

RENDERED: JANUARY 14, 2011; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2009-CA-001624-MR

ESLEY DEE CORNELIUS

APPELLANT

v. APPEAL FROM MCCRACKEN CIRCUIT COURT  
HONORABLE R. JEFFREY HINES, JUDGE  
ACTION NOS. 09-CR-00122 AND 09-CR-00122-001

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING IN PART;  
REVERSING IN PART;  
AND REMANDING

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BEFORE: TAYLOR, CHIEF JUDGE; LAMBERT, JUDGE; HENRY,<sup>1</sup> SENIOR  
JUDGE.

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<sup>1</sup> 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 KRS 21.580. Sr. Judge Henry concurred in this opinion prior to the expiration of his term of senior judge service. Release of the opinion was delayed by administrative handling.

HENRY, SENIOR JUDGE: Esley Dee Cornelius appeals from a judgment of the McCracken Circuit Court following a jury trial at which he was convicted of possession of marijuana, tampering with physical evidence and being a first-degree persistent felony offender (PFO). He argues that there was insufficient evidence to support the tampering charge, and that the Commonwealth failed to prove an element of the PFO charge. We affirm the judgment as to the first issue, but reverse and remand as to the PFO charge.

Cornelius was arrested as the result of a controlled drug buy arranged by Jesse Riddle, a deputy sheriff in McCracken County. Deputy Riddle received a call from a confidential informant, Jose Hernandez, who stated that he had made contact with an individual who might be able to sell him some cocaine. Hernandez arranged to meet this individual, and a recording device was installed in Hernandez's vehicle. Deputy Riddle conducted surveillance. He observed Hernandez pull up beside a pickup truck, which was the type of vehicle the seller had said he would be driving. Riddle saw three black males in the truck. Hernandez pulled over and parked. The pickup drove down the street, turned and then came back and parked behind Hernandez. After a minute or two, one of the men in the pickup got out and entered the passenger side of Hernandez's car. Hernandez used \$1,500 provided to him by the police to purchase a baggy of a white substance which resembled cocaine. The substance was later tested and found not to be cocaine.

Meanwhile, the pickup truck began to pull away. Riddle told other officers to stop the truck. Deputy Tom Crabtree pulled over the pickup truck, drew his gun and ordered the occupants to show him their hands. Cornelius was the driver of the pickup. Deputy Crabtree testified that the driver's window was down, that he could see the driver moving and that his hands were out of sight and not on the steering wheel. The officers eventually had to open the pickup door and remove Cornelius. They handcuffed him, placed him on the ground and searched him. Crabtree found a baggie of marijuana in Cornelius's pocket. The passenger in the truck was Cornelius's seventeen-year-old son.

Matt Carter, a detective sergeant with the sheriff's department, interviewed Cornelius on the day of his arrest and received conflicting statements from him about the marijuana. Initially, Cornelius told the detective that the marijuana was in his hands when he was told by police to put his hands up. He explained that he had discovered the marijuana in the vehicle when they were stopped, and he was getting ready to give it to the officers. Detective Carter conferred briefly with Deputy Crabtree, then returned to confront Cornelius with the fact that the marijuana had been found in his pocket. According to Detective Carter, Cornelius then told him that when the police stopped the truck, his son (the passenger) told him that there was marijuana in the seat, so Cornelius grabbed it and put it in his pocket. When Carter asked him why he put it in his pocket, he responded that he did not try to hide it. "If I'd tried to hide it I'd have put it in my drawers. They knew they'd find it in my pocket."

Cornelius was found guilty of tampering with evidence for concealing the marijuana in the pocket of his pants. He received a sentence of two years on the charge. He was also found guilty of being a persistent felony offender in the first degree. He received a sentence of two years on the tampering charge, but was sentenced to serve eleven years on the PFO charge in lieu of the two years.

On appeal, Cornelius argues that the trial court erred in denying his motion for a directed verdict on the tampering charge.

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. Benham*, 816 S.W.2d 186, 187 (Ky. 1991).

