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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2001-CA-002740-MR

LESLIE CLAY HOLLAND — APPELLANT

v.

APPEAL FROM BELL CIRCUIT COURT
HONORABLE JAMES L. BOWLING, JR., JUDGE
ACTION NO. 01-CR-00038

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: BAKER, BARBER AND JOHNSON, JUDGES.

JOHNSON, JUDGE: Leslie Clay Holland has appealed from the final judgment and sentence entered by the Bell Circuit Court on November 27, 2001, which convicted him of marijuana cultivation, five or more plants,[1] possession of a controlled substance in the second degree (Phenobarbital),[2] and possession of marijuana.[3]

[1] Kentucky Revised Statutes (KRS) 218A.1423.

[2] KRS 218A.1416.

[3] KRS 218A.1422.

Having concluded that the trial court's failure to sua sponte give a missing evidence instruction was not error, and that the evidence presented at trial was sufficient to support the convictions, we affirm.

On or about September 5, 2000, Kentucky State Police Trooper Curtis Pingleton received information that marijuana was growing in a patch at a specified location in Bell County, Kentucky. Following this lead, Trooper Pingleton and KSP Trooper Kevin Knuckles proceeded to a heavily-wooded area in Bell County known as Cary Hollow. Once they reached Cary Hollow, Trooper Pingleton and Trooper Knuckles pulled over on the side of Kentucky Route 66 and proceeded into the woods in search of the marijuana patch.

Shortly thereafter, Trooper Pingleton heard voices coming from within the woods. Trooper Pingleton followed the sound of the voices until he came to an opening in the woods, which turned out to be a marijuana patch. The patch contained nine marijuana plants, varying in height from seven to eight feet.

Trooper Pingleton noticed Leslie Holland and Robert Caldwell sitting in a makeshift campsite located approximately 25 feet uphill from the patch. Trooper Pingleton then followed a path that led directly to the campsite. Upon approaching the campsite, Trooper Pingleton found Holland sitting in a pink-

covered lawn chair and Caldwell sitting on a foam mattress.

Trooper Pingleton immediately asked both Holland and Caldwell to identify themselves, at which time Holland produced a Kentucky State I.D. card with his name on it. Shortly thereafter, Trooper Pingleton noticed a shotgun lying on the foam mattress where Caldwell was sitting. Trooper Pingleton secured the shotgun, which was loaded, and radioed Trooper Knuckles, who immediately proceeded to the campsite.

Trooper Pingleton placed Holland and Caldwell under arrest and advised them of their Miranda[4] rights. Trooper Pingleton then searched both suspects and found a pill bottle in Holland's pocket. The bottle contained several different types of pills, two of which turned out to be Phenobarbital, a schedule III narcotic.

Holland acknowledged that the shotgun belonged to him, however, both Holland and Caldwell disavowed any prior knowledge of the campsite or the marijuana growing nearby. They claimed that while squirrel hunting they were in search of a resting area when they stumbled upon the campsite. Trooper Pingleton asked Holland and Caldwell if anything at the campsite belonged to them and Holland claimed ownership of a red backpack and Caldwell claimed ownership of a red cooler. Trooper Pingleton asked if he could search these items and Holland and Caldwell

[4] Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

consented. Trooper Pingleton found in Holland's backpack a 12-pack of Budweiser beer, two cans of orange soda, a package of peanut butter and crackers, and several small cakes and cookies. In Caldwell's cooler he found a gallon jug of lemonade. Trooper Pingleton and Trooper Knuckles then escorted Holland and Caldwell back to their cruiser, after which Trooper Pingleton returned to the campsite to secure the evidence.

