

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001670-MR

BEVERLY E. SIZEMORE

APPELLANT

v. APPEAL FROM OWEN CIRCUIT COURT
HONORABLE STEPHEN L. BATES, JUDGE
ACTION NO. 04-CR-00023

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: ABRAMSON AND VANMETER, JUDGES; KNOPF,¹ SENIOR JUDGE.

VANMETER, JUDGE: Beverly Sizemore appeals from a judgment entered by the Owen Circuit Court after she and numerous codefendants were found guilty of multiple drug-related offenses including, in her case, engaging in organized crime and complicity to trafficking in five or more pounds of marijuana. For the reasons stated hereafter, we affirm.

¹ Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Briefly, this matter arose from the operations of an alleged criminal drug syndicate in Owen County between January and April 25, 2004. Beverly and her husband, Scott Sizemore, were indicted on multiple charges. Also indicted were Beverly's parents, her sister, and several others. Scott and several codefendants entered guilty pleas to the charges against them, while Beverly was tried jointly with her parents, her sister, and another codefendant. According to the detailed testimony, members of the alleged syndicate imported massive quantities of marijuana from Mexico into the United States and then to Owen County for distribution. The jury found Beverly guilty of engaging in organized crime, complicity to trafficking in five or more pounds of marijuana, first offense, and three misdemeanors. She was sentenced to concurrent terms of imprisonment which totaled fifteen years. This appeal followed.

First, Beverly asserts that the trial court erred by failing to suppress evidence gleaned from a search of the trailer she shared with Scott, on the ground that he did not voluntarily consent to the search. We disagree.

The voluntariness of a person's consent to a warrantless search is a question of fact which must be determined based on the totality of the circumstances. *Schneckloth v. Bustamonte*, 412 U.S. 218, 227, 93 S.Ct. 2041, 2048, 36 L.Ed.2d 854 (1973). The prosecution bears the burden

of showing, by a preponderance of the evidence, that consent was voluntarily given. *Id.*, 412 U.S. at 222, 93 S.Ct. at 2045. See also *Talbott v. Commonwealth*, 968 S.W.2d 76, 82 (Ky. 1998).

Here, Officer Stigers testified during the suppression hearing that late on the evening of April 24, 2004, he and another officer went to the Sizemores' trailer after Scott was identified as having sold marijuana to another person earlier that day. Stigers stated that he could smell a strong marijuana odor as he approached the trailer, and he could see Scott and a small child through the open door. Stigers knocked, identified himself, and asked if he and the other officer could enter to talk with Scott. Scott responded "sure, come on in," and he opened the door for the officers. Scott was asked to hold the child so the officers wouldn't bump into him, and Scott was advised both of the allegations against him and of his Miranda rights. Before Scott was placed under arrest, he made arrangements for his mother-in-law to take the child, and he advised the officers of two places in the trailer where marijuana was located. When he could not locate a third bag, he indicated that Beverly probably had moved it. After Scott invited the officers to look through the trailer and they confirmed that he was giving them permission to search, the officers located a third bag of marijuana in the kitchen freezer. A pipe and a total of 10.5 ounces of marijuana were

seized. Scott stated "that he and Beverly had only sold to friends and family." When Beverly then pulled up in her car Stigers went outside, identified himself, and advised her of her Miranda rights. Beverly, who refused to talk with the officers, was placed under arrest for trafficking in marijuana. In her purse were found pills, a small bag of marijuana, rolling papers, and \$2,464 in cash that Beverly identified as income tax refund money.

Contrary to Beverly's assertions on appeal, the evidence adduced during the suppression hearing supports the trial court's denial of the motion to suppress. Regardless of whether probable cause existed for the issuance of a search warrant, the record clearly shows that a warrant was not needed as Scott verbally consented to the search. The record indicates that the trailer was well-lit when the officers arrived, and Scott was awake and on his feet. Stigers testified that although it was obvious that Scott had been using marijuana, he did not appear to be unsteady on his feet. Scott invited the officers into the trailer, he opened the door for them, his responses were polite and coherent, and he took steps to provide for his child. Scott was attentive to the officer's questions, he understood and followed through on commands, he volunteered information, and he showed things to the officers. Although Beverly suggests that Scott was incapable of giving consent

because he was incapacitated by drugs or was coerced by the officers, there simply is nothing in the record to indicate that Scott verbally or physically expressed either intimidation or fear of the officers, or to otherwise support a finding that he was incapable of consent. Moreover, since it is undisputed that the trailer was Beverly and Scott's joint residence at the time of the search, Beverly's own failure to consent did not render the search results inadmissible against her. *Commonwealth v. Sebastian*, 500 S.W.2d 417, 419 (Ky. 1973). Given the totality of the circumstances, we cannot say that the trial court erred by finding that Scott voluntarily consented to the search and by denying Beverly's motion to suppress the evidence seized from the trailer.

