

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-001977-MR

JAMES RANCHER

APPELLANT

v. APPEAL FROM WHITLEY CIRCUIT COURT
HONORABLE JERRY D. WINCHESTER, JUDGE
ACTION NO. 00-CR-00034-001

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
VACATING AND REMANDING
** **

BEFORE: COMBS, DYCHE, and KNOFF, Judges.

COMBS, JUDGE: James Rancher appeals the August 21, 2001, judgment of the Whitley Circuit Court convicting him of first-degree possession of a controlled substance (cocaine) and sentencing him to serve five years in prison. He argues that the trial court erred in failing to direct a verdict of acquittal and in its instructions to the jury. After a review of the evidence and the applicable law, we disagree with his contention that he was entitled to a directed verdict. However, we agree that the jury was erroneously instructed on the concept of complicity. Thus, we vacate and remand for a new trial.

Rancher's conviction was based on events of the evening and early morning hours of April 14 and 15, 2001. At around midnight on April 14, Officer Kenneth Nighbert of the Williamsburg Police Department stopped a vehicle on Interstate-75 after observing it weave from side to side on the roadway and swerve into the emergency lane. As he approached the vehicle, Officer Nighbert noticed that the three occupants in the car were "very fidgety" and that both Rancher (who was sitting in the back seat alone) and Clarence Valentine (who was sitting directly in front of Rancher in the passenger's seat) were drinking beer. When asked for her identification, the driver gave Officer Nighbert an operator's license issued to "Tina Partin." The officer returned to his vehicle. His check of the license revealed that Partin had several prior traffic arrests; however, he learned from the license plate that the vehicle was registered to Fay Miller of Flat Lick, Kentucky.

Officer Nighbert asked the driver to exit the car. Field sobriety tests indicated that she was not under the influence of alcohol. Because her appearance did not match the picture on the driver's license and because she was unfamiliar with Partin's prior criminal history, the officer suspected that she had not been truthful about her identity. During his conversation with the driver, Officer Nighbert noticed that Valentine and Rancher were "moving around quite a bit in the car." He then asked for and obtained permission from the driver to search the vehicle.

Officer Wayne Bird arrived on the scene, and the officers instructed the two male passengers to get out of the car. They found a bag containing \$10,000 worth of cocaine inside the front console and a loaded handgun -- a 9 millimeter Luger -- under the front passenger seat. All three individuals were placed under arrest. At the police station, the officers learned the driver's true name, Danielle Bavol, and that she resided at the same address as the owner of the vehicle. A search of Valentine uncovered three pocket knives, keys, and \$5,210 in cash. Officers found no weapons, drugs, or money on Rancher.

The vehicle was impounded, and the police conducted an inventory search. They found a pair of pants stuffed directly under the rear seat where Rancher had been sitting; inside the pockets of the pants were two plastic bags containing small amounts of cocaine. Bavol, Valentine, and Rancher denied any knowledge that drugs were in the vehicle. They were subsequently indicted on charges of trafficking in cocaine and were tried together in July, 2001.

Rancher was the only defendant who testified at trial. He stated that he did not know Valentine or Bavol very well. He said he ran into them at a grocery store after work on the evening in question; he had approached Valentine about a job. He testified (apparently with some embarrassment) that his sole motive for spending the entire evening riding in the car with his co-defendants was the opportunity to consume the free beer that they offered him. He denied having any knowledge that drugs or weapons were in the vehicle.

The trial court denied Rancher's motions for directed verdict and instructed the jury on trafficking in a controlled substance and possession of a controlled substance. Neither instruction allowed the jury to find Rancher guilty under an accomplice theory. However, the trial court gave a separate instruction which defined complicity. The jury found all three defendants guilty of possession of cocaine and recommended that each serve five years in prison. The trial court sentenced Rancher accordingly. He has brought this appeal.

Rancher argues that the trial court erred to his substantial prejudice by refusing to direct a verdict of acquittal. He contends that the evidence failed to establish that he ever actually possessed – or had any control over – the cocaine found in Baval's automobile. He claims that the circumstantial evidence supposedly linking him to the drugs is far from what is necessary to support a conviction for possession of cocaine. Rancher's counsel argues that when the evidence is considered in the light most favorable to the Commonwealth, it actually "tends to support" his client's innocence:

Danielle Baval was the one who gave false identification, Clarence Valentine was the one who was found to have a large amount of money on his person, the car did not belong to [Rancher], and most telling, James Rancher was the only [one] of the three who took the stand to prove his innocence. He had no prior record and he was a 50 year old man at the time of the incident.

In making the argument that he was entitled to a directed verdict, Rancher relies on the principle that evidence of one's mere presence at the scene of a crime is not sufficient

to support a conviction. Marcum v. Commonwealth, Ky., 496 S.W.2d 346 (1973). He also cites those cases in which the owner/operator of a vehicle is deemed to be in constructive possession of contraband, precedent which arguably precludes him from also being found in possession of the drugs. See, Paul v. Commonwealth, Ky.App., 765 S.W.2d 24 (1988), and Leavell v. Commonwealth, Ky., 737 S.W.2d 695 (1987).

