

Commonwealth Of Kentucky
Court of Appeals

NO. 2005-CA-000839-MR

JAMES SAVAGE

APPELLANT

v. APPEAL FROM LYON CIRCUIT COURT
HONORABLE BILL CUNNINGHAM, JUDGE
ACTION NO. 04-CR-00007

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** **

BEFORE: HENRY, JOHNSON, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: James Savage appeals his convictions of first-degree promoting contraband and second-degree persistent felony offender. We affirm.

On November 14, 2003, a correctional officer, conducting a security check of a utility tunnel behind appellant's cell at the Kentucky State Penitentiary, found what was referred to as an "institutional sticker", or home-made ice pick-like knife, in the tunnel on a ledge beneath the air vent in the wall of appellant's cell. Appellant was indicted on

April 5, 2004, on charges of first-degree promoting contraband and being a second-degree persistent felony offender (PFO II). A jury trial was held on March 22, 2005, and appellant found guilty of first-degree promoting contraband. Prior to the commencement of the sentencing phase, the parties reached an agreement as to punishment. Appellant then entered a guilty plea to the PFO II charge. The trial court ruled that the guilty plea was not a waiver of his right to appeal the guilt/innocence phase of the trial. Appellant was sentenced to one year for the promoting contraband conviction enhanced to five years for the PFO II. This appeal followed. On appeal, the sole issue raised by appellant is that the trial court erred when it failed to grant a directed verdict.

We first address the Commonwealth's argument that appellant failed to preserve this alleged error for review, as the trial videotape contains no record of the original motion for directed verdict and specific grounds therefor. The "video tape recording log", included as part of the certified record, indicates that a motion for directed verdict was denied at the close of the Commonwealth's case, sometime around 12:18. The videotape recording itself, however, cuts off prior to the making of the motion, and resumes following the lunch recess.¹ Therefore, there is no video (or other) recording of counsel's

¹ The videotape cuts off at 12:18:32, at which point the judge has just excused the jury for lunch, with counsel remaining in the courtroom.

original motion for directed verdict. Defense counsel moved for directed verdict again at the close of the evidence, which is shown on the video. No grounds were stated at that time, however. The trial court denied the motion.

The Commonwealth is correct that “[a] motion for a directed verdict shall state the specific grounds therefor.” CR 50.01. See also, Pate v. Commonwealth, 134 S.W.3d 593, 597-598 (Ky. 2004). Appellant contends that grounds were stated in counsel’s original motion, but due to the defective videotape, as well as the death of trial counsel, those grounds are no longer discernable. Although no grounds were stated in the motion made at the close of the evidence, Hill v. Commonwealth, 125 S.W.3d 221, 230 (Ky. 2004), instructs that counsel is not required to repeat his previously stated grounds upon renewing the same motion for directed verdict at the conclusion of all the evidence.

We do not know if counsel stated specific grounds because of two very unusual circumstances: turning off the videotape before the argument on the motion, and the death of defense counsel who could have supplemented the record under CR 75.08 and CR 75.13. We will give appellant the benefit of the doubt and assume the motion for a directed verdict specifically stated the grounds raised herein.

Appellant contends that the trial court erred in failing to grant a directed verdict in his favor, as the evidence was insufficient to prove that he knowingly made, obtained, or possessed the "sticker". KRS 520.050 provides, in pertinent part:

- (1) A person is guilty of promoting contraband in the first degree when:

. . . .

- (b) Being a person confined in a detention facility or a penitentiary, he knowingly makes, obtains, or possesses dangerous contraband.

At trial, the Commonwealth presented testimony from three witnesses, Joe Dunlap, in charge of internal affairs at KSP, and two corrections officers, Robert Johnson and Dennis Yeager. A summary of their testimony follows. Appellant was housed at the Kentucky State Penitentiary, in "thirteen walk" of "Three Cell House", in cell "13-left-20." The cells in thirteen walk are constructed as two rows of cells facing away from each other. Running between the two rows of cells is a utility tunnel. The tunnel contains the air vents and plumbing from the individual cells. There is only one door in and out of the tunnel. Officers are supposed to search the tunnel every shift, although the tunnel is checked more thoroughly at some times than others. Inmates are not allowed in the tunnel, except for

occasions when inmates are performing cleaning tasks, at which times they are supervised.

On November 14, 2003, Officer Johnson was performing a security check of the tunnel, when he found an "institutional sticker", or home-made ice pick-like knife, in the tunnel, directly behind appellant's cell, on a ledge underneath the air vent in the wall of appellant's cell. Inside appellant's cell, a hole/crack in the wall was found, next to the air vent. The vent was about six feet off the floor, but could be reached by standing on the sink. The hole had been patched with soap or toothpaste and had a piece of paint on it, which matched the wall. The hole was therefore not noticeable without close inspection. The "sticker" had a string and a rubber band attached to it. The back of the "patch" covering the hole had a string attached to it which appeared to match the string attached to the sticker. The sticker could pass through the hole.

The sticker was made from a piece of chain-link fence. The outdoor exercise yard was enclosed by a chain-link fence. Inmates were typically patted down when leaving the yard, but not strip searched. Johnson testified the sticker was capable of causing serious physical injury or death, and therefore qualified as "dangerous contraband" in the penitentiary.

Dunlap testified that appellant was assigned to cell "13-left-20" on March 18, 2003, but that he went to the "inside hospital" that day and returned back to the cell on March 27, 2003. During this time, another inmate occupied the cell. After appellant returned to the cell on March 27, 2003, no other inmate occupied the cell until the sticker was found on November 14, 2003. Between these dates, appellant was out of the cell for one day and part of another day, but no other inmate occupied the cell on these occasions. Sergeant Yeager testified that a thorough search of the tunnel was done rarely, and that where the sticker was found was not a place every officer would check. Attempts to obtain fingerprints from the sticker were unsuccessful.

Appellant testified in his own defense, and denied having any knowledge of the sticker, nor any knowledge of the surrounding circumstances.

"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." Commonwealth v. Benham, 816 S.W.2d 186, 187 (Ky. 1991). Appellant was the only inmate to occupy the cell from March 27, 2003, until the contraband was found on November 14, 2003. The sticker was accessible from appellant's cell, and had the same type of

string attached to it as found attached to the "patch" covering the hole in appellant's cell. We conclude there was sufficient circumstantial evidence for a jury to reasonably find that appellant knowingly possessed dangerous contraband.

For the aforementioned reasons, the judgment of the Lyon Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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