

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-002134-MR

DAVID ROWLAND

APPELLANT

APPEAL FROM BRECKINRIDGE CIRCUIT COURT
v. HONORABLE ROBERT A. MILLER, JUDGE
INDICTMENT NO. 03-CR-00126

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: COMBS, CHIEF JUDGE; DYCHE AND HENRY, JUDGES.

HENRY, JUDGE: David Rowland appeals from a judgment of the Breckinridge Circuit Court sentencing him to 15 years' imprisonment following his conviction on controlled substance and drug paraphernalia possession charges. Upon review, we affirm.

On October 22, 2003, David was indicted by the Breckinridge County Grand Jury on one count of manufacturing methamphetamine, one count of first-degree trafficking in a

controlled substance, and one count of possession of drug paraphernalia, with each count being enhanced by David's possession of a firearm. He was also charged with being a first-degree persistent felony offender.

The indictment stemmed from a bulletin received by the city of Cloverport advising that a man named Gary Thompson was "cooking" methamphetamine in Daviess and Hancock Counties and was then traveling through other counties to sell it. The bulletin also advised that Thompson was believed to be armed and dangerous and included a felony warrant from the Perry County Sheriff's Department in Cannelton, Indiana for his arrest.

Acting on this information, on August 30, 2003, Officers Rob Vanderhoef and David Pace visited a local address in Cloverport looking for Thompson and learned that he might be at the home of Wesley and Carol Rowland. The officers then traveled to the Rowland property.

Upon arrival, the officers found and secured Thompson and obtained verbal consent from Carol Rowland to search her house and property. They also called Bobby Jones, the actual owner of the property, and requested permission to search the outbuildings and curtilage of the property, to which he agreed.

During the search, the officers found both firearms and various items associated with the manufacture of methamphetamine in a garage and in a mobile home adjacent to the

property. Subsequent to the arrival of additional police officers as backup, Trooper David Bailey from the Kentucky State Police entered the house and found David Rowland sitting on a bed in one of the bedrooms on the first floor. According to David, at the time he was visiting the Rowlands when he became tired and decided to take a nap in his nephew's bedroom. Once David was moved out of the bedroom and into the kitchen, Trooper Bailey found various drug paraphernalia and what was later confirmed to be methamphetamine under the mattress where he had been sitting. As a result, David was arrested and charged with first-degree possession of a controlled substance, possession of marijuana, and possession of drug paraphernalia. In addition, Wesley Rowland, Carol Rowland, Thompson, and another woman were also arrested.

On September 16, 2003, the Breckinridge District Court held a preliminary hearing on all of the defendants' cases. During the hearing, Officer Vanderhoef testified that there were boxes of David's clothes in the kitchen, indicating that he lived there. Officer Pace testified that David also confirmed that bags by the back door of the house were his. In addition, the district judge noted that Wesley and Carol Rowland's written requests for the appointment of counsel stated that David lived at their residence. A similar request by David also represented that he lived with Wesley and Carol.

At the conclusion of the hearing, the district court found that there was probable cause to indict David, and the matter was referred to the grand jury. As noted above, he was indicted on October 22, 2003. On the following day, David appeared in open court with his counsel and entered a plea of "not guilty" to the pending charges.

On May 11, 2004, a hearing was held relating to a suppression motion filed by Carol Rowland. During the hearing, David's counsel advised the trial court that a suppression motion had not been filed on David's behalf due to their position that he was not living at the Rowland residence at the time of his arrest and therefore did not have standing to do so. At the conclusion of the hearing, the trial court found that Carol had voluntarily consented to the search of her house and garage, so the evidence found therein would accordingly not be suppressed. The court further found, however, that any evidence found within the mobile home adjacent to the Rowland property should be suppressed since the mobile home was being rented by the Rowlands and therefore their permission was needed to engage in a search there.

David's case proceeded to trial on July 29, 2004, with Wesley and Carol Rowland already having pled guilty to various charges. The Commonwealth's first witness was Trooper Bailey, who testified that when he arrived at the Rowland residence, he

was told that officers had received consent to conduct a search. Once he was inside the house, Bailey found David sitting on a bed in a first-floor bedroom. After David would not respond to his questions or move from the bed, Bailey indicated that he directed him to move into the kitchen. Once David did so, Bailey testified that he lifted the mattress where he had been sitting and found what was later determined to be processed methamphetamine and drug paraphernalia. Bailey further testified that, based on his training and experience, he believed that David's initial refusal to move from the bed was an effort to try to conceal the discovered items. Towards the end of Bailey's testimony, the Commonwealth introduced a photo of the bedroom in question, as well as photos of the items found under the mattress. David offered no objection to the introduction of these photos.

