RENDERED: SEPTEMBER 1, 2006; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-000548-MR

CHARLES CLEMMONS, JR. — APPELLANT

v. — APPEAL FROM WHITLEY CIRCUIT COURT
HONORABLE JERRY D. WINCHESTER, JUDGE
ACTION NO. 04-CR-00086-002

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; HUDDLESTON AND KNOPF, SENIOR JUDGES.[1]

COMBS, CHIEF JUDGE: Charles Clemmons was convicted by a Whitley County jury of four counts of criminal possession of a forged instrument in the second degree in connection with several forged payroll checks. He appeals the final judgment of the Whitley Circuit Court that sentenced him to three-years' imprisonment on each charge -- to run concurrently. On appeal, Clemmons challenges the admissibility of testimony from the

[1] Senior Judges Joseph R. Huddleston and William L. Knopf sitting as Special Judges by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Commonwealth's witnesses regarding the counterfeit checks and the sufficiency of the evidence supporting his convictions.

On April 24, 2004, Tiffany Ledford and Douglas Walden, both acquaintances of Clemmons, cashed a payroll check from Ruby Tuesday's restaurant at the IGA in Williamsburg, Kentucky. The check was returned to IGA by AmSouth Bank and was marked counterfeit. Three days later, on April 27, 2004, Walden returned to the store with another payroll check from Ruby Tuesday. The store's assistant manager, Danny Moses, refused to cash it. Moses, who is also a Whitley County Deputy Sheriff, followed Walden from the store where he saw him get into a yellow Dodge Neon driven by Clemmons. Ledford was in the front passenger seat. Moses followed the Neon in his own car for several miles until the Neon stopped at a pawn shop. As Walden got out of the car, Moses confronted him and identified himself as a police officer. Walden reacted by getting back into the Neon. Clemmons backed the Neon up, almost striking Moses and his vehicle. Clemmons then ran over a curb and went through a line of traffic heading south on Highway 25.

While continuing to follow the Neon, Moses radioed Detective Wayne Bird of the Williamsburg City Police for assistance. The Neon stopped in Pleasant View, and Moses observed that Walden took the driver's seat as Clemmons got into the back seat. Ledford remained in the front passenger seat.

When Detective Bird caught up with Moses in Saxton, they pulled over the Neon and searched it. Several counterfeit checks were recovered from the vehicle as well as a computer, printer, scanner, ink cartridges, and blank checks.

Clemmons was indicted along with Douglas Walden and Tiffany Ledford on seven counts of second-degree criminal possession of a forged instrument. Walden subsequently entered a guilty plea and agreed to testify against Clemmons. Additional testimony on behalf of the Commonwealth was heard from Deputy Sheriff Moses and from Sherry McCullah,[2] a cashier at Ray's Market where counterfeit checks had also been passed. The only witness for the defense was Sabra Higgins. Higgins, who lived with Walden, was the owner of the Neon and was the named payee on two of the counterfeit checks.

Six checks were entered into evidence at trial. One check had been cashed at the IGA and another at Davenport's Market. Both had been returned marked as counterfeit by AmSouth Bank. The remaining four checks had been recovered from the Neon by Deputy Moses and Detective Bird.

Clemmons was tried on seven counts of criminal possession of a forged instrument.

[2] This witness's name is spelled as "Sherry McCullah" in the record and "Sharon McCullough" in the appellant's brief. We shall refer to her by the version used in the record.

Count I related to the Ruby Tuesday's check (Exhibit 1) that Ledford and Walden cashed at the IGA on April 24, 2004. Clemmons was found not guilty of this charge.

Count II of the indictment was dismissed.

Count III related to the check that was cashed at Davenport's Market (Exhibit 2). The purported issuer was IBM. Clemmons was found not guilty of this charge.

The remaining four counts corresponded to the four checks (Exhibits 3, 4, 5 and 6) found by Bird and Moses in the Neon. These checks, which were all entered into evidence, had not been endorsed or cashed. Clemmons was found guilty of these four counts.

