

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2009-CA-001306-MR

MICHAEL D. POINTS

APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE GEOFFREY P. MORRIS, JUDGE  
ACTION NO. 05-CR-003024 & 06-CR-000608

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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

ACREE, JUDGE: Appellant Michael Points claims he received ineffective assistance of counsel because his attorney failed to object to improper jury instructions and a faulty verdict form. While the jury instructions are improper and the verdict form is faulty, there is no reasonable probability that the outcome of this case would have been different if the errors were corrected. Therefore, the

Jefferson Circuit Court's order denying Points' motion pursuant to Kentucky Rule of Criminal Procedure (RCr) 11.42 motion is affirmed.

On July 24, 2005, an officer stopped Points for running a stop sign on his moped. The officer conducted a pat down and discovered a package containing thirty-seven individually wrapped pieces of crack cocaine amounting to 8.812 grams. The officer also found \$65.00 and a cell phone. The legality of that search is not at issue.

On October 12, 2005, Points was indicted and charged with trafficking in a controlled substance in the first degree and disregarding a stop sign. On February 21, 2006, the grand jury issued a second indictment charging Points as a persistent felony offender in the second degree. Points' case proceeded to trial and he was found guilty of trafficking in a controlled substance in the first degree and disregarding a stop sign. On April 3, 2007, Points waived his right to the sentencing phase and entered an agreement to serve an enhanced sentence as a persistent felony offender. The Jefferson Circuit Court entered judgment against Points and sentenced him to a total of twenty-one year's imprisonment.<sup>1</sup> Points appealed as a matter of right to the Supreme Court of Kentucky which affirmed the judgment. *Points v. Commonwealth*, No. 2007-SC-000310-MR, 2007 WL 4462300 (Ky. Dec. 20, 2007).

On June 23, 2009, Points filed a motion to vacate the judgment under RCr 11.42. Points' motion was denied without a hearing. On appeal, Points argues his

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<sup>1</sup> Final judgment was not entered until almost a year after the trial because Points was placed in federal custody.

counsel was ineffective for failing to object to improper jury instructions and a faulty verdict form. Points does not contest the circuit court's refusal to grant an evidentiary hearing.

Points is entitled to reasonably effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 688, 687, 104 S.Ct. 2052, 2064 (1984). However in order to warrant reversal, a claim of ineffective assistance of counsel must meet the two-prong test set forth in *Strickland*. *Id.* at 688, 694. First “the defendant must show that counsel’s representation fell below an objective standard of reasonableness.” *Id.* at 688. Second, “[t]he defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 694. With this test in mind, we turn to the jury instructions to determine if they were deficient.

At trial, the jury was presented with instructions on trafficking in a controlled substance, possession of a controlled substance, and failure to stop at a stop sign. The jurors were informed they could convict Points of either the trafficking charge or the possession charge. The trafficking instruction stated:

You will find the Defendant, Michael D. Points, guilty under this instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:

A. That in Jefferson County, Kentucky, on or about the 24<sup>th</sup> day of July, 2005, the Defendant had in his possession a quantity of Cocaine;

B. That in so doing, the Defendant knew the substance was Cocaine;

AND

C. That he had the Cocaine in his possession with the *intent to distribute, dispense, sell or transfer it to another person.*

(emphasis added). The instructions also contained a definitions instruction that defined the terms “knowingly,” “possession,” “sell,” and “trafficking.” Pursuant to the definitions instruction, “‘trafficking’ means to sell a controlled substance, or possess with the *intent to sell a controlled substance.*” (emphasis added). Because there was no evidence of an actual sale, the jury was left to determine if Points had the requisite intent for trafficking.

Points asserts that the trafficking instruction contains two errors. First, the instruction improperly includes the word “transfer” which is not included in the statutory definition for “traffic.” Second, the instruction allows for conviction if the jury finds intent to dispense, however, the Commonwealth did not present any evidence to support a conviction under this theory. When the instructions were offered, Points’ counsel made a general objection arguing his client was entitled to a directed verdict. However, she did not specifically object to the language of the trafficking instruction. Points avers his counsel was ineffective because failing specifically to object to this instruction denied him a unanimous verdict and the ability to bring a meaningful appeal.

The Commonwealth argues that any error in the trafficking instruction was corrected by the inclusion of the narrower definition of “traffic” provided within the definitions instruction and the exclusion of definitions for the alternative theories of intent to “distribute,” “dispense,” and “transfer.” However, there is a

counter-argument on the same facts that including conflicting definitions resulted in more confusion. Therefore, the Commonwealth's argument carries little weight.

