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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-002582-MR

CARA HUCKLEBERRY — APPELLANT

v.

APPEAL FROM MUHLENBERG CIRCUIT COURT
HONORABLE DAVID H. JERNIGAN, JUDGE
ACTION NO. 07-CR-00120

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; ACREE, JUDGE; BUCKINGHAM,[1] SENIOR JUDGE.

ACREE, JUDGE: Cara Huckleberry appeals her Muhlenberg Circuit Court conviction for trafficking in a controlled substance in the first degree, principal or accomplice, and sentence of six-years' imprisonment. Huckleberry claims the evidence against her was insufficient to sustain a conviction and that the trial court

[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 Kentucky Revised Statute (KRS) 21.580.

should have granted her motion for directed verdict. We disagree and, therefore, affirm.

Huckleberry spent the afternoon and evening of May 18, 2007, with Gary Lear at his family's farm. Shortly after midnight on May 19, Kentucky State Police Trooper Brandon McPherson stopped Lear and Huckleberry at a traffic safety checkpoint. Lear was asked for his license and registration and to step out of the vehicle. Lear had been arrested one week prior to the stop on methamphetamine charges. Trooper McPherson asked for and received consent from Lear to search the truck. Huckleberry, who was seated in the middle of the bench seat of the truck, was asked to exit the vehicle.

Trooper McPherson testified at trial that he then proceeded to search and inventory the truck. There were numerous items in the passenger seat area including a laptop computer, various papers and groceries. In the middle of the bench seat, Trooper McPherson found a cloth bag containing a gallon-size plastic bag with what appeared to be methamphetamine inside. Trooper McPherson testified that he found the bag on top of the bench seat in the area where Huckleberry was sitting "as if she was sitting immediately on top of it". The Trooper stated that there was no way anyone could have placed the bag there after Huckleberry exited the vehicle. The substance in the bag was field-tested and came back positive for methamphetamine.

Trooper McPherson testified that the methamphetamine was 173 grams by weight, the largest amount of methamphetamine he had ever found. He

further testified that in his experience it is more common to find someone with one gram or less of methamphetamine. According to Trooper McPherson, a quantity of drugs this large indicated that it was intended for sale or distribution.

Huckleberry denied that the drugs were hers. She testified she had never seen the bag containing the methamphetamine and was not sitting on it. She said Trooper McPherson had moved things around on the seat and that must be how the methamphetamine found its way to the spot where she had been sitting.

At the close of Commonwealth's case and again at the close of all evidence, Huckleberry moved for a directed verdict arguing that the Commonwealth failed to meet its burden of proof. Both motions were denied. In a bench conference, the attorneys discussed the proposed jury instructions and there was no objection to the instruction on trafficking in a controlled substance in the first degree, principal or accomplice.

The jury found Huckleberry guilty of trafficking in a controlled substance in the first degree, principal or accomplice, and set her sentence at six years' imprisonment. This appeal followed.

Huckleberry argues that the trial court erred in denying her motion for a directed verdict on the trafficking charge. She contends that the Commonwealth only established "a mere possibility that [she] possessed the contraband with the intent to manufacture, distribute, dispense, or sell it" and "there was no evidence that anyone intended to distribute, dispense, or sell [the drugs]."

"On motion for a directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth." *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (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.*

Huckleberry's first argument must fail. Despite her contention to the contrary, there was sufficient evidence to support a finding that she possessed the methamphetamine. If Huckleberry was sitting on the bag, that is sufficient evidence to prove constructive possession. *Burnett v. Commonwealth*, 31 S.W.3d 878, 881 (Ky. 2000)(evidence that cocaine was found in area of car next to where defendant had previously been seated sufficient to prove constructive possession of cocaine), *cited in Hayes v. Commonwealth*, 175 S.W.3d 574, 593 (Ky. 2005). Trooper McPherson presented evidence that she was sitting on the bag of drugs and Huckleberry testified to the contrary. This presented a jury question of witness credibility. The jury determined that Trooper McPherson's testimony was more credible.

Similarly, Huckleberry's argument that the evidence was insufficient to support her intent to distribute, dispense, or sell the drugs must also fail. Our Supreme Court recently rendered *Parker v. Commonwealth*, --- S.W.3d ----, (2006-SC-000102-MR) 2009 WL 1439206 (May 21, 2009)(finality on August 27, 2009) in which the Court held that nothing more than the "large amount of cocaine

[involved in that case] permitted – but did not require – the jury to infer [that the defendants] intended to . . . distribute sell or otherwise transfer it." *Parker*, 2009 WL 1439206, p. *18. The Court cited its authority in a footnote that we incorporate in pertinent part in this opinion.[2] *Id.* fn.75. In *Parker,* the Court stated that "[b]etter practice, of course, would have been for the Commonwealth to have presented evidence from a qualified witness that the amount . . . was inconsistent with personal use." *Id.* In Huckleberry's case, the Commonwealth followed that better practice when Trooper McPherson testified to that effect. The evidence on the issue of intent to sell or distribute was therefore sufficient for presentation to the jury.

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

ALL CONCUR.

[2] *See, e.g., State v. McCleod*, 186 S.W.3d 439, 447 (Mo.Ct.App. 2006) (holding that although possession of seven and one-half ounces of marijuana was insufficient to infer an intent to deliver the marijuana, "[c]ertainly, at some point, the amount of a controlled substance in a defendant's possession can establish, beyond a reasonable doubt, that the defendant intended to deliver or distribute that substance to others."); *United States v. Payne*, 805 F.2d 1062, 1066 (D.C.Cir.1986) ("evidence of a significant quantity of drugs is highly suggestive of intent to distribute...."); *Commonwealth v. Rugaber*, 369 Mass. 765, 343 N.E.2d 865, 868 (1976) ("Intent to distribute a drug may be inferred from possession of large quantities of that drug."); 28A C.J.S. *Drugs and Narcotics* § 384 (2008) ("An intent to distribute, deliver, or sell controlled substances may be inferred from the possession of a large quantity of a controlled substance. A reasonable inference of intent to deliver a controlled substance is permitted when the amount possessed cannot be viewed as intended for personal consumption. Thus, a jury is permitted, but not required, to infer intent to distribute when a person possesses an amount of a controlled substance that is too large to be used by the possessor alone.") (footnotes omitted).

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