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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-000808-MR

DOMENICO VILARDO — APPELLANT

v.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE MARTIN J. SHEEHAN, JUDGE
ACTION NO. 07-CR-00356

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: MOORE AND WINE, JUDGES; HENRY,[1] SENIOR JUDGE.

HENRY, SENIOR JUDGE: Domenico Vilardo appeals from a judgment of the Kenton Circuit Court finding him guilty of possession of a handgun by a convicted felon and of being a first-degree persistent felony offender. After our review, we affirm.

[1] Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

On May 31, 2007, the Kenton County grand jury indicted Vilardo on one count of possession of a handgun by a convicted felon, a violation of KRS 527.040, and one court of being a first-degree persistent felony offender (PFO), a violation of KRS 532.080, as a result of events that allegedly took place on April 2, 2007. Vilardo pled guilty to the possession charge on February 13, 2008, but requested a bench trial on the PFO 1st charge.

At that trial, the Commonwealth presented testimony from one witness – David McHugh, a probation and parole officer with the Kentucky Department of Corrections – along with exhibits establishing four of Vilardo's previous felony convictions. Those convictions and their ultimate dispositions are summarized as follows:[2]

(1) Kenton Circuit Court Indictment No. 01-CR-00096 – Vilardo pled guilty to a charge of first-degree possession of a controlled substance and received a probated sentence of three years' imprisonment on June 4, 2001. The events leading to this conviction took place on November 22, 2000. (Exhibit 1)

(2) Kenton Circuit Court Indictment 01-CR-00103 – Vilardo pled guilty to receiving stolen property over $300 and received a probated sentence of three years' imprisonment on June 4, 2001. This sentence was ordered to run consecutive to Vilardo's sentence in Indictment No. 01-CR-00096. The events leading to this conviction took place on November 9, 2000. (Exhibit 4)

[2] We note that the convictions are presented here in the order in which they occurred instead of the order in which they were presented as evidence at trial.

(3) Kenton Circuit Court Indictment No. 01-CR-00645 – Vilardo pled guilty to a charge of first-degree wanton endangerment and received a sentence of one year's imprisonment on July 31, 2002. This sentence was ordered to run consecutive to Vilardo's sentence in Indictment No. 01-CR-00096 and his sentence in Indictment No. 01-CR-00103. The events leading to this conviction took place on September 1, 2001. (Exhibit 2)

(4) Grant Circuit Court Indictment No. 04-CR-00116 – Vilardo pled guilty to first-degree possession of a controlled substance and possession of drug paraphernalia and received a sentence of three-and-a-half years' imprisonment on September 24, 2004. The events leading to these convictions took place on August 3, 2004. (Exhibit 3)

Following the bench trial, the trial court found Vilardo guilty of the PFO 1st charge and sentenced him to sixteen years' imprisonment – eight years for the possession conviction enhanced to sixteen years due to the PFO 1st conviction. This appeal followed.

Vilardo styles his argument on appeal as a contention that the trial court erred by failing to grant his motion for a directed verdict as to the PFO 1st charge. However, his argument is more accurately described as a complaint about an evidentiary decision by the trial court and its effect on the overall proof presented by the Commonwealth in support of the charge. Specifically, Vilardo contends that the trial court erred by allowing the Commonwealth to introduce evidence of his conviction in Grant Circuit Court Indictment No. 04-CR-00116

(Exhibit 3) because the copy of the indictment presented as part of the proof of that conviction contained a handwritten change, thus raising questions about the document's authenticity.[3] Assuming that this document should not have been introduced as evidence, Vilardo then contends that the Commonwealth failed to provide adequate proof that he had been convicted of two prior felonies for purposes of KRS 532.080. We address each argument in turn.

The change in question was a one-digit correction to the Social Security Number originally given for Vilardo in the indictment. The copy contained a seal and signature from the Grant Circuit Court Clerk – dated August 9, 2007 – certifying the document to be a "true copy" of the original indictment. After examining Exhibit 3, the trial court concluded that the change in question appeared to have been made before the clerk placed the certification seal on the copy and that the document was therefore not rendered invalid. Vilardo argues that the change called into question the authenticity of the copy of the indictment and effectively invalidated the certification that had been stamped thereon by the Grant Circuit Court Clerk. Therefore – the argument goes – the copy was not self-authenticating and the Commonwealth should have been required to present testimony from a clerk concerning the change before the trial court allowed Exhibit 3 to be introduced into evidence.