When Trooper Pingleton arrived back at the campsite, he discovered a bag of marijuana underneath the pink-colored lawn chair where Holland had been sitting. He also found at the campsite a pair of walkie-talkies, a stove, a jug of water, binoculars, a flashlight, a shovel, a hammer, a saw, several 12-gauge shotgun shells, and several empty Budweiser beer cans. Approximately 25 feet downhill from the marijuana patch, Trooper Pingleton discovered a man-made irrigation pond. After securing the evidence, Trooper Pingleton obtained samples from the marijuana plants growing in the patch and he took several photographs of the crime scene.

On February 1, 2001, a Bell County grand jury indicted Holland for marijuana cultivation, five or more plants,[5] possession of marijuana, possession of prescription drugs not in

[5] Caldwell was also indicted and charged with one count of marijuana cultivation.

a proper container,[6] possession of a controlled substance in the second degree (Phenobarbital), and possession of a controlled substance in the third degree (Alprazolam).[7] Caldwell was also indicted and charged with one count of marijuana cultivation. Holland and Caldwell were tried jointly before a jury in the Bell Circuit Court on October 25, 2001.[8]

Trooper Pingleton, who was the first witness to testify at the trial, described in detail the events that transpired in the woods of Cary Hollow on the afternoon of September 5, 2000. Trooper Pingleton identified and described the pill bottle he found in Holland's pocket, the bag of marijuana he found underneath the pink-covered lawn chair where Holland was sitting, the samples he took from the marijuana plants growing in the patch, and the photographs he took of the crime scene, all of which were then introduced into evidence by the Commonwealth. Trooper Pingleton further testified that when Caldwell and Holland were separated at the Bell County Jail that Caldwell informed him that the marijuana patch belonged to Holland.[9]

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[6] KRS 218A.210. The possession of prescription drugs not in a proper container and possession of a controlled substance in the third degree charges were subsequently dismissed.

[7] KRS 218A.1417. Alprazalom is a generic form of Xanax.

[8] The defendants were represented by separate counsel.

[9] Holland's attorney did not object to this line of questioning and it is not an issue on appeal.

Carl Lawson, Jr., a forensic serologist, also testified on behalf of the Commonwealth. Lawson testified that the substance contained in the bag found underneath the chair where Holland was sitting was marijuana. Lawson also testified that the samples collected from the plants found growing in the woods were marijuana. Lawson further testified that two of the pills contained in the bottle found in Holland's pocket were Phenobarbital. After the Commonwealth rested its case, both Holland and Caldwell moved for directed verdicts of acquittal on the cultivation charges. The motions were summarily denied.

Caldwell testified in his own defense and denied any participation in these crimes. Caldwell claimed that he and Holland were squirrel hunting on the afternoon of September 5, 2000, and that they stopped at the campsite because they were tired and looking for a place to rest. Caldwell disavowed any prior knowledge of the campsite or the marijuana growing nearby. Caldwell also denied making any statements to Trooper Pingleton implicating Holland in these crimes.

Holland also testified in his own defense and denied any involvement in these crimes. Holland claimed that he was teaching his dog, Weiser, to squirrel hunt on the afternoon of September 5, 2000. Holland claimed that he and Caldwell stopped to rest at the campsite because they were tired and thirsty. Like Caldwell, Holland disavowed any prior knowledge of the

campsite or the marijuana growing nearby. Holland also claimed the marijuana found underneath the chair where he was sitting was not his. However, he admitted that the shotgun shells found at the campsite belonged to him. As for the Phenobarbital found in his pocket, Holland claimed that he mistakenly mixed his mother's medication with his before he left to go hunting that afternoon. After resting his case, Holland's attorney again moved for a directed verdict of acquittal on the cultivation charge, which was also summarily denied.[10]

The jury found Holland guilty of marijuana cultivation, five or more plants, possession of a controlled substance in the second degree (Phenobarbital), and possession of marijuana.[11] The jury recommended a sentence of three years on the cultivation conviction, 12 months and a $500.00 fine on the possession of a controlled substance in the second degree conviction, and 12 months and a $500.00 fine on the possession of marijuana conviction. On November 27, 2001, the trial court sentenced Holland to three concurrent six-month terms on each conviction. The trial court further ordered Holland to be

[10] Caldwell also joined in the motion.

