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NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

# Court Of Appeals

NOS. 2000-CA-001255-MR & 2001-CA-000665-MR

ROY GENE HENSLEY — APPELLANT

v.

APPEAL FROM LAUREL CIRCUIT COURT
HONORABLE LEWIS B. HOPPER, JUDGE
ACTION NO. 2000-CR-00019

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING
** ** ** ** **

BEFORE: KNOPF, MILLER, AND TACKETT, JUDGES.

KNOPF, JUDGE: Roy Gene Hensley appeals from a judgment of the Laurel Circuit Court, entered May 12, 2000, convicting him of trafficking in marijuana[1] and sentencing him as a second-degree persistent felony offender[2] to a maximum term of ten years in prison. Hensley maintains that the Commonwealth's evidence at trial showed no more than that he was present in a car where

[1]KRS 218A.1421(2).

[2]KRS 532.080.

marijuana was found and that his "mere presence" in the car was insufficient evidence to support the jury's verdict. Hensley also appeals from a separate order of the same court, entered February 28, 2001, denying his motion for a new trial. A new trial is warranted, he contends, because the owner of the car, Hensley's sister, has come forward with an affidavit in which she swears that Hensley is innocent. We affirm.

The arresting officer, a narcotics detective with the London, Kentucky, police force, testified that at about 1:00 A.M. on November 8, 1999, he stopped a west-bound car on the Daniel Boone Parkway in Laurel County because it was being driven erratically. He suspected the driver of being under the influence, and his suspicion became stronger when he approached the car and smelled a powerful odor of marijuana. The driver and owner of the car was Glenna Brewer, Hensley's sister. Her boyfriend was in the front passenger seat; Hensley was in the back seat behind Brewer.

Having obtained Brewer's consent, the officer conducted a canine search of the car. The dog alerted near the fender above the left rear wheel and again in the back seat. In the trunk, concealed above the left rear wheel-well, an assisting officer found five baggies containing what proved to be about thirteen ounces of marijuana. In the back seat, the dog uncovered another baggie containing marijuana, and the detective found a seventh, smaller baggie of marijuana in the pocket of a jacket upon which, the detective testified, Hensley had been sitting. The detective charged the three occupants of the

vehicle with trafficking in marijuana, arrested them, and transported them to the police post in London. There, during processing and after he had been warned as required by Miranda v. Arizona,[3] Hensley stated, according to the testimony of two officers, that no one would give him a job and he therefore "had to do something to supplement my income."

At trial Hensley denied any knowledge of the marijuana, denied that the jacket was his and that he had been sitting on it, and denied that he had made the statement about supplementing his income. The jury nevertheless found him guilty. He contends that constructive possession of the marijuana should have been attributed to the car's owner and driver, not to him, a mere passenger, and that accordingly he was entitled to a directed verdict of acquittal. We disagree.

Hensley correctly notes that constructive possession of contraband contained in a vehicle may be attributed to anyone with dominion and control over the vehicle.[4] It may also be attributed, however, to anyone within the vehicle in a position to exercise control over the contraband itself.[5] It was not unreasonable in this case for the jury to attribute possession of the marijuana found in the back seat to Hensley and for it to believe that he possessed it with the intent to sell. He admitted as much to the officers at the police station; at least

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[3]384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602 (1966).

[4]Leavell v. Commonwealth, Ky., 737 S.W.2d 695 (1987); Paul v. Commonwealth, Ky. App., 765 S.W.2d 24 (1988).

[5]Burnett v. Commonwealth, Ky., 31 S.W.3d 878 (2000).

the jury was entitled to so find. The trial court, accordingly, did not err by denying Hensley's motions for a directed verdict.[6]

Nor did the court abuse its discretion by denying Hensley's motion for a new trial. At the time of trial, in April 2000, Hensley's sister, Brewer, was a fugitive from justice and so was not available to testify. She subsequently pled guilty to marijuana trafficking and was sentenced to five years' probation in lieu of two years' imprisonment. Following her sentencing, Brewer provided Hensley with an affidavit in which she swore that all of the marijuana in her car the night of the arrest had been hers and that Hensley had had no knowledge of it. On the basis of this affidavit, which Hensley characterizes as newly discovered evidence, he contends that the trial court should have granted him a new trial. Again, we disagree.

RCr 10.02 authorizes a trial court to grant a new trial "if required in the interest of justice." To determine whether newly discovered evidence requires a new trial, courts must consider the following factors: (a) Is the evidence in fact newly discovered, that is, discovered since trial?[7] (b) Have the movant and his attorney sworn to facts from which the court may infer a diligent effort on their parts to discover the evidence before the first trial.[8] (c) Is the new evidence more than merely

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[6]Commonwealth v. Benham, Ky., 816 S.W.2d 186 (1991).

[7]Anderson v. Commonwealth, Ky., 63 S.W.3d 135 (2001).

[8]Collins v. Commonwealth, Ky., 951 S.W.2d 569 (1997); Wheeler v. Commonwealth, Ky., 395 S.W.2d 569 (1965).

cumulative or impeaching?[9] (d) Is the new evidence of such decisive value or force that it would, with reasonable certainty, change the result if a new trial were granted?[10] A negative answer to any of these questions defeats the new-trial motion.

Here, although Brewer's testimony may not have been available to Hensley at the time of his trial, it is not clear that her testimony was undiscovered. After-the-fact testimony by a previously unavailable codefendant is frequently characterized as not newly discovered.[11] Furthermore, although an assurance of diligence is required, neither Hensley nor his counsel submitted affidavits attesting to their diligence in obtaining Brewer's testimony. And it is far from reasonably certain that Brewer's testimony at a new trial would change the result. As the trial court noted, Brewer is an obviously biased witness who now has nothing to lose by assuming responsibility for the crime. A jury is apt to give her testimony little credence. The trial court did not abuse its discretion, therefore, when it denied Hensley's motion for a new trial.

In sum, there was sufficient evidence to submit the question of Hensley's alleged marijuana trafficking to the jury, and there was too little showing of newly discovered evidence to

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[9]Foley v. Commonwealth, Ky., 55 S.W.3d 809 (2000).

[10]Anderson v. Commonwealth, *supra;* Dolan v. Commonwealth, Ky., 468 S.W.2d 277 (1971).

[11]Carwile v. Commonwealth, Ky. App., 694 S.W.2d 469 (1985). *Cf.* United States v. Jasin, 280 F.3d 355 (3rd Cir. 2002) (That codefendant evidence was unavailable does not suffice to show that it was undiscovered); United States v. Montilla-Rivera, 115 F. 3d 1060 (1st Cir. 1997) (That codefendant evidence was unavailable will rarely suffice to establish that it was undiscovered).

justify a new trial. Accordingly, we affirm the May 12, 2000, judgment and the February 28, 2001, order of the Laurel Circuit Court.

ALL CONCUR.

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