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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-002322-MR

MARCUS B. BOYKEN — APPELLANT

v.

APPEAL FROM MCLEAN CIRCUIT COURT
HONORABLE BRIAN WIGGINS, JUDGE
ACTION NO. 10-CR-00012

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: MOORE AND STUMBO, JUDGES; SHAKE,[1] SENIOR JUDGE.

SHAKE, SENIOR JUDGE: Marcus B. Boyken appeals from a judgment of the McLean Circuit Court convicting him of possession of anhydrous ammonia in an unapproved container, tampering with physical evidence, and second-degree

[1] Senior Judge Ann O'Malley Shake 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.

wanton endangerment. On appeal, Boyken argues that the trial court erred by allowing lay testimony identifying the odor of anhydrous ammonia in his vehicle and by denying his motion for a directed verdict on the tampering charge. Finding no error, we affirm.

For purposes of this appeal, the events leading up to Boyken's arrest on these charges are not in dispute. During the evening hours of February 22, 2010, Deputy Timothy McCoy was patrolling a stretch of Kentucky Highway 138 in McLean County. Around 10:00 p.m., he observed Boyken traveling at a high rate of speed and crossing the center line. Deputy McCoy's radar indicated that Boyken was driving 77 mph in a 55 mph zone. As Deputy McCoy activated his lights to pull over the vehicle, he saw a container thrown out of the window of Boyken's car. The container was followed by a vapor cloud, which Deputy McCoy recognized as anhydrous ammonia by its strong odor and by a "chokey" feeling it caused him.

After the container was thrown out, Boyken pulled over. Deputy McCoy put Boyken in handcuffs and patted him down. In Boyken's jacket, Deputy McCoy found a small camera case containing a set of digital scales, baggie corners and a stripped pen.

Sheriff Frank Cox arrived at the scene shortly after the stop. The Sheriff stated that he saw a white lid and he smelled anhydrous ammonia in

Boyken's vehicle. Sheriff Cox and Deputy McCoy also retrieved a small water cooler on the side of the road near where the container was thrown from the vehicle. The lid found in the vehicle fit the container.

Based on this traffic stop, Boyken was indicted for possession of anhydrous ammonia in an unapproved container with intent to manufacture methamphetamine, tampering with physical evidence, first-degree wanton endangerment, and possession of drug paraphernalia. The last charge was dismissed prior to trial. Following a jury trial, Boyken was convicted on the remaining counts. He received a sentence of seven years of imprisonment. He now appeals from the convictions for possession of anhydrous ammonia and tampering with physical evidence.

Boyken primarily objects to the qualifications of the witnesses to identify anhydrous ammonia. At trial, Sheriff Cox and Deputy McCoy both testified that they recognized the smell of anhydrous ammonia through their experiences in farming operations. In addition, the Commonwealth called Bruce Cabbage to testify that the cooler found on the road was not an approved container for anhydrous ammonia. He further testified that he identified a slight smell of anhydrous ammonia on the cooler. Boyken maintains that none of the witnesses were competent to identify anhydrous ammonia by smell. We disagree.

Pursuant to Kentucky Rules of Evidence (KRE) 701, a non-expert witness may testify "in the form of opinions or inferences" if the testimony is "(a) [r]ationally based on the perception of the witness; (b) [h]elpful to a clear

understanding of the witness' testimony or the determination of a fact in issue; and (c) [n]ot based on scientific, technical, or other specialized knowledge[.]" Testimony offered under KRE 701 is constrained, however, by KRE 602, which "further refines the scope of permissible lay opinion testimony, limiting it to matters of which the witness has personal knowledge." *Cuzick v. Com.*, 276 S.W.3d 260, 265 (Ky. 2009); *see also Mills v. Com.*, 996 S.W.2d 473, 488 (Ky. 1999). In this case, Sheriff Cox, Deputy McCoy and Mr. Cabbage were each testifying from personal knowledge when identifying the odor of anhydrous ammonia.

Moreover, even if specialized knowledge were required to identify the odor of anhydrous ammonia, the Commonwealth established that each of these witnesses was qualified to do so. Sheriff Cox testified that he had been a farmer for fifteen years before he became sheriff and had applied anhydrous ammonia to crop fields. He also testified that he had handled numerous tanks of anhydrous ammonia during his work as sheriff. Similarly, Deputy McCoy testified that he had worked at a farm supply store for twelve or thirteen years and had extensive experience with anhydrous ammonia tanks. He further testified that he had received specialized training in methamphetamine after becoming a deputy.

Finally, Mr. Cabbage testified that he had worked for a farm supply store for twenty-four years. During the course of this employment, he designed and built an anhydrous ammonia storage system and worked on transport trailers. He testified he was familiar with the federal regulations for approved containers

for anhydrous ammonia. In addition, the Kentucky Department of Agriculture hired Cabbage in 2002 to build a safety trailer for use in training for the handling of anhydrous ammonia. Finally, Cabbage is certified in Kentucky as a fire training instructor in the handling of anhydrous ammonia and he had taught safety courses in the subject for police, firefighters and emergency medical personnel.

Considering this experience, Sheriff Cox, Deputy McCoy and Mr. Cabbage were well-qualified to identify anhydrous ammonia by smell. Furthermore, Mr. Cabbage was clearly qualified to testify concerning the approved containers for anhydrous ammonia. Therefore, their testimony was admissible under KRE 702.

Boyken also maintains that he was entitled to a directed verdict on the charge of tampering with physical evidence. He points out that in *Com. v. Henderson*, 85 S.W.3d 618 (Ky. 2002), a stolen purse was emptied of its contents and thrown from the window of a car during a police chase. However, the defendant in *Henderson* was charged with tampering based on his act of hiding the money from the purse in his shoe and not for throwing the purse out of the window. Boyken contends that his act of throwing the cooler from the window of the car would likewise not qualify as tampering with physical evidence.

However, Boyken misreads this aspect of the holding in *Henderson*. In that case, the Commonwealth attempted a fairly novel application of the tampering statute, charging the defendant with tampering for hiding the stolen money in his shoe. While the Kentucky Supreme Court upheld this interpretation,

the defendant's act of throwing the purse from the car window involved the more commonly accepted application of the offense. *See Phillips v. Com.*, 17 S.W.3d 870, 876 (Ky. 2000), and *Burdell v. Com.*, 990 S.W.2d 628, 633 (Ky. 1999).

Under KRS 524.100(1), a person is guilty of tampering with physical evidence when, believing that an official proceeding is pending or may be instituted, he:

> (a) Destroys, mutilates, conceals, removes or alters physical evidence which he believes is about to be produced or used in the official proceeding with intent to impair its verity or availability in the official proceeding[.]

In *Burdell*, the Kentucky Supreme Court held that a person "who conceals or removes evidence of criminal activity contemporaneously with the commission of his crime commits the offense of tampering with physical evidence" as defined by the statute. *Burdell*, 990 S.W.2d at 633. Boyken's actions in throwing the cooler from the window of his car clearly fall within this definition. Consequently, the trial court properly denied Boyken's motion for a directed verdict. *Com. v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991).

Accordingly, the judgment of conviction by the McLean Circuit Court is affirmed.

ALL CONCUR.

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