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Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001554-MR

HARRY FINN, JR. APPELLANT

v. APPEAL FROM LOGAN CIRCUIT COURT
HONORABLE TYLER L. GILL, JUDGE
ACTION NO. 07-CR-00014

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, MOORE, AND TAYLOR, JUDGES.

MOORE, JUDGE: Harry Finn appeals the Logan Circuit Court's judgment convicting him of first-degree possession of a controlled substance (cocaine); use of drug paraphernalia; failure to signal; operation of a motor vehicle while under the influence of a substance which impairs driving ability and operation of a motor

vehicle without a license. Finn was sentenced to a total of ten years. After a careful review of the record, we affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

Officer Roger Lindsey of the Russellville Police Department initiated a traffic stop after observing Finn driving without headlights and then turning into an alley without signaling. Officer Lindsey testified that he detected the odor of marijuana about Finn's person and asked him to step out of the vehicle. Other officers, including Sergeant Todd Ramer and Patrolman Mike Cannon, responded to assist Officer Lindsey. After Finn performed poorly on field sobriety testing, he was placed under arrest for DUI and operating on a suspended license.

Upon searching Finn's vehicle, the officers found and seized a glass pipe containing suspected cocaine residue, a chore boy, and a clear bag containing approximately four grams of marijuana which were all contained in a pair of gloves. Officer Lindsey testified that the gloves were found in an area of the vehicle that was accessible to both Finn and his passenger, Brenda McCormick. Sergeant Ramer testified that he did not know whether the gloves were men's or women's gloves. Officer Lindsey searched the person of Finn and found and seized a white ink pen casing. Finn admitted that the pen casing was his "push rod" that he used earlier to ingest cocaine.

Finn was transported to Logan Memorial Hospital where he agreed to have blood and urine samples taken. During the trial, LaShanda Neymour of the Kentucky State Police Center Forensic Laboratory testified that cocaine was

detected in Finn's urine but not in his blood. This indicated that the drug had "cycled out" of Finn's system. Joe Tanner, a technician at the Kentucky State Police Laboratory, testified that while cocaine was detected on the glass pipe and the white pen casing, it was an amount that could not be appreciated by the naked eye. Because those two items were placed in the same evidence bag, cross contamination could have occurred.

At the close of the Commonwealth's case, Finn moved for a directed verdict arguing that the burden of proof could not be met regarding the cocaine possession and that the only evidence solely attributed to Finn was the white pen casing, which could have been contaminated by the glass pipe. The trial court overruled Finn's motion for directed verdict.

The jury returned a not guilty verdict on the possession of marijuana, and guilty verdicts on the possession of cocaine, use of drug paraphernalia, failure to signal, operation of a motor vehicle under the influence of a substance which impairs driving ability and operation of a motor vehicle without a license. Upon recommendation of the jury, Finn was sentenced to ten years.

II. STANDARD OF REVIEW

The standard of review for a motion for directed verdict is set forth in *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991), *citing* *Commonwealth v. Sawhill*, 660 S.W.2d 3 (Ky. 1983):

> 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.
>
> 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 directed verdict of acquittal.

III. ANALYSIS

A. VENUE

Finn's first argument is that the Commonwealth failed to prove that the charged incidents occurred in Logan County, therefore, venue has not been established. While the issue of venue has not been properly preserved because Finn failed to raise it as a basis for directed verdict at trial, he asks this Court to review it for palpable error pursuant Kentucky Rules of Criminal Procedure (RCr) 10.26 and *Schoenbachler v. Commonwealth*, 95 S.W.3d 830 (Ky. 2003).

According to both RCr 10.26 and *Schoenbachler* "[a] palpable error is one that 'affects the substantial rights of a party' and will result in 'manifest

injustice' if not considered by the court . . . ." The court in *Schoenbachler* goes on to say that "a conviction in violation of due process constitutes '[a] palpable error which affects the substantial rights of a party' which we may consider and relieve though it was insufficiently raised or preserved for our review." *Id*.

This issue of venue does not result in palpable error because venue can be waived. "[T]he prosecution of a charge in the circuit court of the wrong county is not a jurisdictional defect but one of venue, which can be waived." *Chancellor v. Commonwealth*, 438 S.W.2d 783 (Ky.App. 1969). "Venue is said to be jurisdictional, but a lack of venue does not deprive a court of jurisdiction to adjudicate the case." 8 Ky. Prac. Crim. Prac. & Proc. § 12:84 (2007-2008). Accordingly, we cannot say that Finn's substantial rights have been impaired such that a manifest injustice would result had venue been improper.