[11] The jury also found Caldwell guilty of marijuana cultivation, five or more plants.

placed on supervised probation for a period of five years.[12] This appeal followed.

Holland first claims the trial court erred by denying his motion for a directed verdict of acquittal. The standard of review for a trial court's denial of a motion for a directed verdict is well established. In Commonwealth v. Benham,[13] our Supreme Court stated:

> On motion for a 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.
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> 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 [citation omitted].

Holland claims the trial court failed to prove the offenses of marijuana cultivation and marijuana possession beyond a reasonable doubt. In support of this contention, Holland cites the lack of direct evidence linking him to these crimes. Holland insists that the Commonwealth only established

[12] The trial court allowed Holland one year to pay the $1,000.00 fine.

[13] Ky., 816 S.W.2d 186, 187 (1991).

that he was in "mere proximity" of the marijuana patch and the bag of marijuana that was found underneath the chair. Holland claims the Commonwealth failed to establish that he exercised any control over these items, and he insists that he was simply in the "wrong place at the wrong time." Since Holland's argument relates to the two separate convictions for marijuana cultivation and possession of marijuana, we will address each conviction separately.

Holland cites two foreign cases[14] for the proposition that mere proximity to an illicit drug is not sufficient, in and of itself, to support a conviction for possession. Holland then argues that the concept of "constructive possession" does not apply to the offense of marijuana cultivation. This argument is misplaced, however, since possession is not an essential element of marijuana cultivation. KRS 218A.1423, reads in relevant part as follows:

> (1) A person is guilty of marijuana cultivation when he knowingly and unlawfully plants, cultivates, or harvests marijuana with the intent to sell or transfer it.
>
> . . . .
>
> (4) The planting, cultivating, or harvesting of five (5) or more marijuana plants shall

[14] Earle v. United States, D.C., 612 A.2d 1258, 1272 (1992) (Mack, J., dissenting)(holding that mere proximity to drugs is insufficient to warrant a conviction on a drug possession charge) and Walton v. Commonwealth, 255 Va. 422, 497 S.E.2d 869, 871-72 (1988)(holding that mere proximity to an illicit drug is insufficient to prove possession).

> be prima facie evidence that the marijuana plants were planted, cultivated, or harvested for the purpose of sale or transfer.

Thus, "knowingly" and "intentionally" are the requisite mental states required under the statute. In order to satisfy the "knowingly" element of KRS 218A.1423, the Commonwealth must prove that Holland was aware of the presence and nature of the plants as marijuana and of the nature of his conduct regarding the cultivation of the plants.[15] These elements can be proved by either direct or circumstantial evidence.[16] To survive a motion for a directed verdict of acquittal, the Commonwealth must introduce evidence sufficient to "induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty."[17]

This Court was faced with a similar issue in McRay, supra, where the Kentucky State Police found over 2,000 marijuana plants growing on Dewayne McRay's farm. McRay was subsequently convicted of marijuana cultivation in violation of KRS 218A.990(6)(repealed, Acts 1992, ch. 441, § 30).[18] McRay's

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[15] Robert G. Lawson & William H. Fortune, Kentucky Criminal Law § 18-2(c)(2) at 630 (Lexis 1998). As noted above, the mere fact that Holland cultivated five or more marijuana plants is prima facie evidence of his intent to sell or transfer the marijuana. See KRS 218A.1423(4).

[16] McRay v. Commonwealth, Ky.App., 675 S.W.2d 397, 399 (1984).

[17] Benham, 816 S.W.2d at 187.

[18] KRS 218A.990(6) was the predecessor to KRS 218A.1423.

conviction was based solely upon circumstantial evidence as he was never observed in the vicinity of the marijuana patch or seen cultivating in the surrounding area.

