

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-001174-MR
and
NO. 1997-CA-001255-MR

TAMIKA M. MONTAQUE

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE ERNEST A. JASMIN, JUDGE
ACTION NO. 96-CR-000840

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
VACATING SENTENCE AND REMANDING

* * * * *

BEFORE: GUDGEL, Chief Judge, ABRAMSON, and COMBS, Judges.

ABRAMSON, JUDGE: Tamika Montaque appeals from a May 15, 1997, judgment of Jefferson Circuit Court sentencing her to ten years in prison.¹ Montaque was convicted of trafficking in a controlled substance (cocaine) in the first degree (KRS 218A.1412) and of possession of drug paraphernalia (KRS 218A.500). Because Montaque was found to have been in possession of a firearm at the time of the commission of these offenses, she was subjected to an enhanced penalty, pursuant to KRS 218A.992,

¹This is appeal No. 97-CA-1255-MR. Montaque also took an appeal (No. 97-CA-1174-MR) from an earlier version of the same judgment. The two appeals have been consolidated for our review.

and was denied probation, at least in part, pursuant to KRS 533.060. On appeal, Montaque claims that the Commonwealth failed to prove that her possession of a firearm had any bearing on or connection with the trafficking or paraphernalia offenses and that, consequently, she should not have been subjected to an enhanced penalty or deemed ineligible for probation. Having concluded that Montaque was improperly subjected to an enhanced penalty, we vacate her sentence and remand for re-sentencing.

The case against Montaque began on December 20, 1995, when Louisville and Jefferson County police officers executed a search warrant for the apartment she occupied with Ronald Johnson. The officers discovered approximately nine ounces of cocaine in the apartment. The officers also found digital scales, knives, plastic bags, and cellular phones, some of these items bearing cocaine residue and all suggesting that Montaque and Johnson intended to distribute the cocaine. Montaque and Johnson were both arrested and indicted. Subsequently, Montaque admitted having received the nine ounces of cocaine from an out-of-state relative and further admitted that she had planned to sell it. She denied, however, that an unloaded, semi-automatic handgun the police later found in the trunk of a car owned by Johnson's mother and parked in the apartment building parking lot played any part in her drug dealing. Montaque claimed the gun belonged to a friend who had asked her two or three weeks before her arrest to store it for him. She had hidden the gun, she said, in the 1985 Cadillac, which she was then borrowing from Johnson's mother. Montaque testified that she was not using the Cadillac at the time of the search because a short time before

she had purchased a car of her own. The police found the unloaded gun wrapped in a plastic shopping bag along with two ammunition clips and a box of loose shells. Because the bag was located in the back of the trunk behind a speaker box, the gun was not accessible at all from the car's passenger compartment and was only awkwardly accessible through the trunk.

In her motions for a directed verdict on the firearm possession enhancement and for a new trial, Montaque argued that KRS 218A.992 contemplates the existence of some nexus between the firearm and the underlying offense. Because the Commonwealth failed to prove a nexus, Montaque insisted that the statute could not properly be invoked. In response, the Commonwealth claimed both that an adequate nexus had been established--in that the jury could reasonably surmise that Montaque would have used the Cadillac in the course of her drug dealing--and also that KRS 218A.992 does not require proof of a nexus but only proof of firearm possession contemporaneous with the underlying offense, which Montaque admitted. The trial court denied Montaque's motions, but did not specify whether it did so as a matter of fact (i.e., a nexus was established) or as a matter of law (i.e., no proof of nexus required). We shall therefore review both questions, bearing in mind that in the context of directed verdict rulings we review the trial court's factual determinations deferentially, Commonwealth v. Benham, Ky., 816 S.W.2d 186 (1991), but we review its statutory interpretations *de novo*. Keeton v. City of Ashland, Ky. App., 883 S.W.2d 894 (1994).

Preliminarily, we note that Chapter 218A of the Kentucky Revised Statutes, which is titled "Controlled Substances," provides for the regulation of drugs and like agents having, among other characteristics, an "actual or relative potential for abuse." KRS 218A.020. The chapter prohibits various acts relating to controlled substances and provides penalties for violations of the various statutes including property forfeiture, fines and other criminal sanctions. KRS 218A.140, 218A.160, 218A.410, 218A.991. A part of this regulatory scheme, KRS 218A.992, provides in pertinent part as follows:

Enhancement of penalty when in possession of a firearm at the time of commission of offense.

(1) Other provisions of law notwithstanding, any person who is convicted of any violation of this chapter who was at the time of the commission of the offense in possession of a firearm, shall:

(a) Be penalized one (1) class more severely than provided in the penalty provision pertaining to that offense if it is a felony;
or

(b) Be penalized as a Class D felon if the offense would otherwise be a misdemeanor.

