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Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-000667-MR

THOMAS LEE

APPELLANT

v. APPEAL FROM ADAIR CIRCUIT COURT
HONORABLE JAMES G. WEDDLE, JUDGE
ACTION NO. 04-CR-00088

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: ACREE AND LAMBERT, JUDGES; HARRIS, SENIOR JUDGE.

ACREE, JUDGE: Thomas Dwayne Lee appeals the Adair Circuit Court's judgment convicting him of violating KRS 218A.1423(2), marijuana cultivation of five (5) or more plants, with a firearm enhancement that elevated the charge from a class D to a class C felony pursuant to KRS 218A.992(1)(a). The jury sentenced Lee to ten years in prison, the maximum penalty allowed by law.

Lee raises two issues on appeal. First, he contends the trial court erred in refusing to grant his motion for a directed verdict on the firearm enhancement. Second, he argues the trial court erred in refusing to grant his motion requesting funds to secure an examination by a private psychiatrist. Because both arguments lack merit, we affirm the conviction.

The grounds for the criminal charges against Lee were revealed when the Kentucky State Police attempted to serve an emergency mental petition at Lee's residence. On July 6, 2004, four law enforcement officers led by Captain Jeff Hancock arrived to serve the petition. Lee was not cooperative and even stated he wanted a "shoot out" with police. Captain Hancock found it necessary to withdraw from the property and set up a command post half a mile from Lee's home. He then telephoned Lee and, over the next ten hours, negotiated Lee's surrender. Before the negotiations concluded peacefully, Lee indicated he had guns in his home and that he actually desired a violent confrontation with the police. Based on this information, Captain Hancock obtained an arrest warrant for Lee and a search warrant for his residence.

After Lee's surrender, the State Police searched his residence and found a large collection of firearms, including four handguns and twenty long guns, including three semi-automatic assault rifles. One of the handguns, a .380 automatic, was found on a table next to a corded telephone. The evidence and testimony elicited at trial indicates that this is the telephone Lee used during his with police and that there was at least one round in the magazine of this gun.

Additionally, there were several shotguns and rifles located in a case by the door with ammunition located in an adjacent compartment. However, other than the .380 automatic, no one could testify whether any of these guns was loaded.

Additionally, the police confiscated 458 marijuana plants in various stages of development growing near the rear of the residence. These plants were located both near the house and in the edge of the wooded area behind the house.

On July 27, 2004, Lee was indicted on the charges of which he was ultimately convicted. Trial took place on January 24, 2008, and the judgment of conviction was entered on March 17, 2008. This appeal followed.

“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 [is] the defendant entitled [] to a directed verdict of acquittal.”

Commonwealth v. Benham, 816 S.W.2d 186, 187 (Ky. 1991), citing *Commonwealth v. Sawhill*, 660 S.W.2d 3 (Ky. 1983). In the case before us, it was not “clearly unreasonable” for the jury to find Lee guilty of violating KRS 218A.992.

The firearm enhancement statute, KRS 218A.992, as it read when Lee was indicted, stated:

(1) Other provisions of law notwithstanding, any person who is convicted of any violation of this chapter who was at the time of the commission of the offense in possession of a firearm, shall:

(a) Be penalized one (1) class more severely than provided in the penalty provision pertaining to that offense if it is a felony[.]

KRS 218A.992(1)(a). The statute required nothing more than that the person charged be in possession of a firearm at the time of the offense. However, in 2005 the statute was amended to add that the firearm must be possessed “in furtherance of the offense.” 2005 Kentucky Laws Ch. 150 (SB 63), Section 13. This amendment effectively codified the Kentucky Supreme Court’s decision in *Commonwealth v. Montaque*, 23 S.W.3d 629 (Ky. 2000), in which the Court held a nexus must exist between the firearm possession and the commission of the crime. *Id* at 632.

Though the Supreme Court declined to delineate a bright line rule for finding this nexus, the Court did provide some guidance.

First, whenever it is established that a defendant was in actual possession of a firearm when arrested, or that a defendant had constructive possession of a firearm within his or her “immediate control when arrested,” then, like under the federal sentencing guidelines, the Commonwealth should not have to prove any connection between the offense and the possession for the sentence enhancement to be applicable. However, the defendant should be allowed to introduce evidence to the contrary, which would create an issue of fact on the issue. Next, when it cannot be established that the defendant was in actual possession of a firearm or that a firearm was within his or her immediate control upon arrest, the Commonwealth must prove more than mere possession. It must prove some connection between the firearm possession and the crime.

Id. at 632-33 (footnotes and citations omitted). Therefore, if the Commonwealth showed that Lee either was in actual possession of a firearm when arrested or in constructive possession of a firearm that was within his immediate control when arrested, then the Commonwealth has established the nexus required by law.

