

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-002068-MR

HAROLD D'RONE IKARD

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE SHEILA R. ISAAC, JUDGE
ACTION NO. 05-CR-00471

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: LAMBERT, TAYLOR, AND WINE, JUDGES.

WINE, JUDGE: Harold D'Rone Ikard ("Ikard") appeals from a judgment wherein he was convicted of Class C possession of a controlled substance, first degree, and being a persistent felony offender ("PFO") second degree. Ikard received a five year sentence on the possession charge enhanced to ten years by the PFO. In addition, Ikard received six months on a misdemeanor charge of possession of marijuana, to run concurrently with the other sentence. Ikard argues he was deprived of a fair trial because the jury instructions were inadequate and allowed the jury to convict him of an offense,

possession of a controlled substance, that is not listed as a crime in Kentucky. For the reasons stated below, we affirm the trial court.

Ikard was on parole when his parole officer, Emily Corman Howard (“Officer Howard”), received information that Ikard was selling drugs. On February 18, 2005, Officer Howard, Officer John Sumpter (“Officer Sumpter”), and Officer Johnathan Webb (“Officer Webb”) went to Ikard’s residence and knocked on the door. No one answered but the officers could hear a woman’s voice behind the door. Approximately six minutes later, the female and Ikard answered the door together. The officers placed Ikard in handcuffs for their safety while Officer Howard searched the residence. Ikard indicated his delay in answering the door was because he was using the restroom. Upon searching, Officer Howard discovered no indication that Ikard had made a bowel movement but did discover a white powdery substance floating on top of the water and a pink powdery substance on the bottom of the toilet.

The officers found a cut straw and two white pills, later identified as Lortab, on Ikard’s kitchen table. In Ikard’s bedroom, the officers recovered a saucer with white powder on it. In another bedroom, there were money orders in varying amounts written to Harold Borders (“Borders”), Lanisha Bell (“Bell”) and others. Finally, Officer Sumpter found a metal box under Ikard’s couch cushion. Ikard did not respond when asked what was in the box but admitted that the contents belonged to him. The officers found marijuana and several pill bottles, all but one bottle was prescribed to Borders or

Bell. Some of the bottles contained Oxycontin, morphine, and methadone. Ikard had \$1,860 on his person.

At trial, Ikard claimed that he did not know there was marijuana in the box when he told the officers that the contents were his. He further explained to the jury that his son, Borders, is a paraplegic who had been staying with him during the last few months of 2004 to January 2005. Ikard asserted that Borders left the pills behind when he returned home to North Carolina. Ikard also testified his cousin, Bell, took care of Borders after his shooting injury. Ikard explained that Bell, who suffers from terminal cancer, had put her pills in the box for safekeeping. Ikard contends that he never intended to sell or use the pills but intended to return them to Borders and Bell. Finally, Ikard explained that the white pills found in his home were his Lortab that he had been taking by prescription for ten years for the pain from an accident he suffered in December 1996. He claimed his doctor was fully aware that he used the straw to snort the Lortab. Despite this testimony, the jury convicted Ikard of possession of a controlled substance.

Ikard argues that Instruction No. 4, under which the jury found him guilty of first-degree possession of a controlled substance, did not accurately state the elements of the offense. He acknowledges that the error he asserts was not preserved for review by this Court but asks that the trial court's error be reviewed under the palpable error rule of RCr 10.26. To prevail on an unpreserved claim under palpable error, one must show that the error resulted in manifest injustice. *Martin v. Commonwealth*, 207 S.W.3d 1, 3, (Ky. 2006). RCr 10.26 provides: "A palpable error which affects the substantial rights of a

party may be considered . . . by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error.”