Carol Rowland was the next witness to testify on behalf of the Commonwealth. She indicated that, as of August 30, 2003, David had been living in her home for three to four months and had his own bedroom next to the kitchen. Carol further testified that the methamphetamine and drug paraphernalia found by the police did not belong to her or her husband, and that David had a problem with methamphetamine addiction. She also admitted that other people had access to the house and bedrooms and often stayed overnight.

The third witness for the Commonwealth was Officer Vanderhoef. Vanderhoef testified that he was not surprised to find David at the Rowland residence, as it was his understanding that David had been living there since problems with his sister caused him to move from her house. Vanderhoef further testified that there were two bedrooms on the first floor of the residence - one where David was found and another that appeared to be Wesley and Carol Rowland's master bedroom. Moreover, during Vanderhoef's testimony, the Commonwealth introduced additional photos of things found at the Rowland residence, including firearms, items used to manufacture methamphetamine, an envelope containing foil (with residue), and a plastic tube (with residue). Again, David voiced no objection to the introduction of these photos.

The Commonwealth's final witness was Amelia Gordon of the Kentucky State Police. She testified as to the testing and identification of the methamphetamine and drug paraphernalia found under the mattress on which David had been sitting. During Gordon's testimony, the Commonwealth introduced into evidence a box containing some of the items found under the mattress. Once again, David offered no objection.

At the end of the Commonwealth's case, David moved - for the first time - to suppress the items found in the Rowland residence and to dismiss the case against him. He specifically

based his request on the trial court's decision as to the suppression motion filed earlier by Carol Rowland. The trial court denied this motion, as well as David's subsequent motion for a directed verdict.

David's only witness was his sister, Janet Harper, who testified that he had been living with her on August 30, 2003. She also indicated that on that date David had been visiting the Rowlands and had only been doing so for two or three weeks. David's renewed directed verdict motion following her testimony was again denied.

Following closing arguments, the case was submitted to the jury, which found David guilty of first-degree possession of a controlled substance and possession of drug paraphernalia. Following the penalty phase, the jury found that David was a first-degree persistent felony offender and recommended an enhanced sentence of 15 years on the controlled substance charge and a sentence of 12 months on the drug paraphernalia charge.

On August 9, 2004, David moved for a new trial, arguing that the "testimony concerning the methamphetamine found inside the home at Hwy 992 in Cloverport Kentucky should not have been allowed pursuant to this Court's order entered May 14, 2004." In response, the Commonwealth argued that David never filed a motion to suppress and failed to object to the introduction of evidence at trial, thereby waiving the issue of

suppression. In addition, the Commonwealth set forth that it "honored the Court's ruling [in the Carol Rowland case] and did not introduce any evidence against [David] that was found in a mobile home adjacent to [David's] residence." The trial court ultimately denied the motion for a new trial in its August 20, 2004 order.

On September 9, 2004, the trial court entered a judgment and sentence order, sentencing David in accordance with the jury's recommendations. This appeal followed.

On appeal, David first argues that the trial court erred in failing to grant his motion for a directed verdict of acquittal. Specifically, he argues that it was unreasonable for the jury to find him guilty of possession of a controlled substance and drug paraphernalia because the Commonwealth failed to prove that he had either constructive or actual possession of those items when they were seized at the Rowland residence. The Commonwealth, of course, disagrees with this position and also contends that the issue is not properly preserved for review.

After examining the record, we agree that it is arguably questionable as to whether the issue is properly before us. However, we ultimately conclude that the question is of little practical consequence, as we believe that the evidence was sufficient to convict David whether the issue is preserved

or whether it is unpreserved and subject to review under the RCr¹ 10.26 "palpable error" standard.²

As a general rule, we are obligated to review arguments pertaining to directed verdicts under the standard set forth in Commonwealth v. Benham, 816 S.W.2d 186 (Ky. 1991): "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." Id. at 187. "On motion for 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." Id. "A motion for a directed verdict of acquittal should only be made (or granted) when the defendant is entitled to a complete acquittal i.e., when, looking at the evidence as a whole, it would be clearly unreasonable for a jury to find the defendant guilty, under any possible theory, of any of the crimes charged in the indictment or of any lesser included

¹ Kentucky Rules of Criminal Procedure.

² RCr 10.26 provides: "A palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error."

offenses." Campbell v. Commonwealth, 564 S.W.2d 528, 530 (Ky. 1978). Essentially, a defendant is entitled to a directed verdict only if the Commonwealth produces no more than a "mere scintilla" of evidence of guilt. Benham, 816 S.W.2d at 187-88. We finally note that, "[f]or 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." Id. at 187.

