

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2005-CA-001068-MR

DANIEL FORTNER

APPELLANT

v. APPEAL FROM CARTER CIRCUIT COURT  
HONORABLE SAMUEL C. LONG, JUDGE  
ACTION NO. 04-CR-00067

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: COMBS, CHIEF JUDGE; McANULTY, JUDGE; POTTER, SENIOR JUDGE.<sup>1</sup>

COMBS, CHIEF JUDGE: Daniel Lee Fortner was convicted of one count of promoting contraband by a Carter County jury. The Carter Circuit Court sentenced him on April 20, 2005, to a maximum term of one-year's imprisonment. On appeal, Fortner argues that the trial court erred in denying his motion for a

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<sup>1</sup> Senior Judge John W. Potter sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

directed verdict of acquittal based on insufficiency of the evidence. Finding no error, we affirm.

The charge at issue arose when Fortner was an inmate at the Carter County Detention Center. He was housed in a pod with approximately seventeen other inmates. (A pod is a living area equipped with bunk beds, a seating area with television, and bathrooms.) On October 25, 2003, acting on a tip from inmate Josh Greer, prison deputies conducted a search for contraband in Fortner's bunk. They found a small utility knife, a piece of metal, and a needle and thread in an open-sided metal box attached to the foot of Fortner's bed. Although Fortner was charged with two counts of promoting contraband in connection with these items, the jury acquitted him of both counts.

The deputies also found a can of Bugler's tobacco under Fortner's mattress containing two marijuana cigarettes. When Fortner was asked by the deputies how he had obtained the marijuana, he responded, "It's mine. That's all I'm gonna tell you." The jury found Fortner guilty of promoting contraband in connection with the marijuana.

On appeal, Fortner argues that the evidence failed to show that he had sufficient custody and control over the area in which the marijuana cigarettes were found in order to give adequate support to the jury's verdict.

In reviewing an allegation that a court erred in failing to direct a verdict, we are governed by Commonwealth v. Benham, 816 S.W.2d 186, 187 (Ky. 1991), which holds:

[T]he 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.

The pertinent statute, KRS<sup>2</sup> 520.050, provides as follows:

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

(a) He knowingly introduces dangerous contraband into a detention facility or a penitentiary; or

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

(2) Promoting contraband in the first degree is a Class D felony.

Fortner argues that the marijuana cigarettes were placed under his bunk by another inmate. He introduced evidence that the pod was overcrowded. Other inmates (including the informant, Josh Greer, who slept on the floor near Fortner's bunk) had easy access to the area under Fortner's mattress. Fortner contends that the Bugler can was found beneath the mattress of the empty bunk above him rather than under his own mattress and that any other inmate could have placed it there.

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<sup>2</sup> Kentucky Revised Statutes.

Testimony was offered tending to support Fortner's contention. Shawn Moore, one of the deputies who conducted the search, testified that Fortner could not have brought the marijuana into the prison himself because of tight security measures. The pod also housed an inmate who participated in a work release program. Deputy Moore testified that although work release inmates are searched when they return to the detention facility, they sometimes succeed in hiding contraband and smuggling it into the facility.

In explaining his incriminating admission to the prison officers, Fortner claims that he made the statement because he feared retaliation by other inmates for becoming a "snitch." He testified that he smokes filtered cigarettes and does not use loose tobacco like Bugler. Finally, he notes that the Bugler can was never tested for fingerprints, emphasizing that the jury acquitted him of two other charges arising from the search.

Our review of the record reveals considerable contradictory evidence indicating that Fortner possessed the marijuana cigarettes. The testimony of Joel Mosier, the second prison deputy conducting the search, indicated that the Bugler can was found beneath the mattress on which Fortner was sleeping. Mosier testified that the search took place after the inmates had gone to bed, and he recalled that they had to ask

Fortner to get out of his bunk in order to search it. Mosier also testified that Fortner told him everything in the bunk was his except for some clothes on the top bunk. Thus, the jury could have reasonably inferred that the Bugler container was found beneath the mattress on which Fortner was sleeping.

Fortner has argued that because the mattresses are so thin, the Bugler can could not have been effectively hidden beneath one and that its presence would have interfered with his sleeping. This evidence could equally support the argument that Fortner had placed the can under his mattress in order to hide it under his blanket and sheet. The obviousness of its presence is not inconsistent with a desire to hide it more effectively at the expense of comfort.

The fact that the jury acquitted Fortner of the other two charges cannot be used to establish his innocence on this charge. The jury apparently distinguished between the area under the mattress and the area to which all the inmates had easy access (e.g., that which was under Fortner's immediate control *versus* the area in which the other items of contraband were found).

Fortner's argument that a work-release inmate may have brought the marijuana into the facility does provide a possible explanation of how he obtained the marijuana. However, the statute provides that the crime of promoting contraband may

involve either introducing dangerous items into a detention facility (KRS 520.050(1)(a)) **or possessing** them in such a facility (KRS 520.050(1)(b)).

Fortner last contends that his self-incriminating admission was motivated by fear of being deemed a "snitch" by fellow inmates. However, in his testimony at trial, he flatly denied making the statement at all. The jury exercised its legitimate prerogative as fact finder by choosing instead to believe the testimony of Shawn Moore, who explained that the admission was made to prison officials after Fortner was taken from the pod to be booked. Moore also testified that "nobody likes to be a snitch;" thus, the jury was fully aware that the "snitch" factor may have played a role in Fortner's admission. The jury properly weighed and determined the credibility of testimony. See Davis v. Commonwealth, 147 W.3d 709, 730 (Ky. 2004). We cannot agree that the trial court erred in refusing to set aside the verdict and to enter a directed verdict in its place.

We affirm the order of the Carter Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Lisa Bridges Clare  
Assistant Public Advocate  
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo  
Attorney General of Kentucky

David W. Barr  
Assistant Attorney General  
Frankfort, Kentucky