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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001476-MR

CLIFFORD E. REED,
AKA CLIFFORD "PETE" REED

APPELLANT

v. APPEAL FROM FLEMING CIRCUIT COURT
HONORABLE STOCKTON B. WOOD, JUDGE
ACTION NO. 09-CR-00107

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING IN PART
AND VACATING IN PART

** ** * * * * *

BEFORE: COMBS, STUMBO AND WINE, JUDGES.

STUMBO, JUDGE: Clifford "Pete" Reed appeals from the final judgment and sentence of the Fleming Circuit Court which adjudged him guilty of possession of a firearm by a convicted felon and sentenced him to four and one-half years' imprisonment. For the following reasons, we affirm in part, and vacate in part.

Upon receiving information that a crime was occurring at a trailer in Fleming County, Kentucky, Officer Thurman Paige obtained a search warrant for the premises. Officer Paige, along with other officers, knocked on the trailer door. When no one answered, they forced their way in through a locked door. Inside the trailer, the officers found a rifle in the bedroom and some marijuana and drug paraphernalia.

Reed returned to the trailer during the search and was arrested and charged with possession of marijuana, possession of drug paraphernalia, possession of a controlled substance in the third degree, and possession of a firearm by a convicted felon. The charge of possession of a firearm by a convicted felon was severed from the other charges.

Prior to the start of the trial for the charge of possession of a firearm by a convicted felon, Reed moved for a continuance, claiming Rebecca Adams, a key witness to his defense, was unable to get transportation to the courthouse due to financial reasons. He contended that she was unavailable per RCr 9.04. The trial court offered to send a deputy sheriff to pick her up, but counsel for Reed did not know her address. Adams had previously testified at a preliminary hearing that she owned the firearm at issue, but had Reed move the firearm from the trunk of her car to his residence. The trial court denied Reed's motion for a continuance, electing to allow Reed to play a videotape of Adams' prior testimony to the jury.

At trial, Reed asserted that he did not live in the trailer in which the firearm was found, but rather rented the trailer to Adams. Officer Paige and Deputy Jeff

Plank, who was also present at the search and subsequent arrest of Reed, each testified that they found marijuana and drug paraphernalia in the trailer, and that Reed claimed ownership of each. Reed objected to the admission of this testimony, but was overruled. Reed was permitted to play the video of Adams' previous testimony before the jury. At the conclusion of trial, the jury returned a verdict and recommended a sentence of four and one-half years' imprisonment, which the trial court imposed. This appeal followed.

On appeal, Reed first argues the trial court abused its discretion by permitting the Commonwealth to elicit evidence regarding the marijuana and drug paraphernalia. Reed contends such testimony constituted "bad acts" evidence impermissible under KRE¹ 404(b). We disagree.

A trial court's ruling on the admissibility of evidence is reviewed for an abuse of discretion. *Clark v. Commonwealth*, 223 S.W.3d 90, 95 (Ky. 2007) (citation omitted). The test for an abuse of discretion is whether "the decision 'was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.'" *Id.* (citation omitted).

KRE 404(b) provides, in part, that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Such evidence is admissible if offered for another purpose, *i.e.*, "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident[.]" KRE 404(b)(1).

¹ Kentucky Rules of Evidence.

KRS² 527.040 details the requirements for a conviction for possession of a firearm by a convicted felon, explaining that a person is guilty thereof “when he possesses, manufactures, or transports a firearm when he has been convicted of a felony[.]” Possession may be proven through actual or constructive possession of the firearm. *Deboy v. Commonwealth*, 214 S.W.3d 926, 930 (Ky. App. 2007) (citation omitted). Constructive possession exists when a person “knowingly has the power and intention at a given time to exercise dominion and control of an object, either directly or through others.” *Id.* (citation omitted).

In the case at bar, Reed asserted as a defense that he did not own the firearm, nor did he live in the trailer in which the firearm was found. In response, the Commonwealth sought to prove that Reed did live in the trailer in order to demonstrate that he constructively possessed the firearm by introducing evidence that marijuana and drug paraphernalia were found in the trailer in which the firearm was also found and that Reed claimed ownership of each. The Commonwealth argued that evidence showing Reed had other possessions in the trailer makes it more likely that Reed lived in the trailer. *Id.* (holding that evidence which tended to prove defendant had possession and control of a vehicle was relevant to support a conviction for possession of a firearm which was found in the vehicle).

Reed argues that the Commonwealth presented other evidence to prove he lived in the trailer, and therefore, the evidence regarding the marijuana and drug

² Kentucky Revised Statutes.

paraphernalia were unnecessary; however, such evidence does not render the drug evidence any less relevant. Reed also contends the drug evidence was highly prejudicial; nonetheless, determining whether Reed lived in the trailer was essential to the case, and the drug evidence was relevant to that determination. Such relevance outweighs any possible prejudice to Reed. Thus, the trial court did not abuse its discretion by admitting the drug evidence at trial.

Reed next argues the trial court abused its discretion by denying his motion for a continuance of the trial because Adams was unavailable to testify. We disagree.

RCr 9.04 allows for the postponement of trial based upon sufficient cause. Various factors are to be considered when reviewing the denial of a motion for continuance, including:

length of delay; previous continuances; inconvenience to litigants, witnesses, counsel and the court; whether the delay is purposeful or is caused by the accused; availability of other competent counsel; complexity of the case; and whether denying the continuance will lead to identifiable prejudice.

Snodgrass v. Commonwealth, 814 S.W.2d 579, 581 (Ky. 1991) (citation omitted) (overruled on other grounds by *Lawson v. Commonwealth*, 53 S.W.3d 534 (Ky. 2001)). Though, we note the determination lies solely within the discretion of the trial court. *Id.* (citations omitted).

After careful review of the record, we find the trial court did not abuse its discretion by denying Reed's motion for a continuance. Reed filed his motion on the morning of trial, citing Adams' unavailability. The trial court offered to send a

deputy sheriff to transport Adams to the courthouse, but Reed did not know her address. The trial court permitted the videotape of Adams' prior testimony to be played before the jury, during which Adams claimed ownership of the firearm at issue. Accordingly, we are unable to identify any prejudice to Reed that resulted from the trial court's denial of his motion for a continuance.

Finally, Reed maintains that the trial court's order imposing court costs on him was reversible error since he was declared indigent prior to trial. The Commonwealth concedes this was reversible error, and we agree. *See Travis v. Commonwealth*, 327 S.W.3d 456, 459 (Ky. 2010) (holding that court costs and fines cannot be imposed on a defendant found to be indigent by the court); *see also* KRS 534.040. Accordingly, the portion of the trial court's order imposing court costs on Reed is vacated.

The order of the Fleming Circuit Court is affirmed in part, and vacated in part.

ALL CONCUR.

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