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NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 1999-CA-002417-MR

ROY S. WASSO

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE THOMAS L. CLARK, JUDGE  
ACTION NO. 99-CR-00387

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING  
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BEFORE: COMBS, JOHNSON AND SCHRODER, JUDGES.

JOHNSON, JUDGE: Roy S. Wasso, was indicted for trafficking in a controlled substance in the first degree (cocaine),<sup>1</sup> possession of drug paraphernalia,<sup>2</sup> and for being a persistent felony offender in the second degree (PFO II)<sup>3</sup> by a Fayette County grand jury on April 6, 1999. At a jury trial held on August 24, 1999,

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<sup>1</sup>Kentucky Revised Statutes (KRS) 218A.1412.

<sup>2</sup>KRS 218A.500.

<sup>3</sup>KRS 532.080.

Wasso was found not guilty of the possession of drug paraphernalia charge, but was found guilty of possession of a controlled substance in the first degree (cocaine) and the PFO II charge. Wasso has raised two issues on appeal: (1) whether the trial court erred by refusing to grant his motion for a directed verdict; and (2) whether his trial counsel was so ineffective as to deny him a fair trial. Having found no grounds for reversal, we affirm.

On February 10, 1999, several members of the Lexington Metro Police Department executed a search warrant on a house located at 857 Darley Drive in Fayette County, Kentucky. The search warrant was for the house and the person of Wasso and Joe Vickers, both of whom resided at the house. On the night of the search, Vickers was not present. During the search of the house, several crack cocaine pipes were found along various window sills and one crack cocaine pipe was found inside a clock in Vicker's bedroom.

The lead officer on the case was Detective Jack Dawson. Det. Dawson testified that he was responsible for preparing an inventory listing each item of evidence and where it was found. Det. Dawson remained in the house with Wasso while the other officers conducted their search. During the search, the phone rang and Det. Dawson answered it. Det. Dawson picked up the receiver and said, "This is Fred, whaddya [sic] need?" The caller replied, "I need a fifty hard." Det. Dawson testified that this was drug terminology meaning that the man wanted to buy

a \$50.00 piece of crack cocaine. Det. Dawson also testified that the caller asked for "Roy", and Det. Dawson replied, "he's busy." The call was placed from a local bar, and the caller agreed to meet at a local gas station to complete the drug deal.

The officers obtained Wasso's consent to search a Chevrolet Blazer which he regularly operated and which was parked in the driveway. In the vehicle, underneath the front passenger seat, Detective Shane Ensminger found a cigarette package which contained a plastic bag. Inside the plastic bag were four smaller bags which were later determined to contain cocaine. Two of the bags contained crack cocaine and the other two contained powder cocaine.

Wasso was arrested and taken to police headquarters, where he was interrogated by Det. Dawson. Wasso said the previous week he had found the plastic bag and had put it inside an empty cigarette package and had placed it underneath his seat. He claimed that he had forgotten the package was under his seat. Wasso claimed that it was dark when he found the plastic bag, but he thought it contained either crack cocaine or "fleece." He explained that "fleece" is melted wax that is used to trick a buyer into thinking he is purchasing crack cocaine.

Sergeant Mark Simmons testified that the cocaine had a street value of between \$40-\$50 per rock, or \$200 total. Sgt. Simmons also testified that this amount of cocaine and the way it was prepackaged in individual wrappers indicated that it was designated for sale rather than personal use.

On August 24, 1999, Wasso was convicted by a jury of possession of a Schedule II controlled substance and as a PFO II. The trial court entered the judgment of conviction on September 22, 1999, and sentenced Wasso to prison for eight years. This appeal followed.

Wasso argues that the trial court erred by refusing to grant his motion for a directed verdict. The directed verdict standard was set forth in Commonwealth v. Benham<sup>4</sup>:

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.

On appellate review, the test of a directed verdict to determine whether there is sufficient evidence to find the defendant guilty is, if under the evidence as a whole, it would have been clearly unreasonable for a jury to find guilt, only then would Wasso be entitled to a directed verdict of acquittal.<sup>5</sup>

In Benham, the Supreme Court held that there was sufficient evidence for a juror to believe the defendant was guilty of arson. The evidence against Benham showed that he was

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<sup>4</sup>Ky., 816 S.W.2d 186, 187 (1991) (citing Commonwealth v. Sawhill, Ky., 660 S.W.2d 3 (1983)).

<sup>5</sup>Trowel v. Commonwealth, Ky., 550 S.W.2d 530, 533 (1977); Sawhill, supra at 5.

in the area of the fire and that he had a motive and the opportunity to commit the arson.

