

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-000537-MR

MONTEZ KILLEBREW

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE ERNEST A. JASMIN, JUDGE
INDICTMENT NO. 97-CR-01746

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

* * * * *

BEFORE: COMBS, EMBERTON, and GUIDUGLI, Judges.

COMBS, JUDGE. Montez Killebrew (Killebrew) appeals from a judgment of the Jefferson Circuit Court sentencing him to ten years for trafficking in a controlled substance while in possession of a firearm and for illegal possession of drug paraphernalia while in possession of a firearm following conviction by a jury. After reviewing the record, we affirm.

On May 6, 1997, several Louisville police officers obtained a warrant to search a residence at 1622 West Kentucky Street in Louisville, Kentucky, based in part on information from a confidential informant that Killebrew was selling narcotics from that location. As several police officers approached the residence, they saw Killebrew exiting from the front door. When he saw them, Killebrew tossed a plastic object

inside the doorway of the residence. The police detained Killebrew and had him accompany them inside the residence. Upon searching him, they recovered \$706 in cash from his trouser pockets, a key to the front door of the residence, and a key to the lock on the side gate of the property.

When the police entered the one-room garage apartment, they discovered a black female inside. During a search of the premises, they found two large plastic bags containing a hard white substance, a .357 caliber revolver with six live bullets under a bed, \$1,469 in cash in a drawer of a chest in the bedroom, six bullets for a .380 caliber handgun on the top of the refrigerator, an electronic scale with a white powder residue, and one medium size plastic bag containing a hard white substance just inside the front doorway. The police also seized a work schedule for the National Federation of the Blind attached to the refrigerator. After completing the search, Officer Irish placed Killebrew under arrest. A subsequent laboratory analysis of the white substance in each of the plastic bags identified it as crack cocaine totaling 65.7 grams.

In July 1997, the Jefferson County Grand Jury indicted Killebrew on one felony count of trafficking in a controlled substance (cocaine) in the first degree while in possession of a firearm (KRS 218A.1412 and KRS 218A.992), and one felony count of illegal possession of drug paraphernalia while in possession of a firearm (KRS 218A.500 and KRS 218A.992).

A jury found Killebrew guilty of both felony counts in the indictment. Prior to the sentencing phase, the parties

reached an agreement on sentencing for a total sentence of ten (10) years. On February 25, 1998, the trial court sentenced Killebrew consistently with the parties' agreement to ten (10) years for trafficking in a controlled substance (cocaine) while in possession of a firearm and five (5) years for illegal possession of drug paraphernalia while in possession of a firearm – both sentences to run concurrently for a total sentence of ten (10) years. Killebrew filed a motion for a new trial pursuant to RCr 10.02 and a motion for judgment notwithstanding the verdict pursuant to RCr 10.24 – both of which the trial court denied. This appeal followed.

Killebrew raises four issues on appeal and argues that the trial court erred: 1) by denying a motion to suppress his statement concerning a work schedule; 2) by allowing the handgun to be admitted into evidence; 3) by failing to declare a mistrial based on comments by Officer Irish; and 4) by failing to grant a directed verdict.

Killebrew's first issue involves the alleged statement to the police concerning the work schedule posted on and seized from a refrigerator. Prior to trial, defense counsel moved to suppress all statements made by Killebrew to the police. Following a hearing on October 24, 1997, the trial court denied the motion. When Officer Irish spied the work schedule, he queried, "What's this?" Killebrew, standing nearby, immediately responded, "It's mine." Killebrew contends that this statement was improperly elicited from him as no Miranda warning had been given. Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L.

Ed. 694 (1966). Officer Irish testified that he merely asked a rhetorical question directed at the other officers and that Killebrew volunteered his answer. Irish had not advised Killebrew of his Miranda rights as he did not yet intend to question him.

Killebrew argues that he had a right to be informed of his Miranda rights (including the right to remain silent) because he was the target of the search and had been named specifically in the search warrant. He contends that the question about the work schedule was reasonably likely – if not intended – to elicit a response from him and that he thus had not voluntarily waived his right to remain silent.

