

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 2000-CA-001779-MR

JASON ANDREW FITZGERALD

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE GARY D. PAYNE, JUDGE  
ACTION NO. 00-CR-00180

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: KNOPF, SCHRODER, AND TACKETT, JUDGES.

SCHRODER, JUDGE: This is an appeal from a jury verdict convicting Jason Andrew Fitzgerald of second-degree assault; receiving stolen property over \$300.00; carrying a concealed deadly weapon; operating a motor vehicle under the influence; leaving the scene of an accident; and no operator's license. Fitzgerald contends that the trial court should have directed a verdict in his favor on the charge of receiving stolen property because the Commonwealth failed to introduce evidence of the value of the stolen property; that the trial court's failure to grant a continuance denied him his right to present a defense; and that the trial court committed substantial error by

incorrectly instructing the jury on the DUI charge. We disagree with all of his contentions and hence affirm.

On December 11, 1999, Stella Leak's white 1984 Monte Carlo was stolen from a Chevron station in Verona, Kentucky. Leak saw two people drive off in her car. Later that day, Kenny Feedback was at a Marathon station near his residence on Kingston Road in Lexington. Feedback saw a man arguing with the cashier because she would not let him buy cigarettes without proper identification. The man was in a white Monte Carlo in the company of a young girl. Feedback returned to his house on Kingston Road, and about 15 minutes later he saw the man from the Marathon station driving the white Monte Carlo at an excessive speed on Kingston Road. Feedback later identified the man driving the Monte Carlo as Fitzgerald; the young girl was later identified as Rachel Pletcher.

In the meantime, Jack Hilderbrand was doing some work around his house at 705 Kingston Road. He had taken his garden hose down to the street to let it drain. As he returned from the street and was going back up the driveway, he saw a car, the aforementioned Monte Carlo, on the sidewalk heading toward him. Hilderbrand dove toward the street, away from the car, but the rear driver's side of the car hit his leg. The Monte Carlo came to a rest sideways in the road, and the two occupants of the vehicle fled on foot. Hilderbrand's leg was very seriously injured. Hilderbrand had an open fracture of his tibia and fibula in the right leg. The blood supply and the nerves to the

foot were at risk for survival, and the injury was limb threatening.

Officers of the Lexington Metro Police responded to the call on Kingston Road. Following their arrival, the police noticed a faint smell of marijuana coming from the Monte Carlo. The police spoke with witnesses who advised them that two persons had fled the vehicle, and the police began searching the area for suspects. Eventually the police noticed two subjects walking near a BP station. The police approached the two subjects, Fitzgerald and Rachel Pletcher, and questioned them. The police brought Feedback to the BP for a show-up, and Feedback identified Fitzgerald as the man driving the vehicle that struck Hilderbrand. The police also observed that Fitzgerald had watery eyes, dilated pupils, and a faint smell of marijuana about his clothing. Fitzgerald was arrested, and in a search of his person incident to the arrest, a double-edge knife was found. Following his arrest, Fitzgerald was transported back to Kingston Road, where he admitted driving the vehicle.

On February 15, 2000, Fitzgerald was indicted on seven criminal counts surrounding the December 11, 1999, hit-and-run incident. Specifically, Fitzgerald was indicted for second-degree assault (KRS 508.020); receiving stolen property over \$300.00 (KRS 514.110); second-degree unlawful transaction with a minor (KRS 530.065); carrying a concealed deadly weapon (KRS 527.020); operating a motor vehicle under the influence (KRS 189A.010); leaving the scene of an accident (KRS 189.580); and no operator's license (KRS 186.410).

On May 9, 2000, the day before trial, Fitzgerald moved for a continuance based upon his inability to locate Rachel Pletcher. The court overruled the motion, and the trial was held on May 10, 2000. During the trial, the Commonwealth introduced an exhibit reflecting a January 2000 adjudication of Pletcher's case in juvenile court wherein she was determined to be guilty of carrying a concealed weapon and receiving stolen property. Also introduced was a stipulation that if Pletcher were available to testify she would state that she was the driver of the car that hit Hilderbrand. Fitzgerald testified on his own behalf and stated that Pletcher, and not he, was driving the vehicle that hit Hilderbrand.

Fitzgerald was convicted of second-degree assault; receiving stolen property over \$300.00; carrying a concealed deadly weapon; operating a motor vehicle under the influence; leaving the scene of an accident; and no operator's license. The trial court sentenced Fitzgerald to five years on the assault charge and one year on the receiving stolen property charge, to run consecutively, but, over the objection of the Commonwealth, suspended imposition of the sentence and placed Fitzgerald on probation for five years. Fitzgerald was also fined \$200.00 for carrying a concealed deadly weapon, \$200.00 for the DUI, and \$250.00 for no operators license. This appeal followed.

First, Fitzgerald contends that he was entitled to a directed verdict on the receiving stolen property charge because the Commonwealth failed to introduce evidence of the value of the 1984 Monte Carlo.