In the case sub judice, there was sufficient evidence for a reasonable juror to have concluded that Wasso was guilty of possession of cocaine. A person is guilty of possession of a controlled substance in the first degree:

When he knowingly and unlawfully possesses: a controlled substance, that contains any quantity of methamphetamine, including its salts, isomers, and salts of isomers or, that is classified in Schedules I or II which is a narcotic drug; a controlled substance analogue; lysergic acid diethylamide; or phencyclidine.

While Wasso denied that any of the crack pipes found at his house were his and while he denied that the substance contained in the plastic bags was cocaine, there was clearly sufficient evidence for the jury to find otherwise. Wasso admitted that he first had placed the plastic bags inside an empty cigarette package and then placed the package underneath the seat in his Blazer knowing it to contain either cocaine or "fleece." Furthermore, the call to Wasso's phone could clearly be interpreted as an attempt to purchase cocaine from Wasso. In fact, the caller agreed to meet Det. Dawson at a local gas station to complete the deal. During his interrogation at police headquarters, Wasso admitted that he knew the caller and that the caller had called earlier that night.

Wasso argues that other than his own statement there was no evidence to connect him to the cocaine. This is a mischaracterization of the evidence. The phone call and the

cocaine found in the Blazer were also evidence against Wasso. When looking at the evidence as a whole and the totality of the surrounding circumstances, it clearly was not unreasonable for the jury to conclude that Wasso knowingly possessed cocaine. Wasso was living in a house where cocaine was being used. His vehicle contained cocaine that he admittedly had placed under the seat. The phone call to his cell phone could create a strong inference that Wasso was knowingly possessing cocaine, and a reasonable juror clearly could have disbelieved Wasso's testimony. Thus, there was sufficient evidence to find Wasso guilty of possession of cocaine and his motion for a directed verdict was properly denied.

Wasso also claims he is entitled to a new trial because he was denied effective assistance of counsel. Wasso raises a number of potential errors, but freely acknowledges that they have not been preserved for appellate review and that a RCr<sup>6</sup> 11.42 motion is normally used to collaterally attack a judgment before the trial court after the judgment has been affirmed on direct appeal.

However, Wasso argues that the alleged errors should be considered in his direct appeal, because they meet the palpable error standard as set forth in RCr 10.26.

A palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or

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<sup>6</sup>Kentucky Rules of Criminal Procedure.

preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error.

This approach to attacking a judgment was addressed by our Supreme Court in Humphrey v. Commonwealth,<sup>7</sup> with Justice Lambert writing for a unanimous Supreme Court and stating, “[a]ppellant’s wholly unpreserved claims will not be considered on this direct appeal but this does not preclude their consideration in a proper collateral attack proceeding.” The Supreme Court went on to state, however, that unpreserved errors may be presented on direct appeal “if such could [be] done in good faith, as palpable error under RCr 10.26.”<sup>8</sup>

The palpable error test is a very strict standard.

As our Supreme Court has stated, the requirement of ‘manifest injustice’ as used in RCr 10.26 (formerly RCr 9.26) [ ] means[s] that the error must have prejudiced the substantial rights of the defendant, Schaefer v. Commonwealth, Ky., 622 S.W.2d 218 (1981), i.e., a substantial possibility exists that the result of the trial would have been different. Partin v. Commonwealth, Ky., 918 S.W.2d 219, 224 (1996). One federal court has interpreted FRE 103(e), as requiring that the error must seriously affect the fairness, integrity or public reputation of judicial proceedings. United States v. Filani, 74 F.3d 378 (2nd Cir. 1996).<sup>9</sup>

In Partin, supra, the Supreme court stated that “upon

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<sup>7</sup>Ky., 962 S.W.2d 870, 872 (1998).

<sup>8</sup>Id.

<sup>9</sup>Castle v. Commonwealth, Ky.App., 44 S.W.3d 790, 793-94 (2000) (citing Brock v. Commonwealth, Ky., 947 S.W.2d 24, 28 (1997)).

consideration of the whole case, the reviewing court must conclude that a substantial possibility exists that the result would have been different in order to grant relief.<sup>10</sup>

We will address Wasso's alleged errors in the order they appeared in his case. First, Wasso claims that a motion should have been made to suppress from evidence the cocaine found in the vehicle. Wasso argues that if he had not consented to the search, the police would not have been able to search the Blazer at that time.

The issue to be determined is whether Wasso's consent was freely and voluntarily given.<sup>11</sup> Applying these rules, Wasso's claim fails the first prong of the palpable error test. The fact that Wasso's trial counsel did not make a motion to suppress the cocaine as evidence did not cause a manifest injustice. The record is devoid of any evidence to support

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<sup>10</sup>See also Byrd v. Commonwealth, Ky., 825 S.W.2d 272, 276 (1992); and Jackson v. Commonwealth, Ky.App., 717 S.W.2d 511, 514 (1986).

