

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-000992-MR

GREGORY BOYD

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE ANN O'MALLEY SHAKE, JUDGE
ACTION NO. 00-CR-000286, 99-CR-001841 & 99-CR-001841

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING
** **

BEFORE: COMBS, DYCHE, AND MILLER, JUDGES.

MILLER, JUDGE: Gregory Boyd brings this appeal from a May 1, 2001 judgment of the Jefferson Circuit Court. We affirm.

Boyd was a passenger in a car pulled over for a moving violation by Officer Kelly Hammond of Louisville Police Department. While Officer Hammond questioned the driver, Boyd and the other passenger in the car both attempted to exit the vehicle into oncoming traffic. Officer Hammond ordered Boyd and the other passenger back into the vehicle, then requested "backup." After backup arrived, Officer Hammond patted down the driver of the vehicle. During the pat down, Officer Hammond noticed a small piece of plastic protruding from the driver's

pocket, which he believed to be narcotics. The item turned out to be a small bag of marijuana. Boyd and the other passenger were then taken from the vehicle and searched. Although no contraband was found on Boyd, a cell phone case containing a cell phone and approximately \$1,300.00 in cash was.

A drug dog brought to search the vehicle alerted at the rear seat. At this time, Officer Hammond became aware of a strong odor of marijuana in the rear of the car. Ultimately, a small amount of marijuana was discovered in the vehicle's arm rest, and approximately ten pounds of marijuana was found under and behind the rear seat. Inside one of the bundles of marijuana was a large quantity of cocaine. The driver, Boyd, and the other passenger were arrested.

On July 28, 1999, Boyd was indicted by the Jefferson County Grand Jury for trafficking in a controlled substance in the first degree, Kentucky Revised Statutes (KRS) 218A.1412 and trafficking in marijuana, five pounds or more, KRS 218A.1421. On February 8, 2000, the Jefferson County Grand Jury returned another indictment against Boyd for second degree persistent felony offender (PFO II), KRS 532.080(2). Upon trial by jury, Boyd was found not guilty of trafficking in cocaine, but guilty of trafficking in marijuana. Boyd waived his right to have the jury determine his sentence, and accepted the Commonwealth's offer of five years' imprisonment. He additionally entered a plea to the PFO II charge, thereby enhancing his sentence to a total of ten years' imprisonment. The circuit court entered its

judgment of conviction and sentence on May 1, 2001. This appeal follows.

Boyd maintains the circuit court erred by denying his motion for directed verdict. "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." Commonwealth v. Benham, Ky., 816 S.W.2d 186, 187 (1991). Boyd was convicted for violation of KRS 218A.1421(1), which provides in pertinent part: "[a] person is guilty of trafficking in marijuana when he knowingly and unlawfully traffics in marijuana." "Traffic" is defined in KRS 218A.010(28) as "means to manufacture, distribute, dispense, sell, transfer, or possess with intent to manufacture, distribute, dispense, or sell a controlled substance."

Boyd was present in a vehicle that had approximately ten pounds of marijuana hidden under the backseat. Officers at the scene testified there was a strong odor of marijuana in the vehicle. Additionally, air fresheners were found over several vents in the car. Boyd attempted to exit the vehicle by opening his door into oncoming traffic before police finished their investigation. Boyd was found to be in possession of approximately \$1,300.00 in cash. Drawing all fair and reasonable inferences from the above evidence in favor of the Commonwealth, we believe that a reasonable juror could believe beyond a reasonable doubt that Boyd was guilty of trafficking in marijuana over five pounds. As such, we are of the opinion the circuit court did not err in denying Boyd's motion for directed verdict.

Boyd contends the trial court erred by denying his motion to suppress evidence. Specifically, Boyd complains the approximately \$1,300.00 found on him during the traffic stop was improperly seized and thus should have been suppressed. In Stewart v. Commonwealth, Ky. App., 44 S.W.3d 376, 380 (2000), this Court held:

Our standard of review of a circuit court's decision on a suppression motion following a hearing is twofold. First, the factual findings of the court are conclusive if they are supported by substantial evidence. The second prong involves a *de novo* review to determine whether the court's decision is correct as a matter of law. (footnotes omitted).

