

Commonwealth of Kentucky
Court of Appeals

NO. 2007-CA-002565-MR

ALLEN NEWKIRK

APPELLANT

v. APPEAL FROM PENDELTON CIRCUIT COURT
HONORABLE ROBERT MCGINNIS, JUDGE
INDICTMENT NO. 05-CR-00003

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: DIXON AND VANMETER, JUDGES; LAMBERT,¹ SENIOR JUDGE.

LAMBERT, SENIOR JUDGE: Allen Newkirk appeals from the June 24, 2005, final judgment of the Pendleton Circuit Court, convicting him of driving under the influence and sentencing him to five years' imprisonment. As we discover no palpable error, we affirm.

¹ Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

On October 5, 2004, Newkirk was driving on U.S. Highway 27, in Pendleton, Kentucky, when he was signaled to pull over by Kentucky State Police Trooper Gerald Fieger. Trooper Fieger would later testify that he pulled Newkirk over because he was swerving and driving erratically. Trooper Fieger testified that Newkirk smelled of alcohol and had red eyes and broken speech. He administered several field sobriety tests as well as a preliminary breath test, all of which Newkirk failed. Trooper Fieger arrested Newkirk and transported him to the Falmouth Police Department where he submitted to a breath alcohol test and tested more than twice as high as the legal limit.

Newkirk was indicted for driving under the influence, fourth offense, on January 5, 2005. Newkirk originally entered into a plea agreement but was eventually granted leave to withdraw his guilty plea. On May 27, 2005, Newkirk was tried before a jury which found him guilty of driving under the influence, fourth offense. The Pendleton Circuit Court subsequently entered a judgment against Newkirk, sentencing him to five years' imprisonment, on June 24, 2005. On April 17, 2009, Newkirk was granted a belated appeal. Additional facts will follow, as necessary.

On appeal, Newkirk argues that the Commonwealth impermissibly shifted the burden of proof when it made several references to Newkirk's failure to produce witnesses to support his claim that he had only drunk one beer on the night he was arrested. Newkirk argues that the prosecution's suggestion that the jury

should consider Newkirk's lack of witnesses as an indication of guilt effectively shifted the burden of proof onto Newkirk to prove his innocence as opposed to the Commonwealth's burden to prove his guilt. We do not agree.

“It is one of the boasted tenets of our civilization that every citizen is presumed to be innocent until he is proven guilty beyond a reasonable doubt.”

Collins v. Commonwealth, 195 Ky. 745, 243 S.W. 1058 (Ky. 1922). Reasonable doubt has been defined as that which is “doubt based on reason and arising from evidence and lack of evidence.” *Black's Law Dictionary* 1265 (6th ed. 1990). Newkirk has failed to show that the Commonwealth's comments impacted the burden of proof in his trial. The jury is not instructed by the prosecutor's trial comments, but rather by the jury instructions provided by the court. In this case, the jury instructions stated:

The law presumes a defendant to be innocent of a crime and the Indictment shall not be considered as evidence or as having any weight against him. You shall find the Defendant not guilty unless you are satisfied from the evidence alone and beyond a reasonable doubt that he is guilty. If upon the whole case you have a reasonable doubt that he is guilty, you shall find him not guilty.

This Court has previously held that a prosecutor's argument that a defendant failed to rebut the Commonwealth's argument was not a shift of burden. *Tamme v. Commonwealth*, 973 S.W.2d 13 (Ky. 1998). “A prosecutor may comment on tactics, may comment on evidence, and may comment as to the falsity of the defense position.” *Id.* at 38 (citation omitted).

The evidence against Newkirk was overwhelming. He failed several field sobriety tests, he failed an initial breath test, and he failed a breath test at the police station. It is highly improbable, given this evidence, that a jury would have found Newkirk not guilty even if he had produced a legion of witnesses who testified that he consumed only one alcoholic beverage. The Commonwealth's comment on Newkirk's failure to provide witnesses was within the limits of appropriate prosecutorial tactic, and Newkirk has therefore failed to show any wrong-doing by the Commonwealth.

We also note that Newkirk's argument was unpreserved for appeal. As such, he brings the argument under RCr² 10.26, which allows the appeal of an unpreserved "palpable error which affects the substantial rights of a party." As we have already indicated, Newkirk failed to show that the burden of proof was shifted or that his trial was unfair. Accordingly, Newkirk has failed to show that the comments of the prosecutor affected his substantial rights, and he has thus failed to show palpable error.

For the foregoing reasons, the June 24, 2005, judgment of the Pendleton Circuit Court is affirmed.

ALL CONCUR.

² Kentucky Rules of Criminal Procedure.

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