The jury was instructed to find Cornelius guilty if it believed beyond a reasonable doubt that he had concealed the marijuana in the belief that it was about to be produced or used in an official proceeding; and that he did so with the intent to impair its availability in the proceeding.

Cornelius points out that there was no eyewitness testimony that he actually put the marijuana in his pocket when the police officers approached the pickup

truck. He contends that his confession to Detective Carter that he had put the marijuana in his pocket was insufficient to sustain his conviction under Kentucky Rules of Criminal Procedure (RCr) 9.60. RCr 9.60 provides that a defendant's confession, "unless made in open court, will not warrant a conviction unless accompanied by other proof that such an offense was committed." Cornelius argues that the mere presence of the marijuana in his pocket was insufficient corroboration to support his confession. But Deputy Crabtree testified that when he ordered the occupants of the truck to show him their hands, Cornelius's hands were out of sight, he was moving, and he refused to leave the truck. This testimony was sufficient corroborative evidence for the jury to infer that Cornelius had placed the marijuana in his pocket during that interval in order to impair its availability in an official proceeding.

Cornelius contends that no one "in their right mind" would think that he could successfully conceal drugs by placing them in his pocket when the police are approaching to apprehend him. In our view, an individual in that highly stressful situation might react in exactly in such a manner. Cornelius likens his situation to that of concealment of contraband by shoplifters, which the Kentucky Supreme Court has ruled typically does not rise to the level of tampering. *Commonwealth v. Henderson*, 85 S.W.3d 618, 620 (Ky. 2002). The Court explained that because shoplifters must conceal the contraband in order to escape without detection, the concealment is directly incident to the underlying crime. Tampering "requires more. The concealment must be to prevent the evidence from being used in an

official proceeding, a fact that is lacking in the typical shoplifting situation.” *Id.* Cornelius’s concealment of the marijuana was not part of the underlying crime; rather, he placed it, albeit in a poorly chosen hiding place, in an effort “to prevent law enforcement officials from finding the evidence and using it in an official proceeding.” *Id.*

Next, Cornelius argues that he was denied due process of law because the Commonwealth failed to prove each element of the first-degree persistent felony offender charge, specifically, that one of the two prior felony convictions used to prove the charge did not result in a sentence of one year or more. *See* Kentucky Revised Statutes (KRS) 532.080(3). The jury instructions describing that prior conviction (which occurred in Illinois for unlawful possession of firearm ammunition by a felon) did not mention the length of the sentence imposed at all. In fact, the sole penalty imposed in that case was a fine of \$1,000. Because this issue was not preserved for appeal, Cornelius requests that we review it under the palpable error standard. *See* RCr 10.26. The Commonwealth concedes 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.

*Brewer v. Commonwealth*, 206 S.W.3d 343, 349 (Ky. 2006) (internal quotations and footnotes omitted).

We agree with Cornelius that the jury instructions constituted palpable error. “[T]he language of the statute [KRS 532.080(3)(a)] is clear and unambiguous. In order for there to be a first-degree PFO prosecution based on convictions from a foreign jurisdiction, the sentences imposed for each conviction must be for one year or more or a sentence of death.” *Johnson v. Commonwealth*, 277 S.W.3d 635, 639 (Ky. App. 2009). Without this error, Cornelius could not have been convicted of PFO in the first degree, which carries a possible sentence of ten to twenty years when it is employed to enhance a conviction for tampering with physical evidence, a Class D felony. See KRS 532.080(6)(b); KRS 524.100(2).

The Commonwealth contends that Cornelius could have been convicted of being a PFO in the second degree on the basis of the other felony conviction described in the jury instructions, and urges us to remand Cornelius to the McCracken Circuit Court for resentencing as a persistent felony offender in the second degree. While such a resolution might appear practical, it is prohibited by the holding of our Supreme Court in *White v. Commonwealth*, 770 S.W.2d 222 (Ky. 1989), without a retrial on the charge of PFO second degree.

Accordingly, Cornelius’s conviction on the charge of being a persistent felony offender in the first degree is reversed, and the case is remanded to the McCracken Circuit Court for dismissal of that charge and for further proceedings in accordance with this opinion.

ALL CONCUR.

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