

# Commonwealth Of Kentucky

## Court Of Appeals

No. 1997-CA-000725-MR

THEODORE HUNT

APPELLANT

v. APPEAL FROM HARDIN CIRCUIT COURT  
HONORABLE T. STEVEN BLAND, JUDGE  
ACTION NO. 96-CR-000218

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: GUIDUGLI, JOHNSON, and KNOPF, Judges.

KNOPF, JUDGE: The appellant, Theodore Hunt, appeals from his conviction and sentence on two (2) counts of trafficking in marijuana, less than eight (8) ounces, second offense. Finding no error, we affirm.

On July 25, 1996, Hunt was indicted on two (2) counts of trafficking in marijuana, less than eight (8) ounces, second offense, a Class D felony. KRS 218A.1421. The charges arose out of two (2) incidents, on January 13, 1996 and January 24, 1996, respectively, when Hunt sold one-quarter ounce of marijuana to a police informant, Thomas Frame. Frame testified at the trial,

and an audio tape recording of the transactions was played for the jury. Hunt testified in his own behalf. Hunt disputed Frame's testimony, stating that it was the informant who tried to sell the marijuana to him. The jury found Hunt guilty on both counts. The trial court imposed the jury's sentence, and also followed the jury's recommendation that the sentences run consecutively for a total of ten (10) years. The trial court subsequently denied Hunt's motions for a judgment notwithstanding the verdict or for a new trial. This appeal followed.

Hunt raises six (6) issues on appeal. First: Hunt argues that the trial court erred in denying his motion for an instruction on the lesser included offense of possession of marijuana. We disagree. A person is guilty of trafficking in marijuana when he knowingly and unlawfully traffics in marijuana. KRS 218A.1421(1). "Traffic" means to manufacture, distribute, dispense, sell, transfer, or possess with intent to manufacture, distribute, dispense or sell a controlled substance. KRS 218A.010(25). Trafficking requires proof of intent to distribute, dispense, or sell marijuana. In contrast, the possession offense requires only possession of marijuana. KRS 218A.1422.

Possession of marijuana could be a lesser included offense to the charge of trafficking in marijuana, depending upon the evidence. Whether there is sufficient evidence at trial to entitle a defendant to the misdemeanor instruction is a question of law to be decided by the court. When the prosecution produces some evidence warranting an inference of a finding of a lesser degree of the charged offense, the court should instruct on the

lesser degree. Commonwealth v. Collins, Ky., 821 S.W.2d 488, 491 (1991). In the case before us, there was no evidence that Hunt merely possessed marijuana in January 1996.<sup>1</sup> Rather, the sole issue before the jury concerned whether Hunt sold marijuana to Frame. Therefore, we find that Hunt was not entitled to an instruction on the lesser charge of possession of marijuana.

Second: Hunt contends that his sentence is excessive and constitutes cruel and unusual punishment. KRS 532.110 allows the trial court to determine, in its discretion, whether multiple sentences should run concurrently or consecutively, except that "the aggregate of consecutive sentences shall not exceed in maximum length the longest extended term which would be authorized by KRS 532.080 for the highest class of crime for which any of the sentences is imposed." KRS 532.110(1)(c). The Commentary to this section explains:

The third exception, in subsection (1)(c) places an upper limit on the maximum term of imprisonment that can be imposed through consecutive indeterminate terms. This subsection establishes a maximum for accumulated indeterminate terms that is equivalent to the maximum term that can be imposed on a persistent felony offender under KRS 532.080. For example, if an offender stands convicted of three offenses, the greatest of which is a Class B felony, his consecutive sentences when accumulated could equal an indeterminate term which has a maximum of life imprisonment. But if the greatest of his offenses is a Class C felony, his consecutive sentences when accumulated

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<sup>1</sup> Hunt notes that marijuana was found in the house during a search of the house in July 1996. However, the marijuana found at that time did not serve as the basis for this (or any) indictment against Hunt. Indeed, Hunt complains below that the trial court erred in allowing testimony of the results of the July 1996 search.

could equal an indeterminate term having a maximum of no more than twenty years.

In the present case, Hunt was convicted of two (2) Class D felonies, each punishable by no less than one (1) year, nor greater than five (5) years. KRS 532.060(2)(d). The maximum sentence that Hunt received of ten (10) years was within the statutory maximum for consecutive indeterminate terms of twenty (20) years. KRS 532.080 (6)(b). Consequently, Hunt's consecutive sentences do not violate the terms of KRS 532.110(1)(c). Milner v. Commonwealth, Ky. App., 655 S.W.2d 31 (1983).