Police are required to inform a suspect of his rights prior to custodial interrogation. Miranda warnings are not required prior to questioning merely because a suspect may be the “focus of the investigation.” Farler v. Commonwealth, Ky. App., 880 S.W.2d 882 (1994). The trial court ruled that Killebrew’s statement was voluntary and that it was not the product of an interrogation as envisioned by Miranda, finding that Officer Irish’s comment was not directed at Killebrew and that there was no evidence to contradict the officer’s testimony on that point.

A trial court’s factual findings concerning the admissibility of a defendant’s incriminating statements are conclusive if supported by substantial evidence. RCr 9.78. Morgan v. Commonwealth, Ky., 809 S.W.2d 704 (1991). Whether a defendant’s statements were rendered during an interrogation for purposes of activating Miranda is an issue of fact subject to the

clearly erroneous standard of appellate review. United States v. Clark, 982 F.2d 965, 968 (6th Cir. 1993). We hold that the trial court did not err in finding that Killebrew was not under interrogation.

Killebrew's second issue involves the admission of a handgun recovered from the West Kentucky Street residence. He argues that the handgun should not have been admitted because the prosecution did not establish a sufficient chain of custody. KRE 901(1). We disagree.

Officer Thompson testified that during the search, he lifted the bed in the apartment as Officer Henderson picked up a .357 Magnum revolver from beneath it. Officer Irish testified that he was in charge of securing the evidence and that Officer Henderson gave him the handgun at the scene. Officer Irish testified that he placed the handgun in a secure evidence locker and retrieved it from the locker shortly before going to trial. Irish identified the .357 Magnum handgun offered as evidence at the trial as the same gun given to him by Officer Henderson during the search.

In Rabovsky v. Commonwealth, Ky., 973 S.W.2d 6 (1998), the Kentucky Supreme Court discussed the necessary standard of proof for establishing the authenticity of evidence:

While the integrity of weapons or similar items of physical evidence, which are clearly identifiable and distinguishable, does not require proof of a chain of custody, e.g., Beason v. Commonwealth, Ky., 548 S.W.2d 835 (1977), Smith v. Commonwealth, Ky., 366 S.W.2d 902 (1962), a chain of custody is required for blood samples or other specimens taken from a human body for the purpose of analysis

Even with respect to substances which are not clearly identifiable or distinguishable, it is unnecessary to establish a perfect chain of custody or to eliminate all possibility of tampering or misidentification, so long as there is persuasive evidence that 'the reasonable probability is that the evidence has not been altered in any material respect.' Gaps in the chain normally go to the weight of the evidence rather than to its admissibility.

Id. at 8 (citations omitted).

We find no error in the admission of the handgun into evidence.

Killebrew's third issue involves a comment by Officer Irish during cross-examination. Killebrew had told the police that he lived at 1826 Hale Street rather than at the West Kentucky street location. When defense counsel asked Irish if he had conducted any investigation as to the discrepancy as to the address, Irish stated that he had previously been to the residence at 1826 Hale Street on a narcotics complaint. Defense counsel immediately moved for a mistrial on the ground that the answer was unresponsive. The trial court denied the motion for a mistrial but admonished the jury to disregard that portion of the answer related to the drug complaint about the Hale Street address as unresponsive to the question. Killebrew argues that Officer Irish's comment improperly interjected evidence of other crimes in violation of KRE 404(b). He also contends that the comment was so prejudicial that the court's admonition could not cure the error.

First, we note that defense counsel did not present the KRE 404(b) argument to the trial court and relied solely on the ground that the answer was unresponsive. An appellate court will not consider an argument not raised before the trial court.

Commonwealth v. Lavit, Ky., 882 S.W.2d 678, 680 (1994). However,

even if we were to review this unpreserved point on the merits, we would conclude that any arguable error was harmless.

