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Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000285-MR

JAMES DEAN ATKINS — APPELLANT

v.

APPEAL FROM SCOTT CIRCUIT COURT
HONORABLE ROBERT G. JOHNSON, JUDGE
ACTION NO. 03-CR-00010

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KELLER AND NICKELL, JUDGES; KNOPF,[1] SENIOR JUDGE.

KELLER, JUDGE: James Dean Atkins appeals from the order of the Scott Circuit Court finding that KRS 218A.500[2] and 218A.510[3] are constitutional. Atkins asserts on appeal

[1] Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 11-(5)(b) of the Kentucky Constitution and KRS 21.580.

[2] Definitions for KRS 218A.500 and KRS 218A.510; unlawful practices; penalties.

[3] Factors to be considered in determining whether object is drug paraphernalia.

that: 1) KRS 218A.500 and 218A.510[4] are vague and overbroad; 2) they violate the constitutional guarantees of equal protection; 3) the punishment provisions of the paraphernalia statutes conflict with the punishment provisions of the marijuana possession statute and the more lenient should apply; and 4) the punishment provided in KRS 218A.500 and 218A.510 is cruel and unusual. For the reasons set forth below, we affirm.

FACTS

In May of 2002, Atkins was arrested and charged with possession of marijuana, second offense and possession of paraphernalia, second offense. The arresting officer found the following in Atkins's vehicle: 1 marijuana cigarette, 7 marijuana cigarette stubs ("roaches"), a water bong, rolling papers, a rolling machine, scissors, two cans with suspected marijuana seeds, and a baggie with suspected marijuana debris in it. The grand jury indicted Atkins and he ultimately pled guilty to the preceding charges. Based on that guilty plea, the circuit court sentenced Atkins to imprisonment for a period of one year, probated for five years, with thirty days to serve. The circuit court suspended Atkins's obligation to serve the thirty days pending this appeal.

Prior to entering his plea, Atkins filed a motion challenging the constitutionality of KRS 218A.500 and 218A.510. At the hearing on that motion, Officer Whitaker, a patrolman with the Georgetown Police Department and the arresting

[4] We note that, in what appear to be typographical errors in his brief, Atkins variously refers to the statutes in question as KRS 218A.500, KRS 218A.501, and KRS 218A.500-510. The actual statutory provisions to which Atkins objects are KRS 218A.500 and 218A.510; therefore, we will cite the statutes accordingly.

officer, testified that he was called to respond to a potential fight on May 1, 2002. When he arrived at the scene, Officer Whitaker observed Atkins sitting in a van. With Atkins's consent, Officer Whitaker searched the van and found the items listed above. Officer Whitaker then charged Atkins with possession of marijuana and paraphernalia. Officer Whitaker testified that he specifically considered the water bong, the rolling papers, the rolling machine, and the scissors to be paraphernalia.

Officer Whitaker testified that he believes that anything that can be used to inhale or ingest marijuana would be paraphernalia. He would not make an arrest based on possession of paraphernalia unless he found marijuana. However, Officer Whitaker has made arrests for possession of marijuana without also charging the person with possession of paraphernalia. Officer Whitaker believes that "anything that hides marijuana, anything that holds marijuana, anything that disguises marijuana, anything that can be used with marijuana, qualifies as paraphernalia under the statute." Therefore, it would be impossible to find marijuana and not find paraphernalia. During his training, Officer Whitaker was not told to charge a person with possession of paraphernalia when that person only had a roach. Consistent with his training, Officer Whitaker has never made such a charge.

The circuit court, in a summary order, found that the challenged statutes were constitutional. It is from this order that Atkins appeals.

STANDARD OF REVIEW

Whether a statute is constitutional is a question of law; therefore, our review is *de novo. Kohler v. Benckart*, 252 S.W.2d 854 (Ky. 1952); *Moore v. Ward*, 377 S.W.2d 881, 883 (Ky. 1964). In making our *de novo* review, we begin with the presumption that an act of the General Assembly is constitutional. *Wilfong v. Commonwealth*, 175 S.W.3d 84, 91 (Ky.App. 2004); *Martinez v. Commonwealth*, 72 S.W.3d 581, 584 (Ky. 2002). Before the Court can declare an act unconstitutional, the challenger must establish that the act clearly, unequivocally, and completely violates provisions of the constitution. *Wilfong,* 175 S.W.3d at 91; *Cornelison v. Commonwealth*, 52 S.W.3d 570, 572-73 (Ky. 2001).

With this framework in mind, we will analyze the constitutional issues in the order raised by Atkins.

ANALYSIS

A. Overbreadth

"The overbreadth doctrine generally involves a claim that in an effort to control proscribable conduct, a statute impermissibly reaches constitutionally permissible conduct. . . . [However,] [a] law should not be invalidated for overbreadth unless it reaches a substantial number of impermissible applications." *Wilfong*, 175 S.W.3d at 96.

