

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-002861-MR

DAVID L. ROWLAND

APPELLANT

v. APPEAL FROM BRECKINRIDGE CIRCUIT COURT
HONORABLE SAM H. MONARCH, JUDGE
ACTION NO. 00-CR-00076

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * **

BEFORE: BARBER, McANULTY, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: David L. Rowland appeals his conviction of possession of a firearm by a convicted felon. As sufficient evidence was presented at trial to establish Rowland's identity, we affirm.

On July 5, 2000, Rowland was indicted on the charge of possession of a firearm by a convicted felon. A jury trial was held on November 16, 2000. Rowland voluntarily waived his right to be present at trial, and a hearing was held for this purpose on the morning of trial. The court found Rowland to be competent and allowed him to waive his right to be present.

At trial, Officer Rob Vanderhof, Chief of Police of Cloverport, Kentucky, testified that on May 18, 2000, he, along with two other police officers, went to Rowland's residence on official business. Rowland came to the door and invited the officers in when they asked to enter. The officers entered into the living room, where Vanderhof saw a glass-fronted gun cabinet with six rifles inside. At Vanderhof's request, Rowland retrieved a key and unlocked the cabinet. Vanderhof determined that two of the guns were loaded. A citation was prepared and Rowland was arrested for possession of a firearm by a convicted felon.

As Rowland declined to appear at trial, the parties and the court agreed that, in order for the Commonwealth to establish Rowland's identity, Vanderhof would testify as to Rowland's date of birth and social security number as recorded on the citation. The parties and the court further agreed that the Commonwealth could introduce a jail photo of Rowland into the record for the court's eyes only, rather than as an exhibit. The parties and court agreed that Rowland's appearance in the photo would be prejudicial.

Vanderhof read for the jury Rowland's date of birth and social security number as recorded on the citation. Vanderhof testified that such information is recorded in the normal course of completing a document of that nature and it would be relied upon by himself or other agencies in identifying who the person named therein is. Vanderhof further testified that he knew Rowland from a previous dealing with him, and that he had been to

Rowland's residence before, although not inside. Vanderhof testified that Rowland's residence was on a street that was part of his regular patrol area, and that he had regularly patrolled that street in the months preceeding May of 2000.

The defense presented no evidence, and the court denied Rowland's motion for a directed verdict. The jury found Rowland guilty of possession of a firearm by a convicted felon. On November 25, 2000, the court entered its judgment and sentence on jury verdict of guilty, sentencing Rowland to a term of imprisonment of two years and one day. This appeal followed.

On appeal, Rowland argues that the trial court erred in denying his motion for directed verdict because the Commonwealth did not prove his identity. Rowland contends that the Commonwealth's identification of him, which consisted of reading to the jury a birthdate and social security number from the citation, and showing the judge a picture of him, was insufficient evidence to support a belief by the jury that he was the person who committed the crime.¹

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 is the defendant entitled to a directed verdict of acquittal. Commonwealth v. Benham, Ky., 816 S.W.2d 186 (1991). Vanderhof testified that he

¹ Appellant did not raise the issue at trial, nor in this appeal, that he was not "David Rowland", nor dispute the accuracy of the birthdate and social security number recorded on the citation. Further, appellant does not allege that he was not the "David Rowland" referred to in the evidence presented of his prior felony convictions.

knew David Rowland, knew where he lived, and had been to his residence before. Appellant was referred to as "David Rowland" by the Commonwealth, and as "Mr. Rowland" by defense counsel, throughout the trial. "Proof of identity of name is prima facie evidence of identity of person." Jones v. Commonwealth, Ky., 457 S.W.2d 627, 631 (1970), cert. denied, 401 U.S. 946, 91 S. Ct. 964, 28 L. Ed. 2d 229 (1971). Vanderhof read for the jury Rowland's social security number and birthdate from the citation, and testified that such information is recorded in the normal course of completing such documents. "The use of social security numbers as a means of establishing the identity of an individual has become virtually universal in this nation." Johnson v. Commonwealth, Ky., 883 S.W.2d 482, 484 (1994) (Testimony from Department of Corrections records of an individual's social security number, home address, birthdate, and parents' names admissible when such records satisfy the regular business entries exception and when identity is the disputed element.) Accordingly, we conclude that the Commonwealth presented sufficient evidence to establish Rowland's identity.

For the aforementioned reasons, the judgment of the Breckinridge Circuit Court is affirmed.

BARBER, JUDGE, CONCURS.

McANULTY, JUDGE, CONCURS AND FILES SEPARATE OPINION.

McANULTY, JUDGE, CONCURRING BY SEPARATE OPINION: I concur with the holding, however, since the procedure utilized by the trial court seems to be without support in either the

criminal rules, caselaw, or the Kentucky Constitution, I write separately.

RCr 8.28 provides in pertinent part that "the defendant shall be present at . . . every critical stage of the trial, including the impaneling of the jury and the return of the verdict . . ."

RCr 2.05 provides in pertinent part that "Whenever a . . . defendant fails to appear in court as duly required, the presiding judge may issue a warrant for his . . . arrest without the necessity of a supporting affidavit or complaint."

§ 11 of the Kentucky Constitution provides in pertinent part that "in all criminal prosecutions the accused has the right to be heard by himself and counsel . . ."

The Kentucky Supreme Court held in Davenport v. Commonwealth, Ky., 368 S.W.2d 327 (1963) that the Constitutional requirement (§ 11 Ky. Const.) may be waived in misdemeanor cases by absence from trial, but not in felony cases.

In my opinion, the trial court had no authority to permit the defendant to waive his presence. The evidentiary quagmire of establishing identity of the defendant could have been avoided.

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