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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-000635-MR

SEAN NOAKES — APPELLANT

v.

APPEAL FROM BOONE CIRCUIT COURT
HONORABLE DAVID E. MELCHER, JUDGE
ACTION NO. 09-CR-00764

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON, DIXON AND STUMBO, JUDGES.

STUMBO, JUDGE: Sean Christopher Noakes appeals from a Judgment and Sentence of the Boone Circuit Court reflecting a jury verdict of guilty on one count of Promoting Contraband in the 1st Degree. Noakes argues that he was denied a fair trial under the 14th Amendment to the United States Constitution when the trial court refused to instruct the jury on the lesser included offense of Promoting

Contraband in the 2nd Degree. He also contends that the court erred in ordering the five-year sentence for Promoting Contraband to run consecutively with a life sentence he received in a separate murder trial. We find no error, and accordingly affirm the Judgment and Sentence on appeal.

On December 15, 2009, the Boone County grand jury indicted Noakes on one count of Promoting Contraband in the 1st Degree. The indictment arose from an incident occurring on September 30, 2009, while Noakes was incarcerated in the Boone County detention center. It was alleged that on that date, Boone County Deputy Jailer Eric Besecker received a tip from an inmate that Noakes had a "shank" or other item of dangerous contraband on his person or in his cell. On that day, Noakes was also scheduled to appear in court on unrelated charges of murder and attempted murder.

Jail officials investigated the claim that Noakes had a shank by making him pass through a metal detector. The detector allegedly twice alerted to Noakes' rectal area, and a pat down search revealed no contraband. A third metal detector scan again alerted to the presence of metal. Noakes was moved to another room so that an unclothed search could be conducted, where he was momentarily left alone. When the unclothed search later began, a piece of metal was found in Noakes' shoe. The item was photographed, and consisted of a 4" - 5" long piece of metal attached to the barrel of a pen. The metal may have been removed from a cleaning bucket to which Noakes had access, but it had not been sharpened. Sergeant Chris Lynn would later testify that Noakes told him, "You saved someone's life today."

Thereafter, Noakes went to trial on the murder and attempted murder charges, and was found guilty. The charge of Promoting Contraband in the 1st Degree was then tried, which also resulted in a guilty verdict and a recommendation that Noakes receive a sentence of 5 years in prison. The trial court then sentenced Noakes in conformity with the recommendation, ordering the sentence on the Promoting Contraband conviction to run consecutively with the sentence from the murder and attempted murder conviction. This appeal followed.

Noakes now argues that the trial court erred in failing to instruct the jury on the lesser included offense of Promoting Contraband in the 2nd Degree. He maintains that the trial court is required to instruct the jury on any lesser included offense which the evidence supports, and notes that the sole difference in the 1st and 2nd degrees of the Promoting Contraband is the latter charge's removal of the word "dangerous" as it applies to the contraband. Noakes contends that because the piece of metal discovered on his person was not sharpened, the jury could have determined that it was not dangerous and therefore could have returned a guilty verdict on the lesser included offense. He seeks an Order reversing his conviction on this issue. In response, the Commonwealth argues that the trial court correctly determined that the evidence supported a jury finding that Noakes possessed dangerous contraband, but would not have supported a finding that he possessed contraband which was not dangerous. It argues that the court properly declined to instruct the jury on the lesser included offense.

A trial court is required to instruct the jury on a lesser included offense if the evidence would permit a juror to reasonably conclude that the defendant was not guilty of the charged offense but was guilty of the lesser one. *Fredline v. Commonwealth*, 241 S.W.3d 793 (Ky. 2007). Conversely, the court may not instruct on a lesser included offense when the evidence does not support it. *Id*.; *Thompkins v. Commonwealth*, 54 S.W.3d 147, 151 (Ky. 2001) ("The duty to instruct on any lesser included offenses supported by the evidence does not require an instruction on a theory with no evidentiary foundation."). The trial court's ruling on this issue must be affirmed unless it constitutes an abuse of discretion. *Crain v. Commonwealth*, 257 S.W.3d 924 (Ky. 2008).

Noakes was charged with one count of Promoting Contraband in the 1st Degree. This offense is set out in KRS 520.050(1), which states that,

> A person is guilty of promoting contraband in the first degree when:
>
> (a) He knowingly introduces dangerous contraband into a detention facility or a penitentiary; or
>
> (b) Being a person confined in a detention facility or a penitentiary, he knowingly makes, obtains, or possesses dangerous contraband.

