

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-001247-MR

JESUS CARRANZA

APPELLANT

v.

APPEAL FROM BOONE CIRCUIT COURT
HONORABLE KEVIN HORNE, JUDGE
ACTION NO. 07-CR-00714

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CAPERTON, CLAYTON AND DIXON, JUDGES.

CAPERTON, JUDGE: Jesus Carranza appeals as a matter of right the Boone Circuit Court judgment of conviction for possession of a controlled substance, first degree. Carranza argues on appeal that he was entitled to a directed verdict on the charge of trafficking in a controlled substance¹ at the close of the Commonwealth's case-in-chief, and that the Hispanic population of Boone County is

¹ We note that Carranza was indicted and tried on the charge of trafficking in a controlled substance, but was convicted of possession of a controlled substance.

underrepresented in the jury venire generally, and in his specific case. Finding no error, we affirm.

On September 8, 2007, the police were watching a business establishment after they had received a tip that three people with outstanding arrest warrants were there. While in the parking lot of the business establishment, the police observed Carranza exit the establishment and noted that as he walked to his vehicle, he appeared to be intoxicated. The police observed Carranza go to the passenger side of a truck, lean against the truck bed on the rear passenger side and fumble with items in his pocket.² At this time, the police saw money fall from Carranza's pocket. When the police approached Carranza they found a "baggie" in the bed of the truck on top of the wheel well.

Carranza was placed under arrest; a search of Carranza and the immediate vicinity during the arrest produced a small amount of cash and a second "baggie" on the ground near him. When searched at the jail, officers found a large amount of cash on Carranza. Thereafter, the white powder contained in the "baggies" was tested and shown to be positive for cocaine.

Carranza was tried by a jury on March 24, 2008. The police officers testified that the arrest occurred at a place known for drug trafficking, that the bags found near Carranza were typical of either a one-time drug dosage or of a resale, and that the cash was indicative of drug trafficking. The parties stipulated that the white powder contained within the bags was cocaine.

² Subsequently it would be discovered that Carranza's pocket contained keys, a cellular telephone and, apparently, was the source of the zip-lock "baggies" containing white powder.

At the close of the Commonwealth's case, Carranza moved for a directed verdict on the trafficking charge, which was denied by the trial court. The parties then discussed the jury instructions and Carranza objected to the inclusion of an instruction on the lesser-included offense of possession. The trial court overruled Carranza's objection and included the offense of possession of a controlled substance in the jury instructions. After deliberation, the jury convicted Carranza of possession. This appeal follows.

On appeal, Carranza argues two errors by the trial court. First, Carranza asserts that the trial court erred when it failed to grant a directed verdict on the charge of trafficking in a controlled substance, first degree, at the close of the Commonwealth's case-in-chief. Second, he argues that the Hispanic population of Boone County is underrepresented in the county's jury panels generally and, thus, his constitutional rights were violated as his jury was not selected from a fair cross-section of the community. We address each argument below.

First, Carranza argues that he was entitled to a directed verdict on the charge of trafficking based on our established caselaw. In *Commonwealth v.*

Benham, 816 S.W.2d 186 (Ky. 1991), the Kentucky Supreme Court stated:

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 a directed verdict of acquittal. *Commonwealth v. Sawhill*, 660 S.W.2d 3 (Ky.1983).

Benham at 187.

Carranza argues that, based on our jurisprudence and the evidence submitted at trial, the Commonwealth failed to prove the charge of trafficking in a controlled substance and, thus, the trial court erred in denying his directed verdict motion. In response, the Commonwealth aptly argues that Carranza was not convicted of trafficking and, thus, any error was clearly harmless.

We agree with the Commonwealth that if the trial court erred by denying Carranza's motion for such error, then that has been rendered harmless as Carranza was not convicted of the charge that he says entitled him to a directed verdict. Accordingly, we affirm the trial court on this issue. *See, e.g., Nichols v. Commonwealth*, 142 S.W.3d 683, 693 (Ky. 2004) (“[a]ppellant was not convicted of Intentional Murder, and therefore, any error in not directing a verdict on that charge is clearly harmless.”).

Carranza next argues that his constitutional rights were violated as the Hispanic population of Boone County is underrepresented generally in the jury panels of Boone County, and specifically in his case. We note that this issue was not addressed by the trial court and was raised for the first time on appeal.

Kentucky Rules of Criminal Procedure (RCr) 9.34 requires that this issue be addressed via “[a] motion raising an irregularity in the selection or summons of the jurors or formation of the jury must precede the examination of the jurors.” No such motion was made by Carranza. On appeal, Carranza acknowledges that the argument was unpreserved but asks us for a review under RCr 10.26, palpable error analysis.

