

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-002527-MR

FRANCISCO RODRIGUEZ

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE REBECCA M. OVERSTREET, JUDGE
ACTION NO. 00-CR-541

COMMONWEALTH OF KENTUCKY

APPELLEE

AND

NO. 2000-CA-002556-MR

MELECIO JACOBO-RAMIREZ

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE REBECCA M. OVERSTREET, JUDGE
ACTION NO. 99-CR-00541

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS, JOHNSON, and SCHRODER, Judges.

COMBS, JUDGE: The appellants, Francisco Rodriguez and Melecio Jacobo-Ramirez, were convicted of multiple crimes following a jury trial in the Fayette Circuit Court. Both were convicted on two counts of second-degree criminal possession of a forged

instrument (KRS¹ 516.060); Jacobo-Ramirez was also convicted of first-degree trafficking in a controlled substance (KRS 218A.1412) and of possession of drug paraphernalia (KRS 218A.500). Rodriguez and Jacobo-Ramirez (Melecio) appeal from the judgments of the Fayette Circuit Court entered on October 10, 2000, as to their respective convictions. Finding no reversible error, we affirm.

On March 21, 2000, pursuant to a warrant, the Lexington police searched the apartment where the appellants resided along with Melecio's brother, Felipe. Rodriguez and Felipe were at home when police arrived, and they cooperated with the officers conducting the search. Melecio was located at a local bar; he was searched and was taken back to the apartment. All three occupants of the apartment were of Hispanic descent and did not speak English. Therefore, a police translator, Officer Rick Schad, was present during the search to assist the investigating officers. As a result of the search, the appellants and Felipe were arrested and were charged with trafficking, possession of drug paraphernalia, and second-degree criminal possession of a forged instrument. They were tried together in August 2000.

At trial, the Commonwealth presented evidence that the three men sharing the two-bedroom apartment had been the subject of the police search; that Rodriguez had his own bedroom; and that the Jacobo-Ramirez brothers shared the other bedroom. Officer Schad testified that when he asked Rodriguez for identification, he directed the officer to look under the

¹Kentucky Revised Statutes.

mattress in his bedroom. Officer Schad did so and found a wallet containing a Social Security card with the name "Jose Islas," a resident alien card with Rodriguez's name and picture, and about \$216 in cash. No drugs or drug paraphernalia were found on Rodriguez or in his room.

In the bedroom shared by the Jacobo-Ramirez brothers, police officers found a set of digital scales, three separate bags of cocaine, \$1550 in cash in a shirt pocket, and several documents - later determined to be counterfeit, which included Social Security cards and resident alien cards in the names of Felipe and Melecio Jacobo-Ramirez and a resident alien card in the name of Jose Islas, matching the name on the social security card found in Rodriguez's wallet. The Jacobo-Ramirez brothers each had about \$600 in cash on their persons. Melecio also had a cell phone, and Felipe was carrying a suspected "debt sheet" -- a list of names juxtaposed with varying amounts of cocaine.

Melecio and Felipe Jacobo-Ramirez were convicted on all crimes charged in the indictments; Rodriguez was acquitted of the drug-related charges but was found guilty on the charges that he possessed two forged instruments. Melecio was sentenced to serve six years in prison for the trafficking offense, one year on each of the two counts of criminal possession of a forged instrument (these three sentences to run consecutively with each other), and 12 months on the paraphernalia misdemeanor (to run concurrently with the felony convictions) - for a total of eight years. Rodriguez was sentenced to one year on each count of criminal possession of a forged instrument (the sentences to run

consecutively) for a total of two years to serve. The appeals of Jacobo-Ramirez and Rodriguez have been designated to be heard together.²

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As his sole allegation of error, Melecio argues that the trial court erred by failing to grant either of two motions for a mistrial. These motions were made after police officers testified to statements allegedly made by brother/co-defendant, Felipe. Melecio contends that the statements were incriminating to him and that they violated his constitutional right of confrontation. The first motion for a mistrial was made after Detective Doug Caldwell testified that Felipe told him that he and his brother lived in the apartment together. The second motion was based on Officer Schad's testimony that Felipe told the officers searching the apartment that he had no knowledge that drugs were in the apartment and that they belonged to Melecio. Melecio argues that the trial court's denial of his requests for a mistrial warrants a reversal of his drug-related convictions and a remand for a new trial. We disagree.

Statements of non-testifying co-defendants which tend to incriminate the other defendant violate the constitutional right of confrontation. Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968); Lowe v. Commonwealth, Ky.,

²Although he was tried with the appellants, Felipe Jacobo-Ramirez filed a belated appeal, the merits of which were not ready for submission to this panel.

487 S.W.2d 935 (1972). However, such a violation is subject to harmless error analysis.

[W]here a violation of the Bruton rule occurs it need not constitute reversible error if the evidence introduced through the confession or statement of the non-testifying co-defendant is cumulative and other evidence of the guilt of the accused is overwhelming. In such a case only harmless error occurs and the conviction may be upheld.

Butler v. Commonwealth, Ky., 516 S.W.2d 326, 328 (1974). See also, Gill v. Commonwealth, Ky., 7 S.W.3d 365, 368 (1999), cert. denied, 531 U.S. 830, 121 S.Ct. 83, 148 L.Ed.2d 45 (2000).

Prior to Detective Caldwell's allegedly objectionable testimony, other evidence had been admitted concerning the layout of the apartment, which defendants occupied the bedrooms, et cetera. There had also been testimony concerning the contents discovered during the search of the bedrooms indicating which rooms were used by each of the defendants. We have reviewed the video tape containing Detective Caldwell's testimony as to Felipe's statement about the living arrangements in the apartment. We conclude that it qualifies as "cumulative" evidence. The trial court's denial of the motion for mistrial in this instance amounted at the very most to harmless error -- if indeed any error at all.

