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Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000207-MR

RICHARD PITCOCK, JR. — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE KIMBERLY N. BUNNELL, JUDGE
ACTION NO. 06-CR-00913

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; MOORE AND VANMETER, JUDGES.

COMBS, CHIEF JUDGE: Richard Isaac Pitcock, Jr. appeals from a jury verdict and judgment of the Fayette Circuit Court finding him guilty of a number of offenses, including first-degree possession of a controlled substance, and sentencing him to a total of seven-and-one-half years' imprisonment. After our review, we affirm.

On July 5, 2006, the Fayette County Grand Jury indicted Pitcock on one count of first-degree possession of a controlled substance (crack cocaine), a Class D felony pursuant to Kentucky Revised Statutes (KRS) 218A.1415; one count of first-

degree fleeing/evading police, a Class D felony pursuant to KRS 520.095; one count of reckless driving in violation of KRS 189.290; one count of disregarding a stop sign in violation of KRS 189.330; and one count of being a second-degree persistent felony offender, a Class C felony pursuant to KRS 532.080. On July 13, 2006, Pitcock appeared with counsel and entered a plea of not guilty to the indictment.

Following a jury trial held on November 30, 2006, Pitcock was found guilty on all counts with the exception of the first-degree charge of fleeing/evading police. The jury instead found him guilty of the second-degree version of the offense of fleeing/evading. The jury subsequently recommended a total sentence of seven-and-one-half years' imprisonment. On December 8, 2006, the trial court entered a judgment that reflected the jury's findings of guilt. On December 28, 2006, the court sentenced Pitcock in accordance with the jury's recommendations. This appeal followed.

Pitcock first argues that the trial court erred by denying his motion for a directed verdict because the evidence presented by the Commonwealth was insufficient to support a conviction. Our standard of review as to the denial of a motion for directed verdict was set forth by the Kentucky Supreme Court in *Commonwealth v. Benham*, 816 S.W.2d 186 (Ky. 1991):

> 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.

Id. at 187. Accordingly, we must examine the evidence as a whole to determine if the jury's finding of guilt was clearly unreasonable.

At trial, Officer Stacy Shannon of the Lexington-Fayette Urban County Government Division of Police testified on behalf of the Commonwealth. She indicated that on May 18, 2006, at approximately 4:00 a.m., she was patrolling her beat when she saw a man approach a silver SUV parked on a street. That street was known to be a frequent site for illegal drug transactions. The SUV's tail lights were on, and its motor was running. The driver of the SUV extended his arm from the vehicle and took something from the man. Shannon testified that she had a clear, unobstructed view of the driver and that he was wearing a red jacket over a blue shirt.

Believing that a drug transaction was taking place, Shannon pulled behind the SUV, illuminated it with her spotlight, and exited her cruiser. At that point, the individual who had been standing next to the SUV walked away, and the vehicle sped away from the scene. Shannon returned to her cruiser, activated its emergency lights and siren, and pursued the SUV. A high-speed chase ensued during which the driver of the SUV proceeded the wrong way down Chestnut Street and ran stop signs at the intersections of Third and Chestnut Streets and Fourth and Chestnut Streets. Shannon's

supervisor ordered her to terminate the chase, and she did. However, she was given permission to patrol the immediate area and to continue to search for the SUV. Some time later, she saw the SUV turn into a private driveway and crash into a house.

The driver immediately exited the vehicle and attempted to flee on foot. Shannon gave chase, and the two ran through some bushes near the side of a house. Shannon testified that the area in question was well lit with street lights. As the driver was running, he removed and discarded his red jacket. Shannon testified that he was wearing a long-sleeved blue shirt and blue jeans. After realizing that she could not catch up with him, Shannon radioed for assistance and returned to her cruiser. Along the way, she stopped and picked up the red jacket and searched the SUV, where she found a suspected rock of crack cocaine wrapped in a $5.00 bill. (Testing at the Kentucky State Police Forensics Laboratory confirmed that the substance was, in fact, crack cocaine.) Shannon then ran the tags on the SUV and called the registered owner – Pitcock's father, Richard Pitcock, Sr. – to inform him that his vehicle had been involved in a wreck.

Pitcock's father arrived on the scene and told Shannon that he had last seen his son on May 14, 2006, when he had given him permission to borrow the SUV. According to Shannon, he also told her that Pitcock had been wearing a red jacket, blue-jean shirt, and blue jeans when he last saw him. Shortly later, Shannon saw Pitcock standing in a nearby driveway. She testified that he was wearing a long-sleeved blue shirt and blue jeans and that he had the same body build and hair color as the person who had been driving the SUV. Shannon also indicated that her trousers were wet from the

knees down as a result of running through bushes during the chase and that Pitcock's pants were similarly damp. According to Shannon, she then interviewed Pitcock, and he admitted to her that the red jacket was his and that he had used crack cocaine earlier in the evening. However, he denied that he had been driving the SUV and told Shannon that "some boys" had stolen the car from him and that he had been looking for it. Despite Pitcock's version of events, Shannon testified that she was 100% certain that he was the person whom she had chased in her cruiser and on foot.

In response to this evidence, Pitcock offered his own highly contradictory testimony at trial. First, he claimed that he was not the driver of the SUV and that he did not own or wear a red jacket. Instead, he testified that he had loaned the vehicle to another individual on May 17, 2006. At trial, Pitcock gave the name of the individual, who would not testify for fear of retribution according to Pitcock. He stated that the SUV was in good shape when he loaned it and that the compact discs in the vehicle were not his. He further indicated that he only came upon the scene of the SUV crash after a friend told him that he had seen the vehicle and that it was about to be towed. Pitcock highlights Shannon's testimony that, during the chase on foot, she was more focused on avoiding obstructions in her path and keeping up with the driver than she was on identifying him or looking for the discarded red jacket; she also did not see the driver actually drop the jacket.