Even on the merits, Finn's arguments lack merit. "[I]t has generally been held in this state that it is not necessary to show by direct evidence that the crime occurred in the county of its prosecution, but the fact may be inferred from evidence and circumstances which would allow the jury to infer where the crime was committed." *Commonwealth v. Cheeks*, 698 S.W.2d at 835 (Ky. 1985).

In *Cheeks*, the defendant was convicted in the Fayette Circuit Court of second-degree assault, and he appealed. The Supreme Court held, in relevant part, that the following facts constituted abundant circumstantial evidence from which a jury could reasonably infer that the offense was committed in Fayette County and that venue was proper:

> Captain Gilbert Grogan stated that he was a paramedic with the Lexington Fire Department and that he was dispatched to go to Warren Court. The witness Lieutenant Robert Summers stated that he was a fire investigator for the Lexington Metropolitan Fire Department and that although he didn't go to the home on Warren Court, he did go to the hospital where the child had been taken. The witness William H. Lilly stated that he was a captain with fire investigation and that he had prepared and filed a report. . . . The report showed that the form is one for the Lexington-Urban County Division of Fire. . . . The witness Allen Ernest stated that he was a detective with the Division of Police, Fayette-Urban county Government, and that he was assigned to work a possible child abuse case.

Cheeks, 698 S.W.2d at 835.

In the case at bar, the evidence presented regarding venue was similar to that presented in *Cheeks*. At trial, Officer Lindsey identified himself as a Russellville Police Officer and named specific streets in describing the location of the arrest. Sergeant Ramer testified that he was employed with the Russellville Police Department and that he was Officer Lindsey's supervisor. A captain with the Russellville Police Department as well as the custodian of records at Logan County Memorial Hospital was called to testify.

This evidence, even if circumstantial, is clearly sufficient as to allow a jury to reasonably infer that the crimes were committed in Logan County. Therefore, we find no error regarding venue.

B. POSSESSION OF CONTROLLED SUBSTANCES- RESIDUE

Finn argues that the trial court erred when it failed to grant his motion for directed verdict based on the amount of cocaine residue found on and/or about

his person. Finn suggests that the cocaine residue, a microscopic amount, detected on the white pen casing was not a sufficient amount to justify charging him with possession of a controlled substance. Rather, he contends a charge for possession of drug paraphernalia was more appropriate for this amount which "could not be accurately weighed."

The Supreme Court of Kentucky held that possession of cocaine residue was sufficient to support the charge of possession of cocaine. *See Commonwealth v. Shivley*, 814 S.W.2d 572 (Ky. 1991). The Court in *Shivley* reasoned that:

> [a] minority of courts have utilized [the] "usable quantity" approach which requires proof that the amount of the drug found be usable for consumption or sale. Mr. Shivley was indicted under KRS 218A.140 and subsection 2 provides: "No person shall possess any controlled substance except as authorized in this chapter." Cocaine is classified as a Schedule II controlled substance. KRS 218A.070(1)(d). Neither statute determines any amount of cocaine which may be possessed legally. Cocaine residue is, in fact, cocaine and we find no argument to the contrary.

Id. at 573.

The Court in *Shivley* made it clear that Kentucky subscribes to the "any amount" test, rather than the "usable quantity" approach. This Court first utilized the "any amount" test in the case of *Commonwealth v. O'Hara*, 793 S.W.2d 840 (Ky. App. 1990). As the *Shivley* Court stated, "In *O'Hara*, KRS 520.010(3) was the focus of the requirement of possession of a specific quantity of marijuana to sustain a conviction under the statute. The Court of Appeals therein

held that the legislature easily could have required a 'usable amount' test had it desired and declined to substitute its judgment for that of the legislature." *Shivley*, 814 S.W.2d at 573. In concluding, the Court ruled

> [t]he appellee views the "any amount" theory as an infringement of individual rights. We view this statute as an exercise of the police power in the area of public health. It has effect and legitimacy so far as it can be applied to the accomplishment of a proper function in the area of promoting public health. To permit the possession of an amount of cocaine insufficient for use can in no way be justified as promoting public health. The statute should be construed so as to preserve this constitutional validity. *Cooper v. State*, 357 N.E.2d 260 (1976), held that where a statute made no mention of any amount of drug necessary to sustain a conviction, it was reasonable to conclude that the legislature intended that any identifiable amount be sufficient to sustain a conviction.

