RENDERED: JULY 19, 2002; 10:00 a.m.
NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

# Court Of Appeals

NOS. 2001-CA-001211-MR AND 2001-CA-002341-MR

MICHAEL JARRICK GILBERT — APPELLANT

V.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JOHN R. ADAMS, JUDGE
ACTION NOS. 01-CR-00082 AND 01-CR-00265

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION AFFIRMING

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BEFORE: GUDGEL, JOHNSON, and SCHRODER, Judges.

GUDGEL, JUDGE: This is an appeal from a judgment and a postjudgment order entered by the Fayette Circuit Court after a jury trial. Appellant was found guilty of possession of both a controlled substance and drug paraphernalia, and he pled guilty to being a second-degree persistent felony offender (PFO). For the reasons stated hereafter, we affirm.

During the morning of October 31, 2000, the Lexington Metro Police Department received a report that an unconscious person had been dragged into a specified motel room and that there might be narcotics in the room. After several knocks the responding police officers were admitted into the motel room, where they observed various items including a steel wool

substance in a trash can, a drinking straw cut into several pieces, some type of powdery material, and an unidentified medication. They also observed, near appellant's feet and just under the edge of the bed where he was seated, two plastic pipes and a plastic bag containing a white powder. The officers, who permitted appellant and the room's other occupants to leave, later discovered a second bag of white powder in the room. Testing of the first bag provided no positive results, but the pipes tested positive for cocaine residue and the second bag tested positive for cocaine.

Appellant was indicted for possession of a controlled substance, first degree, and possession of drug paraphernalia, second degree. Subsequently, he was indicted as a second-degree PFO. A jury found appellant guilty of both possession charges, and he entered a guilty plea to the PFO charge. On May 21, 2001, appellant was sentenced to concurrent sentences of eighteen months on the paraphernalia charge and one year on the cocaine charge, enhanced to six years as a PFO. Appeal No. 2001-CA-1211-MR followed.

On August 1 the Commonwealth informed appellant's counsel that it had learned that one of the members of the grand jury which indicted appellant as a PFO was a convicted felon who was ineligible for service on a grand jury. Appellant filed an RCr 11.42 motion to vacate, which the trial court denied in an order entered on September 27, 2001. Appeal No. 2001-CA-2341-MR followed, and the two appeals subsequently were consolidated. We note that the Commonwealth asserts that the second notice of

appeal was untimely as it was filed thirty-two days after entry of the September 27 order denying RCr 11.42 relief. However, it is clear that since the thirtieth day from entry of the September 27 order fell on Saturday, October 27, the notice of appeal in fact was timely when it was filed on Monday, October 29. See CR 6.01.

First, appellant contends that the trial court erred by denying his motions for a directed verdict. We disagree.

It is undisputed that the police officers observed two plastic pipes containing steel wool, and a small bag containing a white powder, near appellant's feet under the edge of the bed where he was seated. It is also undisputed that appellant volunteered that the powder looked like baking soda and requested that it be tested. Subsequent testing revealed that the pipes contained cocaine residue but that the powder was not a controlled substance.

Appellant seems to assert that no controlled substances were found while he was present in the motel room, and that the cocaine which later was found in the room did not justify the charges against him. However, the record shows that the criminal complaints against appellant in fact were based on the plastic bag and pipes found at his feet, as well as on the officers' observance of other possible drug paraphernalia items in the room. It is well established that the possession of even a residual trace of cocaine in a pipe will support a charge of possession of cocaine. See Bolen v. Commonwealth, Ky., 31 S.W.3d 907 (2000); Commonwealth v. Shivley, Ky., 814 S.W.2d 572 (1991).

As the charges against appellant were supported by evidence that the pipes under the edge of the bed where he was seated tested positive for cocaine residue, it follows that the court did not err by failing to direct a verdict in his favor.

Next, appellant contends that the trial court erred by failing to instruct the jury regarding the offense of attempted possession of cocaine. We disagree.

The charges of possession of cocaine and drug paraphernalia were based on the items which the officers found near appellant's feet. Simply put, appellant either was or was not in possession of those items, and any unsuccessful attempt to purchase cocaine from the person who rented the motel room was simply irrelevant to the charges relating to the items found at his feet. It follows, therefore, that no grounds existed for instructing the jury as to the offense of attempted possession of cocaine, and that the court did not err by failing to give an instruction on that charge.

Next, appellant contends that he "was denied a fair trial because the arresting officer repeatedly injected" prejudicial opinions and conclusions into his testimony. However, appellant admits that the alleged errors in this vein were not preserved for review, and our review of the record fails to demonstrate that he is entitled to relief on this ground in order to prevent a manifest injustice. RCr 10.26.

Finally, appellant contends that the trial court erred by denying his RCr 11.42 motion seeking to set aside his PFO conviction, based on the Commonwealth's postjudgment disclosure

that a member of the grand jury which indicted him on that charge was a convicted felon and ineligible to serve on a grand jury. We disagree.

KRS 29A.080(2)(e) disqualifies from jury service any person who previously has been convicted and not pardoned of a felony. Although generally any challenge to a juror's qualifications is waived unless it is made before the jury is empaneled, Ohio Casualty Insurance Co. v. Cisneros, Ky. App., 657 S.W.2d 244 (1983), an exception to that rule may exist where the complaining party neither knew nor reasonably could have known of the basis for the challenge before the jury was empaneled. Warren v. Commonwealth, Ky. App., 903 S.W.2d 907 (1994). Nevertheless, a voluntary and intelligent guilty plea generally forecloses the possibility of any subsequent independent challenge to a grand jury selection or to the alleged denial of other constitutional rights. Tollett v. Henderson, 411 U.S. 258, 93 S.Ct. 1602, 36 L.Ed.2d 235 (1973). In other words, "a guilty plea constitutes an admission of all facts alleged and a waiver of all non-jurisdictional and procedural defects and constitutional infirmities in any prior stage of the proceeding." 8 Leslie Abramson, Kentucky Practice §22.121 (3d ed. 1997). It therefore follows, in light of appellant's guilty plea to the PFO charge, that the trial court did not err by denying his postjudgment challenge to that conviction. Tollett, 411 U.S. 258.

The court's judgment and order are affirmed.

ALL CONCUR.

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