In pertinent part, KRS 218A.1415(1) provides that: “[a] person is guilty of possession of a controlled substance in the first degree when he knowingly and **unlawfully** possesses: a controlled substance . . . that is classified in Schedules I or II which is a narcotic drug” (Emphasis added). In this case, Instruction No. 4 read:

COUNT 1
FIRST DEGREE POSSESSION OF A CONTROLLED SUBSTANCE

If you do not find the Defendant guilty under Instruction No. 3 [trafficking], you will find the Defendant guilty of First Degree Possession of a Controlled Substance under this Instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:

A. That in this county on or about the 17th day of February, 2005, and before the finding of the Indictment herein, he had in his possession a quantity of methadone, and/or oxycodone, and/or morphine;

B. That he knew the substance so possessed by him was methadone, and/or oxycodone, and/or morphine;

AND

C. That said possession was for an unlawful purpose.

Ikard points out that the statute calls for “unlawful possession” while the trial court’s instruction calls for “possession for an unlawful purpose.” Ikard asserts the difference between the statute and instruction “is monumental” because the statute does not define “unlawful purpose” and the trial court failed to provide a definition for what would

constitute an unlawful purpose in the instructions. Essentially, Ikard asserts “possession for an unlawful purpose” is not the same as “unlawful purpose.” We disagree.

The trial court’s instruction in this case follows 1 Cooper, *Kentucky Instructions to Juries (Criminal)*, § 9.12 (Rev. 5th ed. 2006) with the exception of § (C). Under the statute, the Commonwealth had to prove Ikard’s knowledge and unlawful possession. Both the Commonwealth and the defense agreed that if Ikard merely possessed the drugs and did not intend to sell or ingest them, he could not be found guilty. To be convicted under the facts in this case, the possession had to be for an unlawful purpose. It was at defense counsel’s request that § (C) was added to the instructions. Because Ikard’s defense was that he intended to return the drugs to Borders and Bell, he was entitled to this instruction. “A defendant is entitled to an instruction on any lawful defense which he has.” *Slaven v. Commonwealth*, 962 S.W.2d 845, 856 (Ky. 1997).

Ikard argued that he did not knowingly and unlawfully possess the prescription drugs because his intent was to return them to Bell and Borders. But the jury was not obligated to believe Ikard’s version of the events. The Commonwealth presented the evidence of the cut straw and crushed pills that Ikard admitted snorting. They heard him change his story about exactly when Borders had stayed in his home and when Ikard had visited Borders in North Carolina. Ikard had numerous money orders, ranging from \$50 to \$1,000, that were sent to Bell and Borders. Officer Sumpter recovered the metal box that contained the pill bottles and marijuana under Ikard’s couch cushion. Ikard

admitted the contents of the box belonged to him. Because Ikard's intent regarding the pills was at issue, the trial court properly instructed the jury on this question.

Finally, the instruction correctly sets out all of the elements of the statute. To be convicted of first-degree possession of a controlled substance, the Commonwealth had to prove that Ikard "knowingly and unlawfully possess[ed]: a controlled substance . . . that is classified in Schedules I or II which is a narcotic drug . . ." KRS 218A.1415. Instruction No. 4 does not precisely mirror the statute, requiring the Commonwealth to prove that Ikard's possession "was for an unlawful purpose," *i.e.*, possession with the intent to ingest or sell, rather than merely unlawful as set out in the statute. However, we cannot find that the instruction deviated from the statute in any meaningful way. If anything, the instruction was actually more favorable to Ikard, as it suggested that the jury must find that Ikard's possession was for a particular unlawful purpose.

And even as to this question, the parties agreed that each would tell the jury in their closing that "unlawful purpose" in this case was if Ikard intended to ingest or sell the drugs. However, Ikard still argues that the instruction was deficient because the court did not define "unlawful purpose." We disagree. The trial court is not required to define terms commonly understood by the average juror. *Commonwealth v. Hager*, 35 S.W.3d 377, 379 (Ky.App. 2000). Additionally, the defense had an opportunity in its closing argument to explain what the term meant and the trial court even instructed the jury that it could rely on Ikard's definition in their deliberations. Thus, we find no prejudice to Ikard for the lack of a formal definition in the instructions.

Finding no error, we need not consider Ikard's argument regarding palpable error, because no error occurred regarding the jury instructions. Therefore, for the foregoing reasons, the judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

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