Clemmons's first argument concerns the testimony of Moses and McCullah regarding the checks. He contends that they were permitted to testify about evidence that was outside their personal knowledge. He also complains that a proper chain of custody was not established for the checks.

Clemmons contends that Moses properly testified as to both exhibits from the IGA. However, the check that Walden attempted to cash at the IGA on April 27 was **never introduced** into evidence. The record is unclear, but Count II of the indictment, which was dismissed, perhaps related to this check. Clemmons is correct in stating that he was found not guilty of

Count I, which related to the April 24 check that was successfully cashed at the IGA.

Clemmons objects to Moses's testimony concerning the checks other than those presented at the IGA -- namely, those discovered in the Neon. The record indicates that a total of five checks were recovered from the Neon but that only four were entered into evidence. Moses identified those four checks as the ones that he and Detective Bird had recovered from the vehicle. He explained that Bird found one of these checks in the front seat, that he himself found two checks in the back seat, and that two checks were found in a pair of Levis. Moses identified a photograph of the four checks that was taken when they were recovered from the car; he also testified that Bird documented exactly where in the vehicle each particular check was found. Moses did not remember which of the checks he personally had found or the identity of the issuers of those checks.

Clemmons contends that Moses's testimony was improper because he testified that the checks merely "looked like" the ones that he and Bird had removed from the Neon. Moses also testified that he did not recognize Exhibit 2, a check that was cashed at Davenport's Market. However, he did not recognize it because this check was not recovered from the Neon. Clemmons was found not guilty of the charge relating to this check. But

Clemmons nonetheless claims that Detective Bird, who actually catalogued the evidence in the car, should have identified the checks at trial.

Sharon McCullah, the cashier at Ray's Market, testified that she cashed a check for a woman identifying herself as Sabra Higgins. The check was returned as counterfeit. McCullah identified Exhibit 2 as that check. Our examination of Exhibit 2 shows that the check that McCullah identified had been cashed at Davenport's Market rather than at Ray's. This testimony was at most harmless error because the jury acquitted Clemmons of the charge relating to this check.

McCullah was also asked to examine the other checks. She selected Exhibit 3 (one of the checks found in the Neon), commenting that "we had one like that." Defense counsel objected to this remark, but the objection was overruled. McCullah then stated that "another lady that works at the store cashed one of those," explaining that the checks were of "the same type" and that the checks "were from McDonald's and other places."

KRE[3] 701 provides that:

> [i]f a witness is not testifying as an expert, his or her testimony in the form of opinions or inferences is limited to those opinions or inferences which are:

[3] Kentucky Rules of Evidence.

> (a) Rationally based on the perception of the witness; and
>
> (b) Helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

KRE 602 provides in relevant part that:

> [a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony.

We are persuaded that Moses had sufficient personal knowledge to testify concerning the checks (Exhibits 3 through 6) found in the Neon. He had participated in the search of the Neon and, along with Officer Bird, he discovered the counterfeit checks. He was able to describe in detail where the checks were found in the car. Clemmons emphasizes that Moses could not identify which individual checks were found in a particular place in the car. Any inconsistency or gap in recollection did not render his testimony inadmissible. In Davis v. Commonwealth, 147 S.W.3d 709, 727 (Ky. 2004), an employee who found a bullet in a rental truck was permitted to testify about what he could remember of the characteristics of the bullet even though he had discarded it. "A witness can testify to what was observed even if unable to positively identify each aspect of it." Davis, 147 S.W.3d at 727. Moreover, Clemmons does not

explain how additional testimony from Detective Bird regarding where each particular check was found in the vehicle could have assisted the jury; he cannot substantiate beyond speculation what -- if any -- exculpatory value such extra testimony might have provided to his case.

Clemmons also objects to McCullah's testimony, which indicated that the returned, counterfeit checks "looked like" Exhibit 3. He contends that instead of McCullah, her co-worker should have testified about Exhibit 3 since she allegedly cashed the check and could have more accurately described its bearer. Clemmons forgets that Exhibit 3 was never cashed, and McCullah was merely testifying that the check **resembled** one that her coworker had cashed. This testimony was well within the scope of her personal knowledge and was, therefore, admissible under KRE 701 and 602.

