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Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001861-MR

CHARLES W. MASSIE

APPELLANT

v. APPEAL FROM CUMBERLAND CIRCUIT COURT
HONORABLE EDDIE C. LOVELACE, JUDGE
ACTION NO. 09-CR-00038

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING IN PART,
REVERSING IN PART, AND REMANDING

** ** * ** * ** *

BEFORE: LAMBERT, THOMPSON, AND VANMETER, JUDGES.

THOMPSON, JUDGE: Charles W. Massie appeals from the Cumberland Circuit Court's judgment of conviction after a jury trial for trafficking in marijuana in an amount greater than eight ounces, possession of marijuana, and possession of drug paraphernalia. For the reasons stated, we affirm in part, reverse in part, and remand.

After meeting Patricia Roser on an internet website, Massie left his home in New York and moved into Roser's residence in Cumberland County, Kentucky. On July 8, 2009, the couple traveled to Bowling Green and, at some point, began arguing at which time Massie informed Roser that he was planning to move out of her residence.

When the couple returned to Cumberland County, Roser would not permit Massie to enter the residence. When Massie attempted to enter the residence, Roser allegedly opened the front door and pointed a shotgun in Massie's direction. Massie allegedly grabbed the gun causing it to fire into the front yard. As a result of this domestic disturbance, police were called to the scene and spoke to both parties.

While receiving medical attention in an ambulance, Roser consented to a search of her residence. The police searched a room Massie stated that he used as an office and found a briefcase containing seven bags of marijuana and a can inside a closet containing six bags of marijuana. Additionally, police found marijuana joints and roaches, baggies, scales, pipes, screens, and papers throughout the house.

Subsequently, Massie was indicted by a Cumberland County grand jury for fourth-degree assault, trafficking in marijuana (enhanced due to Massie's possession of a firearm), possession of marijuana, and possession of drug paraphernalia. During trial, Massie testified that the marijuana and other drug-

related evidence did not belong to him, and that he and Roser had equal access to the locations where the drugs and other evidence were found.

At the conclusion of the jury trial, the trial court dismissed the firearm enhancement on the trafficking charge and the fourth-degree assault charge. The jury found Massie guilty of trafficking in marijuana in an amount greater than eight ounces, possession of marijuana, and possession of drug paraphernalia. Massie was sentenced to five-years' imprisonment and fined \$1,000.

Massie contends that the trial court violated his Sixth Amendment right to confront witnesses by admitting the hearsay testimony of a non-testifying witness. Specifically, he argues that Officer Kenny Brown was improperly permitted to testify that Roser informed him that Massie was in possession of a pound of marijuana located in his home office. Because Roser did not testify and was not subject to cross-examination, Massie argues that the trial court violated his confrontation rights provided in *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). Massie concedes this error was unpreserved.

Under RCr 10.26, an appellate court may review for palpable error, an error which affects the substantial rights of a defendant even when the error was not preserved by a proper objection. *Schoenbachler v. Commonwealth*, 95 S.W.3d 830, 836 (Ky. 2003). Palpable error is error so easily perceptible and obvious that a “manifest injustice” would result if relief is not granted. *Id.* Palpable error can only exist if there is a substantial possibility that the defendant’s case would have

been different absent the error. *Brewer v. Commonwealth*, 206 S.W.3d 343, 349 (Ky. 2006).

We first note that a criminal defendant may waive the constitutional right of confrontation. *Parson v. Commonwealth*, 144 S.W.3d 775, 783 (Ky. 2004). The open door doctrine permits the admission of otherwise inadmissible evidence in the form of a waiver when one party's use of inadmissible evidence justifies the opposing party's rebuttal of that evidence with equally inadmissible evidence. *Commonwealth v. Stone*, 291 S.W.3d 696, 701-702 (Ky. 2009).

Specifically, "[o]ther jurisdictions have held, subsequent to *Crawford*, there is no Confrontation Clause violation when the defendant opens the door to the admission of hearsay testimony." *U.S. v. Lopez-Medina*, 596 F.3d 716, 733 (10th Cir. 2010).

During trial, Massie's defense strategy was to cast suspicion of the drug activity on Roser even though she did not testify. Massie's defense counsel cross-examined police regarding whether Roser had admitted to ownership or consumption of the marijuana found in the residence and was able to solicit police testimony that Roser confessed to using marijuana.