He commented on Shannon's admission that it was not unusual for individuals in a high-crime area to take or loan cars. He also cited to his father's

testimony at trial that Pitcock was not wearing a red jacket when he left home with the SUV and that he did not believe that Pitcock owned the jacket because he had not seen it before. Pitcock's father testified that the manner in which he had to adjust the seat of the SUV before driving it home that night was not consistent with how he had to adjust it when Pitcock had been driving the car. He noted that he did not believe that the rap music compact discs strewn throughout the SUV were Pitcock's because he was a country music fan.

Pitcock contends that the totality of the testimony presented at trial supports his defense that he was not the driver of the SUV and that the Commonwealth consequently failed to establish beyond a reasonable doubt that he was the driver. However, after considering the evidence in a light most favorable to the Commonwealth, as we must, we believe that sufficient evidence was presented to survive a motion for directed verdict. Officer Shannon identified Pitcock as the driver of the SUV **without equivocation**. Pitcock's arguments pertain to the weight of the evidence presented and to issues of witness credibility, which are matters left exclusively to the purview of the jury. *Benham*, 816 S.W.2d at 187. Thus, we conclude that the trial court did not err in denying Pitcock's motion for directed verdict and that the jury's decision was not clearly unreasonable.

Pitcock last argues that the jury was improperly instructed as to the definition of *possession* in the context of the possession of a controlled substance charge.

However, he acknowledges that this argument is not preserved for appellate review. Kentucky Rules of Criminal Procedure (RCr) 9.54(2) provides as follows:

> No party may assign as error the giving or the failure to give an instruction unless the party's position has been fairly and adequately presented to the trial judge by an offered instruction or by motion, or unless the party makes objection before the court instructs the jury, stating specifically the matter to which the party objects and the ground or grounds of the objection.

The rule is mandatory in nature and has been strictly enforced. "Failure to comply with subsection (2) of RCr 9.54 has been consistently held to prohibit review of alleged error in instructions because of the failure to properly preserve the claimed error." *Gibbs v. Commonwealth*, 208 S.W.3d 848, 853 (Ky. 2006). Nevertheless, Pitcock asks us to consider his argument pursuant to the "palpable error" standard set forth in RCr 10.26, which provides:

> A palpable error which effects the substantial rights of a party may be considered by the 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.

For an error to be palpable, it must be "easily perceptible, plain, obvious and readily noticeable." *Burns v. Level*, 957 S.W.2d 218, 222 (Ky. 1997). It must also involve "prejudice more egregious than that occurring in reversible error[.]" *Ernst v. Commonwealth*, 160 S.W.3d 744, 758 (Ky. 2005). In reviewing a case for palpable error, our analysis must focus upon whether a substantial possibility exists that the result in the

case would have been different but for the claimed error. *Brewer v. Commonwealth*, 206 S.W.3d 343, 349 (Ky. 2006).

In support of his position that the definition of *possession* presented to the jury was erroneous, Pitcock cites *Pate v. Commonwealth*, 134 S.W.3d 593 (Ky. 2004). In *Pate*, the Kentucky Supreme Court held that the Kentucky Penal Code's definition of *possession* as utilized in KRS 500.080(14) does not apply to offenses covered by KRS Chapter 218A. *Id.* at 598. Instead, the Court set forth that to *possess*, as employed by KRS Chapter 218A, means "[t]o have as property; own." *Id.* The definition of *possession* given to the jury was: "to have actual physical possession or otherwise to exercise actual dominion or control over a tangible object...." Pitcock contends that that definition is at odds with the requirements of *Pate*. We agree. The definition is taken verbatim from KRS 500.080(14), and Pitcock was charged under KRS 218A.1415. The definition was indeed erroneous under *Pate*.

Nonetheless, we do not conclude that the instruction constituted "a substantial error resulting in manifest prejudice." RCr 10.26. The *Pate* Court additionally noted that *possession* for purposes of KRS Chapter 218A includes both "actual" and "constructive" possession. *Pate*, 134 S.W.3d at 598. "To prove constructive possession, the Commonwealth must present evidence which establishes that the contraband was subject to the defendant's dominion and control." *Id.* at 598-99, quoting *Burnett v. Commonwealth*, 31 S.W.3d 878, 881 (Ky. 2000). We have previously held that "the person who owns or exercises dominion or control over a motor vehicle is

deemed to be the possessor of any contraband discovered inside it." *Paul v. Commonwealth*, 765 S.W.2d 24, 26 (Ky.App. 1988); *see also Deboy v. Commonwealth*, 214 S.W.3d 926, 930 (Ky.App. 2007).

Our Supreme Court has recently reaffirmed this interpretation, holding that "proof that a defendant has possession and control of a vehicle is evidence to support a conviction for constructive possession of contraband found within the vehicle." *Burnett*, 31 S.W.3d at 880. The jury's decision reflected that it believed that Pitcock was the driver of the SUV and that, therefore, he had possession and control of the vehicle. Thus, the fact that crack cocaine was found within the SUV supports a conviction for possession of contraband. We conclude that manifest injustice did not occur as a result of the trial court's error because there is not a substantial possibility that the jury's decision would have been different but for the harmless error.

The judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Denise Redwine
Lexington, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

David W. Barr
Assistant Attorney General
Frankfort, Kentucky