Shivley, 814 S.W.2d at 574.

The Supreme Court of Kentucky reasserted this principle in the case of *Bolen v. Commonwealth*, 31 S.W.3d 907 (Ky. 2000). Bolen was convicted in Circuit Court of possession of cocaine, among other charges and argued on appeal that the use of the term "quantity" in KRS 218A.1415(1) implies a measurable amount. The *Bolen* court did not agree as evidenced by the following statement:

> This argument is directly contrary to this Court's holding in *Commonwealth v. Shivley*, 814 S.W.2d 572, that "possession of cocaine residue . . . is sufficient to entitle the Commonwealth's charge to go to a jury when there is other evidence or the inference that [the] defendant knowingly[1] possessed the controlled substance. . . ." Therefore, the existence of cocaine residue on each pipe

[1] Finn's admission that the white pen casing was his "push rod" and that he used it to ingest cocaine is evidence, or at least may allow the inference that he "knowingly" possessed cocaine.

> was sufficient to support a conviction under KRS 218A.1415(1).

Bolen, 31 S.W.3d at 910.

Accordingly, the trial court did not err in denying Finn's motion for directed verdict based on the amount of cocaine residue found on and/or about his person.

C. INCONSISTENT VERDICT

Finn's final argument is that the jury rendered an inconsistent verdict. Finn bases this claim on the fact that the jury returned a not guilty verdict for possession of marijuana. Given the fact the marijuana was among the evidence found in the glove along with the glass pipe and other items, Finn argues that it was inconsistent for the jury to have found him to be in possession of the glass pipe, but not in possession of the marijuana. Therefore, Finn contends the jury could not find him to be in possession of the glass pipe, but could only find that he was in possession of the pen casing. Finn goes on to argue that because Joseph Tanner of the Kentucky State Police Western Regional Crime Lab testified at trial that cross contamination could have occurred between the glass pipe and the pen casing, there was insufficient evidence presented to find Finn guilty of possession of cocaine. We do not agree.

First, as stated in the aforementioned facts, Officer Lindsey testified that the gloves, in which the marijuana was located, were found in an area of the vehicle that was accessible to both Finn and his passenger, Brenda McCormick. Sergeant Ramer testified that he did not know whether the gloves were men's or women's gloves. Therefore it is not inconsistent for the jury to make a finding that the marijuana could have belonged to Finn's passenger. If the jury did not find "beyond a reasonable doubt"[2] that the marijuana belonged to Finn then it was proper for it to render a not-guilty verdict.

[2] *See* KRS 500.070.

Secondly, Finn admitted to using the white pen casing as his "push rod," to ingest cocaine. For that reason, although there was a possibility of cross-contamination, there was also a more obvious probability that the cocaine residue on the white pen casing was there notwithstanding the risk of cross-contamination. It was neither unreasonable nor inconsistent for the jury to find Finn to be in possession of cocaine beyond a reasonable doubt.

Even if the jury rendered an inconsistent verdict, as Finn suggests, this does not constitute error. In *Commonwealth v. Harrell*, 3 S.W.3d 349 (Ky. 1999), the Supreme Court of Kentucky overturned *Pace v. Commonwealth*, 636 S.W.2d 887 (Ky. 1982), holding that "[w]e now view our decision in *Pace* to have focused erroneously on the concept of consistency rather than upon the concept of sufficiency of evidence to sustain each conviction." *Id*. at 351. The Court in *Harrell* went on to quote the Supreme Court of the United States in *Dunn v. United States*, 284 U.S. 390, 52 S.Ct. 189, 76 L.Ed. 356 (1932), asserting that

> rigid adherence to a prohibition against inconsistent verdicts may interfere with the proper function of a jury, particularly with regard to lenity. Such an approach would unduly restrict the right of the jury to consider the evidence broadly and convict or acquit based upon its view of the evidence pertaining to each charge. . . . The better approach would be to examine the sufficiency of the evidence to support each verdict. This approach is consistent with the United State's Supreme Court's holding that each count of an indictment should be regarded as a separate indictment, and thus consistency in a verdict is not necessary.

Harrell, 3 S.W.3d at 351.

Accordingly, we find no error. For the aforementioned reasons the Logan County Circuit Court's denial of Mr. Finn's motion for directed verdict is affirmed.

ALL CONCUR.

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