

Commonwealth of Kentucky

Court of Appeals

NO. 2005-CA-000833-MR

HOWARD WILSON BOWMAN, III

APPELLANT

v. APPEAL FROM McLEAN CIRCUIT COURT
HONORABLE DAVID H. JERNIGAN, JUDGE
ACTION NO. 04-CR-00014

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE, JUDGE; BUCKINGHAM,¹ SENIOR JUDGE; HOWARD,²
SPECIAL JUDGE.

HOWARD, SPECIAL JUDGE: Howard Wilson Bowman, III, appeals from a final judgment and sentence of imprisonment of the McLean Circuit Court. On February 25, 2005, a jury found Mr. Bowman guilty of possession of anhydrous ammonia in an unapproved container and possession of drug paraphernalia by knowingly possessing a

¹ Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

² Special Judge James I. Howard completed this opinion prior to the expiration of his Special Judge assignment effective February 9, 2007. Release of the opinion was delayed by administrative handling.

hollow pen casing of the type used to ingest controlled substances. He was sentenced to five years' imprisonment on the charge of possession of anhydrous ammonia and to six months on the charge of possession of drug paraphernalia, with the sentences to be served concurrently. On appeal, Bowman argues that the trial court erred in failing to grant his motion for directed verdict. Finding no error, we affirm.

On April 11, 2005, Sheriff Frank Cox investigated a propane tank found in a roadside ditch in a rural part of McLean County. Based on his investigation, the sheriff concluded that it contained anhydrous ammonia, a chemical used to manufacture methamphetamine. Later that evening, he and two deputy sheriffs staked out the property. On April 12 around 1:30 a.m., the three officers witnessed a pickup truck approach the tank. The driver remained in the truck, two passengers carried the tank to the truck and a third passenger lifted the tailgate and hardcover of the truck bed so the tank could be placed in the truck. The three passengers got into the truck and the driver started driving on the rural road. The officers followed, stopped the truck and arrested the truck's occupants. The search of the driver, Mr. Kenneth E. Dunaway, yielded methamphetamine, marijuana, and cigarette rolling papers. A deputy sheriff testified that he found on Bowman a hollowed out ink pen casing, similar to that used to smoke methamphetamine. The officers found no contraband on the other passengers, Dennis Kennedy and Harry Hunter. Chemical testing confirmed that the propane tank contained anhydrous ammonia and that the hollowed out pen casing found on Bowman had methamphetamine residue.

Bowman was indicted and charged with possession of drug paraphernalia and possession of anhydrous ammonia in an unapproved container with the intent to manufacture methamphetamine. At the start of the trial, the charge of possession of anhydrous ammonia was amended to remove the element of intent to manufacture methamphetamine. The indictments of Dunaway, Hunter, and Kennedy included, among other charges, possessing anhydrous ammonia in an unapproved container. The four co-defendants were tried jointly. The trial resulted in convictions of different offenses and sentences. The appellant, Bowman, was convicted of possession of anhydrous ammonia in an unapproved container and possession of drug paraphernalia. Dunaway, the driver of the truck, and Kennedy were each convicted of possession of anhydrous ammonia in an unapproved container and sentenced to one year's imprisonment. Hunter was convicted of criminal facilitation to possess anhydrous ammonia in an unapproved container and sentenced to a \$500 fine. This appeal by Bowman followed.

On appeal, Bowman challenges the sufficiency of the evidence and asserts that the trial court erred in denying his motion for directed verdict. Admitting that the Commonwealth produced evidence that the propane tank contained anhydrous ammonia, Bowman contends that the Commonwealth failed to prove that he knew of the tank's contents or that he possessed the tank.