After reviewing the record in a light drawing all fair and reasonable inferences from the evidence in favor of the Commonwealth, we believe that the jury's verdict finding David guilty of possessing methamphetamine and drug paraphernalia is amply supported by the evidence. As the parties recognize in their briefs, in Kentucky, possession may be either actual or constructive, and it need not be exclusive. See, e.g. Johnson v. Commonwealth, 90 S.W.3d 39, 42 (Ky. 2002). Constructive possession, in particular, exists "when a person does not have actual possession but instead knowingly has the power and intention at a given time to exercise dominion and control of an object, either directly or through others." Id.; see also Hargrave v. Commonwealth, 724 S.W.2d 202, 203-04 (Ky. 1986). Accordingly, "[t]o prove constructive possession, the Commonwealth must present evidence which establishes that the

contraband was subject to the defendant's dominion and control." Pate v. Commonwealth, 134 S.W.3d 593, 598-99 (Ky. 2004).

As noted above, Trooper Bailey told the jury that he found David sitting on a bed in the Rowland residence, and that he initially failed to move or respond to his questions. Bailey then testified that he believed from his past experience that David did not want to move from the bed because he was trying to conceal something that was hidden underneath the mattress. There was also considerable testimony supporting the argument that the bedroom essentially "belonged" to David, and that he had been living with the Rowlands and sleeping in the bed in question for several months.³ Accordingly, we believe that the evidence could support a reasonable inference by the jury that the items underneath the mattress were under David's dominion and control, and that he was, in fact, trying to hide them from police. See Blades v. Commonwealth, 957 S.W.2d 246, 250 (Ky. 1997) ("It is well-settled that a jury may make reasonable inferences from the evidence."). We therefore conclude that the trial court did not err in refusing to grant David a directed verdict of acquittal, as it was not clearly unreasonable for the

³ In reaching this conclusion, we recognize the testimony from David's sister that he had been living with her at the time of his arrest. However, where conflicting testimony exists, issues of credibility and the weight to be given any piece of evidence are matters strictly within the purview of the jury. See Benham, 816 S.W.2d at 187; Commonwealth v. Smith, 5 S.W.3d 126, 129 (Ky. 1999).

jury to find him guilty of possessing methamphetamine and drug paraphernalia.

David's second argument is that the trial court erred in failing to suppress the items found under the mattress on which he was sitting because he did not give consent for the bedroom to be searched. The Commonwealth argues in response that this claim of error was waived when David failed to file a motion to suppress at any point prior to trial, and when he failed to object when this evidence was introduced during its case-in-chief.

The issue of evidence suppression is governed by RCr 9.78, which provides:

If at any time before trial a defendant moves to suppress, or during trial makes timely objection to the admission of evidence consisting of (a) a confession or other incriminating statements alleged to have been made by the defendant to police authorities, (b) the fruits of a search, or (c) witness identification, the trial court shall conduct an evidentiary hearing outside the presence of the jury and at the conclusion thereof shall enter into the record findings resolving the essential issues of fact raised by the motion or objection and necessary to support the ruling. If supported by substantial evidence the factual findings of the trial court shall be conclusive.

By its plain language, the rule requires that a person seeking to suppress the introduction of evidence do so either: (1)

before trial, via a motion to suppress, or (2) during trial, via a timely objection.

In this case, David did not file a motion to suppress before trial. Indeed, when asked at the beginning of Carol Rowland's suppression hearing whether David was joining in the motion, his counsel advised the trial court that a suppression motion had not been filed on his behalf due to their position that he was not living at the Rowland residence at the time of his arrest and therefore did not have standing to do so. Consistent with this position, David offered no objection at trial to the introduction into evidence of the items found under the mattress or any photos of those items.

Following the close of the Commonwealth's case, David argued - for the first time - that the evidence found under the mattress should be suppressed because he did not give his consent to search the bedroom and, therefore, an unlawful search and seizure occurred. However, we agree with the Commonwealth that, pursuant to the clear language of RCr 9.78, if David wanted to request that those items be suppressed, he should have done so before trial or in a timely objection during trial - not after they were already introduced into evidence. At that point, it was simply too late and the issue was waived. Cf. Brown v. Commonwealth, 890 S.W.2d 286, 290 (Ky. 1994) (holding that, even when a defendant files a motion to suppress, a

failure to insist that the trial court rule on that motion constitutes a waiver of the issue); Higdon v. Commonwealth, 473 S.W.2d 110, 111 (Ky. 1971) (holding that a defendant's motion to strike trial testimony that had already been admitted and not objected to was "too late" and "correctly overruled").

Consequently, we must reject David's arguments in this respect.

Consequently, the judgment of the Breckinridge Circuit Court is affirmed.

ALL CONCUR.

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