<sup>11</sup>United States v. Bueno, 21 F.3d 120, 126 (6th Cir. 1994). "A warrantless search as occurred in the present case is valid if conducted pursuant to the person's consent. Schneckloth v. Bustamonte, 412 U.S. 218, 219, 36 L. Ed. 2d 854, 93 S.Ct. 2041 (1973). When seeking to justify a search based on consent, the government has the burden of showing by a preponderance of the evidence that the consent was 'freely and voluntarily given,' and was not the result of coercion, duress, or submission to a claim of authority. Bumper v. North Carolina, 391 U.S. 543, 548, 20 L.Ed.2d 797, 88 S.Ct. 1788 (1968). The voluntariness of the consent is determined by the 'totality of the circumstances,' Schneckloth, 412 U.S. at 227, and must be proven by 'clear and positive' proof. United States v. McCaleb, 552 F.2d 717, 721 (6th Cir. 1977). Consent is a question of fact, and the district court's decision regarding consent will not be overturned unless it is clearly erroneous."



Wasso's claim that his consent was not voluntary and uncoerced. Thus, the trial court could have properly ruled that the search was valid and the cocaine would have come into evidence notwithstanding any motion to suppress it. While it is true that this evidence affected the substantial rights of Wasso and that there is a substantial possibility that the outcome of the trial would have been different without the evidence, Wasso has failed to show that it was a manifest injustice to admit the evidence.

The next alleged error is that Wasso's trial counsel should have made a motion to suppress as evidence his entire statement given at police headquarters. Based on all of the evidence in the case sub judice, we conclude that Wasso's counsel's failure to make a suppression motion concerning his statement to the police did not constitute palpable error. Even if a suppression motion had been made, there were sufficient grounds for the trial court to have properly concluded that there was probable cause for the police to have taken Wasso to police headquarters for questioning. Thus, the interrogation did not cause a manifest injustice that prejudiced the substantial rights of Wasso.

Wasso's third claim of error is that certain portions of the taped interview should have been suppressed by motion or at least objected to when played to the jury. Wasso claims his statement made to Det. Dawson that, "[e]verytime [the police] come over [ ] they find drug paraphernalia and I'm always to blame for it[,]'" was inadmissible evidence and highly

prejudicial. We believe that the admission into evidence of this statement fails to meet the palpable error test for several reasons. Trial counsel must be provided with sufficient leeway to make decisions about trial strategy concerning which evidence he wants to object to without the appellate courts second-guessing each of his decisions. Justice O'Connor in writing the majority opinion for the United States Supreme Court in Strickland v. Washington,<sup>12</sup> states, "[j]udicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable."

Thus, in the present case, we cannot conclude that it was palpable error for Wasso's counsel not to object to this evidence. This decision may have been part of an overall trial strategy to give credibility to Wasso's story. It also could have been a trial strategy to attempt to show that the police were overreaching and were essentially out to get Wasso. It is not proper for this Court to turn back the hands of time and to say that it was a palpable error for Wasso's counsel to have chosen this trial strategy.

Another portion of the tape includes Wasso making a statement that he had previously been in jail. Although this

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<sup>12</sup>466 U.S. 668, 689, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

evidence should have been excluded at trial, its admission does not rise to a palpable error. We cannot conclude that the exclusion of this evidence would have resulted in a substantial possibility that the outcome of the trial would have been different. First of all, the jury was well aware that Wasso had a previous felony conviction since he was being tried as a PFO II. Also, Wasso admitted during his testimony that he had a previous felony conviction and the jury was given the proper admonition. Thus, it is unlikely that this evidence had any prejudicial effect on the outcome of the trial.

Wasso's last claim of error regarding the tape is that it was palpable error to admit the portion of the tape where Det. Dawson concluded that based on the evidence it appeared to him that Wasso was selling crack cocaine. Wasso acknowledged in his brief, however, that this commentary by Det. Dawson might be argued as a harmless error since he was not convicted of trafficking cocaine. We agree and for this reason it does not rise to a palpable error. Although it true that an officer's opinion of the accused's guilt is inadmissible,<sup>13</sup> the fact that Wasso was not convicted of the trafficking charge means that his substantial rights were not prejudiced.

Wasso's last claim of error is that the trial court and his trial counsel committed a palpable error by allowing him to testify in his behalf. The decision of whether a defendant should or should not testify is often a difficult one for trial

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<sup>13</sup>Nugent v. Commonwealth, Ky., 639 S.W.2d 761 (1982).

counsel and the defendant. If a defendant testifies, he naturally opens the door to evidence that would not otherwise be admitted; but if he chooses not to testify, he will lose the opportunity to explain his version of the events. Thus, the decision for Wasso to testify was a discretionary, strategic decision and does not constitute palpable error.

For these reasons, the judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

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