

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-001897-MR

THOMAS CONLEY

APPELLANT

APPEAL FROM PENDLETON CIRCUIT COURT
v. HONORABLE ROBERT MCGINNIS, JUDGE
ACTION NO. 05-CR-00020

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: ABRAMSON AND GUIDUGLI, JUDGES; BUCKINGHAM,¹ SENIOR
JUDGE.

GUIDUGLI, JUDGE: Thomas Conley has appealed his June 16, 2005,
conviction following a jury trial in Pendleton Circuit Court for
Possession of a Firearm (Handgun) by a Convicted Felon (KRS
527.040) and for Resisting Arrest (KRS 520.090). He argues that
the circuit court should have directed a verdict in his favor on
both charges because the Commonwealth failed to establish

¹ Senior Judge David C. Buckingham, sitting as Special Judge by assignment of
the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution
and KRS 21.580.

sufficient proof to support a conviction on either charge. We disagree. Therefore, we affirm.

On January 2, 2005, Kentucky State Police Troopers Wendell Higginbotham and Scott Lengle went to Conley's residence to serve an arrest warrant on him for leaving the scene of an accident in Bracken County the previous day. When Trooper Lengle knocked on the door, Conley opened it, but attempted to go back inside once he found out he was going to be arrested. Conley, who has been paralyzed from the waist down since 1981, uses a wheelchair for mobility and was in the wheelchair when he answered the door that day. Trooper Lengle grabbed Conley's wrist to place him in handcuffs, and a struggle ensued. Conley fell out of the wheelchair onto the porch, taking the officers with him, and held his hands underneath his stomach, refusing to allow the officers to handcuff him or further subdue him. Both officers noted Conley's surprising strength and that they were unable to pry his hands apart. When he refused to respond to their official presence, verbal commands, or soft hand and knee checks, the officers sprayed him twice with OC, a pepper spray-like solution. Trooper Lengle eventually had to use flex cuffs to restrain Conley.

Once the officers had successfully restrained him, Trooper Higginbotham rinsed Conley's face with a wet cloth. They also called the local EMS to treat minor scratches on

Conley's wrists. While Trooper Higginbotham was cleaning Conley's face, Trooper Lengle searched the immediate area and discovered a loaded .22 caliber handgun under a cushion of Conley's wheelchair. After removing the ammunition clip as well as the bullet in the chamber, Trooper Lengle placed the gun on the porch. The officers then transported Conley to the Bracken County Courthouse for transportation to the Mason County Detention Center.

The Pendleton County grand jury indicted Conley on two charges; namely, Resisting Arrest and Possession of a Handgun by a Convicted Felon.² The matter proceeded to a jury trial on June 16, 2005. The Commonwealth introduced the testimony of Troopers Higginbotham and Lengle, while Conley testified on his own behalf and also called his mother, Wanda Conley, to testify. Wanda testified that she had visited her son the prior afternoon to partake in their traditional New Year's Day dinner. She owned the handgun the officers found, which she brought to Conley's residence to scare away stray dogs. According to her testimony, she removed the handgun from her purse while Conley was sleeping on the couch, and placed it on the seat of his wheelchair. She then heard a truck approaching as well as children's voices. She decided to hide the handgun under the seat of the wheelchair so that the children would not find it.

² Conley had been convicted on a felony drug charge in 1997.

When she left at 4:00 that afternoon, she forgot to retrieve the handgun from under the wheelchair cushion. She returned the next afternoon to get the handgun, but by that time Conley had already been arrested. Conley testified that he did not know that his mother had brought the handgun to his residence or that she had placed it under the cushion of his wheelchair. He testified that in past discussions, he had told his mother that he did not need to have any guns in his home as they would have caused too much trouble based upon his status as a convicted felon. He also testified that when the officers told him he was being arrested, he panicked and did not know what to do. He claimed that the officers stomped on his head and used a whole can of mace on him.

Following deliberations, the jury convicted Conley on both counts charged in the indictment, and later sentenced him to five years on the handgun possession conviction and fined him \$500 on the resisting arrest conviction. This appeal followed.

