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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-001397-MR

JERMAIN HARRIS — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE MARY C. NOBLE, JUDGE
ACTION NO. 97-CR-000272

COMMONWEALTH OF KENTUCKY — APPELLEE

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

BEFORE: COMBS, JOHNSON AND McANULTY, JUDGES.

JOHNSON, JUDGE: Jermain Harris has appealed from the judgment of conviction entered by the Fayette Circuit Court on May 27, 1998, that convicted him of trafficking in a controlled substance in the first degree[1] (cocaine) and possession of drug paraphernalia.[2] Having concluded that there was sufficient evidence to support the conviction, we affirm.

On February 19, 1997, a Fayette Circuit Court Grand Jury indicted Harris for (1) trafficking in a controlled substance in the first degree (cocaine); (2) trafficking in

[1]Kentucky Revised Statutes (KRS) 218A.1412.

[2]KRS 218A.500.

marijuana under eight ounces;[3] (3) possession of marijuana;[4] and (4) possession of drug paraphernalia. These charges arose out of an incident that occurred shortly before midnight on December 2, 1996. Officer Jeff Jacobs of the Lexington-Fayette Urban County Police Department went to an apartment complex in response to a dispatch call regarding a noise complaint. As Officer Jacobs approached the third floor apartment, he heard a television and people laughing and talking loudly and smelled the odor of marijuana. Since the officer believed his knocking on the door might result in the apartment's occupants destroying evidence of drugs, he waited outside the apartment. When the officer heard the elevator opening, he hid behind a wall and watched a woman approach the apartment and enter. Officer Jacobs walked behind the woman as she entered the apartment so he could look inside. In plain view, Officer Jacobs saw Harris and two other individuals sitting on a sofa and smoking marijuana. He also noticed a bag of marijuana sitting on a coffee table. Having observed Harris and the others in the process of committing a crime, Officer Jacobs entered the apartment, called for assistance and arrested Harris and two other individuals.

When Harris was searched, Officer Jacobs found $797 in cash and a pager in his front left pants pocket. Officer Jacobs also noticed that Harris had been sitting on the couch on a black Nike jacket. When the jacket was searched, Officer Jacobs found 28.5 grams of marijuana and 15.6 grams of crack cocaine.

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[3]KRS 218A.1421(2).

[4]KRS 218A.1422.

At the jury trial on April 27, 1998, Harris was convicted of trafficking in a controlled substance in the first degree (cocaine) and possession of drug paraphernalia. The possession of marijuana charge was dismissed on the Commonwealth's motion and Harris was acquitted of trafficking in marijuana. Instead of allowing the jury to set the penalty, Harris accepted the Commonwealth's offer of a five-year prison sentence, which the trial court imposed on May 27, 1998. This appeal followed.

Harris claims on appeal that the Commonwealth failed to produce sufficient evidence to support the trafficking conviction and that the trial court erred as a matter of law in denying his motion for a directed verdict of acquittal. Our standard of review is well-settled.

> On a motion for directed verdict of acquittal, the trial judge must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. Commonwealth v. Benham, Ky., 816 S.W.2d 186 (1991); Trowel v. Commonwealth, Ky., 550 S.W.2d 530 (1977). If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that a defendant is guilty, a directed verdict should not be given. Benham, supra.[5]
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> We must determine 'whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' Jackson v. Virginia, 443 U.S. 307, 319, 61 L. Ed. 2d 560, 99 S.Ct. 2781 (1970) (emphasis in original). Circumstantial evidence alone, if 'substantial and competent,' may support a verdict and need not 'remove every reasonable hypothesis except that of guilt.' United States v. Stone, 748 F.2d 361, 363 (6th Cir. 1984). Moreover, the granting of a motion to

[5]Dishman v. Commonwealth, Ky., 906 S.W.2d 335, 340 (1995).

> acquit 'will be confined to cases where the prosecution's failure is clear.' Burks v. United States, 437 U.S. 1, 17, 57 L. Ed. 2d 1, 98 S. Ct. 2141 (1978) (footnote omitted).[6]

Harris claims that the circumstantial evidence relied upon by the Commonwealth to convict him of trafficking in cocaine was insufficient to support the conviction because it was based on "an inference upon an inference." Harris relies upon Pengleton v. Commonwealth,[7] where the former Court of Appeals in reversing a conviction for larceny stated:

> Further, in arriving at the verdict the jury necessarily indulged an inference from the actions of the appellant that she was in possession of the stolen property and then indulged an inference from the inferred possession that she was guilty of the theft. This was unwarranted. The jury may not in determining the facts base an inference upon and inference. When an inference is based on a fact, that fact must be clearly established and if the existence of such a fact depends upon a prior inference no subsequent inferences can legitimately be based upon it [citations omitted].

Unfortunately, in its five-page brief, the Commonwealth fails to address Pengleton or Harris' "inference upon inference" argument. The Commonwealth merely cites Benham, supra, and Commonwealth v. Sawhill,[8] in support of the well-known rule concerning appellate review of a trial court's denial of a motion for directed verdict and Matherly v. Commonwealth,[9] for the rule "that it is within the peculiar province of the jury to determine

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[6]United States v. Keeton, 101 F.3d 48, 52 (6th Cir. 1996).

[7]294 Ky. 484, 486, 172 S.W. 52, 53 (1943).

[8]Ky., 660 S.W.2d 3 (1983).

[9]Ky., 436 S.W.2d 793, 794 (1968).

the credibility of witnesses and the weight to be given the testimony and physical evidence."

Our research has revealed that Pengleton has been cited by another court only once, that being Rupard v. Commonwealth,[10] a drug trafficking case, where Pengleton was distinguished on the facts.[11] Since the case sub judice also involves drug trafficking, we believe it will be helpful to quote heavily from Rupard to demonstrate how it is distinguishable from Pengleton.

