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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000228-MR

CARL TIMOTHY FULKERSON — APPELLANT

v.

APPEAL FROM MCLEAN CIRCUIT COURT
HONORABLE DAVID H. JERNIGAN, JUDGE
ACTION NO. 03-CR-00028

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: HENRY, McANULTY, AND MINTON, JUDGES.

McANULTY, JUDGE: Carl Timothy Fulkerson was tried by a McLean County jury and found guilty of first degree possession of a controlled substance (methamphetamine) while in possession of a firearm. In this direct appeal of that judgment, Fulkerson alleges that errors occurred in the evidence introduced at trial which require that his judgment of conviction be set aside. We affirm the judgment below.

Fulkerson was involved in a single vehicle accident on April 23, 2003, in the early morning hours. His truck was

observed by the staff of the McLean County Ambulance Service wedged in a ditch so that the doors could not be opened. Fulkerson was seated in the driver's seat. He asserted that he was uninjured. While paramedics waited for the police to arrive, they observed Fulkerson crawl out of the truck through the window, and walk to the passenger side of the truck. He appeared to rummage through items in the vehicle, and leave the vehicle holding something. He walked to a wooded area nearby, and returned empty handed. The paramedics observed this behavior continuing until the police arrived.

When Deputy Palmer arrived, he observed Fulkerson in the wooded area. The paramedics shared their observations with the deputy, who then asked Fulkerson to come back from the woods. Deputy Palmer went to the wooded area and found a blue container by a tree where Fulkerson had been. Inside the container, there was a clear plastic bag containing a white powdered substance. Fulkerson was arrested, and a search of the vehicle incident to arrest revealed a loaded Smith & Wesson 9 mm pistol and loaded Ruger .44 caliber revolver. The Kentucky State Police crime laboratory performed tests which identified the substance as being methamphetamine.

Fulkerson's first claim of error is that the Commonwealth did not establish that the weapons in his vehicle were "firearms" as defined by the Kentucky Penal Code. Pursuant

to KRS 218A.992, Fulkerson's conviction for possession of a controlled substance was enhanced due to his possession of a firearm at the time of commission of the offense. KRS 237.060 defines "firearm" for purposes of the use of KRS 218A.992 as, "any weapon which will expel a projectile by the action of an explosive." Fulkerson argues that the Commonwealth did not establish that the pistols in his vehicle were firearms because they were not shown to be operable. He asserts that since the deputy testified the Commonwealth never tested the weapons for operability, it did not show that they were capable of firing any projectiles.

We do not agree that testing the weapon was the only way to show that the firearms met the statutory definition. The circumstances proved by the Commonwealth in this case included the deputy's testimony that he had experience and training in the use of firearms, and that the weapons upon his examination appeared to be in working order. Appellant testified that the weapons were capable of firing before the wreck of his vehicle.

On motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. Commonwealth v. Benham, 816 S.W.2d 186 (Ky. 1991). It is well-settled in Kentucky that a conviction may be obtained by circumstantial evidence. Pruitt v. Commonwealth, 490 S.W.2d 486, 488 (Ky. 1972). Circumstantial

evidence must be of such a nature that it would not be clearly unreasonable for the jury to find guilt beyond a reasonable doubt. Ford v. Commonwealth, 665 S.W.2d 304 (Ky. 1983). We concur that this standard was met as to the firearm element of the offense. The facts adduced were consistent with a belief that the weapons were operable, and therefore "firearms" under the statutory definition. The trial court correctly denied Fulkerson's motion for directed verdict on this issue.

Fulkerson next claims that it was error for the Kentucky State Police chemist to testify that she identified the substance as methamphetamine without the trial court's first conducting a hearing, pursuant to Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S.Ct. 2786, 125 L. Ed. 2d 469 (1993), to determine the scientific reliability of the tests conducted. The chemist testified that she performed two tests on the sample supplied: 1) an identifying test, using mass spectroscopy, which she testified is to concretely identify the item as a certain substance, and 2) a confirming test, using gas chromatography, which she stated identifies a substance by comparing it to a standard that is run at the same time. She testified that the methods of mass spectroscopy and gas chromatography are well accepted for analysis of organic substances, which is what controlled substances are generally. Following Fulkerson's objection to the admission of the test

results, the trial court held that a hearing was not required under Daubert because the tests were such that, "They're very reliable, they're not new, they're timeworn."

We review the court's finding that the reasoning or methodology is scientifically reliable for clear error. Miller v. Eldridge, 146 S.W.3d 909, 917 (Ky. 2004). The trial court is not required under Daubert to hold a formal hearing in every case. Hyatt v. Commonwealth, 72 S.W.3d 566, 575 (Ky. 2002). A trial court has "wide latitude in deciding *how* to test an expert's reliability and in deciding whether or when special briefing or other proceedings, i.e., at a Daubert hearing, is needed to investigate reliability." Dixon v. Commonwealth, 149 S.W.3d 426, 430 (Ky. 2004).