A trial court has discretion in deciding whether a particular situation constitutes sufficiently manifest necessity to justify declaring a mistrial. Sharp v. Commonwealth, Ky., 849 S.W.2d 542, 547 (1993); Miller, 925 S.W.2d at 453. "It is ordinarily presumed that an admonition controls the jury and removes the prejudice which brought about the admonition." Clay v. Commonwealth, Ky. App., 867 S.W.2d 200, 204 (1993) (citations omitted). The decision as to whether to admonish the jury with a curative instruction to dissipate potential prejudice rather than to declare a mistrial is within the sound discretion of the trial court. United States v. Ushery, 968 F.2d 575, 580 (6th Cir.), cert. denied, 506 U.S. 946, 113 S. Ct. 392, 121 L. Ed. 2d 301 (1992).

In this case, the trial court opted to admonish the jury to disregard that portion of Officer Irish's comment referring to drug complaints at the Hale Avenue address. Officer Irish did not specifically identify Killebrew as the subject of the complaint; his comment was brief and isolated. We cannot say the trial court abused its discretion in giving a curative instruction instead of declaring a mistrial.

Killebrew's fourth and final issue is that the trial court erred by denying his motion for a directed verdict made at the close of the Commonwealth's case and renewed after the defense rested. In Commonwealth v. Benham, Ky., 816 S.W.2d 186 (1991), the Kentucky Supreme Court set forth the standard for handling a

criminal defendant's motion for directed verdict as follows:

On motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given. For the purpose of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but reserving to the jury questions as to the credibility and weight to be given to such testimony.

816 S.W.2d at 187. Our standard on appellate review of a denial of a motion for directed verdict dictates that if under the evidence as a whole it would not be clearly unreasonable for a jury to find the defendant guilty, he is not entitled to a directed verdict of acquittal. Benham, 816 S.W.2d at 187; Baker v. Commonwealth, Ky., 973 S.W.2d 54, 55 (1998).

Killebrew contends that he was entitled to a directed verdict on the issue of his illegal possession of the handgun,¹ the basis for an enhanced sentence. He argues that the Commonwealth failed to present sufficient evidence connecting him to the handgun, noting that the handgun was recovered from underneath the bed and that it was inaccessible to him at the time of the search.

In Houston v. Commonwealth, Ky., 975 S.W.2d 925 (1998), the court addressed the issue of constructive possession in relation to drug offenses. While executing a search warrant,

¹Killebrew's appellate brief raises only this aspect of the motion for directed verdict; he has not challenged the sufficiency of the evidence involving trafficking in cocaine and illegal possession of drug paraphernalia.

the police in Houston found cocaine and three weapons inside an apartment; a loaded revolver on a top shelf of a cabinet in the kitchen, another loaded revolver on the bottom shelf of a cabinet in the kitchen, and a loaded handgun on a television stand in the living room. No fingerprints were found on any of the guns. Houston told the police that he was only staying in the apartment and that the drugs and weapons belonged to other people who were also staying in the apartment. The court held that actual physical possession of a firearm is not required in order for a jury to find that a defendant had possession of a firearm and that the principle of constructive possession was applicable in drug cases for purposes of enhancement of a sentence under KRS 218A.992. A person is deemed to have constructive possession of an object when the object was subject to the person's dominion and control; the possession need not be exclusive to a single person. Rupard v. Commonwealth, Ky., 475 S.W.2d 473, 475 (1971).

Officers Thompson and Irish testified that they saw Killebrew exit the garage apartment and throw a plastic baggie (which was later established to contain cocaine) inside the apartment upon seeing the police. Irish stated that the apartment contained several articles of male clothing, and Killebrew admitted to them that he occasionally stayed at the apartment overnight. Furthermore, Killebrew had possession of keys to the front door of the apartment and to the lock on the fence when he was detained.

After reviewing the record and viewing the evidence in

the light most favorable to the Commonwealth, we believe that there was sufficient evidence for a reasonable jury to find that Killebrew was in constructive possession of the handgun recovered from the apartment. Consequently, we find no error in the refusal of the trial court to grant a directed verdict on this issue.

For the foregoing reasons, we affirm the judgment of the Jefferson Circuit Court.

ALL CONCUR.

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