Felipe's second statement as related by Officer Schad involved more serious implications for Melecio. Officer Schad testified about the search from memory. Since he was present at the scene of the search in his capacity as an interpreter, Officer Schad did not keep any notes nor did he generate a report. In addition to constituting a Bruton violation, his

testimony was inaccurate. During the bench conference on Melecio's renewed motion for a mistrial, the prosecutor acknowledged that Felipe had admitted that the drugs were his -- contrary to Officer Schad's testimony. The prosecutor suggested that the court allow her to lead Officer Schad in order to elicit the actual responses made by Felipe. The trial court reasoned that if the Commonwealth were allowed to impeach its own witness, the defendants were likely to benefit. Thus, it denied the motion for a mistrial as unnecessary unless Officer Schad continued to misquote Felipe. When the testimony resumed, Officer Schad corrected himself and testified that Felipe had admitted to purchasing the drugs.

On this point as well, we conclude that any error in failing to grant a mistrial amounts to the harmless error due to the overwhelming evidence of Melecio's guilt. Melecio had worked at a horse farm and earned slightly more than minimum wage. When he was searched, he was found to possess more than \$600 in cash and a cell phone; more than 71 grams of cocaine in various containers; digital scales; and even more cash in his bedroom. We agree with the Commonwealth that the evidence of Melecio's trafficking in cocaine was so overwhelming that no possible prejudice occurred warranting either the reversal of his conviction or a new trial.

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Rodriguez, who was acquitted of the more serious drug charges, argues that he should have received a directed verdict

since the evidence was insufficient to convict him of possessing a forged Social Security card and a forged resident alien card. The standard for determining the appropriateness of a directed verdict in a criminal case was set forth by the Kentucky Supreme Court in Commonwealth v. Benham, Ky., 816 S.W.2d 186, 187 (1991), citing Commonwealth v. Sawhill, Ky., 660 S.W.2d 3 (1983):

On motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given. For the purpose of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but reserving to the jury questions as to the credibility and weight to be given to such testimony.

On appellate review, the test of 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 of acquittal.

Sufficient evidence was presented to the jury to support the guilty verdict on the first count of criminal possession of a forged instrument. That evidence indicated that the wallet under Rodriguez's mattress contained a Social Security card -- later determined to be counterfeit. Even though found in another room in the apartment, the forged resident alien card matching the name on the Social Security card in his wallet constituted sufficient evidence for the jury to infer that Rodriguez was connected to the green card and thus to support the second conviction for possessing a forged instrument. The criteria required for a directed verdict were not met.

Rodriguez also argues that he was denied a fair trial by the presentation of "false testimony." Officer Schad testified that Rodriguez's wallet contained a resident alien card bearing the name and photograph of Rodriguez. Unlike the forged documents bearing the name "Jose Islas," a green card in Rodriguez's name was not introduced at trial. It is unclear from the record whether Officer Schad--the only interpreter for the three defendants and the many officers involved in the search--confused Rodriguez with one of the other defendants or whether such a document may have existed and was lost.

However, Rodriguez did not object to any of the testimony that he now claims was misleading and prejudicial. A defendant must make an objection to evidence admitted at trial in order to preserve any alleged error for review. RCr³ 9.22. Without a "proper objection" to preserve the error for appellate review, this Court may not consider the merits of the issue. Sherley v. Commonwealth, Ky., 889 S.W.2d 794, 796 (1994); West v. Commonwealth, Ky., 780 S.W.2d 600, 602 (1989). The trial court must first be given the opportunity to rule on the issue. Id. Although Rodriguez suggests that he is entitled to relief under RCr 10.26, he has not demonstrated the existence of a "manifest injustice" resulting from Officer Schad's testimony, see Brock v. Commonwealth, Ky., 947 S.W.2d 24, 28 (1997). We believe that even without the testimony of Officer Schad, there was sufficient evidence to support Rodriguez's conviction for possessing counterfeit documents.

³Kentucky Rule of Criminal Procedure.

Finally, Rodriguez contends that the trial court erred in ordering that his two sentences be served consecutively instead of concurrently (as recommended by the jury). He acknowledges that the trial court has broad discretion in determining how multiple sentences are to be served with respect to each other. Swain v. Commonwealth, Ky., 887 S.W.2d 346 (1994); Dotson v. Commonwealth, Ky., 740 S.W.2d 930 (1987). Nevertheless, he argues that abuse of discretion is apparent in this case as the trial court justified its decision on facts not in evidence. Specifically, the trial court stated that it felt "very strongly" that if a person came into the country illegally and committed a crime, he should "do the time." Rodriguez contends that there is no evidence that he came into the country illegally and that the trial court was wrong to use that "fact" in imposing his sentence.

The formal sentencing hearing in this case was conducted after the preparation of a pre-sentence investigation report -- a document which is not contained in the record for our review. While there was no evidence that Rodriguez came into the country illegally, there was no evidence that he had entered the country legally. However, at the hearing, Rodriguez asked the trial court to order that he be conditionally released until he was picked up by the immigration authorities. Thus, there was a basis for the court to infer that even if his initial border crossing had been legal, Rodriguez might have remained in this country illegally. Regardless of whether a defendant's alien status constitutes an appropriate consideration for the trial

court in these circumstances, the trial court articulated other reasons for the manner in which it ordered the sentences to run. We find no abuse of discretion in the trial court's decision to order consecutive running of the sentences.

The judgments of the Fayette Circuit Court are affirmed.

ALL CONCUR.

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