McRay appealed his conviction, arguing that the Commonwealth had failed to prove that he had any knowledge of the marijuana patch.[19] In support to this contention, McRay cited the language of KRS 218A.990(6)(c), which read as follows,

> No owner, occupant, or person having control or management of land on which marijuana has been planted, cultivated or harvested shall be found guilty of violating the provisions of this subsection, unless the Commonwealth proves that he knew of the planting, cultivating or harvesting of the marijuana.[20]

McRay insisted that the Commonwealth had failed to prove that he had any knowledge of the planting, cultivating or harvesting of the marijuana found on his farm.

This Court held that there was sufficient evidence to support McRay's conviction. The Court noted that "[g]uilt and knowledge can be established [solely] by circumstantial evidence."[21] Holland attempts to distinguish McRay on the grounds that he did not own the land which he was accused of using for marijuana cultivation. This distinction lacks merit,

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[19] McRay, 675 S.W.2d at 399.

[20] The General Assembly chose to omit this particular provision from the current version of KRS 218A.1423.

[21] Id. at 399. See also 29A Am.Jur.2d, Evidence, § 1434 (2002).

however, as ownership of the land was not an essential element of the offense for which McRay or Holland was convicted.[22]

The question presented on appeal is whether the evidence was sufficient to allow a reasonable jury to infer that Holland knowingly cultivated the marijuana found in the woods of Cary Hollow. While the evidence of guilt is not overwhelming, there is sufficient circumstantial evidence of record to allow a reasonable juror to infer that Holland knowingly cultivated the marijuana.

Trooper Pingleton testified that he found Holland sitting in a makeshift campsite located approximately 20-25 feet uphill from the marijuana patch. Holland admitted to possessing a loaded 12-gauge shotgun and shells and a 12-pack of Budweiser beer. A bag of marijuana was found directly underneath the lawn chair where Holland was sitting. A pair of walkie-talkies, binoculars, a flashlight, a shovel, a hammer, and a saw were also found at the campsite.

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[22] As noted above, McRay was convicted of marijuana cultivation pursuant to KRS 218A.990(6)(a)(repealed, Acts 1992, ch. 441, § 30), which read in relevant part as follows:

> Any person who knowingly and unlawfully plants, cultivates, or harvests marijuana for the purposes of sale shall be confined to the penitentiary for not less than one (1) year nor more than (5) five years or be fined not less than three thousand dollars ($3,000) nor more than five thousand dollars ($5,000) or both.

Thus, Holland was linked to the campsite by the empty Budweiser beer cans, the shotgun shells that he had placed on an earthen shelf and the bag of marijuana suitable for personal use found under the chair where he was sitting. Holland was found with a loaded shotgun at a campsite near the marijuana patch. The campsite overlooked the marijuana patch and it was supplied with materials and equipment suitable for use in the cultivation of marijuana. In addition, Trooper Pingleton testified that co-defendant Caldwell told him that the marijuana plants belonged to Holland. While we agree with Holland that the Commonwealth failed to produce any direct evidence linking him to the marijuana patch, we hold that the circumstantial evidence was sufficient to allow the jury to reasonably infer that Holland was knowingly cultivating marijuana.

We will now address the sufficiency of the evidence to support Holland's conviction for possession of marijuana. Obviously, "possession" is an essential element of KRS 218A.1422, which provides that: "[a] person is guilty of possession of marijuana when he knowingly and unlawfully possesses marijuana." Thus, to support a conviction, the Commonwealth was required to prove Holland's possession of the marijuana, be it actual or constructive.[23] There was sufficient evidence for a reasonable juror to conclude that Holland at a

[23] Houston v. Commonwealth, Ky., 975 S.W.2d 925, 928 (1998).