The trial court was correct that there are scientific methods, techniques and theories so well established that they can be accepted without the necessity of a formal hearing. See Johnson v. Commonwealth, 12 S.W.3d 258 (Ky. 1999); Florence v. Commonwealth, 120 S.W.3d 699 (Ky. 2003). The better method is to take judicial notice pursuant to KRE 201(b)(2) of the evidence's reliability and validity. Johnson, 12 S.W.3d at 261. We conclude that the tests used in this case to identify the substance as methamphetamine are widely accepted in the scientific community and are considered quite reliable and valid. State v. Lucero, 207 Ariz. 301, 85 P.3d 1059 (Ariz.App.

2004); State v. Sercey, 825 So.2d 959 (Fla.App. 2002). Moreover, Fulkerson did not provide proof to refute the reliability of the identifying and confirming tests used in this case. Florence, 120 S.W.3d at 703. Thus, we affirm the trial court's admission of this evidence.

Fulkerson's third allegation of error is that one of the sheriff's deputies erroneously testified to a field test result without his having been qualified as an expert in such tests. Although Fulkerson objected to this line of inquiry, the deputy testified that his field test result "was positive" before the trial court could sustain the objection. Fulkerson requested a mistrial, and stated that if the trial court was not inclined to grant a mistrial, an admonition should be given. The Commonwealth argued that there was no necessity for a mistrial since the chemist was expected to testify that the substance was tested and found to be methamphetamine. The trial court held that the mistrial would be granted if the chemist did not so testify, and granted the motion for an admonition. The trial court admonished the jury to disregard the testimony regarding a field test as such tests were not admissible testimony.

Indeed, as previously discussed, the Kentucky State Police lab chemist testified that the substance tested positive for methamphetamine. We conclude that Fulkerson has received an

adequate remedy, particularly as he requested the admonition, Stanford v. Commonwealth, 734 S.W.2d 781 (Ky. 1987), and can show no harm for which a mistrial would be necessary since the substance was scientifically identified as methamphetamine. A mistrial is appropriate only where the record reveals "a manifest necessity for such an action or an urgent or real necessity." Skaggs v. Commonwealth, 694 S.W.2d 672, 678 (Ky. 1985), citing Wiley v. Commonwealth, 575 S.W.2d 166 (Ky.App. 1979). The trial court's ruling was correct.

Finally, Fulkerson argues that no proper chain of custody of the evidence was established and so the integrity of the substance was not maintained. Deputy Palmer testified that he secured the evidence from the scene in the McLean County evidence room. His answer to the Commonwealth's Attorney's question, "You personally took it and took it there?" is inaudible. When asked what was done with the container with the powdery substance, Deputy Palmer testified that Deputy Wright transported it to the Kentucky State Police laboratory. When asked how Deputy Wright came into possession of the substance, Deputy Palmer testified that he gave it to him from the evidence room. Deputy Palmer was unable to recall the date that occurred.

Deputy Wright testified that the evidence was in the sheriff's office, and either the sheriff or Chief Deputy Orton

asked him to transport the substance to the Madisonville laboratory. Deputy Wright was unable to answer the question from whom he had received the evidence. He testified that the evidence was kept in the office filing cabinet and he did not know whether the cabinet was locked, but said that the evidence was not accessible to anyone but a deputy. He testified that he took the evidence to the Kentucky State Police laboratory at Madisonville on June 5, 2003.

Fulkerson objected to the admission of the evidence on the basis of the chain of custody as Officer Wright could not testify as to how he had received the evidence. The Commonwealth argued that Deputy Palmer identified himself as the source of providing the evidence to Deputy Wright. The trial court found that there was sufficient proof as to the evidentiary admissibility and the defense's arguments were ones that went to the weight of the evidence.

The trial court's ruling was correct. It is unnecessary to establish a perfect chain of custody or to eliminate all possibility of tampering or misidentification so long as there is persuasive evidence that the reasonable probability is that the evidence has not been altered in any material respect. Love v. Commonwealth, 55 S.W.3d 816, 821 (Ky. 1998). Gaps in the chain normally go to the weight of the evidence and not to its admissibility. Id.

The evidence offered by the deputies provided a reasonable probability that the substance delivered to the Kentucky State Police laboratory was the same as that collected from the scene. Additionally, there was a sufficient basis for believing that the substance was not accessible to others and so had not been altered in any material respect prior to its being transported from the McLean County Sheriff's office to the laboratory. Any questions as to the transfer of the evidence from the evidence area to Deputy Wright, as a possible gap in the chain, go to the weight of the evidence rather than to its admissibility. Therefore, the court's ruling was correct and the evidence as to the testing of the substance was properly admitted.

For all the foregoing reasons, we affirm the judgment of the Mclean Circuit Court.

ALL CONCUR.

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