

Commonwealth Of Kentucky
Court of Appeals

NO. 2007-CA-000681-MR

CHRISTOPHER B. WINN

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE KIMBERLY N. BUNNELL, JUDGE
INDICTMENT NO. 06-CR-00111

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: CAPERTON, LAMBERT, AND THOMPSON, JUDGES.

LAMBERT, JUDGE: Christopher Winn appeals from a conviction of trafficking in a controlled substance based on an allegation that the jury instructions violated his rights to due process. After careful review, we affirm.

On December 9, 2005, Lexington Police Officer Robert Schwartz witnessed a black sedan driving without tail lights. Schwartz pulled the car over, and the driver, Winn, rolled his window down only a small amount to slip his license and title to Schwartz. Schwartz smelled the odor of marijuana through the

window and, while checking Winn's license and registration with dispatch, requested that a K-9 unit be sent to the scene.

The K-9 unit walked around Winn's car, and the dog alerted to the bottom seam of the driver's-side door. A search revealed 6.39 grams of crack cocaine, 3.8 ounces of marijuana, and digital scales.

After hearing all the evidence, a jury found Winn guilty of trafficking in a controlled substance in the first-degree, trafficking in marijuana, and possession of drug paraphernalia. Winn was also found guilty of being a persistent felony offender and was sentenced to fifteen years' imprisonment. This appeal followed.

Winn argues that he was denied a unanimous verdict because the jury instructions included theories of the case that were unsupported by the evidence. More specifically, he contends that the use of the words "dispense" and "ultimate user," as defined in KRS 218A.010, imply that the cocaine was lawfully possessed, which is a legal impossibility.

First, Winn admits that this issue was not preserved for appeal. Therefore, under RCr 10.26, we will only review the complaint for palpable error, meaning:

one which affects the substantial rights of a party and relief may be granted...only upon a determination that a manifest injustice has resulted from the error. This means, upon consideration of the whole case, the reviewing court must conclude that a *substantial possibility exists that the result would have been different* in order to grant relief.

See *Partin v. Commonwealth*, 918 S.W.2d 219,224 (Ky. 1996) (emphasis added) (citing *Jackson v. Commonwealth*, 717 S.W.2d 511 (Ky.App. 1986)).

Winn suffered no manifest injustice. The jury instructions defined "traffic" as: "to manufacture, distribute, dispense, sell, transfer, or possess with intent to manufacture, distribute, dispense, or sell a controlled substance." Although Winn would have us use the definition of "dispense" found in KRS 218A.010, the jury was not presented with this definition. Instead, the jury was given "dispense" in its common definition of "[t]o deal out in parts or portions; distribute." The American Heritage College Dictionary 400 (3rd ed. 1993). Therefore, there is no indication from the record that there was a substantial possibility that the result would have been different. Therefore, we find no palpable error and decline review pursuant to RCr 10.26.

Accordingly, we affirm the judgment of the Fayette Circuit Court.

ALL CONCUR.

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