It has long been this Court’s policy that novel arguments will not be considered for the first time on appeal and we shall not now entertain a change in policy. *See Shelton v. Commonwealth*, 992 S.W.2d 849, 852 (Ky.App. 1998) (“[a]n appellate court will not consider a theory unless it has been raised before the trial court and that court has been given an opportunity to consider the merits of the theory.”). *See also Brodgen v. Commonwealth*, 476 S.W.2d 192 (Ky. 1972) (Court would not consider for the first time on appeal an issue concerning irregularity in the selection of jurors.).

Given our prohibition against deciding a novel issue on appeal, we nevertheless will consider Carranza’s argument under RCr 10.26.

We review a claimed error under RCr 10.26 for:

A palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error.

“Manifest injustice” requires that substantial rights of the defendant were prejudiced by the error, i.e., there is a substantial possibility that the result of the trial would have been different. *Schaefer v. Commonwealth*, 622 S.W.2d 218 (Ky. 1981), and *Jackson v. Commonwealth*, 717 S.W.2d 511 (Ky.App. 1986).

Further refining the parameters of RCr 10.26, the Kentucky Supreme Court in *Brewer v. Commonwealth*, 206 S.W.3d 343 (Ky. 2006), undertook an analysis of what constitutes a palpable error.

For an error to be palpable, it must be easily perceptible, plain, obvious and readily noticeable. A palpable error must involve prejudice more egregious than that occurring in reversible error. A palpable error must be so grave in nature that if it were uncorrected, it would seriously affect the fairness of the proceedings. Thus, what a palpable error analysis “boils down to” is whether the reviewing court believes there is a “substantial possibility” that the result in the case would have been different without the error. If not, the error cannot be palpable.

Id. at 349.

In support of his argument that his constitutional rights were violated because the Hispanic population of Boone County is underrepresented in Boone County jury panels, Carranza provides this Court with citation to relevant caselaw, but the remainder of his argument is based on raw population statistics for Boone County, and speculation and conjecture that “[m]inorities are underrepresented at the Boone County jury pool and the particular procedures employed by Boone County”

Carranza cites this Court to *Duren v. Missouri*, 439 U.S. 357, 99 S.Ct. 664 (1979) which clarified the fair-cross-section inquiry announced in *Taylor v. Louisiana*, 419 U.S. 522, 538, 95 S.Ct. 692, 702 (1975) that “petit juries must be drawn from a source fairly representative of the community” and that “jury wheels, pools of names, panels, or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof.” *Duren* held that:

In order to establish a prima facie violation of the fair-cross-section requirement, the defendant must show (1) that the group alleged to be excluded is a “distinctive” group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

Id. at 364.

The raw statistics which Carranza presents to this Court are insufficient to factually demonstrate an irregularity in the jury panel. *See Bowling v. Commonwealth*, 942 S.W.2d 293, 304 (Ky. 1997) (“claim of irregularity must be demonstrated by actual prejudice . . . [and] requires a factual showing to demonstrate irregularity in the jury.”)(internal citations omitted); *Dickerson v. Commonwealth*, 174 S.W.3d 451,462 (Ky. 2005)(“[m]ere use of raw population statistics is insufficient.”).

Additionally, Carranza alleges that “the fact that many Latinos that are tried in Criminal Courts may not have an immigrant status seems to be an

indicator of the disregard for the guarantees of their Constitutional Rights.” The Commonwealth argues that Carranza’s unfounded claims that Boone County has many illegal immigrants that will not be called for jury duty must fail as there is no evidence to support such allegations. Moreover, the Commonwealth directs this Court to *Thiel v. S. Pacific Co.*, 328 U.S. 217, 66 S.Ct. 984 (1946), where the Court stated at 987, that “[j]ury service is a duty as well as a privilege of citizenship.”

Problematically for Carranza, and unlike the caselaw to which he cites, Carranza does not provide any actual evidence to support his allegations regarding the jury panels of Boone County. Carranza offers no data concerning the jury pool or any data concerning the empanelling of a jury. Furthermore, a review of the record reveals that there is no record from the trial court concerning any evidence on the issue. We do not find Carranza’s bare allegations to be sufficient to sustain his burden of proof in the matter *sub judice*. Accordingly, we find no error by the trial court on this issue.

Accordingly, we affirm the Boone County’s judgment of conviction for possession of a controlled substance, first-degree.

ALL CONCUR.

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