Clemmons also argues that the chain of custody established for the checks was inadequate. We note that this issue was not preserved for appeal. We will, however, review it under the palpable error standard of RCr[4] 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

[4] Kentucky Rules of Criminal Procedure.

> manifest injustice has resulted from the error.

The breadth of discretion of a trial court in analyzing whether a chain of custody is adequate depends upon the nature of the evidence.

> If the offered item possesses characteristics which are fairly unique and readily identifiable and if the substance of which the item is composed is relatively impervious to change, the trial court is viewed as having broad discretion to admit merely on the basis of testimony that the item is the one in question and is in a substantially unchanged condition. On the other hand, if the offered evidence is of such a nature as not to be readily identifiable, or to be susceptible to alteration by tampering or contamination, sound exercise of the trial court's discretion may require a substantially more elaborate foundation. A foundation of the latter sort will commonly entail testimonially tracing the "chain of custody" of the item with sufficient completeness to render it improbable that the original item has either been exchanged with another or been contaminated or tampered with.

Grundy v. Commonwealth, 25 S.W.3d 76, 80 (Ky. 2000) (citations omitted). In this case, the checks were readily identifiable and not susceptible to tampering or alteration. Therefore, an exhaustive inquiry into the chain of custody was not required. As Moses was one of the individuals who found the checks in the car, his testimony was sufficient to establish their identity. We find no error.

Clemmons next argues that the Commonwealth failed to provide evidence that was qualitatively and quantitatively sufficient to establish his guilt beyond a reasonable doubt. He claims that the trial court erred in failing to grant his motions for a directed verdict of acquittal. Our review of the denial of a motion for directed verdict is governed by the standard set forth in Commonwealth v. Benham, 816 S.W.2d 186, 187 (Ky. 1991):

> 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.
>
> On appellate 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 acquittal.

Applying this standard, we cannot agree that there was insufficient evidence that Clemmons possessed the counterfeit checks. Although he was not the owner of the Neon, Clemmons was in possession and control of the vehicle during a crucial portion of the police pursuit.

> We have held proof that a defendant was in possession and control of a vehicle **sufficient to support a conviction for constructive possession** of contraband found within a vehicle. That holding is in accord with the general rule:
>
> **The contents of an automobile are presumed to be those of one who operates it and is in charge of it**, and this applies particularly where the operator is also the owner, as here. Where immediate and exclusive possession of an automobile ··· is shown, the inference is authorized that the owner of such property is the owner of what is contained therein and this inference has been referred to as a rebuttable presumption.

Dixon v. Commonwealth, 149 S.W.3d 426, 429 (Ky. 2004)(citations omitted). (Emphases added.)

Although he was not the title owner of the car, Clemmons drove the Neon during the first portion of the police pursuit. He tried to hit Moses and his vehicle when making his getaway. Moses kept the vehicle steadily under observation, and there is absolutely no evidence that the checks, the printer, and the other incriminating items could have been placed in the vehicle **after** Clemmons relinquished the wheel to Walden. Thus, Clemmons maintained control over the vehicle containing the counterfeit checks. Additionally, Walden testified that he, Tiffany Ledford, and Clemmons were all in possession of the counterfeit checks recovered from the Neon. Walden testified that the check-cashing scheme was entirely Clemmons's idea and

that the counterfeit checks were created using Clemmons's computer equipment and supplies. Walden testified that the checks which constituted Exhibits 3, 4, 5, and 6 (all relating to the four counts on which Clemmons was found guilty) were produced by Clemmons on his computer and printer, using his paper and ink. This testimony constituted more than sufficient evidence to satisfy the statutory element of possession.