[3] The Commonwealth contends that Vilardo did not adequately preserve this issue for appellate review; however, we believe the record reflects otherwise. Therefore, the issue is properly before this Court.

"The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Kentucky Rules of Evidence (KRE) 901(a). We review a trial court's finding of authentication under an "abuse of discretion" standard. *Johnson v. Commonwealth*, 134 S.W.3d 563, 566 (Ky. 2004). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). Ultimately, the burden of authentication for a party attempting to introduce an item into evidence is "slight" and "requires only a *prima facie* showing of authenticity to the trial court." *Johnson*, 134 S.W.3d at 566.

The document in question is a certified copy of Grant Circuit Court Indictment No. 04-CR-00116 – a public record. A public record is generally admissible in evidence as proof of its contents pursuant to KRE 803(8). *Skimmerhorn v. Commonwealth*, 998 S.W.2d 771, 776 (Ky. App. 1998); *Commonwealth ex rel., Howard, Commissioner of Revenue v. Denham*, 303 Ky. 413, 414, 197 S.W.2d 907, 908 (1946). Before such a document can be introduced as evidence, however, it must be authenticated. Therefore, "[a] party seeking to introduce a public record must present a certified copy of that record *or* have a person who has compared the copy with the original testify that the document is authentic." *Skimmerhorn*, 998 S.W.2d at 776; see also KRE 902(4); KRE 1005; RCr 9.44. When a certified copy of a public record is presented, it is considered

"self-authenticated and does not require testimonial declarations of its verity" from a witness. *Skimmerhorn*, 998 S.W.2d at 777.

Here, the copy of the indictment offered by the Commonwealth as evidence was certified by the Grant Circuit Court Clerk and was therefore presumptively self-authenticating given the "slight" burden of authentication. *Cf. Johnson*, 134 S.W.3d at 566. Vilardo offered no extrinsic evidence during trial to counter this presumption. He instead merely went on a hypothetical questioning expedition as to the appearance of the copy and whether the Court should consider a copy sufficient evidence to establish a prior felony conviction. We also note, after examining the copy of the indictment in question, that the trial court's conclusion that the corrective change occurred prior to the copy being certified by the Grant Circuit Court Clerk appears reasonable.[4] Accordingly, we conclude that the trial court did not abuse its discretion by finding the copy of the indictment contained in Exhibit 3 to be authentic and by allowing it to be admitted as evidence.

Vilardo's second argument is that the Commonwealth failed to establish that he had been previously convicted of two felonies for which he received sentences that ran non-consecutively to one another, as required for a PFO

[4] We further note that Exhibit 3 contained a certified copy of the actual judgment of conviction and sentence in the Grant County action that Vilardo has failed to challenge.

1st conviction pursuant to KRS 532.080(3)[5] and (4).[6] The success of this argument, however, depends entirely upon our acceptance of Vilardo's contention that Exhibit 3 was improperly introduced as evidence of his felony conviction in Grant County. Since we did not reach such a conclusion, Vilardo's argument must be rejected. Even if we were to assume, as Vilardo contends, that the convictions evidenced by Exhibits 2 and 4 constituted only one conviction for purposes of KRS 532.080, the sentence of imprisonment evidenced by Exhibit 3 did not run concurrently or consecutively in an uninterrupted fashion to those convictions. Therefore, the requirements for a PFO 1st conviction were met, and Vilardo's argument must be rejected.

The judgment of the Kenton Circuit Court is affirmed.

ALL CONCUR.

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[5] KRS 532.080(3) provides, in relevant part, that "[a] persistent felony offender in the first degree is a person who is more than twenty-one (21) years of age and who stands convicted of a felony after having been convicted of two (2) or more felonies[.]"

[6] KRS 532.080(4) provides that "[f]or the purpose of determining whether a person has two (2) or more previous felony convictions, two (2) or more convictions of crime for which that person served concurrent or uninterrupted consecutive terms of imprisonment shall be deemed to be only one (1) conviction, unless one (1) of the convictions was for an offense committed while that person was imprisoned."