The standard for determining the appropriateness of a directed verdict is set forth in Commonwealth v. Benham, Ky., 816 S.W.2d 186, 187 (1991), 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.

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.

KRS 514.110 provides that:

(1) A person is guilty of receiving stolen property when he receives, retains, or disposes of movable property of another knowing that it has been stolen, unless the property is received, retained, or disposed of with intent to restore it to the owner.

(2) The possession by any person of any recently stolen movable property shall be prima facie evidence that such person knew such property was stolen.

(3) Receiving stolen property is a Class A misdemeanor unless the value of the property is three hundred dollars (\$300) or more, or unless the property is a firearm (regardless of the value of the firearm), in which case it is a Class D felony.

While the Commonwealth failed to present evidence directly addressing the value of the 1984 Monte Carlo, nevertheless, pictures of the vehicle were introduced into evidence, as was evidence to the effect that the car was in

working condition, and was able to make the 100-mile drive from Verona to Lexington the day it was stolen. Based upon the evidence presented, we are persuaded that, upon drawing all reasonable inference in favor of the Commonwealth, it would not be unreasonable for a juror to conclude that the fifteen-year-old Monte Carlo was worth at least \$300.00.

Next, Fitzgerald contends that the trial court erred when it denied his motion for a continuance to allow him time to locate Rachel Pletcher. Fitzgerald contends that, though it was stipulated that if Pletcher were to testify she would testify that she, and not Fitzgerald, was driving the vehicle when it struck Hilderbrand, the live testimony of Pletcher was crucial to his defense.

"The decision whether or not to grant a continuance lies within the sound discretion of the trial court . . . ." Stump v. Commonwealth, Ky. App., 747 S.W.2d 607, 609 (1987). Before a trial court will grant such a motion, "sufficient cause" must be shown. RCr 9.04. The factors the trial court may consider in exercising its discretion are the length of the delay, previous continuances, inconvenience to litigants, witnesses, counsel and the court, whether the delay is caused by the accused, the complexity of the case, and whether granting the motion would lead to prejudice. Snodgrass v. Commonwealth, Ky., 814 S.W.2d 579, 581 (1991). Reversal of a criminal conviction will not be ordered by a reviewing court without a finding that the trial court abused its discretion in denying a motion for

continuance. Abbott v. Commonwealth, Ky., 822 S.W.2d 417, 418 (1992).

The record discloses that trial was originally set for April 6, 2000, but that upon motion by Fitzgerald for a continuance due to his inability to locate Pletcher, the trial court granted a continuance until May 10, 2000. Hence a 34-day continuance had previously been granted for the same purpose for which the second continuance was sought - to locate Rachel Pletcher. Further, in seeking a continuance, Fitzgerald failed to comply with RCr 9.04, which provides that:

A motion by the defendant for a postponement on account of the absence of evidence may be made only upon affidavit showing the materiality of the evidence expected to be obtained, and that due diligence has been used to obtain it. If the motion is based on the absence of a witness, the affidavit must show what facts the affiant believes the witness will prove, and not merely the effect of such facts in evidence, and that the affiant believes them to be true.

Under these circumstances, i.e., the previous continuance for the same reason and Fitzgerald's failure to comply with RCr 9.04, it was not an abuse of discretion for the trial court to deny Fitzgerald an additional continuance.

Finally, Fitzgerald contends that the trial court committed substantial error by incorrectly instructing the jury in the DUI instructions. Fitzgerald concedes that this issue was not preserved for appeal, but contends that the issue should be considered as a palpable error under RCr 10.26.

KRS 189A.010(1)(c) provides that:

A person shall not operate or be in physical control of a motor vehicle anywhere in this

state while under the influence of any other substance or combination of substances which impairs one's driving ability.

In this case, Fitzgerald was accused of driving under the influence of marijuana. The trial court gave the following jury instruction in conjunction with this charge:

You will find the Defendant guilty of Operating a Motor Vehicle While Under the Influence of Alcohol or Other Substance Which Impairs Driving Ability if, and only if you believe from the evidence beyond a reasonable doubt all of the following:

A. That in this county on or about December 11, 1999, and within 12 months before the finding of the Indictment herein he operated a motor vehicle;

AND

B. That while doing so, he was under the influence of alcohol or any other substance which may impair one's driving ability.

The instruction given by the trial court is substantially in compliance with the instruction as given in 1 Cooper, Kentucky Instructions to Juries (Criminal) § 8.64A (Anderson 1999).

Fitzgerald contends that while the statute is clear that one must be under the influence to be convicted, the instruction given by the trial court required the jury merely to make a finding of whether the substance "may" have impaired his ability to drive. We disagree.

The instruction clearly requires the jury to find that Fitzgerald "was under the influence[.]" The "may" used in the instruction refers to the statute's provision that the substance causing the intoxication is not limited to alcohol but to "any



other substance which may impair one's driving ability." Fitzgerald's argument is based on a misreading of the instruction. The instruction given by the trial court was not erroneous and, it follows, was not palpable error under RCr 10.26.

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

ALL CONCUR.

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