On appeal, Conley argues that there was insufficient proof to support his conviction, and that the circuit court should have directed a verdict in his favor on both charges. In its brief, the Commonwealth points out that Conley's argument was not preserved for review as the record does not contain the motion for a directed verdict his counsel apparently made at the conclusion of the Commonwealth's case. For this reason, it

posits, there is no way to determine what objections Conley might have offered or what elements of the offenses he was claiming were supported by insufficient proof. The Commonwealth also offers a second preservation argument, in that Conley failed to object to the giving of instructions on a particular issue. Despite the lack of preservation, the Commonwealth nevertheless maintains that it submitted sufficient proof to allow the matter to go to the jury and to support the ultimate convictions.

We agree with the Commonwealth that Conley's arguments are unpreserved. A close examination of the videotaped record of the trial reveals a lapse of about one minute following the close of the Commonwealth's case, which resumes during a conversation regarding jury instructions. The record does not reflect any motion for a directed verdict, which could have been argued during the lapse. While we note that counsel for Conley made a renewed motion for a directed verdict at the close of his case, which the circuit court denied, there is no record of the original motion or the grounds upon which it was based. As the Commonwealth points out, "[i]t is the duty of the appellant to see that the record is complete on appeal." *Roberts v. Fayette County Bd. of Educ.*, 173 S.W.3d 918, 923 (Ky.App. 2005). Conley did not attempt to locate the missing portion of the videotape

or submit a narrative statement to create a record of the directed verdict motion.

Because the issues Conley raises are unpreserved, we much review this matter under the palpable error rule of RCr 10.26, which 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.

The palpable error rule "is not a substitute for the requirement that a litigant must contemporaneously object to preserve an error for review. . . . In determining whether an error is palpable, 'an appellate court must consider whether on the whole case there is a substantial possibility that the result would have been any different.'" *Commonwealth v. Pace*, 82 S.W.3d 894, 895 (Ky. 2002). In the present matter, we must determine whether the trial court would have entered a directed verdict in favor of Conley, had one been requested.

In *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991), the Supreme Court restated the test for a directed verdict as follows:

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. 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.

The test of a directed verdict on appellate review 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.* The *Benham* court went on to state: "[T]here must be evidence of substance, and the trial court is expressly authorized to direct a verdict for the defendant if the prosecution produces no more than a mere scintilla of evidence." *Id.* at 187-88.

POSSESSION OF A HANDGUN BY A CONVICTED FELON

Conley asserts that the Commonwealth submitted insufficient proof to establish that he knowingly possessed the handgun recovered by Trooper Lengle, and merely established that it was found buried under the cushion of his wheelchair after his arrest. He relies upon his mother's testimony that the handgun belonged to her deceased husband, and that she brought the gun to his residence and hid it without his knowledge, but forgot to take it home with her. We disagree with Conley's

argument, and hold that under either the palpable error rule or the *Benham* standard, the circuit court's ruling must stand.

Under the Kentucky Penal Code, the crime for possessing a firearm by a convicted felon is defined as:

(1) A person is guilty of possession of a firearm by a convicted felon when he possesses, manufactures, or transports a firearm when he has been convicted of a felony, as defined by the laws of the jurisdiction in which he was convicted[.]

While the parties stipulated that he was a convicted felon, Conley disputes that he was in possession of a handgun. In *Johnson v. Commonwealth*, 90 S.W.3d 39, 42-43 (Ky. 2003), the Supreme Court recently addressed the possession element of KRS 527.040(1):

Possession may be proven through either actual possession or constructive possession. *United States v. Kitchen*, 57 F.3d 516, 520 (7th Cir. 1995)(discussing a federal statute that makes it unlawful for a felon to possess a firearm). "Constructive possession 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.*, quoting *United States v. Garrett*, 903 F.2d 1105, 1110 (7th Cir. 1990), *cert. denied*, 498 U.S. 905, 111 S.Ct. 272, 112 L.Ed.2d 227 (1990). . . . "Constructive possession can be established by a showing that the firearm was seized at the defendant's residence." *United States v. Boykin*, 986 F.2d 270, 274 (8th Cir. 1993)(discussing the same federal statute discussed in *Kitchen*), *cert. denied*, 510

U.S. 888, 114 S.Ct. 241, 126 L.Ed.2d 195
(1993).

