, in its fact-finding role, that Tokovic's testimony was not credible.

For the foregoing reasons, the Final Judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

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