Massie's defense strategy involved eliciting the hearsay testimony of a declarant who did not testify at trial. The prosecutor rebutted this inadmissible hearsay testimony by eliciting equally inadmissible hearsay testimony that Roser stated the drugs belonged to Massie. Considering the open door doctrine and the requirement that an error must be so easily perceptible and obvious to permit reversal, we conclude that the trial court's admission of Roser's hearsay testimony

was not a manifest injustice requiring relief. Based on the facts, we cannot conclude that palpable error occurred.

Massie argues that his convictions for trafficking in marijuana more than eight ounces and possession of marijuana violate the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution and Section 13 of the Kentucky Constitution. He concedes this error was unpreserved. However, the “failure to present a double jeopardy argument to the trial court should not result in allowing a conviction which violates double jeopardy to stand.” *Clark v. Commonwealth*, 267 S.W.3d 668, 674-675 (Ky. 2008).

“Both the Fifth Amendment to the United States Constitution and Section 13 of the Kentucky Constitution secure an individual’s protection against double jeopardy.” *Simpson v. Commonwealth*, 159 S.W.3d 824, 826 (Ky.App. 2005). Double jeopardy questions depend on the analysis found in *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932), as adopted in *Commonwealth v. Burge*, 947 S.W.2d 805, 811 (Ky. 1996), and codified in KRS 505.020. “In *Blockburger*, the Court held that ‘where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.’” *Lloyd v. Commonwealth*, 324 S.W.3d 384, 387 (Ky. 2010) (quoting *Blockburger*, 284 U.S. at 304, 52 S.Ct. at 182). “[N]either the United States nor the Kentucky Constitution proscribes the imposition of multiple punishments for separate offenses committed during the

course of a single criminal episode.” *Beaty v. Commonwealth*, 125 S.W.3d 196, 210 (Ky. 2003).

Massie was convicted of trafficking in marijuana under KRS 218A.1421 and possession of marijuana under KRS 218A.1422. Under *Blockburger*, two questions must be answered: Do KRS 218A.1421 and KRS 218A.1422 each require proof of an element that the other does not? If so, did the two convictions arise from the same incident? *Beaty*, 125 S.W.3d at 210-211.

KRS 218A.1421 is violated when a person “knowingly and unlawfully trafficks in marijuana” and KRS 218A.1422 is violated when a person “knowingly and unlawfully possesses marijuana.” Necessarily, “one must possess the [marijuana] before one can sell or transfer it to another.” *Beaty*, 125 S.W.3d at 212. Therefore, possession of marijuana is a lesser offense of trafficking in marijuana and, when convictions for possession and trafficking of marijuana arise from the same incident, the prohibition against double jeopardy is violated. *Mangrum v. Commonwealth*, 674 S.W.2d 957, 958 (Ky. 1984). We turn to whether Massie’s convictions arose from the same incident.

In *Beaty*, the Court explained that without factual unity, multiple convictions are not proscribed. *Beaty*, 125 S.W.3d at 212; *see also* KRS 505.020(1). Addressing whether convictions for possessing methamphetamine and manufacturing methamphetamine could withstand a double jeopardy challenge, the *Beaty* Court succinctly stated that the convictions were proper if “the methamphetamine that he was convicted of possessing was not the same

methamphetamine that he was convicted of manufacturing.” *Id.* at 213. Our inquiry, then, is whether the trafficking and possession convictions were based on the same quantity of marijuana.

In *Simpson*, 159 S.W.3d at 828, the Court held that although Simpson was convicted of possession and trafficking in marijuana, his double jeopardy rights were not violated where marijuana was found during a pat-down search and, three days later, during a search pursuant to a warrant of Simpson’s impounded car. “A reasonable jury could have found that the marijuana on Simpson’s person was for his own personal use, while the significant amount of marijuana in the car was for trafficking. Thus, the separate charges for possession and trafficking were permissible.” *Id.*

Unlike the searches in *Simpson* that were distant in time and place, in this case marijuana was found during a single search of the same residence. We note that if the marijuana was found only in the briefcase and can, Massie’s conviction for possession and trafficking would violate double jeopardy. To hold otherwise would permit separate possessory crimes for each packet or container of marijuana within the offender’s possession at a single time and place. However, in addition to the “loose” marijuana found in the residence where Massie was residing, marijuana joints and roaches were also discovered. We cannot ignore the similarities with the facts in *Beaty*.

