

Commonwealth of Kentucky

Court of Appeals

NO. 2005-CA-001773-MR

MICHAEL MCGREGOR

APPELLANT

v. APPEAL FROM GREENUP CIRCUIT COURT
HONORABLE LEWIS D. NICHOLLS, JUDGE
ACTION NO. 03-CR-00126

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: STUMBO AND VANMETER, JUDGES; PAISLEY,¹ SENIOR JUDGE.

VANMETER, JUDGE: Michael McGregor appeals from a judgment entered by the Greenup Circuit Court after a jury found him guilty of being a convicted felon in possession of a handgun. For the reasons stated hereafter, we affirm.

On August 29, 2003, Officer Jeff Waskey of the Russell Police Department pulled over a vehicle after he observed that it bore improper license plates and that it kept

¹ Senior Judge Lewis G. Paisley sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

crossing the highway's center line. The driver and the front seat passenger were removed from the vehicle while McGregor, the back seat passenger, was told to remain in the car. Waskey testified that he had to advise McGregor to cease moving around. Subsequently, he observed McGregor moving around an item between his feet. McGregor was told to exit the vehicle, and Waskey then found a loaded, holstered 9mm pistol and an extra magazine on the vehicle floorboard where McGregor had been seated. A jury found McGregor guilty of being a convicted felon in possession of a handgun. In accordance with the jury's recommendation, the court sentenced McGregor to ten years' imprisonment. This appeal followed.

First, McGregor contends that the trial court erred by failing to grant a mistrial after the Commonwealth's witness twice commented on his silence. We disagree.

During his direct examination, Waskey testified that McGregor stated the gun was not his and he could not be charged with its possession. In response to the Commonwealth's inquiry, Waskey testified that McGregor said nothing else about the gun, and that he provided no other statements after he was advised of his rights pursuant to *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). McGregor did not object. On redirect examination, Waskey testified that the gun holster was fitted for a left-handed person, and that he had observed that the other two persons in the vehicle were right-handed. When asked whether he had made any observations or obtained statements from McGregor about his dominant hand, Waskey testified that after

McGregor was advised of his *Miranda* rights, “he refused to write any statements.” At this point defense counsel objected and asked for the charge's dismissal or, alternatively, a mistrial, alleging a violation of McGregor's right against self-incrimination. The Commonwealth responded that any error was harmless because McGregor had already stated at the scene that the gun was not his. The court denied the request for a dismissal or a mistrial, noting that the Commonwealth's inquiry had concerned the officer's observations rather than McGregor's silence. In any event, the officer subsequently testified without objection that after they reached the police department, McGregor stated he was left-handed.

Clearly, McGregor did not timely preserve any objections on direct examination. Moreover, although he timely objected to the subsequent statements in issue, he cannot now complain on appeal that the court failed to admonish the jury to disregard the testimony since he never requested such an admonition.

Further, the court did not err by failing to grant a mistrial. Even if we assume without deciding that the officer improperly commented on McGregor's silence, this case is readily distinguishable from *Green v. Commonwealth*, 815 S.W.2d 398 (Ky. 1991), and *Romans v. Commonwealth*, 547 S.W.2d 128, 130 (Ky. 1977), as cited by McGregor. Unlike the situations in those cases, McGregor's statements at the scene were not inconsistent with his defense at trial that the gun was not his. Additionally, the Commonwealth made no attempt to use McGregor's post-arrest silence to impeach his defense at trial. *See Wallen v. Commonwealth*, 657 S.W.2d 232, 233 (Ky. 1983); *Gordon*

v. Commonwealth, 214 S.W.3d 921 (Ky.App. 2006). Any error was harmless, and McGregor is not entitled to relief on appeal. RCr² 9.24.

Next, McGregor contends that the court erred by failing to grant a directed verdict in his favor. We disagree.

Even if we assume without deciding that this issue was properly preserved for review, McGregor is not entitled to relief. As stated in *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991),

[o]n 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 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.” *Id.* at 187.