There is no evidence in the record to indicate that Lee was ever in actual possession of a firearm during his ten-hour standoff or when he was taken into custody. However, the record does support a reasonable inference Lee had constructive possession of the firearms in his home and that he was able to exercise immediate control over those firearms.

“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.” *Riley v. Commonwealth*, 120 S.W.3d 622, 629 (Ky. 2003), quoting *Johnson v. Commonwealth*, 90 S.W.3d 39, 42 (Ky. 2002). Lee did “knowingly” have the “the power and intention” at the time of the standoff and his arrest to “exercise dominion and control” over the firearms in his home. There were multiple firearms located throughout the home, including the loaded .380 automatic and several long guns and ammunition in a gun case near the front door. Since Lee clearly had constructive possession of the firearms, it need only be established that these weapons were within his immediate control at the time he was arrested.

A firearm is in a person’s immediate control when it is located in “the area within which [that person] might gain [actual] possession over the [firearm].”

Id. It has been illustrated that Lee had ready access to both guns and ammunition. He could have removed one of the long guns from the gun case near the door and loaded it with the ammunition stored right next to it. Even if there were only one round in the .380 automatic it could be quickly accessed and used to protect his marijuana operation. Lee even expressed his willingness to use his firearms against law enforcement.¹ Thus, the firearms were clearly within Lee's immediate control. "Under *Montaque*, if the defendant had constructive possession of a firearm and the firearm was within his 'immediate control' when he was arrested, no further proof of a nexus need be shown." *Johnson v. Commonwealth*, 105 S.W.3d 430, 436-67 (Ky. 2003). The Appellant had constructive possession of the firearms in his house and they were within his immediate control. Therefore, sufficient evidence existed to submit the firearms enhancement issue to the jury for resolution.

Lee presents three arguments that, despite the Commonwealth's evidence, proof of a nexus was not sufficient to survive the motion for directed verdict. First, he argues that there is no evidence indicating that the weapons were ever in his immediate control. Second, because the firearms were located in the home and the marijuana in the woods, there is a failure to make a sufficient showing of a nexus under *Montaque*. Third, he claims, because the only loaded

¹ Lee testified in his own behalf and denied wanting a "shoot out" with police. However, he did admit to his belief that he had a right to grow marijuana and to defend against the confiscation of that property.

gun was the .380 automatic weapon, there was no nexus between the marijuana offense and the firearms. We are not persuaded by these arguments.

Lee's argument that no weapons were ever in his immediate control hinges on the fact that little testimony was elicited as to his location in the home relative to the firearms during the ten-hour standoff with police. However, Lee himself testified that he was using the corded phone which was located immediately adjacent to, and certainly within easy reach of, the loaded .380 automatic sitting on the same table. A jury certainly could have reasonably inferred that the firearm was where Lee "might have gained possession" of it. *Riley* at 629. A jury also could have reasonably inferred that Lee could have gained possession of the firearms located near the door. It appears from this argument that Lee is simply arguing that he was never in *actual* possession of a firearm. However, and we reiterate, Lee need not have had actual possession of the firearms to be subject to the firearm enhancement. *Houston v. Commonwealth*, 975 S.W.2d 925, 927 (Ky. 1998). Furthermore, the weapons did not need to be so immediately accessible to Lee that virtually no effort would put him in control of them. Speaking to this issue the Kentucky Supreme Court held "that the entire interior of a vehicle and all containers therein should be considered within a defendant's 'immediate control.'" *Kotila v. Commonwealth*, 114 S.W.3d 226, 247 (Ky. 2003), citing *New York v. Belton*, 453 U.S. 454, 460, 101 S.Ct. 2860, 2864, 69 L.Ed.2d 768 (1981). If even a weapon in a container in a vehicle's backseat and not immediately accessible to a defendant is deemed within his "immediate

control,” then clearly the .380 automatic, and even the firearms located by the front door, should be considered within Lee’s immediate control.

Because the weapons were in Lee’s immediate control, the marijuana’s location in the woods behind the Appellant’s home and the location of the weapons in the home does not necessitate a directed verdict on the firearms enhancement. Nevertheless, Lee relies chiefly on a factual analogy between *Montaque* and his case to make this argument. However, *Montaque* is clearly distinguishable since the defendant in that case, unlike Lee, was never in constructive possession of the firearm in question. *Montaque* at 633 (“Nor was the gun in Montaque’s actual possession or within her immediate control when she was arrested.”). The proximity of the drugs to the firearm, an issue in *Montaque*, is not relevant here.