Next, Beverly asserts that the trial court erred by denying her motion for a directed verdict as to the charge of complicity to trafficking in five or more pounds of marijuana. An issue exists as to whether Beverly's motion was sufficiently specific to preserve this issue for review. However, even if we assume without deciding that the sufficiency of the evidence issue was adequately preserved, we must conclude that Beverly is not entitled to relief.

The Kentucky Supreme Court succinctly stated that when a party makes a 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.

Commonwealth v. Benham, 816 S.W.2d 186, 187 (Ky. 1991). See CR 50.01. The test on appellate review is whether, "under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt[.]" *Benham*, 816 S.W.2d at 187 (citing *Commonwealth v. Sawhill*, 660 S.W.2d 3 (Ky. 1983)).

Beverly was indicted for trafficking, alone or in complicity with another, pursuant to KRS 218A.1421 and KRS 502.020(1). Under KRS 218A.1421(4), a first offense of trafficking in five or more pounds of marijuana is a Class C felony. "Traffic" is defined by KRS 218A.010(34)² as meaning "to manufacture, distribute, dispense, sell, transfer, or possess with intent to manufacture, distribute, dispense, or sell a controlled substance." KRS 502.020(1) addresses issues of complicity, stating:

A person is guilty of an offense committed by another person when, with the intention of promoting or facilitating the commission of the offense, he:

² Formerly numbered as KRS 218A.010(28).

- (a) Solicits, commands, or engages in a conspiracy with such other person to commit the offense; or
- (b) Aids, counsels, or attempts to aid such person in planning or committing the offense; or
- (c) Having a legal duty to prevent the commission of the offense, fails to make a proper effort to do so.

Here, as summarized in the jury instructions, the jurors could find that Beverly was guilty of marijuana trafficking under any one of three different scenarios. First, the jurors could find that Beverly trafficked in five or more pounds of marijuana on a day or days between April 3 and April 25, 2004. Second, under the option of "Trafficking in Marijuana - Five Pounds or More Principal or Accomplice," the jurors could find that Beverly was guilty of either trafficking, or complicity to trafficking with her codefendant Dale Masden, without determining whether she acted as a principal or as Masden's accomplice. The jurors in fact found Beverly guilty under the remaining option, that of complicity to trafficking in five or more pounds of marijuana, based on findings that Masden knowingly possessed five or more pounds of marijuana on a day or days between April 3 and April 25, 2004 with the intent of selling or distributing it to another, that Beverly "aided, assisted or attempted to aid" Masden "in so doing by among other

things buying, selling and distributing said marijuana," and that Beverly thereby intended that Masden would "possess the marijuana with the intent of selling or distributing it to another person."

The record shows that there was overwhelming evidence that some of Beverly's codefendants engaged in a drug trafficking conspiracy. In addition to the testimony of Officer Stigers, as summarized above, the statements made against Beverly at trial included the following:

- Scott Sizemore testified that he had been smoking marijuana on the evening of April 24, and that the officers could smell the marijuana outside of his trailer since the door was open. He confirmed that he invited the officers into his home, and that marijuana and a pipe were found as described by Stigers. He denied that his cooperation with the police resulted from his drug usage, stating that he "was brought up to address a police officer with respect." Both Scott and Beverly regularly obtained marijuana from Beverly's father, Lee Roy Brewer, and they sold it from their home. Beverly had recently obtained a pound of marijuana from Lee Roy. Scott described the procedures for obtaining marijuana from Lee Roy or occasionally from Masden when Lee Roy was unavailable.

He and Beverly kept a mental tally of how much money they owed Lee Roy, and either of them would pay Lee Roy or his wife out of the proceeds of marijuana sales. If Scott was unavailable to supply a customer with marijuana during the week, Beverly would provide the drugs and Scott would collect payment on the weekend. Scott thought the money in Beverly's purse came from an income tax refund, a paycheck, and possibly drug sales. He and Beverly had discussed a marijuana shipment that was due to arrive from Mexico in a few days. Scott testified that his regular drug usage did not affect his ability to keep a job. He and Beverly had borrowed some \$40,000 from the Brewers to pay debts and purchase their trailer; whenever they had extra money, they gave it to the Brewers.

- Codefendant Jacqueline Sims, who resided with Masden, testified that Beverly obtained a pound of marijuana from her about an hour before the Sizemores' April 24 arrests because Lee Roy was asleep. Sims did not collect payment. Although transactions were supposed to go through Lee Roy, the Sizemores had acquired marijuana from Sims and Masden once before.
- Masden testified that Lee Roy would tell him when the Sizemores or some other person(s) needed marijuana.

