

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 96-CA-3500-MR

RONALD DEAN CLAYCOMB

APPELLANT

v. APPEAL FROM BRECKINRIDGE CIRCUIT COURT  
HONORABLE SAM H. MONARCH, JUDGE  
ACTION NO. 96-CR-14

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

\* \* \* \* \*

BEFORE: ABRAMSON, DYCHE, and HUDDLESTON, Judges.

ABRAMSON, JUDGE: Ronald Dean Claycomb appeals from his conviction for cultivating marijuana, more than five plants, and the resulting five-year sentence. Claycomb claims on appeal that the trial court erred when it: (1) refused to direct a verdict in his favor on the charge; (2) denied him probation as a penalty for exercising his right to a jury trial; and (3) permitted the prosecution to conduct improper cross-examination of him. Having reviewed the evidence presented at the trial and the applicable law, we affirm the trial court's judgment.

Claycomb first argues that the trial court should have directed a verdict for him either at the conclusion of the Commonwealth's case in chief or at the close of the defense case in chief. The offense of which Claycomb was convicted is KRS 218A.1423, which states that

(1) A person is guilty of marijuana cultivation when he knowingly and unlawfully plants, cultivates, or harvests marijuana with the intent to sell or transfer it.

\* \* \* \*

(4) The planting, cultivating, or harvesting of five (5) or more marijuana plants shall be prima facie evidence that the marijuana plants were planted, cultivated, or harvested for the purpose of sale or transfer.

Although the presumption does not shift the burden of proof, it does "provide a guide for the trial court in evaluating a motion for directed verdict." Commonwealth v. Collins, Ky., 821 S.W.2d 488 (1991).

The evidence introduced by the Commonwealth was circumstantial. At the time of the offense, Claycomb had lived with his family for at least six years on a farm owned by his uncle. During a Kentucky State Police marijuana eradication helicopter mission, a state trooper saw marijuana in a cluster of horseweed on the farm where Claycomb lived. Another trooper working with a ground crew testified that he cut down marijuana plants on the same farm. He also saw several other marijuana plants in an adjacent barn, hanging to dry or laid out to dry.

One seedling used to start new plants was still in a pot along with several empty pots.

The evidence presented demonstrates that the crime alleged by the Commonwealth did occur. The evidence showed that the marijuana was growing or was drying on property that was within Claycomb's possession and control. The testimony also indicated that the marijuana was located in an area which Claycomb visited often because he kept his cut tobacco in an adjacent barn or nearby. From the evidence, it was reasonable to infer that Claycomb was aware of the marijuana's presence on the property where he lived.

On appellate review of the denial of a motion for a directed verdict, we must determine whether it would be clearly unreasonable for a jury to find guilt, looking at the evidence as a whole. If the answer to that question is in the affirmative, a defendant is entitled to a directed verdict. Commonwealth v. Benham, Ky., 816 S.W.2d 186 (1991); Commonwealth v. Sawhill, Ky., 660 S.W.2d 3 (1983). To sustain Claycomb's view, we would have to conclude that the Commonwealth's testimony was incredible or that the evidence in support of Claycomb's case was irrefutable and destroyed the probative value of the Commonwealth's evidence so that no reasonable person could conclude that Claycomb was guilty beyond a reasonable doubt. We decline to conclude that no reasonable person could determine that Claycomb was guilty beyond

a reasonable doubt of this crime. The trial court properly denied the motion for a directed verdict.

Claycomb's second argument is that the trial court abused its discretion when it denied him probation as a penalty for exercising his right to a jury trial. We first note the context in which this allegation is made. Immediately before the trial, the trial court was discussing with Claycomb whether he should accept a plea agreement offered by the Commonwealth. The trial court told Claycomb not to plead if he did not believe he was guilty, but also advised Claycomb that he would sentence him to whatever sentence the jury might recommend, adding "I won't probate any portion of a jury sentence." From that statement, Claycomb contends that the trial court penalized him for exercising his right to a jury trial and therefore abused its discretion when it subsequently denied him probation.

We disagree with Claycomb's claim. The Commonwealth characterizes the trial court's pretrial statement as part of the colloquy with him, comparing the effect of a two-year sentence under the plea agreement and a sentence of unknown length following a jury verdict. Claycomb depicts the statement as a clear indication that his exercise of the right to a jury trial would preclude any form of probation. The December 18, 1996 Judgment of Conviction shows that the trial court did follow the KRS 533.010(2) requirement that it consider Claycomb for probation as an alternative to imprisonment. The Judgment

clearly reflects that the trial court rejected probation based upon two statutory reasons: (1) there was a substantial risk that Claycomb would commit another crime if placed on probation; and (2) Claycomb was in need of correctional treatment which could be provided most effectively in a correctional institution. See KRS 533.010(2)(a)-(b); Hulett v. Commonwealth, Ky. App., 854 S.W.2d 679 (1992) (judgment of conviction entitled to presumption of regularity). Moreover, nothing in the record or in the Judgment indicated that the trial court had prejudged consideration of Claycomb for probation.