Atkins's argument regarding overbreadth is that KRS 218A.500 and 218A.510 criminalize the possession of items, such as rolling papers, that may have both

legal and illegal uses. In order to determine if Atkins is correct, we must look at the statutes in question. KRS 218A.500 provides as follows:

> (1) "Drug paraphernalia" means all equipment, products and materials of any kind which are used, intended for use, or designed for use in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance in violation of this chapter. It includes, but is not limited to:
>
> > (a) Kits used, intended for use, or designed for use in planting, propagating, cultivating, growing, or harvesting of any species of plant which is a controlled substance or from which a controlled substance can be derived;
> >
> > (b) Kits used, intended for use, or designed for use in manufacturing, compounding, converting, producing, processing, or preparing controlled substances;
> >
> > (c) Isomerization devices used, intended for use, or designed for use in increasing the potency of any species of plant which is a controlled substance;
> >
> > (d) Testing equipment used, intended for use, or designed for use in identifying, or in analyzing the strength, effectiveness or purity of controlled substances;
> >
> > (e) Scales and balances used, intended for use, or designed for use in weighing or measuring controlled substances;
> >
> > (f) Diluents and adulterants, such as quinine hydrochloride, mannitol, mannite, dextrose and

lactose, used, intended for use, or designed for use in cutting controlled substances;

(g) Separation gins and sifters used, intended for use, or designed for use in removing twigs and seeds from, or in otherwise cleaning or refining marijuana;

(h) Blenders, bowls, containers, spoons, and mixing devices used, intended for use, or designed for use in compounding controlled substances;

(i) Capsules, balloons, envelopes, and other containers used, intended for use, or designed for use in packaging small quantities of controlled substances;

(j) Containers and other objects used, intended for use, or designed for use in storing or concealing controlled substances;

(k) Hypodermic syringes, needles, and other objects used, intended for use, or designed for use in parenterally injecting controlled substances into the human body;

(l) Objects used, intended for use, or designed for use in ingesting, inhaling, or otherwise introducing marijuana, cocaine, hashish, or hashish oil into the human body, such as: metal, wooden, acrylic, glass, stone, plastic, or ceramic pipes with or without screens, permanent screens, hashish heads, or punctured metal bowls; water pipes; carburetion tubes and devices; smoking and carburetion masks; roach clips which mean objects used to hold burning material, such as marijuana cigarettes, that have become too small or too short to be held in the hand; miniature cocaine spoons, and cocaine vials; chamber pipes; carburetor pipes; electric

pipes; air-driven pipes; chillums; bongs; ice pipes or chillers.

(2) It is unlawful for any person to use, or to possess with intent to use, drug paraphernalia for the purpose of planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packing, repacking, storing, containing, concealing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance in violation of this chapter.

(3) It is unlawful for any person to deliver, possess with intent to deliver, or manufacture with intent to deliver, drug paraphernalia, knowing, or under circumstances where one reasonably should know, that it will be used to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance in violation of this chapter.

(4) It is unlawful for any person to place in any newspaper, magazine, handbill, or other publication any advertisement, knowing, or under circumstances where one reasonably should know, that the purpose of the advertisement, in whole or in part, is to promote the sale of objects designed or intended for use as drug paraphernalia.

(5) Any person who violates any provision of this section shall be guilty of a Class A misdemeanor for the first offense and a Class D felony for subsequent offenses.

KRS 218A.510 provides as follows:

In determining whether an object is drug paraphernalia, a court or other authority should consider, in addition to all other logically relevant factors, the following:

(1) Statements by an owner or by anyone in control of the object concerning its use;

(2) Prior convictions, if any, of an owner, or of anyone in control of the object, under any state or federal law relating to any controlled substance;

(3) The proximity of the object, in time and space, to a direct violation of KRS 218A.500(2), (3) or (4);

(4) The proximity of the object to controlled substances;

(5) The existence of any residue of controlled substances on the object;

(6) Direct or circumstantial evidence of the intent of an owner, or of anyone in control of the object, to deliver it to persons whom he knows, or should reasonably know, intend to use the object to facilitate a violation of KRS 218A.500(2), (3) or (4); the innocence of an owner, or of anyone in control of the object, as to a direct violation of KRS 218A.500(2), (3) or (4) shall not prevent a finding that the object is intended for use, or designed for use as drug paraphernalia;

(7) Instructions, oral or written, provided with the object concerning its use;

(8) Descriptive materials accompanying the object which explain or depict its use;

(9) National and local advertising concerning its use;

(10) The manner in which the object is displayed for sale;

(11) Whether the owner, or anyone in control of the object, is a legitimate supplier of like or related items to the community, such as a licensed distributor or dealer of tobacco products;

(12) Direct or circumstantial evidence of the ratio of sales of the object to the total sales of the business enterprise;

(13) The existence and scope of legitimate uses for the object in the community;

(14) Expert testimony concerning its use.