McGregor asserts that no reasonable juror could find him guilty of possessing the gun which was located on the back seat floorboard, as he owned neither the gun nor the vehicle in which it was found. However, as noted above, Waskey testified that he observed McGregor moving around in the vehicle's back seat and moving an item between his feet. After McGregor exited the vehicle, Waskey found the gun on the floorboard where McGregor had been seated. Waskey further testified that due to the

² Kentucky Rules of Criminal Procedure.

presence of trash under the seats of the vehicle, a person in the front seat could not have slid the gun under the seats to the back floorboard. Given that McGregor was the only person in the back seat when the vehicle was stopped, under the evidence as a whole it was not clearly unreasonable for the jury to find him guilty of possessing the gun. The court therefore did not err by denying McGregor's motion for a directed verdict.

Next, McGregor contends that the court erred by shifting the burden of proof to him. More specifically, he asserts that KRS 527.040(1) required the Commonwealth to prove not only that he was a convicted felon, and that he was in possession of a firearm, but also that he has not received a full pardon or relief pursuant to the Federal Gun Control Act of 1968. Although McGregor admits that the issue was not raised below, he asserts that the alleged error was palpable and therefore was subject to review as affecting his substantial rights. RCr 10.26. However, our courts previously have determined that the KRS 527.040(1) pardon or relief provision is not an element of the crime of being a convicted felon in possession of a firearm. Instead, that provision constitutes a negative issue which falls within the particular knowledge of a defendant who has received such pardon or relief, and the burden of proving the existence of such pardon or relief falls upon the defendant rather than upon the Commonwealth. *See Eary v. Commonwealth*, 659 S.W.2d 198, 200 (Ky. 1983); *Duvall v. Commonwealth*, 593 S.W.2d 884, 886 (Ky.App. 1979). As McGregor produced nothing to suggest that he has been granted a full pardon or relief relating to his prior felony, no palpable error occurred below and he is not entitled to relief on appeal. RCr 10.26.

Finally, McGregor contends that the court abused its discretion by allowing the Commonwealth to introduce improperly certified evidence of a prior conviction. We disagree.

KRE³ 902(4) permits the self-authentication and admission for any purpose of an official record or a copy thereof “attested by an official having the legal custody of the record[,]” and the accompanying certificate “may be made by any public officer having a seal of office and having official duties in the district or political subdivision in which the record is kept, authenticated by the seal of office.” The “generally accepted rule [is] that a certified copy of a public record is admissible in evidence as proof of its contents.” *Commonwealth ex rel., Howard v. Denham*, 303 Ky. 413, 197 S.W.2d 907, 908 (1946). As stated in *Prichard v. Kitchen*, 242 S.W.2d 988, 990 (Ky. 1951), when “a person's name is signed for him at his direction and in his presence by another, the signature becomes his own and has the same effect as though written by the person himself.” The determination of whether to admit or exclude evidence will not be set aside absent an abuse of the trial court's discretion. *Skimmerhorn v. Commonwealth*, 998 S.W.2d 771, 775 (Ky.App. 1998), citing *Mullins v. Commonwealth*, 956 S.W.2d 210, 213 (Ky. 1997).

Here, a copy of a final judgment from the Hopkins Circuit Court was provided as evidence of McGregor's prior felony convictions. The judgment's final page was impressed with a seal and stamped with the following statement:

³ Kentucky Rules of Evidence.

I, Clerk of the Hopkins Circuit Court, hereby certify that the foregoing is a true and correct copy of the document as it appears of record in my office.

This 8th day of Oct. 2003.

Carolyn A. Polley, Clerk

By _____
D.C.

Handwritten initials were inserted in the “by” line.

Having carefully viewed the document, we cannot say that the trial court abused its discretion by finding that the document was properly certified by or on behalf of the Hopkins Circuit Clerk, and by admitting it into evidence. This is especially true since McGregor's attempts at impeachment included nothing to demonstrate that the facts shown in the document were inaccurate. *See Commonwealth, by Funk v. Clark*, 311 Ky. 710, 225 S.W.2d 118 (Ky. 1949). Further, even if it could be said that the court abused its discretion by admitting the document, no harm resulted since there is no indication that the information regarding McGregor's prior convictions was inaccurate or inherently inadmissible.

The court's judgment is affirmed.

ALL CONCUR.

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