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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 1999-CA-001439-MR

GARY D. ROGERS — APPELLANT

v.

APPEAL FROM LINCOLN CIRCUIT COURT
HONORABLE DANIEL J. VENTERS, JUDGE
ACTION NOS. 97-CR-00042 AND 97-CR-00043

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION

AFFIRMING

** ** ** ** **

BEFORE: EMBERTON, CHIEF JUDGE, KNOPF, AND SCHRODER, JUDGES.

SCHRODER, JUDGE. This is an appeal from a judgment pursuant to a jury verdict convicting appellant of cultivating marijuana and possession of drug paraphernalia. Appellant argues there was insufficient evidence that the plants seized were marijuana and insufficient evidence connecting appellant to the property where the marijuana was seized, that the court improperly allowed the jurors to rehear certain testimony of a Commonwealth witness during their deliberations, and that statements made by

appellant to police after he refused to sign a waiver of rights form were inadmissible. Upon review of appellant's arguments, the record herein, and the applicable law, we believe the lower court's rulings on the above were proper and, thus, affirm.

On August 21, 1997, two officers in a Kentucky State Police helicopter spotted what they believed to be marijuana growing outside a residence in Lincoln County and immediately landed on said property. According to one of the officers, prior to landing, they observed a male subject come out of the house and do something with the suspected marijuana, either take it inside or push it over. Upon landing, the officers then went up to the house and were met at the door by appellant, Gary Rogers. The officers then informed Rogers that they were aware of marijuana growing on the property and asked who owned the house. Appellant stated that his mother, Estelle Rogers, owned the house and property. Subsequently, the officers obtained the consent of Estelle Rogers to search the residence.

The search of the property around the house yielded 37 marijuana plants. In the basement of the house, police found marijuana plants in a plastic tray in a stove, a police scanner, and a handgun. Of the 37 marijuana plants, police took leaf samples of 15 and destroyed the remainder. The samples were then taken to the Kentucky State Police evidence locker, after

which they were sent to the lab where they all tested positive for marijuana.

During the search of the property in question, the evidence established that other family members of Gary Rogers and Estelle Rogers were present on the property, including Gary's brother, nephew, and at least one sister. When asked by Officer Stewart Adams, one of the officers from the helicopter who first approached the house, who the marijuana belonged to, appellant stated that he did not know anything about it. Subsequently, when questioned by another officer who responded to the scene, Officer Curtis Mouser, appellant admitted that he had been living in the basement of the house with his mother because he had been remodeling his home. Appellant also admitted to Officer Mouser that the handgun, scanner, and certain clothes in the basement were his. Appellant further stated that he was responsible for maintaining the outside property, including mowing the grass.

On September 26, 1997, police conducted a second search of the Rogers' residence pursuant to a search warrant. In this search, police seized fluorescent lights, soil, fertilizer, scales, baggies, more firearms, more marijuana, and a large amount of what police believed to be stolen property.

Appellant was indicted in two separate indictments, one pertaining to the search on August 21, 1997, and the other

pertaining to the search warrant executed on September 26, 1997. Relative to the August search, appellant was charged with one count of cultivating more than five marijuana plants. As to the September search, appellant was charged with trafficking in marijuana, a misdemeanor count of possession of drug paraphernalia, and numerous counts of receiving stolen property. Pursuant to a jury trial on May 24-25, 1999, appellant was acquitted on the trafficking charge and convicted of the one count of cultivating more than five marijuana plants and the one count of possession of drug paraphernalia. The receiving stolen property charges were dismissed upon defense motion for a directed verdict. Appellant was sentenced to one year in prison on each charge, to be served concurrently. This appeal followed.

Appellant first argues that the trial court erred in not granting his motion for directed verdict on grounds that there was insufficient evidence tying him to the marijuana growing outside the residence. 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 is the defendant entitled to a directed verdict of acquittal. Commonwealth v. Benham, Ky., 816 S.W.2d 186 (1991).

As stated earlier, Officer Mouser testified that appellant admitted to him that he was living in the basement of

his mother's home at the time the marijuana was growing there because he was remodeling his own home. He specifically admitted that certain clothes, the police scanner, and the gun found there were his. Further, appellant told Officer Mouser that he mowed and maintained the outside property.

Appellant points to the testimony of his nephew, David Adams, who claimed that he (Adams) was the one living in the basement of Estelle Rogers' home and that most of the marijuana found inside the home was his (Adams'). Adams further testified that he and his uncle, Billy Reynolds, planted the marijuana outside the house and that none of the marijuana found was appellant's. Adams, as well as other friends/family of appellant's, testified that appellant did not reside at Estelle Rogers' home.

