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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-001670-MR

MICHAEL EUGENE WIX — APPELLANT

v.

APPEAL FROM DAVIESS CIRCUIT COURT
HONORABLE THOMAS O. CASTLEN, JUDGE
ACTION NO. 1998-CR-00032

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING
** ** ** ** **

BEFORE: COMBS, HUDDLESTON, AND KNOPF, JUDGES.

KNOPF, JUDGE: A jury found Michael Eugene Wix guilty of promoting contraband in the first degree, as prohibited by KRS 520.050, and further determined that he should be sentenced as a first-degree persistent felony offender, pursuant to KRS 532.080. Wix appeals from the July 1, 1998, judgment of the Daviess Circuit Court ratifying that verdict and sentencing him accordingly to ten (10) years in prison. Wix contends that the trial court erred during both the guilt and sentencing phases of his trial by not granting his motions for directed verdicts. We are persuaded, however, that the Commonwealth's evidence, as

viewed both before and after Wix's defenses, justified the court's denial of those motions.

In January 1998, Wix resided at the Harold N. Taylor Restricted Custody Facility in Daviess County, Kentucky, where he was serving concurrent sentences for theft and possession of a controlled substance. Beginning at approximately 8:30 p.m. January 5, 1998, Deputy Kenneth Vanover conducted a search of Wix's sleeping area. The inmates at the Restricted Custody Facility are not confined to cells. They live in dorm complexes, which include small cubicles for each inmate. Each cubicle contains a bed and a clothes cupboard and is separated from neighboring cubicles and the hallway by low partitions. Deputy Vanover first had to waken Wix, who, upon being roused, put on a pair of pants that he had left draped across the partition between his cubicle and the next. When Wix had dressed, Deputy Vanover began his search by "patting Wix down." In the front pocket of the pants Wix had just put on, Deputy Vanover found a plastic bag containing what proved to be a small amount (1.2 grams) of marijuana. He also discovered, in Wix's clothes cupboard, a packet of cigarette rolling papers. On the basis of these discoveries, Wix was indicted for promoting contraband. At trial he conceded that the small bag of marijuana had been in the pocket of his pants, but he denied having put it there or having known about it. He explained that he possessed rolling papers because he rolled his own tobacco cigarettes, those being less expensive than the factory-rolled kind, and he asserted, although without providing much detail, that another inmate in the dorm

may have borne a sufficient grudge against him following a confrontation over an attempted theft to plant the incriminating evidence.

At the end of the Commonwealth's case, Wix moved for a directed verdict. He maintained that the Commonwealth had failed to prove that he had "knowingly" possessed the marijuana. Anyone could have put it in his pants' pocket, he insisted, given the inmates' freedom of movement throughout the dorm and the fact that he had left his pants lying out. The court ruled, however, that while these considerations raised some doubt concerning Wix's guilt, the Commonwealth had introduced sufficient evidence to justify submitting the question to the jury. We agree.

As the parties both note, it is now a well established rule in Kentucky that the denial of a motion for a directed verdict is to be affirmed on appeal unless the appellate court determines that, considering the Commonwealth's competent evidence in the light most favorable to the Commonwealth, a guilty verdict was patently unreasonable. Commonwealth v. Benham, Ky., 816 S.W.2d 186 (1991); Commonwealth v. Sawhill, Ky., 660 S.W.2d 3 (1983). The verdict here survives this review.

KRS 520.050, the statute Wix was accused of having violated, provides as follows:

> (1) A person is guilty of promoting contraband in the first degree when:
> (a) He knowingly introduces dangerous contraband into a detention facility or a penitentiary; or
> (b) Being a person confined in a detention facility or a penitentiary, he knowingly makes, obtains, or possesses dangerous contraband.

> (2) Promoting contraband in the first degree is a Class D felony.

Wix does not dispute that the Harold N. Taylor Restricted Custody Facility is a detention facility. Marijuana, furthermore, in any amount, is dangerous contraband under this statute. Koonce v. Commonwealth, Ky. App., 769 S.W.2d 73 (1989). Thus, the Commonwealth conclusively established that Wix possessed dangerous contraband within a detention facility. The only doubtful element of the offense was whether Wix's possession was knowing.