"[U]nlawfully obtained evidence will be admissible if ultimately, or inevitably, it would have been discovered by lawful means." Commonwealth v. Elliott, Ky. App., 714 S.W.2d 494, 496 (1986) (citing Nix v. Williams, 467 U.S. 431, 104 S. Ct. 2501, 81 L. Ed. 2d 377 (1984)). In the case *sub judice*, Boyd was detained after the traffic stop. After attempting to leave the scene, Boyd was searched; the search yielded a cell phone case containing approximately \$1,300.00. Shortly thereafter, Boyd was arrested upon discovery of substantial quantities of marijuana and cocaine in the vehicle in which he was a passenger. We harbor grave doubt as to whether the initial search of Boyd was proper. Nevertheless, we are of the opinion the cash was properly admitted. We think the cash would have been inevitably discovered and seized incident to Boyd's arrest. Under the authority of Elliott, we must conclude the circuit court did not err in denying Boyd's motion to suppress evidence.

Boyd maintains the court erred by allowing the prosecutor to introduce evidence of his post-Miranda¹ silence. In support of his argument, Boyd cites us to Doyle v. Ohio, 426 U.S. 610, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976), in which the United States Supreme Court held that "it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial." Id. at 618.

In the present case, the arresting officer was asked on direct examination whether any of the defendants made any statements, to which the officer replied, "Not to me." Counsel for Boyd's co-defendant objected and Boyd's counsel moved for a mistrial. The circuit court denied Boyd's motion for a mistrial, but instructed the Commonwealth to "move on."

Officer Hammond was not the only officer involved in Boyd's arrest; thus, Hammond's testimony did not foreclose the possibility Boyd made a statement elsewhere. The exchange between the Commonwealth and Hammond was brief, and immediately redirected by the circuit court. As such, we cannot say the testimony rises to the level of being used to impeach an explanation subsequently offered at trial as set out in Doyle. Thus, we are of the opinion the circuit court did not improperly allow evidence of Boyd's post-Miranda silence.

Boyd contends the circuit court erred by allowing inadmissible expert testimony. Specifically, Boyd asserts that

¹Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

Officer Hammond was not competent to offer expert testimony concerning behavior that indicated drug activity. The admission of expert testimony lies within the sound discretion of the trial court, and will not be disturbed absent an abuse of discretion. See Goodyear Tire & Rubber Company v. Thompson, Ky., 11 S.W.3d 575 (2000). Officer Hammond was an officer on the Louisville Police Department. He testified he had received training to identify drug activity. He further testified to the application of that training to the case at hand. As Officer Hammond was a police officer, specially trained to identify drug activity, we cannot say he was not competent to offer expert testimony concerning behavior that indicated drug activity. Hence, we are of the opinion the circuit court did not abuse its discretion by allowing Officer Hammond's testimony.

Boyd also contends the court erroneously allowed expert opinion testimony from one Detective David James. Boyd complains the court should not have recognized Detective James as an "expert in narcotics." The circuit court expressly recognized Detective James as an expert in narcotics based upon, *inter alia*, thirteen years' experience in a narcotics unit, extensive classroom training in narcotics, and his participation in instructing and training numerous law enforcement agencies in narcotics. In light of Detective James' experience and other qualifications, we are of the opinion the circuit court properly recognized Detective James as an expert in narcotics. As such, we do not believe the circuit court abused its discretion in allowing expert testimony from him. Id.

In sum, we are of the opinion the circuit court did not err in allowing expert testimony from Officer Hammond or Detective James.

Boyd asserts the circuit court erred in denying his motion for mistrial. Specifically, Boyd complains that the Commonwealth failed to disclose a statement Boyd allegedly made to Drug Enforcement Agency (DEA) Agents. "In order to grant a mistrial, there must appear in the record a manifest necessity for such action." Kirkland v. Commonwealth, Ky., 53 S.W.3d 71, 75-76 (2001). The standard for reviewing the denial of a mistrial is abuse of discretion. Bray v. Commonwealth, Ky., 68 S.W.3d 375 (2002). Discovery of oral incriminating statements made by defendant is governed by Ky. R. Crim. P. (RCr) 7.24, which reads in pertinent part:

[T]he Commonwealth shall disclose the substance of any oral incriminating statement known . . . to have been made by a defendant to any witness. . . .