Finally, Lee argues that because the firearms were unloaded they do not qualify under KRS 218A.992, the firearms enhancement provision. However, “[b]ecause the operability of the firearm is not an element of the firearm enhancement, the inoperability of a firearm is an affirmative defense for which the defense has the burden of proof.” *Campbell v. Commonwealth*, 260 S.W.3d 792, 804 (Ky. 2008). There are several flaws in this argument.

An unloaded weapon is not the equivalent of an inoperable one. The former can be loaded and fired; the latter cannot. But even if we were to equate an unloaded firearm with an inoperable one, the evidence does not support the affirmative defense. By Lee’s own admission, there was at least one round in the

.380 automatic. Even absent that proof, there was still enough evidence to submit the firearms enhancement to the jury. ““Once it is established that a defendant was in possession of a weapon during the commission of an offense, a presumption arises that such possession was connected to the offense[,]’ and ‘[t]he government does not have to produce any further evidence establishing a connection between the weapon and the offense.’” *Lunsford v. Commonwealth*, 139 S.W.3d 926, 932 (Ky.App. 2004), quoting *United States v. Sanchez*, 928 F.2d 1450, 1460 (6th Cir. 1991). That, it seems to us, would include the requirement to prove the weapons in question were loaded. With this presumption, the evidence presented at trial concerning the amount of ammunition, the evidence of the location of the ammunition relative to the firearms, and the evidence of the loaded .380 automatic, it would not be unreasonable for a jury to decide that there was a nexus between the firearms and the marijuana cultivation despite most of the weapons being unloaded. At most, the evidence was sufficient on this issue presented a fact question for the jury. We find no error here.

Lee also argues that according to *Binion v. Commonwealth*, 891 S.W.2d 383 (Ky. 1995), a defendant is entitled to funds for his own private mental health expert, both to assist the defendant at trial and to evaluate the defendant. However, this analysis of *Binion* is incorrect. In *Binion*, the Court noted that KRS 31.185 provides for expert mental health assistance for indigent criminal defendants in accordance with the requirements of KRS 31.110(1)(b). *Binion*, 891 S.W.2d at 385. In pertinent part KRS 31.185(1) states:

Any defending attorney operating under the provisions of this chapter is entitled to use the same state facilities for the evaluation of evidence as are available to the attorney representing the Commonwealth. If he or she considers their use *impractical*, the court concerned *may* authorize the use of private facilities to be paid for on court order from the special account of the Finance and Administration Cabinet.

KRS 31.185(1)(emphasis added). The record under review in no way indicates that the use of state facilities to evaluate Lee were inadequate or impractical.

Additionally, “[u]nder this statute the authorization to use private facilities paid for by public funds is a matter within the discretion of the trial judge based on a finding that the use of state facilities is impractical.” *Binion*, 891 S.W.2d at 385 (citations omitted).

The Kentucky Supreme Court recently discussed the standard to be used when reviewing a trial court’s decision to deny an indigent defendant access to funds for a private expert. Upon review, the reviewing court should ask:

1) whether the request has been pleaded with requisite specificity; and 2) whether funding for the particularized assistance is “reasonably necessary”; 3) while weighing relevant due process considerations. Upon review, however, this Court's analysis is limited to whether the trial court has abused its discretion.

Benjamin v. Commonwealth, 266 S.W.3d 775, 789 (Ky. 2008) (citations omitted).

Additionally, the Supreme Court reiterated that an indigent defendant does not have “the right to *choose* a psychiatrist or receive funds to hire one of his choosing; nor did it entitle him to additional state funds simply because he was unhappy with

the results of an initial examination.” *Id.* (emphasis in original), citing *Crawford v. Commonwealth*, 824 S.W.2d 847, 850 (Ky. 1992).

Therefore on review, this Court must determine whether the trial court abused its discretion in deciding that 1) the use of state facilities to evaluate Lee were not “impractical” as required by KRS 31.185 and 2) that the funding for assistance was not pleaded with requisite sufficiency or was not “reasonably necessary” as required by *Benjamin*. The lower court did not abuse its discretion in either regard.

On October 26, 2005, the Court ordered, *sua sponte*, that Lee be evaluated by the Kentucky Correctional Psychiatric Center (KCPC) to determine his competency to stand trial and whether Lee was insane at the time he committed the offense. One month prior to the competency hearing scheduled for February 10, 2006, Lee moved for funds for a private mental health evaluation.² Lee did not specify why the use of state facilities was impractical, nor on what legal basis any mental health issues would be relevant for determining guilt or innocence.

At the competency hearing, Dr. Frank Deland, a KCPC psychiatrist, testified that Lee was competent to stand trial, though it was a close call. After hearing further testimony from Lee, his mother, and his ex-wife, the trial court ordered a 72-hour commitment at Eastern State Hospital (ESH), and subsequently found Lee not competent to stand trial. The trial court ordered Lee committed to ESH for one year. It also should be noted that, at this hearing, Lee’s attorney

² This motion was originally made verbally, and then followed up with a motion in writing.

agreed with the judge that the only issue for which funds were being requested was the determination of Lee's competency.