Clemmons also argues that the Commonwealth failed to prove that the checks were counterfeit because there were no witnesses from the purported issuers -- McDonalds, IBM, and Pellissippi State Tech -- to testify that the checks were unauthorized. McDonald's and Pellissippi State Tech were the named payors on Exhibits 3 through 6, the subject of the guilty verdict, while IBM allegedly issued check 2, the subject of Count III on which Clemmons was acquitted. Although this issue was not raised at trial, we shall review it pursuant to RCr 10.26 due to the seriousness of the alleged error.

Clemmons bases this argument on our holding in Perkins v. Commonwealth, 694 S.W.2d 721 (Ky.App. 1985). Perkins was charged with possessing and uttering two forged checks which were drawn on the account of Irvine Short in the Farmers Deposit Bank. Mr. Short's daughter testified that Mr. Short was eighty-two years of age and that he did not have an account at that bank. After examining the first check, she stated that the

signature on the check was not that of her father. However, the prosecutor did not show the second check to Short's daughter, and the record contained no other evidence that the check was a forgery. This court concluded that there was no evidence that the second check had been forged. Therefore, the Commonwealth had failed to prove an essential element of the crime beyond a reasonable doubt. Perkins, 694 S.W.2d at 722.

However, Perkins does not stand for the proposition that it is invariably necessary to have the testimony of the issuer in order to prove that an instrument has been forged. KRE 901(a) provides that:

> [t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

In this case, Moses testified that the checks were counterfeit. Walden also testified that they were counterfeit. In Perkins, by contrast, there was **no evidence** whatsoever that the second check was a forgery. We conclude that the testimony of Moses and Walden constituted ample evidence to support the jury's finding that the checks were counterfeit and that Perkins is distinguishable and unavailing to Clemmons.

Clemmons next contends that the Commonwealth violated KRE 609 in cross-examining defense witness Sabra Higgins as to

whether she had ever been charged with (as distinguished from convicted of) a felony. KRE 609(a) provides in relevant part that:

> [f]or the purpose of reflecting upon the credibility of a witness, evidence that the witness has been **convicted of a crime** shall be admitted if elicited from the witness or established by public record if denied by the witness[.] (Emphasis added.)

For impeachment purposes in Kentucky, only felony convictions can be used. Slaven v. Commonwealth, 962 S.W.2d 845, 859 (Ky. 1997). Higgins's testimony was intended primarily to impeach Walden's testimony. She testified that she was the owner of the Neon and that she had known Clemmons for about nine months and Walden for eight or nine years. Contradicting Walden's testimony that Clemmons knew nothing of computers, she testified instead that he was very computer literate and had been carrying a computer and printer to her car on the very day of the arrest.

On cross-examination, the Commonwealth's attorney asked her if she had ever been charged with a felony. Over objections of defense counsel, Higgins replied that she was currently in jail for a felony **charge**. The question was improper, but we agree with the Commonwealth that it constituted harmless error under RCr 9.24. In light of the totality of the evidence in this case, there was no substantial possibility that the outcome would have been different but for this error.

Commonwealth v. McIntosh, 646 S.W.2d 43, 45 (Ky. 1983). Thus, it does not warrant a reversal.

Finally, Clemmons argues that the trial court improperly allowed Walden to testify that Clemmons had introduced him to using crack cocaine and to embarking on the counterfeit check scheme as a means of making money to support his drug habit. He also claims that the court erred in admitting Moses's testimony that Clemmons had backed up the Neon, almost hitting him and his car. Clemmons acknowledges that neither of these alleged errors was preserved for review.

Clemons argues that defense counsel was intimidated from objecting properly when the trial judge stated that "he was not going to stop the trial every five minutes so counsel could make an objection at the bench." The record, however, reveals that this comment by the court was directed solely to defense counsel's repeated objections to the testimony of Moses and McCullah regarding the **identification of the checks**. Both of these last allegations of error were unpreserved. As they do not rise to the level of palpable error set forth in RCr 10.26, we shall decline review.

We have found no single error sufficient to warrant a reversal; nor is there cumulative error in this case. Therefore, we affirm the judgment of the Whitley Circuit Court.

ALL CONCUR.

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