minimum "constructively possessed" the marijuana found under the chair where he was sitting. Possession sufficient to convict under the law need not be actual since a defendant can be shown to have had constructive possession if he had dominion and control over the contraband.[24] "Kentucky courts have continued to utilize the constructive possession concept to connect defendants to illegal drugs and contraband."[25] Although Holland insisted at trial that the bag of marijuana did not belong to him, the question of whether he had dominion and control over the marijuana was a question of fact for the jury to resolve.[26]

Holland next argues that the Commonwealth had a duty to preserve the evidence found at the campsite, such as the various tools and the bag of marijuana, for fingerprinting. Holland insists that the Commonwealth's failure to preserve this allegedly "exculpatory evidence" violated his due process rights under the Fifth and Fourteenth Amendments to the United States Constitution and Sections 2 and 11 of the Kentucky Constitution. We disagree.

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[24] Id. See also Hargrave v. Commonwealth, Ky., 724 S.W.2d 202, 203-04 (1986) cert denied, 484 U.S. 821, 108 S.Ct. 81, 98 L.Ed.2d 43 (1987) (citing Rupard v. Commonwealth, Ky., 475 S.W.2d 473, 475 (1972)).

[25] Houston, 975 S.W.2d at 927.

[26] Commonwealth v. Smith, Ky., 5 S.W.3d 126, 129 (1999). "Credibility and weight of the evidence are matters within the exclusive province of the jury." Id.

First and foremost, Holland failed to raise this argument below; thus, he is now precluded from raising this issue on appeal, unless it constitutes palpable error pursuant to RCr[27] 10.26. Even assuming arguendo that Holland had raised this issue at trial, his contention lacks merit as it is contrary to the law of this Commonwealth. As was stated by our Supreme Court in Kirk v. Commonwealth,[28] "[a]bsent a showing of bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law."[29]

Trooper Pingleton testified at trial that he did not preserve the items found at the campsite for fingerprinting because of their exposure to moisture. Holland attempts to attack Trooper Pingleton's credibility by claiming that he had no reason to believe that the items found at the campsite had been exposed to moisture due to the fact it had not rained on the day Holland was arrested. It appears that Holland is claiming that Trooper Pingleton acted negligently in the administration of his duties, rather than in bad faith. We fail to see any negligence, and even if there were negligence, it is

[27] Kentucky Rules of Criminal Procedure.

[28] Ky., 6 S.W.3d 823, 826 (1999).

[29] Id. (citing Arizona v. Youngblood, 488 U.S. 51, 58 109 S.Ct 333, 337, 102 L.E.2d 281 (1988); and Collins v. Commonwealth, Ky., 951 S.W.2d 569, 572 (1997)).

insufficient to establish the bad faith required under the standard recognized in this Commonwealth.[30] Consequently, Holland was not denied due process under the law.

Holland's final argument that the trial court erred by failing to sua sponte give a missing evidence instruction concerning the Commonwealth's failure to preserve the evidence found at the campsite is also not preserved since Holland failed to request a missing evidence instruction.[31] Regardless, Holland was not entitled to a missing evidence instruction as he failed to establish that Trooper Pingleton or the Commonwealth acted in bad faith.[32]

For the forgoing reasons, the final judgment and sentence of the Bell Circuit Court is affirmed.

ALL CONCUR.

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[30] Collins, 951 S.W.2d at 573. Cf., Lunnon v. State, Del., 710 A.2d 197, 199-201 (1997), for a similar result under Delaware law. See also Brent G. Filbert, Annotation, Failure of Police to Preserve Potentially Exculpatory Evidence as Violating Criminal Defendant's Rights under State Constitution, 40 A.L.R.5th 113 § 3 (1996).

[31] RCr 9.54(2); Nickell v. Commonwealth, Ky., 565 S.W.2d 145, 148 (1978).

[32] See e.g., Estep v. Commonwealth, Ky., 64 S.W.3d 805, 809-10 (2002) and Roark v. Commonwealth, Ky., 90 S.W.3d 24, 36 (2002).

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