We believe that the trial court did not err in denying Rancher's motions for a directed verdict. Possession of contraband may be proven by constructive possession; that is, having control over, or the right to control, the contraband. Rupard v. Commonwealth, Ky., 475 S.W.2d 473, 475 (1971). Constructive possession may also be proven by circumstantial evidence and can be implied where the contraband was found in a place immediately and exclusively accessible to the defendant. Burnett v. Commonwealth, Ky., 31 S.W.3d 878 (2000). Like Rancher, the defendant in Burnett was a lone, back-seat passenger, charged with trafficking in drugs found near his seat after a traffic stop. In addressing Burnett's argument that he was entitled to a directed verdict, the Court reasoned as follows:

We agree that *Leavell, supra*, establishes the principle that proof that a defendant has possession and control of a vehicle is evidence to support a conviction for constructive possession of contraband found within the vehicle. However, we do not believe that either *Leavell* or *Paul* establishes the principle that proof that someone other than a passenger-defendant had possession or control of a vehicle in which contraband is found, precludes a finding that the passenger-defendant was in constructive

possession of the contraband. Rather, we believe that ownership and control of the vehicle is only one factor to consider in these types of cases.

To prove constructive possession, the Commonwealth must present evidence which establishes that the contraband was subject to the defendant's dominion and control. The proof offered by the Commonwealth in this case to show that Burnett was in constructive possession of the cocaine was: (1) that the cocaine was found in an area in the car next to where Burnett had previously been sitting, i.e., in an area within his immediate control; and (2) that the owner of the car disavowed possession of the drugs and claimed that they belonged to Burnett. While not overwhelming, the evidence was sufficient to create an issue of fact for the jury.

Id. at 880-81, (citations omitted).

While the circumstantial evidence in Burnett was somewhat stronger than in this case, we believe that the evidence of Rancher's proximity to the contraband, coupled with the evidence of his suspicious behavior, was sufficient to warrant submission of the matter to the jury. As in Burnett, the cocaine in the pants was found directly under Rancher's seat. Officer Nighbert testified that Rancher was "fidgety" and nervous -- a condition that he testified was rare for an occupant (other than the driver) of an automobile stopped by police. Certainly, Rancher's credibility as a witness was a matter particularly for the jury and not for this court. Thus, it was not unreasonable for the jury to find Rancher guilty of possession of cocaine. See, Commonwealth v. Benham, Ky., 816 S.W.2d 186, 187 (1991).

Next, Rancher alleges error in the trial court's instruction Number 3, given over his objection, which contained the following definition of complicity:

Complicity--Means that a person is guilty of an offense committed by another person when, while acting knowingly with regard to the result of another's conduct, he solicits, commands, or engages in a conspiracy with such other person to engage in that conduct, or aids, counsels, or attempts to aid such person in planning or committing such conduct.

Clearly, the only circumstances requiring a definition for complicity is where "the jury is instructed to find the defendant guilty if 'he, alone or in complicity with another,' committed the offense." 1 Cooper Kentucky Instructions to Juries (Criminal) § 10.01. As stated earlier, the jury never had any opportunity to find Rancher guilty as an accomplice. At best, the trial court's instruction was gratuitous surplusage that had no relevant bearing on Rancher's ultimate fate.

Rancher's objection to this instruction has several facets. He argues that he was not indicted for complicity and that there was no evidence that he engaged in any behavior sufficient to find him guilty as an accomplice; that the instruction fails to include any facts to guide the jury in its application but merely defines an abstract legal concept -- a practice denounced in Daugherty v. Commonwealth, Ky., 572 S.W.2d 861 (1978); and that the confusion engendered by the instruction resulted in a denial of his right to a unanimous verdict. The Commonwealth maintains that:

[w]hile the evidence presented at the trial clearly would have supported an instruction on complicity to trafficking, this issue was made moot by the jury's determination that [Rancher] was guilty of the higher offense of actual possession.

This argument has no relevance since the offense of possession is a lesser included offense as to the crime of trafficking – not a greater offense. The Commonwealth cites no evidence in the record from which the jury could possibly infer that Rancher intended to conspire with, aid, or counsel Valentine or Bavol either in the offense of trafficking in or in possession of cocaine. Having reviewed the entire trial transcript, we agree with the appellant that there is no evidence warranting the incorporation of the definition of complicity within the jury's instructions.

We cannot agree with the Commonwealth's argument that any error in this regard is merely harmless:

Again, the most important fact in this case with regard to this issue, is that [Rancher] was not found guilty of complicity, but was instead found guilty by the jury of possession of a controlled substance under instruction no 2. . . . The jury was given the choice of convicting [Rancher] under count one, trafficking; count two, possession; or count three, complicity. . . . [Rancher] was not convicted pursuant to the instruction he now complains of, complicity, but was rather convicted of possession of a controlled substance.

As Rancher points out, these statements are not accurate. The jury was not given any meaningful opportunity to find him guilty of complicity under instruction number 3; that instruction was definitional only. Rancher had not been indicted under this theory -- nor did the Commonwealth prosecute him under such a theory. The trial court's decision to include a definition of complicity had no bearing on the reality of the crime with which he was charged and arguably served as a

distracted for the jury that may have impaired its ability to evaluate properly the elements of his alleged offense.

We agree with Rancher that it is impossible to discern how the jury utilized the instruction – if at all. We cannot assume that he was not prejudiced by the erroneous instruction.

Accordingly, the judgment of the Whitley Circuit Court is vacated, and the matter is remanded for a new trial consistent with this opinion.

KNOPF, JUDGE, CONCURS.

DYCHE, JUDGE, DISSENTS.

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