We believe the statements to Officer Mouser in which appellant admitted that he lived in the basement of Estelle Rogers' home and maintained the outside property were sufficient connection to the property and the marijuana thereon to submit the issue of whether appellant was cultivating the marijuana to the jury. It has been held that circumstantial evidence is sufficient to establish that a defendant was cultivating marijuana. McRay v. Commonwealth, Ky. App., 675 S.W.2d 397 (1984). While the evidence was conflicting, it is for the trier

of fact to decide if appellant, Adams, Reynolds, or, perhaps all three, were cultivating the marijuana.

Appellant next argues that there was not sufficient evidence that the plants seized by the police were, in fact, marijuana. We disagree. Officer Mouser testified that he recognized all the plants seized outside the house as marijuana from his past experience in identifying marijuana. Officer Mouser further testified that he took the 15 leaf samples to the Kentucky State Police evidence locker and logged them in, after which they were sent to the Kentucky State Police ("KSP") Laboratory for analysis. William Bowers, a forensic chemist at the KSP lab, testified that he analyzed the samples in evidence bag 98004412 which had been submitted by Officer Mouser and transported by Officer Stewart Adams. He stated that all the samples contained in that evidence bag tested positive for marijuana. In our view, the above evidence was sufficient evidence that the plants seized in the present case were marijuana.

Appellant's next assignment of error is that he was denied due process and a fair trial when the trial court allowed the jury to review part of Officer Mouser's testimony without rehearing the evidence refuting this testimony. During jury deliberations, the jury asked the court if they could rehear Officer Mouser's testimony specifically regarding the statements

made by appellant to the officer as they were walking around the premises. Appellant's trial counsel objected on grounds that it would unduly emphasize a particular portion of the evidence. The trial court overruled the objection, allowing the jury to rehear the requested portion of Officer Mouser's testimony. A decision as to whether to replay certain requested testimony during jury deliberations is within the sound discretion of the trial court. Baze v. Commonwealth, Ky., 965 S.W.2d 817 (1997), cert. denied, 523 U.S. 1083, 118 S. Ct. 1536, 140 L. Ed. 2d 685 (1998). We cannot say the court abused its discretion in allowing the jury to rehear the testimony at issue in this case.

Appellant also argues that the trial court erred in failing to suppress the evidence resulting from the search of the outside property. We deem this argument to be unpreserved since appellant's suppression motion related only to the search inside the home and whether Estelle Rogers gave valid consent therefor. Hence, this issue is precluded from our review. Patton v. Commonwealth, Ky., 273 S.W.2d 841 (1954). Further, we reject appellant's assertion that the alleged error constituted palpable error under RCr 10.26.

Appellant's final argument is that the trial court erred in allowing the statements made by appellant to Officer Mouser regarding the fact that he was living on the premises to be admitted, since he refused to sign a waiver of rights form.

During the trial, the court held a hearing on this issue upon the objection by defense counsel to the admission of these statements.

Officer Mouser testified during this hearing that when he first arrived on the scene and prior to asking appellant any questions on the day in question, he verbally advised appellant of his Miranda rights and asked him to sign a waiver of rights form. Officer Mouser testified that appellant told him that he was willing to talk to him, but that he would not sign the waiver of rights form because he could not read. According to Officer Mouser, during his conversation with appellant, he never asked for an attorney or refused to answer any questions. Conversely, appellant testified that he was not read his rights by any officer before the police began questioning him. The trial court allowed the statements made to Officer Mouser to be admitted, finding that, despite appellant's refusal to sign the waiver of rights form, appellant was verbally read his rights and thereafter voluntarily spoke with and answered the officer's questions.

Any statements made to police are considered to have been made voluntarily and are, thus, admissible if the defendant has been read his Miranda rights and thereafter does not request to consult with counsel or otherwise indicate that he does not wish to be interrogated. Jewell v. Commonwealth, Ky., 424

S.W.2d 394 (1967). There is no requirement that the defendant sign a written waiver of his rights before he can be interrogated. A trial court's findings of fact on a motion to suppress an incriminating statement to police are conclusive if supported by substantial evidence. RCr 9.78; Talbott v. Commonwealth, Ky., 968 S.W.2d 76 (1998). In the present case, the trial court's finding that appellant had been read his Miranda rights prior to making the statements to Officer Mouser was supported by substantial evidence (Officer Mouser's testimony). Hence, the statements were properly admitted.

For the reasons stated above, the judgment of the Lincoln Circuit is affirmed.

ALL CONCUR.

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