The remedy for noncompliance is found in RCr 7.24(9) which reads in pertinent part:

If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule. . . , the court may direct such party to permit the discovery or inspection of materials not previously disclosed, grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, or it may enter such other order as may be just under the circumstances.

In the instant case, the circuit court prohibited the Commonwealth from entering the statement into evidence. The court allowed Boyd to inspect the statement and offered him the

option of using it. We believe the circuit court properly applied RCr 7.24(9), and that there existed no "manifest necessity" for mistrial. Thus, we are of the opinion the circuit court did not abuse its discretion in denying Boyd's motion for mistrial.

Boyd also maintains the circuit court erred in failing to instruct the jury on the lesser included offense of criminal facilitation. A "lesser included offense" is defined in KRS 505.020(2), which reads in pertinent part:

A defendant may be convicted of an offense that is included in any offense with which he is formally charged. An offense is so included when:

- (a) It is established by proof of the same or less than all the facts required to establish the commission of the offense charged;

. . . .

In Houston v. Commonwealth, Ky., 975 S.W.2d 925, 930 (1988), the Supreme Court held:

[C]riminal facilitation requires proof not of the same or less than all the facts required to prove the charged offenses of trafficking in . . . a controlled substance, but proof of additional and completely different facts . . . [I]t is not a lesser included offense when the defendant is charged with committing . . . the object offenses.

As criminal facilitation is not a lesser included offense of trafficking in a controlled substance, we are of the opinion the circuit court did not err in failing to instruct the jury on the lesser included offense of criminal facilitation.

Boyd contends he "was denied his constitutional rights by the prosecutor's misconduct during closing arguments."

Specifically, Boyd complains that during closing arguments the Commonwealth referred to the odor of the confiscated marijuana, which was present in the courtroom. Boyd further laments the Commonwealth's asking the jury whether the doubt created by the defense was "reasonable" constituted a shift in the burden of proof. As this issue was not preserved below, we are asked to review it as palpable error. RCr 10.26. Relief may be granted on an issue unpreserved for review if manifest injustice has resulted. See Schuttemeyer v. Commonwealth, Ky. App., 793 S.W.2d 124 (1990). We cannot say either of Boyd's complaints concerning closing arguments resulted in manifest injustice to Boyd. Thus, we do not believe the Commonwealth's closing arguments formed a basis for invoking the palpable error rule.

Boyd argues the circuit court erred by not dismissing his indictment. Specifically, Boyd asserts the Commonwealth used grand jury subpoenas to obtain evidence approximately a year after Boyd's original indictment. The use of grand jury subpoena power to conduct post indictment investigation is improper. Wilson v. Commonwealth, Ky., 37 S.W.3d 745 (2001). A court, however, may not dismiss an indictment for errors in grand jury proceedings unless such errors prejudiced defendant. Bank of Nova Scotia v. United States, 487 U.S. 250, 108 S. Ct. 2369, 101 L. Ed. 2d 228 (1988). In the instant case, while it appears the Commonwealth misused the grand jury subpoena power in an attempt to gather evidence, the evidence was not introduced at trial. As the evidence was not introduced at trial, we do not believe Boyd suffered prejudice. As such, we are of the opinion the circuit

court did not err in refusing to dismiss the indictment against Boyd.

Boyd contends the circuit court erred by failing to allow him to withdraw his guilty plea. Specifically, Boyd asserts that the circuit court "pressured" him, and that his own counsel "[misstated] the law." Further, he alleges his counsel's "misstatement" was not "corrected" by the circuit court. As such, he argues, his plea was not knowingly, intelligently, and voluntarily entered. Withdrawal of a guilty plea is a matter within the sound discretion of the trial court. Hurt v. Commonwealth, Ky., 333 S.W.2d 951 (1960).

In the instant case, the record indicates Boyd was questioned at length by the circuit court concerning his understanding of the charges against him and his rights thereon. Further, the circuit court specifically found on the record that Boyd's guilty plea was knowingly, understandingly and voluntarily entered. We think the court properly informed Boyd concerning his guilty plea. We simply do not believe the court abused its discretion in refusing to allow Boyd to withdraw his guilty plea.

Finally, Boyd asserts he was "denied his constitutional rights as a result of cumulative error." Upon the foregoing, we deem this assignment of error to be without merit.

For the foregoing reasons, the judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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