The lesser included offense of Promoting Contraband in the 2nd Degree is set out in KRS 520.060(1), which states that,

> A person is guilty of promoting contraband in the second degree when:

> (a) He knowingly introduces contraband into a detention facility or a penitentiary; or
>
> (b) Being a person confined in a detention facility or a penitentiary, he knowingly makes, obtains, or possesses contraband.

"Dangerous contraband" is "contraband which is capable of use to endanger the safety or security of a detention facility or persons therein, including, but not limited to, dangerous instruments as defined in KRS 500.080, any controlled substances, any quantity of an alcoholic beverage, and any quantity of marijuana, and saws, files, and similar metal cutting instruments[.]" KRS 520.010(3). Conversely, "contraband" is "any article or thing which a person confined in a detention facility is prohibited from obtaining or possessing by statute, departmental regulation, or posted institutional rule or order[.]" KRS 520.010(1).

Noakes' argument centers on his claim that the metal item discovered on his person is reasonably characterized as "contraband" rather than "dangerous contraband." In support of this argument, he directs our attention to the testimony of Deputy Lynn, who stated that it did not appear that the metal was sharpened. Noakes contends that because the metal did not - according to Deputy Lynn - appear to be sharpened, it therefore could have been found by the jury not to be "dangerous." Noakes also points to a statement made by the trial judge when the jury instructions were being considered, wherein the court stated that the jury could believe the metal is not dangerous. This statement appears in the video record at 2/21/11, 01:07. Noakes argues that since the trial judge conceded that the jury

could find the item to be contraband and not dangerous contraband, it necessarily follows that he was entitled to a jury instruction on the lesser included offense.

We have examined the trial court's statement, and in context the judge is not opining that the metal contraband is or is not dangerous, nor that a jury could find that it is not dangerous. Rather, the judge was simply restating Noakes' argument for the purpose of clarifying the issue. What is clear, however, is that the judge repeatedly noted that two people testified at trial that the contraband was dangerous, whereas there was no testimony or other evidence that the contraband was not dangerous. Upon recognizing that a lesser included instruction must be supported by the evidence, the court denied Noakes' motion for the instruction because no evidence was produced at trial supporting a conclusion that the metal item was not dangerous.

As noted above, we do not examine this issue *de novo* but rather consider the trial court's ruling under the abuse of discretion standard. *Crain*, *supra*. The trial judge determined that no evidence was adduced at trial that the metal instrument was not dangerous. This finding is supported by the record, and as such does not constitute an abuse of discretion. We find no error on this issue.

Noakes also argues that he was denied a fair trial under the Due Process clause of the 14th Amendment to the United States Constitution because the circuit court ordered the five-year sentence for Promoting Contraband to run consecutively with the life sentence he received in the murder trial. He maintains that the sentence is violative of KRS 532.110(1)(c), which provides that "[i]n no

event shall the aggregate of consecutive indeterminate terms exceed 70 years." Because in his view the life sentence is more than 70 years, no sentence can run consecutively with a life sentence under that statute. Noakes directs our attention to *Bedell v. Commonwealth*, 870 S.W.2d 779 (Ky. 1994) and other case law in support of this argument, and he seeks an Order reversing his conviction on this issue.

In ordering the sentence for Promoting Contraband to run consecutively with the life sentence for murder, the trial court cited KRS 533.060(3), which requires a sentence to run consecutively with another offense if it occurred while the defendant was awaiting trial on the other charge. Because the offense of Promoting Contraband was committed while Noakes was awaiting trial on the murder charge, the circuit court applied KRS 533.060(3) to run the sentences consecutively.

We find as controlling the Kentucky Supreme Court's decision in *Clay v. Commonwealth*, 2010 WL 2471862 (Ky. 2010).[1] In *Clay*, the court determined that *Bedell* applied to situations where the defendant was convicted *in the same trial* of separate crimes and one sentence was for a term of years and the other was for life imprisonment. The *Clay* court opined that KRS 532.110(1)(c) and KRS 532.080 only apply "to sentences rendered in the same action for separate offenses." *Id*. In the matter at bar, Noakes was convicted and sentenced in separate trials and for separate offenses, though one offense was committed while

[1] This unpublished case is cited pursuant to CR 76.28(4)(c)

awaiting trial for the other. We conclude that the circuit court properly applied KRS 533.060(3) as requiring consecutive sentences.

For the foregoing reasons, we affirm the Judgment of the Boone Circuit Court.

ALL CONCUR.

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