

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-002226-MR

JAMES ROBINSON

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JOHN R. ADAMS, JUDGE
ACTION NO. 01-CR-00608

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * ** **

BEFORE: COMBS, GUIDUGLI, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: James Robinson appeals his conviction of possession of cocaine and tampering with physical evidence. Having reviewed the record and the applicable law, we affirm.

On April 11, 2001, the Lexington Police Department executed a search warrant at the apartment of Lorene Burdette and David Spears, where appellant was also residing at the time. The items recovered in the search included 1.25 grams of crack cocaine in baggies found in the toilet, \$2050 found in appellant's shoe, and \$135 found in appellant's pocket. On June 12, 2001, appellant was indicted on charges of first-degree trafficking in a controlled substance, tampering with physical

evidence, and possession of drug paraphernalia. The drug paraphernalia charge was dismissed prior to trial, which commenced on August 20, 2001.

At trial, Lorene Burdette testified that she was a crack cocaine user, and that she had been allowing people to sell drugs out of her house. She testified that appellant had been staying with her for a few weeks before April 11, and that she believed he sold crack cocaine, although she never actually witnessed him doing so. Burdette testified that on the night at issue, when the police first came in, she was in the bathroom and appellant was either in the kitchen or the bedroom. She testified that appellant came suddenly running into the bathroom, with the police right behind him, and knocked her down as she was getting up from the toilet. Burdette testified that she did not see appellant put cocaine in the toilet, but that everything happened very fast.

Sargent Lawrence Weathers testified that he was the third or fourth officer to enter the residence. Upon entering, he saw appellant going into the bathroom with Detective Hart following. Weathers immediately went in the bathroom to assist, where he saw appellant with his hand in the commode. Weathers testified that Detective Hart was yelling at appellant to get his hand out of the commode, and that Detective Hart had his hand in the commode as well. Weathers testified that he told appellant to get his hand out of the commode but that he wouldn't. Weathers then saw appellant reach up with his left hand and try to flush the commode, but that it wouldn't flush. Weathers then

grabbed appellant's left hand and pulled him away from the commode. Weathers testified that Detective Hart held on to appellant's right hand, and then Officer Brotherton came in and handcuffed him. Weathers testified that Officer Brotherton retrieved the cocaine from the commode. Weathers testified that he did not see appellant put the cocaine in the commode. Officers Hart and Brotherton did not testify.

Appellant testified that he was not selling cocaine out of Burdette's apartment, that he didn't know anything about cocaine being sold out of the apartment, and that he did not possess the cocaine at issue. Appellant testified that on the night the police came in he was lying on the couch and heard a loud noise and got scared because he didn't know what was going on and ran into the bathroom, where Burdette was on the toilet. Appellant further testified that his hand was never in the toilet, but that his hand only went on the toilet in order to break his fall as three or four officers got on him to force him to the floor.

The jury found appellant guilty of first-degree possession of a controlled substance and tampering with physical evidence. The trial court entered final judgment on September 17, 2001, sentencing appellant to a total of two years imprisonment, probated for three years. This appeal followed.

On appeal, appellant argues that the trial court erred in failing to grant a directed verdict on both the possession and tampering charges. With regard to the possession charge, appellant contends that no evidence was presented that he

possessed the cocaine. Appellant contends that no one saw him with the cocaine, that the cocaine was not found on him, that no one saw him put the cocaine in the toilet, and that there were other people in the drug business that resided in the apartment. "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). In light of the aforementioned testimony that appellant resided in the apartment and was found with his hand in the toilet where the cocaine was found, we conclude that sufficient evidence was presented for the jury to reasonably find him guilty of the possession charge.

With regard to the tampering charge, appellant reasserts the same arguments as for the possession charge, in particular the fact that no evidence was presented that anyone saw him throw the cocaine into the toilet. KRS 524.100 provides:

(1) A person is guilty of tampering with physical evidence when, believing that an official proceeding is pending or may be instituted, he:

(a) Destroys, mutilates, conceals, removes or alters physical evidence which he believes is about to be produced or used in the official proceeding with intent to impair its verity or availability in the official proceeding[.]

Appellant contends that no evidence was presented that the cocaine was destroyed, mutilated, concealed or altered, as required by the statute, in that the police immediately saw the cocaine in the toilet, that it was in baggies, and that there was no evidence that it had been affected in any way by being dropped

in the water. Appellant contends that, with regard to the evidence presented, the only remotely applicable word contained in the statute is "removed," but that the jury did not have the option of considering this word as the jury instruction did not include it.¹

"The tampering statute clearly provides for all degrees of destruction of evidence, including mutilation, alteration and attempted tampering." Smith v. Commonwealth, Ky. App., 712 S.W.2d 360, 361 (1986) (Holding as without merit the appellant's argument that his failure to completely destroy the evidence entitled him to an instruction on "attempted tampering" rather than "tampering".) See also, Taylor v. Commonwealth, Ky., 987 S.W.2d 302, 305 (1998) (Appellant argued that because he placed the cocaine under the seat of the car while in the plain view of the police officers, that he did not actually "conceal" the cocaine within the meaning of KRS 524.100 because the officers knew where it was. Court held that trial court's denial of motion for directed verdict on tampering charge was not error.) In the present case, in light of the testimony that appellant was found with his hand in the toilet where the cocaine was found, we conclude that sufficient evidence was presented for the jury to reasonably find appellant guilty of tampering with physical evidence. Benham, 816 S.W.2d at 187.

¹With regard to appellant's contention, we believe that the absence of the word "removed" from the jury instruction would work in appellant's favor, as it made the instruction less inclusive.

Appellant finally argues that the trial court erred in refusing to instruct on attempted tampering. Appellant contends that because the cocaine remained in the toilet, was not flushed, and thus was not destroyed, mutilated, concealed, or altered, that the Commonwealth only proved that he attempted to tamper with physical evidence. In light of the aforementioned holding in Smith, 712 S.W.2d at 361, that the tampering statute encompasses attempted tampering as well, we reject appellant's argument.

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

ALL CONCUR.

BRIEF FOR APPELLANT:

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