Although "possession" is not defined in the statute, our Supreme Court recently held that "possession" for purposes of KRS 218A.992 includes the notion of constructive possession as well as that of actual physical possession. Houston v. Commonwealth, Ky., ___ S.W.2d ___ (rendered 9/3/98). In that case, the defendant was convicted of drug trafficking after officers executing a search warrant for his apartment found cocaine and

two loaded revolvers in the kitchen and marijuana and a loaded handgun in the living room. The defendant disavowed ownership of the guns but acknowledged that his fingerprints could be found on them. The Houston court held that "a drug violation penalty may be enhanced under KRS 218A.992 if the violator has constructive possession of a firearm." Id. Houston was found to be in constructive possession of the guns, all of which were "in plain view and easily accessible." Id.

In this case, Montaque, who admits possessing the firearm in question, asks us to interpret the phrase "who was, at the time of the commission of the offense, in possession of a firearm." (Emphasis added). She insists that the qualifying language, "at the time of the commission of the offense," refers not only to the temporal relationship between the alleged possession and the alleged offense, but also evidences the General Assembly's intent that sentence enhancement be imposed only for firearm possession that is related to the offense in a purposeful and not merely a coincidental way. The Commonwealth argues that according to the plain meaning of the statutory language a mere temporal relationship is sufficient to justify

sentence enhancement.² For three reasons, we agree with Montaque.

First, fundamental principles of statutory construction support Montaque's interpretation of the statute. Generally, we are obliged to construe a statute "in such a manner that 'no part of it is meaningless or ineffectual.'" Combs v. Hubb Coal Corporation, Ky., 934 S.W.2d 250, 252 (1996) (citation omitted). "It is an elementary rule of construction that effect must be given, if possible, to every word, clause, and sentence of a statute." Hampton v. Commonwealth, 257 Ky. 626, 78 S.W.2d 748, 750 (1934). Unless the "at the time of the commission of offense" language signifies some nexus between the firearm possession and the alleged offense other than a merely temporal one, that language is meaningless. Clearly, no penalty enhancement could be sustained if the possession were not even contemporaneous with the offense.

Second, penalty enhancement on the basis of firearm possession alone would automatically subject gun possessors as a class to harsher penalties than non-possessors, despite the fact that in some instances the gun possession would have no bearing on the offense and would not increase the risk of gun-related

²At oral argument, the Commonwealth acknowledged that a purely temporal relationship could result in enhancement even where the firearm was located in a different city. In the example posed by another member of this panel, a Lexington resident leaves his gun in his Lexington apartment and travels to Louisville for a rock concert where he purchases and sells drugs. Upon his conviction in Jefferson County, according to the Commonwealth, the defendant would be subject to an enhanced penalty because his gun ownership was contemporaneous with commission of the drug crime, despite the lack of any connection between the firearm and the crime.

violence. Our Supreme Court succinctly stated the standard for equal protection analysis in Kentucky in Commonwealth v. Wasson, Ky., 842 S.W.2d 487, 500 (1992):

[N]o class of persons can be discriminated against under the Kentucky Constitution. All are entitled to equal treatment, unless there is a substantial governmental interest, a rational basis, for different treatment.

Where a firearm is readily available, even if not used, during the commission of a violation of Chapter 218A, there is certainly a rational basis for enhancing the penalty; guns and drugs are a dangerous combination. However, where the firearm is not accessible and not otherwise connected to the drug violation, the defendant is being penalized for mere possession of a firearm. There appears to be no rational basis for subjecting gun possessors as a class to an enhanced penalty unless the possession is connected in a meaningful way to the drug violation.

Thus, a separate classification for firearm possessors (the inevitable consequence of the Commonwealth's position that only a temporal relationship is necessary), would most probably conflict with the equal protection provisions of the Kentucky Constitution. Commonwealth v. Howard, Ky., 969 S.W.2d 700 (1998); Commonwealth v. Wasson, supra. Since we are obliged, when we are reasonably able to do so, to construe a statute so as to avoid doubts about its constitutionality, Overnite Transp. Co. v. Gaddis, Ky. App., 793 S.W.2d 129 (1990), we conclude that the General Assembly did not intend application of KRS 218A.992 unless the Commonwealth establishes a meaningful nexus, beyond the possession itself, between the firearm possession and the

violation of Chapter 218A. See People v. Atencio, 878 P.2d 147 (Colo. App. 1994) (construing Colorado's enhancement statute as including a nexus requirement).

Finally, as Montaque notes, ". . . doubts in the construction of a penal statute will be resolved in favor of lenity and against a construction that would produce extremely harsh or incongruous results. . . ." Woods v. Commonwealth, Ky., 793 S.W.2d 809, 814 (1990) (quoting from Commonwealth v. Colonial Stores, Inc., Ky., 350 S.W.2d 465, 467 (1961)). We agree with Montaque that this so-called 'rule of lenity' is pertinent. The construction of KRS 218A.992 urged by the Commonwealth, which advocates automatically subjecting all firearm possessors to enhanced penalties for violations of Chapter 218A, would create a significant risk of unduly harsh and incongruous sentences for those violators whose firearm possession did not have any connection to their drug offense. As noted above, KRS 218A.992 can reasonably be understood to require proof of some nexus between the firearm and the drug violation. The rule of lenity applies, therefore, and provides another reason for our conclusion that KRS 218A.992 does include a nexus requirement.