> Daniel Rupard and Dieter Sierp were found guilty of possessing marijuana for the purpose of sale or disposal to another.
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> . . .
>
> Information was received by the law enforcement officials in Clark County relating to possible violation of the Narcotic Drug Act (KRS Chapter 218) at an abandoned house located in a remote section of Clark County on a farm owned by Siegal Todd. On the morning of July 27, 1970, a detective of the Kentucky State Police and the Clark County Sheriff entered the house and found marijuana spread out on the floor on sheets in two of the rooms. This marijuana was in the process of being dried. In another room the officers saw four bags of marijuana which had been stripped from its stems and placed in plastic bags. Nearby on a stairway the officers observed a set of postage scales suitable for weighing light articles such as packages of marijuana.
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> After the officers had left during the middle of the day, they returned to the scene at about 5 p.m. to conduct a surveillance. About 8:30 p.m. they observed the defendants driving toward the house along the somewhat isolated gravel roadway. When the defendants

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[10]Ky., 475 S.W.2d 473 (1971).

[11]See also W. E. Shipley, Annotation, Modern Status of the Rules Against Basing an Inference Upon an Inference or a Presumption Upon a Presumption, 5 A.L.R. 3d 100 (1966).

saw the officers' car, they sought cover behind some bushes. One of the officers watched the two defendants approach the house and go upon the side porch as if to enter the house. The officer was unable to see whether either of the men actually entered the house, inasmuch as his line of vision was obstructed by reason of the physical contour of the area.

. . .

The officers went to the parked car of the defendants and awaited their arrival, which occurred approximately twenty minutes after the defendants were seen to go upon the porch of the house.

As soon as the defendants entered their car, the officers approached them and arrested them. In plain view on the ledge above the dashboard was a plastic bag containing marijuana. (It was not one of the bags which the officers had seen earlier at the house.)

. . .

The officers then returned to the house with the two defendants in custody and discovered that there were then five bags of marijuana rather than the four which they had seen earlier. Additionally, they noted that the scales had been moved from the position in which they had been earlier. The officers said that they did not observe anyone at or near the premises during the day except the defendants.

. . .

The circumstances presented in this case support a rational inference that these appellants had constructive possession and probably actual possession of the marijuana which was found in the abandoned farmhouse. The owner of the house testified that he had not authorized either of the appellants to use the house. One of the officers saw the appellants go upon the porch of the house as if to enter; both of the officers saw the appellants coming from the direction of the house to their car and noted that one of them appeared to be deeply affected as if under

the influence of a narcotic drug. Marijuana was found in their automobile in plain view. When the officers returned to the house, they discovered that another batch of marijuana had been bagged and the scales had been moved from the position where the officers had seen them earlier. These circumstances suffice to support the rational inference that these appellants indeed had dominion and control of the marijuana in the abandoned house; hence, it was appropriate for the trial court to admit the contraband material in evidence.

. . .

It is not necessary to pile an inference upon another inference in order to sustain the conviction in this case. The appellants' reliance upon Pengleton v. Commonwealth, 294 Ky. 484, 172 S.W.2d 52, is misplaced. In Pengleton, Kate Pengleton's conviction of stealing chickens was reversed. The evidence showed that four hens owned by Herman Peters disappeared on a Sunday afternoon. The next day the hens were bought by a merchant who said that Ralph Smith came to the store, accompanied by Kate Pengleton and her thirteen-year-old daughter, Marie. Smith was carrying two of the hens and Marie had the other two. Smith, who had been living with Kate for a year or more although she was married to someone else, testified that he stole the chickens and that Kate had no part in it. The only evidence to link Kate with the theft was the fact that she walked into the store with Smith and her small daughter who had the hens in their hands. The court noted that possession of stolen property is sufficient to cast on the accused the burden of explaining that fact and that the jury may believe or disbelieve such explanation. However, the court noted that since Kate never had actual possession and there was no circumstance from which it could be deduced that she exercised any control or dominion over the stolen property or that she received any part of the proceeds of its sale, it was impermissible for the jury to indulge an inference from Kate's actions that she was in the possession of the stolen property and then indulge the additional inference from the inferred possession that she was guilty of the theft. That situation

> does not obtain in this case, as a review of the facts already discussed indicates.[12]

Similarly, we do not believe that Harris' conviction required the jury to indulge an inference from Harris' actions that he was in possession of the crack cocaine and then indulge the additional inference from the inferred possession that he was guilty of trafficking. Rather, we believe as in Rupard that "[t]he circumstances presented in this case support a rational inference that [Harris] had constructive possession and probably actual possession" of the crack cocaine in his jacket. The temperature that night was around 30 degrees and two of the three occupants of the apartment were sitting on a jacket. The evidence supported a finding that Harris was sitting on the black Nike jacket where the crack cocaine was found. It was reasonable to infer that Harris possessed the cocaine in the jacket he was sitting on. The possession of the cocaine along with the $797 in cash and the pager were sufficient evidence to support a trafficking conviction.

Thus, we hold that Harris' conviction for trafficking in cocaine was based on evidence "sufficient to induce a reasonable juror to believe beyond a reasonable doubt" that Harris was guilty. Accordingly, the judgment of the Fayette Circuit Court is affirmed.

COMBS, JUDGE, CONCURS.

McANULTY, JUDGE, CONCURS IN RESULT ONLY.

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[12] Rupard, supra at 474-76.

BRIEF FOR APPELLANT:

Elizabeth Shaw
Richmond, KY

BRIEF FOR APPELLEE:

A.B. Chandler, III
Attorney General

Anitria M. Franklin
Assistant Attorney General
Frankfort, KY