That state of mind, or *mens rea*, is defined in KRS 501.020(2):

> A person acts knowingly with respect to conduct or to a circumstance described by a statute defining an offense when he is aware that his conduct is of that nature or that the circumstance exists.

Was Wix aware of the marijuana in his pants pocket? In insisting that the Commonwealth failed to prove that he was, Wix correctly notes that there was only circumstantial evidence of his state of mind. A defendant's mental state, however, may be proved by such means. Chumbler v. Commonwealth, Ky., 905 S.W.2d 488 (1995); Williams v. Wilson, Ky., 972 S.W.2d 260 (1998) (dissenting opinion by Justice Cooper). The question, as noted above, is whether no jury could reasonably conclude from the Commonwealth's evidence, circumstantial as it was, that Wix knew he had marijuana in his pocket. We are not persuaded that such an inference was unreasonable. In the vast majority of instances, after all, whatever is in one's pocket one put there oneself. Indeed, possession or control of the area or container

where a controlled substance is found permits an inference of possession of the controlled substance. Houston v. Commonwealth, Ky., 975 S.W.2d 925 (1996). Exclusive possession or control of the area or container permits an inference of knowing possession of the contraband. United States v. Lazcano-Villalobos, 175 F.3d 838 (10th Cir. 1999). While "Exclusive possession" is not a precise concept, here no one but Wix had a right to or was accustomed to access to his pants. The trial court did not err, therefore, by deciding that Wix's possession of the pants was sufficiently exclusive to permit the jury to infer his knowledge of the marijuana from its presence therein.

Nor did the trial court err by again denying Wix's directed-verdict motion following the presentation of his defense. Rarely will a defense be so compelling as to overcome, as a matter of law, a *prima facie* case by the Commonwealth. West v. Commonwealth, Ky., 780 S.W.2d 600 (1989); Holbrook v. Commonwealth, Ky. App., 925 S.W.2d 191 (1995). This would seem to be especially true where the defendant relies, not on an affirmative defense, but, as did Wix, on discrediting the prosecution. Although his testimony denying knowledge of the marijuana, if believed, might have warranted an acquittal, it was not so conclusive that the trial court erred by subjecting it to jury deliberation. Rayburn v. Commonwealth, Ky., 476 S.W.2d 187 (1972); Owsley v. Commonwealth, Ky. App., 743 S.W.2d 408 (1987).

Recognizing that this might be our response to his appeal concerning the denial of his directed-verdict motions, Wix

further contends that the jury verdict itself should be reviewed under a different standard. This Court may and should overrule the jury, we are told, if its verdict was against the manifest weight of the evidence, and we should make this determination without deference to the Commonwealth.

Ordinarily, of course, the fact finder, the jury in this case, is given exclusive discretion to weigh the evidence and to judge the credibility of witnesses. Benham and Sawhill, *supra*; Partin v. Commonwealth, Ky., 918 S.W.2d 219 (1996). Wix insists, however, that there is an exception to this rule whereby an appellate court is authorized to "re-weigh" the evidence so as to prevent a "serious miscarriage of justice." He relies for this proposition upon Tibbs v. Florida[1], a death penalty case, wherein the United States Supreme Court upheld the Florida Supreme Court's determination that its reversal of a conviction for murder and rape on weight-of-the-evidence grounds, as opposed to insufficiency grounds, did not create a double-jeopardy bar to a new trial.

We need not address the question Wix raises concerning the scope of our authority to review a jury's fact finding, for even if we may, in exceptional circumstances, overrule a verdict for which sufficient evidence was introduced,[2] we are not persuaded that this case would warrant such exceptional relief.

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[1]457 U.S. 31, 102 S. Ct. 2211, 72 L. Ed. 2d 652 (1982).

