

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-002795-MR

RAY SMITH

APPELLANT

v. APPEAL FROM RUSSELL CIRCUIT COURT
HONORABLE EDDIE C. LOVELACE, JUDGE
ACTION NO. 98-CR-00091

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING
** **

BEFORE: JOHNSON, MILLER, AND SCHRODER, JUDGES.

MILLER, JUDGE: Ray Smith brings this appeal from a November 1, 1999, judgment of the Russell Circuit Court, entered upon a jury verdict. We affirm.

On August 23, 1998, a multi-agency marijuana eradication unit conducted helicopter surveillance over parts of Russell County, Kentucky. The unit's helicopter circled over a farm owned by Ray Smith and his girlfriend, Brenda Holman. The officers observed what they considered to be a recently tended patch of marijuana, together with a truck parked nearby, and at least two persons fleeing the patch. After landing near the patch, the officers found a brown boxer dog, later determined to

be Smith's. They also discovered a well-worn path from the truck to the patch, some fifty feet away. The truck contained several pieces of mail addressed to Smith. The truck was later determined to belong to Smith's employer, Ace Hardware (formerly Dollar Deals) but had been loaned to Smith. The officers found plastic buckets emblazoned with the Dollar Deals logo.

This information was offered to the Russell County grand jury on September 21, 1998. The grand jury returned an indictment charging Smith with cultivating marijuana. Kentucky Revised Statutes (KRS) 218A.1423. A trial was held September 29 and 30, 1999. Smith offered as his defense that the marijuana was planted and grown by a person or persons unknown to him. The jury rejected this defense and returned a verdict of guilty. On November 1, 1999, Smith was sentenced to one year imprisonment, later reduced to five years' probation. This appeal follows.

Smith's first assignment of error is that the circuit court erred by not allowing him to advance his theory of the case. Specifically, Smith contends that the circuit court should have allowed him to offer as evidence names of other landowners who had marijuana planted on their property without their knowledge by persons unknown. Admissibility of evidence is within the discretion of the trial judge. Rulings on admissibility of evidence should not be reversed on appeal in the absence of a clear abuse of discretion. See Simpson v. Commonwealth, Ky., 889 S.W.2d 781 (1994).

Because Smith's defense was that an unknown person planted the marijuana, he was allowed to suggest that other

landowners had experienced the same problem. The circuit court, however, rejected his effort to identify the landowners. Smith believes his being prevented from disclosing those names deprived him of presenting a meaningful defense. It appears from the record Smith made no attempt to subpoena those landowners for the purpose of testifying as to marijuana being planted on their property. As such, we do not perceive a clear abuse of discretion on the part of the circuit court by not admitting the names of the landowners.

Even if prohibiting such testimony were error, under the circumstances, we believe it to be harmless. The test for harmless error is whether there is any reasonable possibility that absent the error the verdict would have been different. See Ky. R. Crim. P. (RCr) 9.24; Crane v. Commonwealth, Ky., 726 S.W.2d 302 (1987).

Smith next complains that the circuit court erred in rejecting certain character testimony. Specifically, Smith maintains that his character witnesses should have been able to testify as to whether or not they believed Smith would cultivate marijuana on his property. Smith directs us generally to Kentucky Rules of Evidence 405. We perceive that this rule has no relevancy inasmuch as it addresses the method of proving character rather than whether or not character evidence is admissible. We find no merit in this contention.

Moreover, Smith called a host of witnesses to testify as to his veracity. Even though advised of Smith's truthfulness by these witnesses, the jury chose not to believe Smith's own

testimony that he did not cultivate the marijuana. As such, we are of the opinion it would not be reasonable to believe that the jury's hearing the same witnesses say they did not believe Smith would grow marijuana would have changed their verdict.

Smith further contends the circuit court erred in excluding testimony that his live-in girlfriend, Holman, had cancer. We are not clearly advised as to why Smith wanted this evidence before the jury. The record does reflect that on cross-examination Holman was questioned as to her employment and income and the fact she was on medical leave and receiving various insurance benefits. This appears to have been a tactic of the Commonwealth to show that Smith and Holman were suffering financial difficulties and, as such, might resort to cultivating marijuana. Presumptively, Smith desired to ameliorate the fact that Holman was receiving income benefits by showing that the benefits were paid because of her cancerous condition. Inasmuch as Holman testified that she and Smith were always able to meet their financial obligations, we find no error in excluding the proffered evidence.

Smith next contends the Commonwealth's closing argument was improper. Smith directs us to no specific improper statements made by the Commonwealth during closing argument. In his brief, Smith appears to maintain he offered objections. A thorough review of the record indicates there were no objections made during the Commonwealth's closing argument. Nevertheless, we find nothing objectionable. We also note that no motion for

mistrial was made by Smith. As such, we deem this assignment of error to be without merit.

Smith's next assignment of error is that the circuit court erred in overruling his motion for directed verdict.

On appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal.

Commonwealth v. Benham, Ky., 816 S.W.2d 186, 187 (1991).

On motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth.

Id. at 187. In the present case, the Commonwealth presented the following evidence: nineteen marijuana plants yielding a street value of \$38,000.00 found on Smith's property; Smith's borrowed truck found approximately fifty-feet away from a recently tended marijuana patch; the same truck parked beside a well-worn path leading directly to the marijuana; Smith's live-in girlfriend told law enforcement officers at that time Smith was indeed in the back field with someone else; officers witnessed two persons running away from the area before the arrest; plastic buckets with Smith's employer's logo were found nearby; and Smith's dog was found in the vicinity of the marijuana patch. In light of these facts, we believe it would not be clearly unreasonable for a jury to find guilt. As such, we perceive no error in the circuit court's denial of Smith's motion for a directed verdict.

As another assignment of error, Smith maintains he should have been granted a new trial based upon the discovery of new evidence. Specifically, Smith maintains that witness, Brenda

Holman, discovered after the trial that her testimony as to time had been based on eastern time as opposed to central time. The explanation for Holman's mistake was that her watch was set on eastern time as a result of her being employed in Casey County, which is on eastern time, instead of where she resided in Russell County, which is on central time. It is unclear from the record why the time difference was not discovered until after the trial.

Generally, a new trial motion based on newly discovered evidence should only be granted when the new evidence is such that would, with reasonable certainty, change the verdict upon retrial.

Carwile v. Commonwealth, Ky. App., 694 S.W.2d 469, 470 (1985).

Holman's most crucial testimony regarding time was that Smith left for the creek "forty-five minutes to an hour" before the helicopter arrived and, thus, could not have been in the marijuana patch. Holman made no reference to a specific time. The Commonwealth offered testimony of two law enforcement officers who stated Holman had informed them at the time of the surveillance that Smith and another man were at the back of the property. Further, Holman herself testified that at the time of the incident she was on medical leave and had not worked in Casey County for about two months. Given this evidence, we are of the opinion there is no reasonable certainty the verdict would change upon retrial.

We deem Smith's other assignment of error as moot.

Upon the whole, we do not perceive abuse of discretion by the Russell Circuit Court.

For the foregoing reasons, the judgment of the Russell
Circuit Court is affirmed.

ALL CONCUR.

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