The above statutes, read in conjunction, delineate those items that can be considered paraphernalia and what criteria are to be used to determine whether an item is being used as paraphernalia. KRS 218A.500 may include a number of items that have legal purposes as well as illegal purposes, and standing alone, might be overbroad. However, KRS 218A.510 sets forth the context in which those items are to be viewed to determine if their use is illegal, thus constitutionally narrowing KRS 218A.500.

Applying this to Atkins's case, he is correct that the items he had in his possession - rolling papers, a rolling machine, scissors, and a water bong - may all have legal uses. However, when viewed in the context of his arrest - the van had an odor of marijuana smoke, Atkins's admission that he had recently been smoking marijuana, and his prior conviction for possession of both marijuana and paraphernalia - clearly provide a context within KRS 218A.510 to support Officer Whitaker's citation for possession of paraphernalia. Therefore, as applied to Atkins, KRS 218A.500 and 218A.510 are not overbroad.

B. Vagueness

"The vagueness doctrine is rooted in due process principles and is directed toward ensuring fair notice in the clarity and precision of penal provisions. . . . [A] provision is too vague if it fails to give fair notice of what it prohibits . . . ." *Wilfong*, 175 S.W.3d at 95. To withstand a vagueness challenge,

> [a] statute [must] be worded in such a manner so as to not encourage arbitrary or discriminatory enforcement. . . . In reviewing a vagueness challenge, the essential inquiry is whether the statute describes the forbidden conduct sufficiently so that persons of common intelligence disposed to obey the law can understand its meaning and application.

Id. at 95-96.

KRS 218A.500 sets forth in detail those items that can be considered drug paraphernalia, listing 12 categories of items. Furthermore, KRS 218A.500 sets forth the forbidden uses of those items. KRS 218A.510 sets forth 14 factors for a court or other authority to consider in determining if one of the listed items is, in fact, drug paraphernalia. Thus, the challenged statutory provisions clearly give a person of common intelligence notice of what is unlawful and Atkins's argument to the contrary is without merit.

C. Equal Protection

Atkins argues that he was denied equal protection because a person arrested by Officer Whitaker with a roach or a marijuana cigarette would be charged with possession of marijuana but not with possession of drug paraphernalia. However, a person arrested with marijuana and rolling papers would be charged with both possession of marijuana and possession of drug paraphernalia. According to Atkins, both persons should be charged with possession of drug paraphernalia because wrapping the marijuana in a rolling paper does not remove the rolling paper from the category of drug paraphernalia. Atkins argues that this disparate treatment violates the equal protection provisions of the Kentucky and United States Constitutions.

"Citizens of Kentucky are entitled to equal protection of the law under the 14th Amendment of the United States Constitution and Sections 1, 2, and 3 of the Kentucky Constitution." *D.F. v. Codell*, 127 S.W.3d 571, 575 (Ky. 2003). The "goal of the Equal Protection Clause [is] to 'keep[ ] governmental decision makers from treating differently persons who are in all relevant respects alike.'" *Id*. at 575, *quoting Nordlinger v. Hahn*, 505 U.S. 1, 10, 112 S.Ct. 2326, 2331, 120 L.Ed.2d 1 (1992). In determining if a statute violates the Equal Protection Clause, the Court must first determine if the person claiming protection is a member of a suspect class. *D.F. v. Codell*, 127 S.W.3d at 575. If the person is a member of a suspect class, the court applies the strict scrutiny standard. If the person is not, then the court applies the rational basis standard. *Id.* at 575. Under the rational basis standard, the "[l]egislative distinctions between persons . . . must bear a rational relationship to a legitimate state end." *Chapman v. Gorman,* 839 S.W.2d 232, 239 (Ky. 1992).

Having reviewed the record, we hold that Atkins is not a member of a suspect class. Therefore, we must apply the rational basis standard in determining if KRS 218A.500 and 218A.510 violate the Equal Protection Clause. We hold that they do not because nothing in either statute can be construed as treating persons who are alike, differently. Furthermore, Officer Whitaker's application of the statutes does not violate the Equal Protection Clause. In order to establish a "selective prosecution" case, Atkins must demonstrate that the prosecution had a discriminatory effect motivated by a discriminatory purpose. *United States v. Armstrong,* 517 U.S. 456, 465, 116 S.Ct. 1480,

1487, 134 L.Ed.2d 687 (1996). Atkins has not shown any discriminatory purpose. Therefore, we hold that Atkins's equal protection argument is also without merit.

D. Rule of Lenity

Atkins argues that there is a conflict between the penalty provisions for possession of marijuana, second offense and for possession of drug paraphernalia, second offense.[5] Because of this perceived conflict, Atkins argues that the Court should apply the "rule of lenity" and remand this matter for sentencing under the more lenient possession of marijuana statute.