Pursuant to KRS 218A.010(40)<sup>2</sup> “‘traffic,’ except as provided in KRS 218A.1431, means to manufacture, distribute, dispense, sell, transfer, or *possess with intent to manufacture, distribute, dispense, or sell a controlled substance.*” (emphasis added). As the Supreme Court of Kentucky in *Commonwealth v. Rodefer*, 189 S.W.3d 550, 553 (Ky. 2006), pointed out, “the text of the statute is clearly without any language defining trafficking as ‘possession with the intent to transfer.’” Therefore, including the term in the jury instruction is improper. *Id.*

“‘Dispense’ means to deliver a controlled substance to an ultimate user or research subject by or pursuant to the lawful order of a practitioner, including the packaging, labeling, or compounding necessary to prepare the substance for delivery.” KRS 218A.010(8).<sup>3</sup> Points is correct in asserting that inclusion of the term “dispense” is not supported by the evidence. The Commonwealth's sole theory turned on Points' intent to sell.

In *Burnett v. Commonwealth*, 31 S.W.3d 878, 883-84 (Ky. 2000), the Supreme Court of Kentucky considered the inclusion of additional terms in a trafficking instruction. The jury instruction in *Burnett*, provided the entire statutory definition of “traffic” despite the fact that the Commonwealth only presented evidence to support a theory of possession with intent to sell. *Id.* at 882.

<sup>2</sup> The statute in effect at the time of Points' trial, KRS 218A.010(34), provided the same definition of “traffic” currently set forth under KRS 218A.010(40). For the purposes of this opinion, we will cite to the current statutory subsection.

<sup>3</sup> The definition of “dispense” in effect at the time of Points arrest was KRS 218A.010(7). The definition currently set forth under KRS 218A.010(8) is almost identical, however the phrase “or research subject” was not included in the prior definition.

The court determined that “[g]iving the jury the general, statutory definition of trafficking likely will result in the jury being presented with theories of guilt not supported by the evidence.” *Id.* at 882.

The requirement that the Commonwealth must prove beyond a reasonable doubt every fact necessary to constitute the crime with which a defendant is charged is a basic and fundamental protection of the Due Process Clause of the United States Constitution. Section 7 of the Kentucky Constitution and RCr 9.82(1) guarantee a defendant the right to a unanimous verdict. Construed together, these constitutional provisions require that each juror’s verdict be based on a theory of guilt in which the Commonwealth has proven each and every element beyond a reasonable doubt.

*Id.* at 883-84 (internal citations omitted). When theories of guilt set forth in the instruction are unsupported by the evidence, a defendant is deprived of their constitutional right because it cannot be ascertained if they received a unanimous verdict. *Id.* at 884. Therefore, because the evidence only supported a theory of intent to sell, Burnett did not receive a unanimous verdict. *Id.* at 884.

This case is analogous to *Burnett*. Under the instruction given, the jury could have convicted Points under a theory that he intended to dispense or transfer the cocaine. Both theories are improper. If Points’ counsel had objected, thereby preserving the issue for appeal, Points would have received a new trial. *See Burnett*, 31 S.W.3d at 884 (finding, when properly preserved, the failure to receive a unanimous verdict cannot be reviewed for harmless error). The importance of the constitutional right to a unanimous verdict makes the failure to object unreasonable.

However to warrant reversal in this instance, there must be a reasonable probability that the result would have been different if the correct instruction had been given. Therefore, we must turn to the second prong of the *Strickland* test.

At the time of Points' arrest he possessed thirty-seven individually wrapped pieces of crack cocaine. The Commonwealth's narcotics expert testified that individuals who sell crack cocaine often divide it up into small amounts, generally 2/10ths of a gram, and store it in twisted-off corners of sandwich bags. The crack cocaine found in Points' possession was divided into small amounts (approximately 2/10ths of a gram each) and was stored in the corners of sandwich bags. Further, the expert testified that users generally carry a means for smoking the drug and only possess a small amount. Points did not possess a smoking device and possessed almost nine grams. When asked to examine the crack cocaine found in Points' possession the expert testified that he believed the drugs were packaged for sale and not individual use.

With this testimony in mind, we must consider if there is a reasonable probability that the outcome of this case would have been different if the correct instruction had been given. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. While Points' counsel was unreasonable in failing to object to the trafficking instruction, the evidence supporting a conviction for intent to sell is strong. Moreover, the Supreme Court of Kentucky has not determined that automatic reversal is warranted under RCr 11.42 when counsel's failure to object results in a jury

verdict that is not unanimous. Given the strength of the evidence, Points cannot satisfy the second prong of the *Strickland* test.

Points' second argument centers on a faulty verdict form. He also presented this argument on direct appeal and the Supreme Court found that the error was not palpable. *Points v. Commonwealth*, 2007 WL 4462300 (Ky. 2007). Likewise, we find the error does not afford Points relief under RCr 11.42 because it simply does not undermine confidence in the outcome of this case.

For the foregoing reasons, we affirm the Jefferson Circuit Court's order denying Points' RCr 11.42 motion.

ALL CONCUR.

BRIEF FOR APPELLANT:

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