

RENDERED: AUGUST 25, 2006; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2005-CA-001056-MR

MARCUS L. MILLER

APPELLANT

APPEAL FROM FAYETTE CIRCUIT COURT
v. HONORABLE JAMES D. ISHMAEL, JR., JUDGE
ACTION NO. 04-CR-01225

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ABRAMSON AND BARBER, JUDGES; EMBERTON,¹ SENIOR JUDGE.

EMBERTON, SENIOR JUDGE: Marcus Miller was convicted of possession of a controlled substance in the first degree and persistent felony offender in the second degree. On appeal he makes three allegations of error by the trial court: that it refused to direct a verdict on the possession charge; that the Commonwealth failed to prove all the elements of persistent

¹ Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

felony offender; and, error in the jury instructions. We find no error in the trial proceedings and affirm.

On August 20, 2004, Officer John Gibbons of the Lexington Police Department responded to a complaint concerning a trespasser at an apartment complex. When he arrived, he pulled into the parking lot and saw Miller and another person walking along a sidewalk. As Officer Gibbons approached, the person with Miller walked away and Officer Gibbons and Miller were joined by a female, Miller's girlfriend. Officer Gibbons asked why the couple was there, and Miller responded that he was visiting a family member. Miller was arrested for criminal trespass.

As Officer Gibbons handcuffed Miller, Miller turned his body so that the Officer could not see the right side of Miller's body or his right hand. All the while Miller seemed reluctant to move his feet. When Gibbons looked to the ground, he noticed a baggie containing a white powdery substance near Miller's feet that he suspected was cocaine, and which testing later confirmed. Officer Gibbons testified that no other person was in the vicinity at the time except for Miller's female acquaintance who Gibbons could see throughout the arrest. He further stated that he did not see anything on the ground as he approached Miller. However, he also testified that he saw no movement by Miller that indicated he had discarded anything. At

the jail, Miller reportedly stated "he would take it and do his time."

At the close of the Commonwealth's case, Miller moved for a directed verdict on the trespassing and possession charges. Although the motion was granted as to the trespassing charge, it was denied as to the possession charge. Miller contended in the trial court, and now argues to this court, that the Commonwealth failed to prove either actual or constructive possession of the cocaine as required by KRS Chapter 218A.² The Commonwealth concedes there was no proof of actual possession but argues that there was sufficient evidence to submit the case to the jury on the theory of constructive possession.

The standard of review of arguments relating to directed verdicts is stated in Commonwealth v. Benham:³

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 such testimony.

On appellate review, the test of a directed verdict is, if under the evidence as a

² Kentucky Revised Statutes.

³ 816 S.W.2d 186 (Ky. 1991).

whole, it would be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal⁴.

Possession of contraband may be either actual or constructive and need not be exclusive.⁵ Possession is constructive when "a person does not have actual possession but instead knowingly has the power and intention at a given time to exercise dominion and control of an object, either directly or through others."⁶ The Commonwealth is required to present evidence which establishes that the contraband was "subject to the defendant's dominion and control."⁷

Officer Gibbons testified that when he approached Miller it was daylight and that he did not observe the baggie on the ground. The only person in the vicinity was Miller's girlfriend, who, Gibbons told the jury, he had in eyesight at all times. Officer Gibbons then described to the jury Miller's body movements during the arrest, including the turning of his body and apparent hesitancy to move his feet. Viewing the evidence in a light most favorable to the Commonwealth, the jury could reasonably infer that Miller dropped the cocaine to the ground as he turned from the Officer and then attempted to hide

⁴ Id. at 187.

⁵ Johnson v. Commonwealth, 90 S.W.3d 39, 42 (Ky. 2002).

⁶ Id.

⁷ Pate v. Commonwealth, 134 S.W.3d 593, 598-599 (Ky. 2004).

it from the Officer. Such reasonable inferences from the evidence were permissible and precluded a directed verdict.⁸

Miller's final contentions concern the persistent felony offender charge and are admittedly unpreserved; he, therefore, urges this court to review the alleged errors under RCr 10.26.⁹ Relief under the rule can be granted only if a manifest injustice results from a palpable error affecting the substantial rights of a party.¹⁰

Miller contends that the Commonwealth failed to present direct proof that Miller was eighteen years of age at the time he committed the prior offense and that at the time of trial, he was twenty-one years old.¹¹ The record reveals, however, that Miller was over the age of eighteen at the time of the prior offense and over twenty-one years old at the time of trial. In fact, defense counsel informed the jury that Miller "is twenty-seven years old". And because Miller's prior felony occurred in 2004, it was established that he was more than eighteen years old at the time of the prior offense. Thus, even if the Commonwealth failed to present direct evidence of Miller's age, it does not rise to the level of palpable error.

⁸ Blades v. Commonwealth, 957 S.W.2d 246, 250 (Ky. 1997).

⁹ Kentucky Rules of Criminal Procedure.

¹⁰ Salisbury v. Commonwealth, 556 S.W.2d 922, 926-27 (Ky.App. 1977).

¹¹ Hayes v. Commonwealth, 698 S.W.2d 827 (Ky. 1985).

The jury was mistakenly instructed that it could find guilt if it believed beyond a reasonable doubt that Miller "completed the service of the sentence" for the prior offense no more than five years prior to August 20, 2004. The actual proof was that Miller did not complete the sentence but instead was on probation. The commission of a felony while on probation for a prior felony is an element of the offense.¹² While the wording of the instruction may not have been precisely in accordance with the evidence, we find no prejudice that resulted in manifest injustice.

The judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

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¹² KRS 532.080(c)(2).