He delivered marijuana at Lee Roy's direction but he was never paid by the recipients. At trial Masden claimed that the Sizemores were identified by initials in a notebook that allegedly recorded deliveries of marijuana. Masden confirmed that Beverly never counted the large sums of money involved in the international transactions.

- Codefendant Deborah Gibbs confirmed that Beverly was not involved in transporting marijuana from Mexico to Kentucky. She once saw Beverly hand some \$500 to Lee Roy, who in turn handed it to Gibbs.

It certainly could be inferred from the evidence that Beverly was aware that her codefendants were involved in organized crime and in the trafficking of large amounts of marijuana. Moreover, there was evidence that Beverly obtained marijuana from Lee Roy, that on several occasions she or Scott obtained marijuana from Masden or Sims when Lee Roy was unavailable, and that the Sizemore's initials were on a listing of alleged marijuana deliveries. Most important, Sims testified regarding her involvement with Masden in the marijuana operation in their shared home, and she testified that Beverly obtained a pound of marijuana from the Sims/Masden home on April 24. Although it was undisputed that marijuana normally was distributed only on Lee Roy's orders, and there was evidence

that Beverly obtained a pound of marijuana from Sims on April 24 only because Lee Roy was asleep, there was substantial evidence that Beverly, Sims, Masden and Lee Roy, among others, were involved in the same joint efforts to buy, sell, and distribute marijuana during the time in question. We cannot say that it was clearly unreasonable for the jury to find Beverly guilty of this charge. Hence, she was not entitled to a directed verdict.

Beverly next contends that the trial court erred by giving conflicting instructions, as the statutory definition of trafficking set out in Instruction No. 6 was broader than the language used in the complicity to trafficking instruction. However, as the record fails to show that Beverly tendered alternative instructions or objected to the court's instructions in any way, this issue was not preserved for appellate review. RCr 9.54. Further, even if the instruction was erroneous, after considering the record as a whole we cannot say that Beverly's rights were substantially affected or that there is any likely possibility that the results would have been different in the absence of the error. RCr 9.54 and 10.26.

Next, Beverly asserts that the trial court erred by denying her motion for a directed verdict as to the charge of engaging in organized crime. Even if we assume without deciding that this issue was properly preserved for review, we must conclude that Beverly is not entitled to relief.

KRS 506.120(1) prohibits "engaging in organized crime," which occurs when "[a] person, with the purpose to establish or maintain a criminal syndicate or to facilitate any of its activities," engages in certain activities including:

- (a) Organize or participate in organizing a criminal syndicate or any of its activities;
- (b) Provide material aid to a criminal syndicate or any of its activities, whether such aid is in the form of money or other property, or credit;
- (c) Manage, supervise, or direct any of the activities of a criminal syndicate, at any level of responsibility;
- . . . ;
- (e) Commit, or conspire to commit, or act as an accomplice in the commission of, any offense of a type in which a criminal syndicate engages on a continuing basis[.]

KRS 506.120(3) defines a "criminal syndicate" as "five (5) or more persons collaborating to promote or engage" in certain named activities "on a continuing basis," including the "[i]llegal trafficking of controlled substances as prohibited by KRS Chapter 218A[.]"

Here, there was evidence to show that Lee Roy was a principal organizer and manager of a criminal syndicate, and that Beverly obtained marijuana from Lee Roy on several occasions in order to traffic it. Given our review of the

evidence as a whole, we cannot say that it was clearly unreasonable for the jury to find that Beverly engaged in organized crime, in violation of KRS 506.120(1)(e), by acting as an accomplice in the trafficking of marijuana and thereby facilitating the activities of the criminal syndicate. Hence, Beverly was not entitled to a directed verdict as to this charge. *Benham*, 816 S.W.2d at 187.

Beverly alternatively contends that even if the evidence was sufficient to support a conviction pursuant to KRS 506.120(1)(e), she is entitled to relief because the court improperly instructed the jury as to the organized crime charge. Again, this issue was not preserved for appellate review.

Although the record shows and the Commonwealth admitted during closing argument that there was no evidence that Beverly violated KRS 506.120(1)(a) or (c) by organizing, managing, supervising or directing the criminal syndicate, the jury was instructed on those alternate theories of the case, as well as pursuant to KRS 506.120(1)(b) and (e). However, even if the instruction was erroneous in that "it cannot be ascertained from the verdict form or otherwise from the record that all of the jurors voted to convict" Beverly "on a theory supported by the evidence[,]" *Burnett v. Commonwealth*, 31 S.W.3d 878, 883 (Ky. 2000), after consideration of the record as a whole we cannot say that Beverly's rights were substantially affected or

that there is any likely possibility that the result would have been different absent the error. RCr 9.54 and 10.26. Hence, she is not entitled to relief.

The court's judgment is affirmed.

ALL CONCUR.

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