The rule of lenity requires that "any ambiguity in a statute . . . be resolved in favor of a criminal defendant." *White v. Commonwealth*, 178 S.W.3d 470, 484 (Ky. 2005). (Emphasis added.) Atkins correctly notes that the penalties for possession of marijuana, second offense and for possession of drug paraphernalia, second offense differ. However, he has not pointed to any ambiguity in either statute. Therefore, we hold that his argument regarding the rule of lenity is without merit.

E. Cruel and Unusual Punishment

Atkins argues that the punishment for possession of drug paraphernalia, second offense is cruel and unusual because it is disproportionate to the punishment for possession of marijuana, second offense and because it "goes beyond what is necessary to achieve the aim of discouraging the possession of drug paraphernalia."

[5] Possession of marijuana is classified as a Class A misdemeanor. Possession of drug paraphernalia, second offense is classified as a Class D felony.

We begin our analysis by noting that the Legislature is the judge of the adequacy of penalties, and unless the punishment fixed is manifestly cruel and unconstitutional, courts will not interfere. *Crutchfield v. Commonwealth*, 248 Ky. 704, 59 S.W.2d 983, 985 (1933). Three approaches have been adopted by the courts to determine if punishment is cruel and unusual: 1) whether the punishment "is of such character as to shock the general conscience and to violate principles of fundamental fairness;" 2) whether the punishment is greatly disproportionate to the offense committed; and 3) whether the punishment goes beyond what is necessary to accomplish the "public intent." *Workman v. Commonwealth*, 429 S.W.2d 374, 378 (Ky. 1968). In determining if the punishment is disproportionate, we must consider three factors: "(1) The gravity of the offense and harshness of the penalty; (2) The sentences imposed on other criminals in the same jurisdiction; (3) The sentences imposed for commission of the same crime in other jurisdictions." *Riley v. Commonwealth*, 120 S.W.3d 622, 633 (Ky. 2003).

Taking into consideration the fact that Atkins is a repeat offender, we hold that the penalty was not unduly harsh, particularly in light of the fact that Atkins was only sentenced to one year, probated for five years, with 30 days to serve. Furthermore, we hold that Atkins's sentence was in line with sentences imposed on other criminals within the Commonwealth. For example, in *Johnson v. Commonwealth*, 134 S.W.3d 563 (Ky. 2004), the defendant was charged with numerous drug-related offenses, including possession of drug paraphernalia. The Supreme Court of Kentucky overturned Johnson's convictions on a number of the charges, but upheld his conviction and sentence of one

year imprisonment with a $500 fine for possession of drug paraphernalia. In *Riley v. Commonwealth*, 120 S.W.3d 622 (Ky. 2003), the defendant was charged with possession of marijuana and drug paraphernalia while in possession of a firearm. He was sentenced to twenty years' imprisonment for possession of marijuana and possession of drug paraphernalia while in possession of a firearm and of being a persistent felony offender. The Supreme Court of Kentucky held that the sentence was not cruel and unusual. In doing so, the Court noted that a number of other jurisdictions have statutes that enhance the penalties for habitual criminals, which have withstood constitutional challenges. *See Riley,* 120 S.W.3d at 634.

As to the penalties in other jurisdictions, Hawaii imposes a penalty of up to five years' imprisonment for possession of drug paraphernalia, again with no distinction for whether it is a first or subsequent offense. HAW. REV. STAT. §329-43.5 and HAW. REV. STAT. §706-660. Finally, a violation of the federal prohibition against selling, offering for sale, transporting, importing, or exporting drug paraphernalia carries with it a maximum of three years' imprisonment. 21 U.S.C.A. 863(b). The Commonwealth's penalty for possession of drug paraphernalia, second offense is not out of line with penalties in other jurisdictions. Therefore, we hold that the punishment provision in KRS 218A.500 does not shock the conscience or violate principles of fundamental fairness.

Finally, we hold that the punishment does not go beyond what is necessary to accomplish the public intent. The clear intent of KRS 218A.500 and 218A.510 is to discourage the use of marijuana. Criminalizing not only the possession of marijuana, but

also the means to consume it, is necessary to accomplish the public intent. Furthermore, as noted in *Riley*, there is nothing inherently unconstitutional in enhancing the penalty for repeat offenders. By providing an enhanced penalty for a second offense possession of drug paraphernalia, the legislature has not gone beyond what is necessary to accomplish the public intent of decreasing marijuana use.

CONCLUSION

For the above reasons, we hold that KRS 218A.500 and 218A.510 are not overbroad or vague; do not violate equal protection; and the punishment provisions are not ambiguous, inconsistent, or cruel and unusual. Therefore, we affirm the judgment of the Scott Circuit Court.

ALL CONCUR.

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