Hunt also argues that his ten (10) year sentence constitutes cruel and unusual punishment. Cruel and unusual punishment is "punishment which shocks the general conscience and violates the principle of fundamental fairness." Cutrer v. Commonwealth, Ky. App., 697 S.W.2d 156, 158 (1985). The factors to be weighed in making a determination of whether a punishment is disproportionate are set forth in Solem v. Helm, 463 U.S. 277, 103 S. Ct. 3001, 77 L. Ed. 2d 637 (1983); accord, Collett v. Commonwealth, Ky. App., 686 S.W.2d 822 (1984), which are: (1) the gravity of the offense and harshness of the penalty; (2) the sentences imposed on other criminals in the same jurisdiction; and (3) the sentences imposed for commission of the same crime in other jurisdictions. Covington v. Commonwealth, Ky. App., 849 S.W.2d 560, 563 (1992).

This Court is not referred to any evidence supporting the elements necessary to find that the sentence was unconstitutionally disproportionate. Consequently, we cannot

find that the jury or the trial court abused its discretion in directing that Hunt's sentences be served consecutively.

Third: Hunt contends that the trial court improperly excluded evidence of Frame's prior convictions. During cross-examination, defense counsel attempted to ask Frame about a number of misdemeanor charges for possession of marijuana. The trial court sustained the Commonwealth's objection, holding that the questions were improper under KRE 609. Counsel also questioned Frame about whether he had ever carried a handgun. Frame stated that he had occasionally carried several different handguns but that he had sold them. Defense counsel then attempted to bring up the fact that Frame had been forced to forfeit eleven (11) handguns to the Kentucky State Police as a result of a felony charge for carrying a concealed deadly weapon. The charge was dismissed after the forfeiture. Hunt argued that Frame's misstatement reflected on his credibility. The trial court excluded the line of questioning, also pursuant to KRE 609.

We find no error in the trial court's evidentiary rulings. In both cases, defense counsel attempted to question Frame on matters excluded by KRE 609. Neither misdemeanor convictions nor dismissed felony charges may be admitted to impeach a witnesses' credibility. Furthermore, whatever marginal probative value these facts may have for other reasons were strongly outweighed by their potential for unfair prejudice or confusion of the issues. KRE 403.

Fourth: Hunt argues that the trial court abused its discretion by not excluding audio tapes due to poor quality, and by allowing Frame to testify as to tape's content. The parties

agree that the audio tape was of poor quality. However, the tape was not included in the record on appeal. The trial court listened to the tapes in chambers and determined they were not wholly inaudible or unintelligible. Without the tapes, we cannot dispute the trial court's conclusion.

Nor was it error to allow Frame to testify as to what occurred during the transactions. Contrary to the assertions in Hunt's brief, Frame did not attempt to interpret inaudible portions of the tape. Rather, he testified as to what he witnessed during the transactions. There was no attempt to interpret the inaudible portions of the tape for the jury. Sanborn v. Commonwealth, Ky., 754 S.W.2d 534, 540-41 (1988).

Fifth: Hunt argues that the trial court erred by allowing testimony of marijuana found in a home. During cross-examination of Detective Gibbs, defense counsel asked about a lock box taken at the time of Hunt's arrest. Detective Gibbs testified that he served Hunt with an arrest warrant on July 26, 1996, at the house owned by Hunt's girlfriend, Karen Patterson. At that time, a drug-sniffing dog indicated the presence of marijuana in a lock box found among Hunt's possessions. A subsequent search of the box revealed no drugs of any kind. The Commonwealth objected, noting that search also led to drug charges against Patterson. The Commonwealth took the position that the line of questioning was not relevant to the transactions occurring in January 1996. The trial court overruled the objection. (9-1-97 VCR 14, 2/10/97, 13:55).

Some time later in the cross-examination, defense counsel returned to the matter of the lock box, asking if the dog

"hit" on anything else in the house. Detective Gibbs answered, "We didn't need the dog inside. We seized marijuana from that residence." Defense counsel immediately objected, arguing that the evidence of the drugs seized in the house prejudiced Hunt's defense. The trial court overruled this objection, concluding that defense counsel had opened the line of inquiry. Defense counsel then asked Detective Gibbs about the charges against Patterson. (9-1-97 VCR 14, 2/10/97, 14:20-22).

While this was a close call, we cannot say that the trial court erred in overruling the objection. Strictly speaking, Detective Gibbs probably overstepped the bounds of the question in discussing the marijuana found in the house. Defense counsel only asked if the drug dog found anything else. However, in raising the issue of the July 1996 search, counsel was treading dangerously close to the matter of the drugs found in the house and the arrest of Karen Patterson. Moreover, defense counsel's question regarding whether the drug-sniffing dog "hit" on anything else in the house could reasonably be interpreted as a broader inquiry regarding the results of the search. While Hunt may have been entitled to an admonition had one been requested, we find no error in the admission of Detective Gibbs' testimony.

Sixth, and lastly: Hunt contends that the Commonwealth failed to prove the chain of custody of the evidence. We decline to address this argument because Hunt fails to demonstrate where the error, if any, was preserved for our review. CR 76.12(4)(c)(iv).

Accordingly, the judgment of conviction and the sentence imposed by the Hardin Circuit Court is affirmed.

ALL CONCUR.

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