[2]See Stone v. Commonwealth, Ky., 456 S.W.2d 43 (1970), and Carmicle v. Commonwealth, Ky., 452 S.W.2d 378 (1970). In both cases the evidence was found on appeal to have contradicted the jury's verdict.

The circumstances of this case do not suggest that the jury's decision was influenced by clear error, passion, or prejudice. Nor did Wix present such compelling evidence of someone else's having put the marijuana in his pocket as to make the jury's verdict difficult to understand. A different jury may have decided differently, but Wix was afforded a fair opportunity to present his case to this jury, and, beyond assuring that fairness, it is not the function of this Court to second guess the outcome of the trial process. Partin v. Commonwealth, *supra*.

Wix also maintains that he was entitled to a directed verdict regarding his sentencing status following the penalty phase of his trial. To prove that Wix should be sentenced as a first-degree persistent felony offender (PFO), the Commonwealth presented properly authenticated records from Summer County, Tennessee, and Simpson County, Kentucky. Those records indicated that a Michael E. (or Eugene) Wix had been convicted of three felonies. The felonies were committed after Wix, the appellant, had turned eighteen, and he had committed the contraband offense while under sentence, apparently, for at least one of them. The Commonwealth also presented testimony by a probation officer to the effect that the records in question had come from the defendant's file and had long been supposed by the Commonwealth to refer to the defendant.

On cross-examination, Wix established that these records did not include the defendant's social security number or birth date. He thereupon moved for a directed verdict on the ground that the records and other proof did not sufficiently

establish his identity as the person who had previously been convicted. The trial court denied the motion. It ruled that the conviction records bearing Wix's name and the probation officer's testimony linking those records to Wix was sufficient evidence to raise a jury question concerning Wix's sentencing status. We agree.

Wix correctly notes that circumstantial evidence, at least evidence requiring inferences less reliable than simple arithmetic calculations, is not sufficient to establish the fundamental elements of PFO status. Hon v. Commonwealth, Ky., 670 S.W.2d 851 (1984). Because the court records introduced at trial did not include his social security number or birth date, Wix characterizes them as providing only circumstantial evidence of his criminal record. We disagree. A name is direct *prima facie* evidence of identity. Jones v. Commonwealth, Ky., 457 S.W.2d 214 (1970); Braden v. Commonwealth, Ky. App., 600 S.W.2d 466 (1978). The prior-conviction records bearing Wix's name were sufficient evidence of his criminal record to place the burden on Wix of disproving that they applied to him. He proffered no such proof.

In sum, although we can sympathize with Wix, whose criminal record has made him subject to a severe sanction for what may seem a minor offense, we are not persuaded that he is entitled to relief from either his conviction for promoting dangerous contraband or his sentence of ten (10) years in prison. The Commonwealth presented sufficient evidence to support both

results, and the jury's conclusions have not been shown to be tainted by any errors, procedural or substantive.

For these reasons, we affirm the July 1, 1998, judgment of Daviess Circuit Court.

COMBS, JUDGE, CONCURS.

HUDDLESTON, JUDGE, CONCURS SEPARATELY.

HUDDLESTON, JUDGE, CONCURRING. While I concur in the Court's legally correct opinion, I write separately to express my dismay at the excessive sentence meted out to the defendant for such a minor offense. The sentence is not only unfair to the defendant, it is unfair to the people of this Commonwealth.

We have been told in numerous studies that it costs from $30,000.00 to $50,000.00 per year to incarcerate an individual convicted of a crime. Should the Commonwealth spend $300,000.00 to half a million dollars to imprison a defendant for ten years for possessing 1.2 grams (0.042 ounces) of marijuana? I think not.

In my view, the Commonwealth seriously overcharged in this case. Unfortunately, there is nothing we can do to correct this injustice.

BRIEF FOR APPELLANT:

Paul J. Neel Jr.
Appellate Public Advocate
Louisville, Kentucky

BRIEF FOR APPELLEE:

A.B. Chandler III
Attorney General

Brian T. Judy
Assistant Attorney General
Frankfort, Kentucky