In a light most favorable to the Commonwealth, we agree that the Commonwealth produced sufficient evidence to support a finding that Conley constructively possessed the handgun. Conley was the sole resident of the trailer and its only occupant when the officers came to serve the arrest warrant. Conley was also in the wheelchair when he answered Trooper Lengle's knock and when the struggle began. Immediately following the struggle, Trooper Lengle found the handgun under the cushion of Conley's wheelchair. There can be no doubt that this evidence could induce a reasonable juror to find Conley guilty beyond a reasonable doubt. As such, we can perceive no manifest injustice in the circuit court's decision to allow the matter to go to the jury.

RESISTING ARREST

Conley asserts that the Commonwealth failed to establish that he used any physical force or violence against Troopers Higginbotham or Lengle. Rather, he passively resisted the officers' actions by lying on the porch with his hands under his stomach and did not make any physical acts towards the officers. For this reason, he argues that there was insufficient proof to support the resisting arrest charge. The Commonwealth counters this argument, arguing that Conley exerted

force against the officers when he began to struggle and then locked his hands together to prevent them from placing him in handcuffs.

The offense of resisting arrest is defined by KRS 520.090 as follows:

(1) A person is guilty of resisting arrest when he intentionally prevents or attempts to prevent a peace officer, recognized to be acting under color of his official authority, from effecting an arrest of the actor or another by:

(a) Using or threatening to use physical force or violence against the peace officer or another; or

(b) Using any other means creating a substantial risk of causing physical injury to the peace officer or another.

The Commentary to the rule provides that the offense "includes only forcible resistance and excludes other forms of nonsubmission to authority. . . . Criminal sanctions are, therefore, needed only when interference with arrest poses a direct threat to the safety of the officer[.]"

Conley does not cite to any case law supporting his argument that his resistance was merely passive, while the Commonwealth cites to opinions from several other jurisdictions upholding convictions in similar situations. The Massachusetts version of the resisting arrest statute, M.G.L.A. 267 § 32B, is very similar to Kentucky's version:

(a) A person commits the crime of resisting arrest if he knowingly prevents or attempts to prevent a police officer acting under color of his official authority, from effecting an arrest of the actor or another, by:

(1) using or threatening to use physical force against the police officer or officers; or

(2) using any other means which creates a substantial risk of causing bodily injury to such police officer or another[.]

In *Commonwealth v. Maylott*, 65 Mass.App.Ct. 466, 841 N.E.2d 717 (2006), the Massachusetts court upheld the defendant's conviction when he stiffened his arm as officers tried to arrest him and refused to comply with their attempts to handcuff him. The court held that he "was actively uncooperative in his behavior as he opposed the arresting officers' attempts to handcuff him. . . . [I]t took the effort of two officers to consummate the arrest, and they were able to do so only after pushing the defendant against the wall, thus gaining a physical advantage over him." *Id.* at 469. Such behavior, the court held, "represents an active, physical refusal to submit to the authority of the arresting officers, and opposition to their efforts to effect the arrest. . . . [T]he circumstances also presented a substantial risk of injury to them." *Id.* at 469-70. The Massachusetts court referred to two other cases also upholding resisting arrest convictions in situations where the

defendant stiffened his arms or body to prevent being handcuffed or placed into a police cruiser. *Commonwealth v. Grandison*, 433 Mass. 135, 741 N.E.2d 25 (2001); *Commonwealth v. Katykhin*, 59 Mass.App.Ct. 216, 794 N.E.2d 1291 (2003).

In the present case, we find the decisions of the Massachusetts courts to be persuasive. Conley's actions represented his physical refusal to submit to the officers' authority. His attempt to go back into his residence led to a scuffle during which all three men fell to the floor of the porch. Despite his disability, his tremendous upper body strength permitted him to prevent two officers from successfully handcuffing him, and it was not until the second application of OC spray was completed that the officers were even able to place the flex cuffs on him. Throughout the course of the incident, the officers were in danger of harm as they attempted to subdue Conley and arrest him.

The circuit court did not commit any error, palpable or otherwise, in denying Conley's motion for directed verdict on the resisting arrest charge and allowing it to be submitted to the jury.

For the foregoing reasons, the judgment of the Pendleton Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

J. Brandon Pigg
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

Michael L. Harned
Assistant Attorney General
Frankfort, Kentucky