During the course of Lee's treatment at ESH, he was evaluated by Dr. Javali Aroon, who also concluded that Lee was competent to stand trial. A second competency hearing was held on May 16, 2007, at which Lee was found competent to stand trial. Lee never resubmitted a motion requesting funds for a private evaluation.

At no time during the course of these events was it shown or sufficiently pleaded that state facilities were "impractical" as required by KRS 31.185(1). Unlike the circumstances regarding the defendant in *Binion*, there was no psychiatric evidence that Lee was not competent to stand trial. Both psychiatrists who examined Lee diagnosed him with the same problems, (1) habitual cannabis use and (2) schizotypo personality disorder. Both psychiatrists found Lee competent to stand trial. Further, they found no evidence of psychosis and it was established that Lee had an intelligence quotient (IQ) in the 110-120 range. In *Binion*, the state psychologist testified that the defendant had an IQ of 76, a probable organic brain defect, schizophrenia, and that his psychosis most likely played a part in his motivation at the time he committed his crime. *Binion*, 891 S.W.2d at 384. There was no similar testimony in this case.

The trial court did not abuse its discretion in denying Lee funds for private evaluation. Lee never pleaded that state facilities were "impractical" or that funding was "reasonably necessary." "[Lee has] no 'right to a psychiatric

fishing expedition at public expense.”” *St. Clair v. Commonwealth*, 140 S.W.3d 510, 530 (Ky. 2004), quoting *Kordenbrock v. Commonwealth*, 700 S.W.2d 384, 387 (Ky. 1985). Additionally, “[t]here is no violation of due process in the refusal to provide for expert witnesses when the defendant offers little more than an undeveloped assertion that the requested assistance would be beneficial.” *St. Clair* at 530, quoting *Simmons v. Commonwealth*, 746 S.W.2d 393, 395 (Ky. 1988). Indeed, the trial court in this case exercised admirable caution and prudence in ordering a year of evaluation and treatment at ESH after hearing testimony that the Lee’s competency was a close call.

For the foregoing reasons the Judgment of Conviction entered by the Adair Circuit Court is affirmed.

LAMBERT, JUDGE, CONCURS.

HARRIS, SENIOR JUDGE, CONCURS IN PART, DISSENTS IN PART, AND FILES SEPARATE OPINION.

HARRIS, SENIOR JUDGE, CONCURRING IN PART AND DISSENTING IN PART: I concur in that portion of the majority opinion which holds that the trial court did not err in denying Lee’s motion requesting funds to secure an examination by a private psychiatrist.

However, I respectfully dissent from that portion of the majority opinion which holds that the trial court properly denied Lee’s motion for a directed verdict on the firearm enhancement element of the marijuana cultivation charge for which he was on trial. Under the wording of KRS 218A.992 prior to its 2005

amendment, and as it was construed in *Commonwealth v. Montaque*, 23 S.W.3d 629 (Ky. 2000), in order to have Lee subjected to the firearm enhancement the Commonwealth had the burden of proving that Lee had actual or constructive possession of a firearm when he was arrested, or that there was “some connection between the firearm possession and the crime[,]” *id.* at 633, *i.e.*, cultivation of marijuana.

While it appears that Lee was sufficiently proven to have had actual or constructive possession of one or more firearms inside the house during the lengthy standoff and negotiations with the police, who were outside, Lee was not arrested until after he went outside the house and surrendered, leaving his small arsenal inside. Having failed to prove that Lee had either actual or constructive possession of a firearm when he was arrested, it was incumbent upon the Commonwealth to prove “some connection” between the marijuana cultivation and Lee’s possession of one or more firearms while he was inside the house.

In my view, the Commonwealth failed to meet that burden as a matter of law. Even when viewed in the light most favorable to the Commonwealth, the evidence shows that the guns were inside the house, while the marijuana plants were outside. There was no proof that Lee had ever used the guns to shoot, shoot at, or threaten persons in the vicinity of his marijuana plants. Nor was there proof that he had ever used the guns to guard or protect his plants from detection, or to facilitate his marijuana cultivation activities. There is simply no showing made beyond mere proximity of the marijuana plants to the house in which the guns

were found. That is not enough to satisfy *Montaque*. Cf. *Lunsford v. Commonwealth*, 139 S.W.3d 926 (Ky.App. 2004) (sufficient showing of nexus under *Montaque* where guns and drugs were both found inside the house and in close proximity to each other).

For these reasons, I would affirm Lee's marijuana cultivation conviction but remand this case to the trial court to resentence Lee without the firearm enhancement.

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