Our decision in this case is bolstered by comparison with federal law. Much like KRS 218A.992, United States Sentencing Guidelines § 2D1.1(b)(1) "directs sentencing courts to increase the offense level . . . '[i]f a firearm or other dangerous weapon was possessed during commission of [a drug-related] offense.'" United States v. Vasquez, 874 F.2d 250, 251

(5th Cir. 1989).³ The commentary to this section of the Guidelines explains its application as follows:

The enhancement for weapon possession reflects the increased danger of violence when drug traffickers possess weapons. The adjustment should be applied if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense. For example, the enhancement would not be applied if the defendant, arrested at his residence, had an unloaded hunting rifle in the closet.

United States v. Otero, 868 F.2d 1412, 1414 (5th Cir. 1989) (quoting from Guidelines § 2D1.1 Application Note 3).

Accordingly, federal courts have developed standards for determining whether § 2D1.1(b)(1) applies to a given case:

The government can prove possession in two ways. First, the government can prove that the defendant personally possessed the weapon by showing that a temporal and spatial relation existed between the weapon, the drug trafficking activity, and the defendant Generally, the government must provide evidence that the weapon was found in the same location where the drugs or drug paraphernalia are stored or where part of the transaction occurred. . . .

Alternatively, when another individual involved in the commission of an offense possessed the weapon, the government must show that the defendant could have reasonably foreseen that possession.

United States v. Hooten, 942 F.2d 878, 882 (5th Cir. 1991). The government must show both "that the weapon was 'present' and that

³In 1991 the Sentencing Commission amended this guideline by deleting the phrase "during commission of the offense." The amendment has been interpreted as making sentence enhancement appropriate whenever a weapon is possessed during the charged offense or during any act that is part of the same course of conduct. United States v. Roederer, 11 F.3d 973 (10th Cir. 1993).

it is probable that the weapon was 'connected with the offense.'" United States v. Vasquez, supra, at 251 (emphasis in the original).

To avoid the potential constitutional problems noted above, similar standards should govern the applicability of KRS 218A.992. Under these standards, Montaque was entitled to a directed verdict on the weapon possession enhancement. Although she admitted possessing the gun and placing it in the Cadillac, the Commonwealth presented absolutely no evidence tending to show that the gun was connected to Montaque's cocaine trafficking. Unlike the situation presented in Houston, the gun was not present in the apartment where the drugs and paraphernalia were discovered. Additionally, there was no evidence that Montaque used the Cadillac in furtherance of her illegal activities. The Commonwealth correctly asserts that proof of Montaque's use of the Cadillac for drug-related transactions, even transactions not directly related to the cocaine seized from her apartment, could have established the nexus required under KRS 218A.992. Cf. United States v. Roederer, supra (holding that a gun found in the defendant's apartment several miles from the charged drug transaction supported sentence enhancement pursuant to § 2D1.1(b)(1) because there was evidence of drug-related activity, although uncharged, in the apartment). The Commonwealth may not, however, rely upon mere speculation to establish such use. The Commonwealth's insistence that use of the Cadillac for drug dealing may be inferred from Montaque's possession of the cocaine and the gun begs the question posed by KRS 218A.992.

The Commonwealth failed to meet its burden of proof in this case. The trial court erred by denying Montaque's motion for a directed verdict on the applicability of KRS 218A.992. As a matter of law, the Commonwealth was obliged to prove a nexus between the alleged firearm possession and the alleged drug offenses; as a matter of fact, it failed to do so.

Montaque also contends that the trial court erred by deeming her ineligible for probation pursuant to KRS 533.060. That statute provides in pertinent part as follows:

(1) When a person has been convicted of an offense or has entered a plea of guilty to an offense classified as a Class A, B, or C felony and the commission of the offense involved the use of a weapon from which a shot or projectile may be discharged that is readily capable of producing death or other serious physical injury, the person shall not be eligible for probation, shock probation, or conditional discharge, except when the person establishes that the person against whom the weapon was used had previously or was then engaged in an act or acts of domestic violence and abuse as defined in KRS 403.720 against either the person convicted or a family member as defined in KRS 403.720 of the person convicted.

Montaque contends that KRS 533.060 does not preclude her being probated. Even if she is deemed to have possessed a weapon for the purposes of KRS 218A.992, she argues, there was no evidence that the commission of her offense involved that weapon's use. We do not reach this issue, for our conclusion above that Montaque did not even possess the gun within the meaning of KRS 218A.992 renders academic this further question concerning the "use of a weapon" as provided in KRS 533.060. On remand, Montaque is to be sentenced for her trafficking and paraphernalia offenses without enhancement under KRS 218A.992.

Her suitability for probation should be assessed accordingly, pursuant to KRS 533.010. Although Montaque is not barred from probation by KRS 533.060, the trial court's authority to grant or to deny probation is otherwise unaffected by this opinion.

For these reasons, we vacate that portion of Jefferson Circuit Court's May 15, 1997, judgment sentencing Tamika Montaque to ten years in prison and remand for re-sentencing in accordance herewith.

ALL CONCUR.

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