

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-002409-MR

DOYLE W. FOISTER

APPELLANT

v. APPEAL FROM BELL CIRCUIT COURT
HONORABLE JAMES L. BOWLING, JR., JUDGE
ACTION NO. 04-CR-00046

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: GUIDUGLI, McANULTY AND SCHRODER, JUDGES.

GUIDUGLI, JUDGE: Doyle W. Foister appeals from a judgment of the Bell Circuit Court reflecting a jury verdict finding Foister guilty of one count of possession of a handgun by a convicted felon. Foister argues on appeal that the trial judge erred in denying Foister's motion for a directed verdict. He also contends that palpable error resulted when the trial judge and the prosecutor referred to other charges and unrelated past convictions. For the reasons stated below, we affirm the judgment on appeal.

On March 11, 2004, the Bell County grand jury indicted Foister on four misdemeanor traffic offenses and one count of possession of a handgun by a convicted felon. The charges arose from an incident occurring on October 12, 2003, wherein Foister borrowed his mother's car to visit a girlfriend. At approximately 1:30 a.m. on that date, Officer James Shackelford observed Foister committing various traffic violations, including driving with a broken headlight.

Shackelford pulled Foister over and discovered that Foister had two outstanding arrest warrants. Foister was arrested. Pursuant to the arrest, Officers Shackelford and Goodwin conducted a search of Foister's vehicle and found a .25 caliber handgun. The handgun was wedged between the vehicle's seat and console.

The matter proceeded to trial on September 16, 2004, whereupon the Commonwealth moved to dismiss all counts of the indictment except the charge of possession of a handgun. After hearing the proof, the jury returned a guilty verdict on the sole remaining charge, and Foister was sentenced to six years in prison. A judgment reflecting the verdict and sentence was rendered on November 10, 2004, and this appeal followed.

Foister first argues that the trial court committed reversible error when it failed to sustain his motion at trial for a directed verdict. He maintains that the Commonwealth

failed to prove an essential element of the crime, to wit, that Foister knew the gun was present in the car. Foister's defense on this issue at trial was that he was unaware of the gun's presence, and that he had no opportunity to see it because he borrowed the car in the early morning hours when it was dark. He contends that the Commonwealth presented no proof on this issue, and that as such he was entitled to a directed verdict.

We find no error on this issue. While the language of KRS 527.040 does not expressly establish intent as an element of the offense,¹ we agree with Foister that it may properly be described as a "general intent" statute. KRS 501.040 states that,

Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of such offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such culpable mental state.

Furthermore,

As Professors Lawson and Fortune note, strict liability crimes are commonplace but "largely limited to offenses with minor penalties--traffic crimes, building, fire, health code violations, etc." Nonetheless, imposition of punishment in the absence of fault (i.e., "mens rea," "intent," "guilty mind," or "scienter") is generally regarded

¹ KRS 527.040 states at section (1) that, "[A] person is guilty of possession of a firearm by a convicted felon when he possesses, manufactures, or transports a firearm when he has been convicted of a felony"

as the exception rather than the rule in our jurisprudence, especially for crimes with substantial penalties.²

In the matter at bar, KRS 527.040 proscribes a "substantial penalty", and the conduct required to commit the offense necessarily involves a culpable mental state. As such, the burden was on the Commonwealth to offer some proof from which the jury could reasonably conclude that Foister knew the gun was present in the vehicle.

The record indicates that such proof was presented at trial. The Commonwealth offered evidence that the handgun was located in the interior of the vehicle and was not concealed. Because some evidence was offered that the gun was not concealed, the jury had a reasonable basis for concluding that Foister was aware of its presence. When this proof is considered in light of Commonwealth v. Benham,³ which requires the trial court to draw all fair and reasonable inferences from it in favor of the Commonwealth, we must conclude that sufficient proof was offered to overcome Foister's motion for a directed verdict.

Foister also argues that palpable error resulted when the trial judge and the prosecutor referred to the severed charges and to unrelated past convictions during the guilt phase

² Walker v. Commonwealth, 127 S.W.3d 596 (Ky. 2004), citing Robert G. Lawson & William H. Fortune, *Kentucky Criminal Law* § 2-1(b)(1).

³ 816 S.W.2d 186 (Ky. 1991).

of the trial. Specifically, Foister notes that the venire heard the trial judge reference the four severed misdemeanor charges, then later the prosecutor again referenced the four charges during the opening statement. Shortly thereafter, a witness mentioned prior burglary and alcohol-related charges. Foister contends that these events had an inflammatory effect and prejudiced the jury against him. As such, he argues that he is entitled to have the conviction reversed.

KRE 103(e) and RCr 10.26 state that,

A palpable error in applying the Kentucky Rules of Evidence which affects the substantial rights of a party may be considered by a trial court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error.

Thus, in order to prevail on his claim of palpable error, Foister must show that his substantial rights were adversely affected and that manifest injustice resulted. Stated differently, Foister must show that but for the alleged error the outcome of the trial would have been different.⁴

Having examined the totality of the record, including the alleged wrongful remarks by the trial judge, the prosecutor, and the witness, we cannot conclude that but for the remarks at

⁴ Ramsey v. Commonwealth, 157 S.W.3d 194 (Ky. 2005).

issue Foister would have been found not guilty on the charge of possession of a handgun by a convicted felon. First, it is worth noting that the trial judge admonished the venire to disregard the initial comments relating to the severed offenses. While Foister argues that this let "the cat out of the bag", we have no basis for concluding that the venire disregarded the judge's admonition. Second, the severed charges were mere misdemeanors, including operating a motor vehicle with a broken headlight. While not completely inconsequential, the severed charges pale in comparison to, for example, an armed robbery conviction - the improper introduction of which the Kentucky Supreme Court recently ruled did not rise to palpable error.⁵ And finally, Foister himself made reference to his incarceration for evading the police and the fact that he eluded apprehension for a period of some two years.

More important, however, is the fact that sufficient evidence exists in the record upon which the jury could have reasonably based its conclusion that Foister was a felon in possession of a handgun. Evidence was tendered showing that Foister was a felon, and that he was aware of the gun's presence by virtue of the fact that it was visible in the vehicle's interior. In sum, Foister's claim does not rise to the level of

⁵ Cochran v. Commonwealth, 114 S.W.3d 837 (Ky. 2003).

palpable error and does not represent a basis for reversing the judgment on appeal.

For the foregoing reasons, we affirm the judgment of the Bell Circuit Court.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Lisa Bridges Clare
Assistant Public Advocate
Department of Public Advocacy
Frankfort, KY

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

Wm. Robert Long, Jr.
Assistant Attorney General
Frankfort, KY