The final argument presented is that the trial court committed reversible error when it permitted the prosecution to cross-examine Claycomb improperly. During cross-examination, the Commonwealth's Attorney challenged Claycomb's credibility by asking numerous questions about his employment by the Kentucky Fish and Wildlife Department. The questioning included references to a fellow employee in Frankfort who allegedly wanted Claycomb's work shirt returned to the Department because he was no longer an employee. Following an objection by Claycomb, the trial court held a hearing in chambers at which time the judge determined that there was a Department employee who would confirm Claycomb's employment with the Commonwealth. Thereafter, the trial judge admonished the jury that: (1) he never allows a state or local government employee to be tried in his work uniform; and (2) although the Commonwealth Attorney's questioning

had been conducted in good faith, Claycomb was in fact still an employee of the Department of Fish and Wildlife.

Judicial admonitions to the jury are frequently necessary to lessen or modify the effect of certain evidence. See, e.g., Commonwealth v. Strunk, Ky., 293 S.W.2d 629 (1956) (admonition about purpose of evidence regarding prior inconsistent statements); Brewer v. Commonwealth, Ky. App., 632 S.W.2d 456 (1982) (admonition regarding effect of witness's prior felony conviction); KRE 105(a) (admonition necessary when evidence is admissible for one purpose or as to one party). We believe that the trial court's detailed admonition in this case was necessary and that it cured any error associated with the Commonwealth's cross-examination of Claycomb. As this Court has previously held, it is presumed that a jury follows an admonition by the trial court and that the admonition cures the harm which it addresses. Clay v. Commonwealth, Ky. App., 867 S.W.2d 200 (1993).

For the reasons stated, we affirm the December 18, 1996 Judgment of Breckinridge Circuit Court.

DYCHE, JUDGE, CONCURS.

HUDDLESTON, JUDGE, CONCURS IN PART AND DISSENTS IN PART.

HUDDLESTON, JUDGE, CONCURRING IN PART AND DISSENTING IN PART. I respectfully dissent from that part of the Court's opinion that holds that the trial court did not err when it

failed to consider probation as an alternative to a sentence of imprisonment.

Prior to the trial in this case, Claycomb was offered a plea bargain by the Commonwealth which was discussed in open court. The trial judge advised Claycomb that he should not plead guilty unless he was, in fact, guilty. The court went on to inform Claycomb that if he elected to go to trial and was convicted, that the court would not probate any portion of a jury sentence.

The Kentucky Penal Code establishes a preference for probation and other less restrictive forms of punishment. Ky. Rev. Stat. (KRS) 533.010(2) provides that:

Before imposition of a sentence of imprisonment, the court shall consider the possibility of probation, probation with an alternative sentencing plan, or conditional discharge. After due consideration of the nature and circumstances of the crime and the history, character, and condition of the defendant, probation, probation with an alternative sentencing plan, or conditional discharge should be granted, unless the court is of the opinion that imprisonment is necessary for protection of the public because:

(a) There is substantial risk that during a period of probation, probation with an alternative sentencing plan, or conditional discharge the defendant will commit another crime;

(b) The defendant is in need of correctional treatment that can be provided most effectively by his commitment to a correctional institution; or

(c) A disposition under this chapter will unduly depreciate the seriousness of the defendant's crime.

The comment to this section of the Penal Code notes that the Code "seeks to establish a policy in favor of rehabilitation of offenders within the community and free of incarceration." Some twenty years after the adoption of the penal code, the Supreme Court of Kentucky said that after considering both the nature of the crime and the history of the defendant, the trial court should grant probation unless to do so would place the public in danger based upon consideration of specified statutory factors [see KRS 533.010(2)(a)-(c)]. Turner v. Commonwealth, 914 S.W.2d 343, 347 (1996).

I believe that it was error for the trial court to announce in advance of trial and conviction and in advance of receiving a pre-sentence investigation report that probation would not be considered when it came time to sentence Claycomb. I would reverse the sentencing order and remand this case to the trial court for resentencing with directions that consideration to be given to probation, probation with an alternative sentencing plan, or conditional discharge, before imprisonment is considered.

I concur in the balance of the Court's opinion.

BRIEF FOR APPELLANT:

BRIEF FOR APPELLEE:



Michael C. Lemke  
Louisville, KY

A.B. Chandler III  
Attorney General

Dana M. Todd  
Asst. Attorney General  
Frankfort, KY