In *Beaty*, during a search of a vehicle operated by the defendant, methamphetamine was found being “cooked” in a jar in the trunk and

methamphetamine residue found on a piece of aluminum foil in a duffle bag in the back seat. The Court analyzed whether the manufacturing and possession were based on the same underlying facts and explained that a reasonable jury could find that two separate offenses were committed:

[I]f the conviction of possession was premised upon the methamphetamine found in the jar in the trunk of the vehicle, KRS 505.020(1)(a) would require that the possession conviction be vacated. However, if the conviction was premised upon the methamphetamine residue found on the piece of burnt aluminum foil in the duffel bag in the back seat, the conviction would not necessarily violate KRS 505.020(1)(a). This residue would have been sufficient to support a conviction under KRS 218A.1415(1), *see Bolen v. Commonwealth, Ky.*, 31 S.W.3d 907, 909 (2000), *Commonwealth v. Shivley, Ky.*, 814 S.W.2d 572, 574 (1991), and a reasonable jury could have believed that this residue was not a product of the manufacturing process occurring in the trunk of the vehicle, *e.g.*, the residue represented methamphetamine purchased on the street or manufactured elsewhere and used personally by Appellant. With such a finding, a reasonable jury could have convicted Appellant of manufacturing methamphetamine (based upon the manufacturing process occurring in the trunk of the vehicle) and possession of methamphetamine (based upon the residue found in the back seat) without violating KRS 505.020(1)(a).

Beaty, 125 S.W.3d at 213.

Based on *Beaty*, we conclude a reasonable jury could have found that the roaches were personally used by Massie and, therefore, convicted Massie of possession and convicted him of trafficking based on the quantity of marijuana

found in the room used as an office. However, as in *Beaty*, the jury instructions did not require the jury to make the distinction between the two offenses and, therefore, the possession conviction must be reversed.

In *Miller v Commonwealth*, 77 S.W.3d 566, 576 (Ky. 2002), the Court stated the burden was on the Commonwealth:

Whether the issue is viewed as one of insufficient evidence, or double jeopardy, or denial of a unanimous verdict, when multiple offenses are charged in a single indictment, the Commonwealth must introduce evidence sufficient to prove each offense and to differentiate each count from the others, and the jury must be separately instructed on each charged offense.

Because the jury instructions did not distinguish between the marijuana found to support the possession and trafficking offenses, it is impossible to determine whether Massie was convicted of possessing marijuana and trafficking marijuana based on the same quantity of marijuana.

The Commonwealth argues that even if the jury instructions did not distinguish the offenses and were erroneous, we should not reverse because Massie did not object to the instructions. It admits that its contention is contrary to the holding in *Miller v. Commonwealth*, 283 S.W.3d 690, 695 (Ky. 2009). In *Miller*, the Court held that “a trial court errs in a case involving multiple charges if its instructions to the jury fail to factually differentiate between the separate offenses according to the evidence.” *Id.* The Commonwealth suggests that the rule recited encourages defense counsel to passively build reversible error into a case. Even if the Commonwealth’s concerns have merit, we are bound by Kentucky Supreme

Court precedent and, therefore, no purpose would be served by our further comment. SCR 1.030(8).

Finally, Massie argues that the trial court erred by imposing \$1,000 in total fines resulting from his two misdemeanor convictions. At the time of sentencing, Massie was represented by private counsel. Therefore, when it imposed the \$1,000 fine against Massie, the trial court was not acting in violation of KRS 534.040(4). Subsequently, this Court granted Massie's motion for a belated appeal, and Massie was appointed a public advocate.

After reviewing the record, we conclude that the trial court did not commit palpable error. The fines were imposed well before Massie was appointed counsel and, therefore, the fines were not improper.

Because Massie's felony trafficking conviction is supported by substantial evidence, it is affirmed. Massie's conviction for possession of marijuana and the \$500 fine imposed for that conviction is reversed. The case is remanded for proceedings consistent with this opinion.

ALL CONCUR.

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