

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-001203-MR

TERRANCE D. SANDERS

APPELLANT

v. APPEAL FROM HICKMAN CIRCUIT COURT
HONORABLE TIMOTHY A. LANGFORD, JUDGE
ACTION NO. 07-CR-00034

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: LAMBERT AND TAYLOR, JUDGES; HENRY,¹ SENIOR JUDGE.

HENRY, SENIOR JUDGE: Terrance D. Sanders appeals from a judgment of the Hickman Circuit Court convicting him of trafficking in a controlled substance within 1000 yards of a school, firearm-enhanced possession of marijuana, and firearm-enhanced possession of drug paraphernalia, as a result of which he was

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).

sentenced to 15 years' imprisonment. Sanders argues that the trial court erred in denying his motion for a directed verdict on the firearm-enhancement portion of his drug charges because the Commonwealth failed to offer any evidence that the firearm in question was operable and capable of firing a projectile. For the reasons set forth below, we affirm.

On August 31, 2007, officers with the Hickman County Sheriff's Office, along with probation and parole officer Eric Meshew, executed an arrest warrant at Sanders' residence in Clinton, Kentucky. Caroline Crawell, Sanders' girlfriend, signed a consent form allowing the officers to search the residence, which was located within 1000 yards of Hickman County High School and Hickman County Elementary School.

As the officers searched the residence, they found "a green, leafy substance" later identified as marijuana on a kitchen counter. In a cabinet under the counter, they found a "gallon bag" of a substance also later identified as marijuana along with a set of scales. In the residence's bedrooms, the officers also found a marijuana roach and a set of digital scales, as well as a loaded .25 caliber semi-automatic handgun, an extra clip of ammunition, and a box of ammunition.

On October 19, 2007, a Hickman County grand jury charged Sanders in an indictment with trafficking in a controlled substance within 1000 yards of a school, firearm-enhanced possession of marijuana, and firearm-enhanced

possession of drug paraphernalia.² Sanders entered a plea of “not guilty,” and the case proceeded to trial before a Hickman County jury on February 26, 2008.

At trial, Hickman County Sheriff John Turner testified that the firearm found at Sanders’ residence was loaded and that the extra clip found next to the firearm was also loaded. He also testified that he had no reason to test fire the firearm. Crawell testified that she owned the firearm and that she had brought it to the residence on the day of the search for protection when she learned that Sanders had been arrested and would not be home that night. Sanders’ counsel twice moved for a directed verdict on the firearm-enhancement portion of the charges on the grounds that the Commonwealth had failed to offer any proof that the handgun found at the residence was operable and functioning. Both motions were overruled, and the trial court stated that the issue was one for the jury. The jury ultimately found Sanders guilty of all three charges – including the two firearm-enhanced drug charges – and recommended that Sanders serve a sentence of 15 years’ imprisonment. On May 28, 2008, the trial court entered a judgment and sentence in accordance with the jury’s verdict. This appeal followed.

Sanders’ sole contention on appeal is that the trial court erred in denying his motion for a directed verdict on the firearm-enhancement portion of his drug charges because the Commonwealth failed to offer any evidence that the firearm in question was operable and capable of firing a projectile. The standards

² Sanders was also charged with other offenses that were ultimately severed from this case and are not part of this appeal.

that trial courts must follow in considering motions for directed verdict are set forth in *Commonwealth v. Benham*, 816 S.W.2d 186 (Ky. 1991):

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.

Id. at 187. “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.*

The opinion of the Supreme Court of Kentucky in *Campbell v. Commonwealth*, 260 S.W.3d 792 (Ky. 2008), is dispositive of this appeal. In *Campbell*, the appellant moved for a directed verdict on the firearm-enhancement portion of his drug charges based on a lack of proof as to the firearm’s operability. *Id.* at 802. Police had found a rusty or corroded sawed-off shotgun behind the headboard of a bed in the appellant’s home while searching for evidence of suspected methamphetamine manufacture. The gun was not subjected to any testing before trial, and neither party presented proof as to whether the gun was actually capable of firing. *Id.* The Supreme Court noted that the case squarely presented the question of whether the Commonwealth has the burden of proving the operability of a firearm in order to enhance sentences for drug offenses or

whether the inoperability of the firearm is an affirmative defense that the defendant has the burden of proving. *Id.* at 802-03.

The Supreme Court ultimately held that “operability of the firearm is not an element of the firearm enhancement” and concluded that “the inoperability of a firearm is an affirmative defense for which the defense has the burden of proof.” *Id.* at 804. Accordingly, even a “total lack of proof” by the Commonwealth as to the operability of the firearm in issue did not entitle the defendant to a directed verdict. *Id.*

Pursuant to *Campbell*, then, it was not the Commonwealth’s burden in this case to prove anything concerning the operability of the firearm found at Sanders’ residence. A directed verdict of acquittal on this issue would have only been proper if Sanders had proven that the firearm was incapable of “expel[ling] a projectile by the action of an explosive.” KRS 237.060(2). Such proof was not offered in this case. Therefore, since Sanders failed to meet his burden of proof, the issue of firearm enhancement was properly put before the jury.

Because the evidence in this case was sufficient to withstand Sanders’ directed verdict motion, we find no reversible error in the trial court’s handling of this matter. For the foregoing reasons, we affirm the decision of the Hickman Circuit Court.

ALL CONCUR.

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