

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001532-MR

SAM DEAN RUSSELBURG

APPELLANT

v. APPEAL FROM CARLISLE CIRCUIT COURT
HONORABLE WILLIAM LEWIS SHADOAN, JUDGE
ACTION NO. 06-CR-00014

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: THOMPSON, JUDGE; BUCKINGHAM AND HENRY, SENIOR JUDGES.¹

THOMPSON, JUDGE: The appellant, Sam Russelburg, was convicted of being a felon in possession of a firearm in violation of KRS 527.040 and sentenced to five years' imprisonment, and was probated. On appeal, he alleges that: (1) the trial court erroneously instructed the jury by submitting an incorrect definition of constructive possession; (2) the Commonwealth failed to prove his guilt beyond a reasonable

¹ Senior Judges David C. Buckingham and Michael L. Henry sitting as Special Judges by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

doubt;(3) the prosecutor's closing argument improperly appealed to community responsibility; and (4) the cumulative error rule requires reversal of his conviction. Because we find no error, we affirm.

The Carlisle County Sheriff, Steve McChristian, responded to a call regarding a dispute between neighbors to a trailer where appellant resided with this brother, Paul. The caller reported having heard gunshots. When the sheriff arrived, Paul opened the door and appellant remained on a couch in the living room. In the same room, Sheriff McChristian observed a pistol and a fifth of whiskey on an end table.

McChristian questioned Paul and verified that Paul was not a convicted felon. Because the neighbors had identified only Paul as having fired shots, he did not question appellant. Satisfied with Paul's responses to his questions, McChristian left the trailer.

Later, McChristian and state police responded to a second call reporting that Paul was again firing gunshots toward a neighbor. Police surrounded the trailer and used a loud speaker to order anyone inside the trailer to come outside. Again, there was no report that appellant had fired any gunshots.

Appellant emerged from the trailer on his own accord; however, Paul refused to do so and the police entered the trailer. A sheriff's deputy testified that in addition to the handgun McChristian had seen earlier, five guns were found in the back bedroom.

At trial, Paul testified that the firearms were kept in his bedroom and he kept a handgun by his bedside. Although appellant had access to the guns, appellant

testified that the guns were Paul's property and that he had never handled them. He knew the guns were in the trailer and that he was a convicted felon.

At the close of the Commonwealth's case and at the close of the evidence, the appellant moved for a directed verdict which was denied. The trial court ultimately instructed the jury on possession of a handgun by a convicted felon and the lesser included offense of possession of a firearm by a convicted felon.

The appellant properly preserved for our review his objection to the court's definition of "constructive possession" contained in the jury instructions. That definition stated:

Constructive possession-Exists 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.

He pursues his same argument to this court as he did before the trial court, to wit, that KRS 527.040 requires that the Commonwealth prove beyond a reasonable doubt that the defendant had actual possession of a firearm and that constructive possession is insufficient.

In light of the Supreme Court's opinion in *Johnson v. Commonwealth*, 90 S.W.3d 39 (Ky. 2002), the appellant's argument is not persuasive. As in this case, the defendant was convicted of being a convicted felon in possession of a firearm. The Court unequivocally stated that in such cases, "[p]ossession may be proven through either actual possession or constructive possession." *Id.* at 42. Moreover, the Court recited the

precise definition of constructive possession given by the trial court in appellant's case.

As stated by our Supreme Court:

Constructive possession exists 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.

Id., quoting *United States v. Kitchen*, 57 F.3d 516,520 (7th Cir. 1995). Although appellant is dissatisfied with our Supreme Court's approval of the instruction given, it was nevertheless proper. We find no error.

Appellant's second argument is that the trial court erroneously denied his motion for directed verdict. He argues that there was insufficient evidence that he "knowingly" had the power and intention to exercise dominion and control of the firearms.

"On appellate review, the test for 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." *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991).

The Commonwealth had the burden of proving that appellant had previously been a convicted felon and that he possessed a firearm. KRS 527.040. As previously stated, the Supreme Court has held that constructive possession is sufficient to prove the second element of the statute.

Constructive possession requires only that the defendant had knowledge of the firearm and that he has the power and intent to exercise control of the firearm.

Johnson, 90 S.W.3d at 42. Ownership of the firearm by the defendant for the purpose of proving constructive possession is not necessary. In *Riley v. Commonwealth*, 120 S.W.3d 622 (Ky. 2003), the Supreme Court upheld a conviction where the firearms were owned by the defendant's father, but located in the same residence that the defendant occupied. Determinative, it noted, was that the defendant "could have easily exercised dominion and control over the two firearms" *Id.* at 629. Likewise, in *Johnson*, the Court held proof that the defendant resided or sometimes resided in the residence where the firearms were found was sufficient for the jury to find that he had constructive possession.

Johnson, 90 S.W.3d at 43. Possession need not be exclusive. That one or more people other than the defendant may have had access to the firearms does not preclude a finding of constructive possession. *Pate v. Commonwealth*, 134 S.W.3d 593, 599 (Ky. 2004).

The evidence presented by the Commonwealth was that the appellant resided in the trailer where the firearms were located. He admitted that he had access to the bedroom in which the firearms were found, he had control of the trailer, and he admitted that the guns were not in a locked container nor otherwise kept so that he was prevented from exercising control over the firearms. Additionally, the sheriff testified that he viewed a handgun on a table in the same room occupied by the appellant. Although the appellant denied that he actually exercised control over any of the firearms and his brother, Paul, confirmed his testimony, it was not unreasonable for the jury to find that appellant constructively possessed the firearms.

Appellant admits that his contention that the prosecutor’s closing argument was improper was unpreserved. He urges review under the palpable error rule. RCr 10.26.

During closing argument in the guilt phase, the prosecutor told the jury that a guilty verdict would let appellant “know what the expected course of conduct is in Carlisle County” and later stated, “tell Sam Russelburg that in Carlisle County, Kentucky, a convicted felon won’t exercise dominion and control over a gun.”

Although counsel is given wide latitude in closing argument, in *Brewer v. Commonwealth*, 206 S.W.3d 343, 350 (Ky. 2006), the Court cautioned prosecutors against using the “send a message” argument to the jury. However, the Court found that while it did not approve of the prosecutor’s remarks, there was no palpable error. *Id.* at 350. Even though this was clearly an improper argument under the facts of this case, we conclude that no manifest injustice resulted from the prosecutor’s statements.

Because we conclude there were no errors, we need not address appellant’s cumulative error argument.

Based on the foregoing, the judgment is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Julia K. Pearson
Assistant Public Advocate
Department of Public Advocacy
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

James C. Shackelford
Assistant Attorney General
Frankfort, Kentucky