The Kentucky Supreme Court, in *Benham v. Commonwealth*, 816 S.W.2d 186, 187 (Ky. 1991), articulated the rule for considering a motion for directed verdict. The Court stated that “[o]n 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.” Our standard of review of the denial of a motion for directed verdict is to determine if under the evidence as a whole, it is clearly unreasonable for a jury to find the defendant guilty. *Benham*, 816 S.W.2d at 187. The same standard applies whether it is direct or circumstantial evidence. “The rule is that if from the totality of the evidence the judge can conclude that reasonable minds might fairly find guilt beyond a reasonable doubt, then the evidence is sufficient to allow the case to go to the jury even though it is circumstantial.” *Commonwealth v. Sawhill*, 660 S.W.2d 3, 4 (Ky. 1983). While circumstantial evidence “‘must do more than point the finger of suspicion,’ *Davis v. Commonwealth*, 795 S.W.2d 942, 945 (Ky. 1990), the Commonwealth need not ‘rule out every hypothesis except guilt beyond a reasonable doubt.’ *Jackson v. Virginia*, 443 U.S. 307, 326, 99 S.Ct. 2781, 2792-93, 61 L.Ed.2d 560 (1979).” *Ratliff v. Commonwealth*, 194 S.W.3d 258, 267 (Ky. 2006).

KRS 250.991(2) states that “any person who knowingly possesses anhydrous ammonia in a container other than an approved container in violation of KRS 250.489 is guilty of a Class D felony KRS 250.489(1) provides that “it shall be unlawful for any person to knowingly possess anhydrous ammonia in any container other than an approved container.”

We have been invited to discuss whether the testimony by Bowman's co-defendants, particularly that of Mr. Dunaway, should be considered in determining the sufficiency of the evidence to support Bowman's conviction. This testimony was introduced after the court had overruled Bowman's original motion for directed verdict, made at the close of the Commonwealth's case in chief. Bowman himself asserted his right not to testify. However, we find that it is not necessary to address this issue because the Commonwealth's evidence alone was sufficient.

Bowman contends that the Commonwealth produced no evidence that he possessed the propane tank. We disagree. The definition of "possession" in the Kentucky Penal Code does not apply to offenses of KRS Chapter 218A. *Pate v. Commonwealth*, 134 S.W.3d 593, 598-99 (Ky. 2004). In *Pate*, the Court stated that "KRS Chapter 218A does not define 'possess' or any of its cognate forms. Consequently, we employ the common meaning of 'possess.'" *Id.* Possession may be either actual or constructive, and need not be exclusive. Two or more persons may be in constructive possession of drugs or contraband at the same time. *Pate*, 134 S.W.3d at 599; *cf. Commonwealth v. Mobley*, 160 S.W.3d 783 (Ky. 2005). "Constructive possession exists when a person does not have actual possession but instead knowingly has the power and intention at a given time to exercise dominion and control of an object, either directly or through others." *Johnson v. Commonwealth*, 90 S.W.3d 39, 42 (Ky. 2003)(*citation removed*); *Burnett v. Commonwealth*, 31 S.W.3d 878, 881 (2000).

Bowman is correct that the Commonwealth must prove more than that he was present or that he was just an innocent bystander. While the Commonwealth's proof

did not “rule out every hypothesis except guilty beyond a reasonable doubt,” *see Ratliff, supra*, the Commonwealth produced more than a “mere scintilla of evidence” that a reasonable juror could infer that the propane tank was subject to Bowman's dominion and control. During its case in chief the Commonwealth presented evidence that Bowman was one of the passengers who actively participated in placing the propane tank into the bed of the pickup truck and that the empty ink pen casing found on Bowman contained methamphetamine residue. While not overwhelming, the evidence was sufficient to support a reasonable juror's finding that Bowman possessed the propane tank. The trial court did not err in denying Bowman's motion for directed verdict at the close of the Commonwealth's case-in-chief.

Bowman next asserts that there was insufficient evidence that he knew that the tank contained anhydrous ammonia. “A jury is allowed reasonable latitude in which to infer intent from the facts and circumstances surrounding the crime.” *Pate*, 134 S.W.3d at 599. Evidence of knowledge can be from direct evidence or a strong inference of knowledge. *Franklin v. Commonwealth*, 490 S.W.2d 148, 150 (Ky. 1972), *cert. denied*, 414 U.S. 858, 94 S.Ct. 66, 38 L.Ed.2d 108 (1973). The Commonwealth presented evidence that there was an odor of anhydrous ammonia coming from the tank and that chemical tests confirmed the existence of anhydrous ammonia. This, coupled with the evidence noted previously such as Bowman's possessing contraband with methamphetamine residue, supports the jury's reasonable conclusion that Bowman knew that the propane tank contained anhydrous ammonia.

The judgment of the McLean Circuit Court is affirmed.

ALL CONCUR.

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