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Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-000553-MR

JOHN T. MCGUFFIN APPELLANT

v.

APPEAL FROM GRAYSON CIRCUIT COURT
HONORABLE ROBERT A. MILLER, JUDGE
ACTION NO. 14-CR-00076

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KRAMER, CHIEF JUDGE; NICKELL AND THOMPSON, JUDGES.

NICKELL, JUDGE: A Grayson Circuit Court jury found John T. McGuffin guilty of trafficking in a controlled substance in the first-degree (two or more grams of methamphetamine)[1] and found him to be a persistent felony offender in the first-degree (PFO I).[2] He was sentenced to twelve years' imprisonment. McGuffin now appeals and claims the trial court: (1) erred in failing to grant a directed verdict;

[1] Kentucky Revised Statutes (KRS) 218A.1412(1)(b), a Class C felony.

[2] KRS 532.080(3).

(2) erred in failing to set a penalty for the underlying offense before setting a penalty for the PFO conviction; and (3) should have dismissed the jury panel. We affirm.

I. BACKGROUND

On November 15, 2013, in a controlled buy set up by the Leitchfield Police Department, a confidential informant purchased what he believed was two grams of methamphetamine from McGuffin. A second controlled buy was carried out on January 15, 2014, with the same confidential informant purchasing what he thought was one gram of methamphetamine.

On June 3, 2014, McGuffin was indicted for trafficking in a controlled substance and PFO I. At trial, a forensic scientist testified she received two samples of methamphetamine for testing, the first weighing 1.862 grams, and the second weighing 0.465 grams. She also testified after testing the two samples, she determined each contained a quantity of methamphetamine. The jury convicted McGuffin on March 30, 2015. This appeal followed.

II. ANALYSIS

A. Directed Verdict

At the close of the Commonwealth's case, McGuffin moved for a directed verdict on the trafficking charge. He argued the evidence was insufficient to prove he trafficked methamphetamine in an amount over two grams, a necessary element to convict him of a Class C felony. McGuffin did not dispute the aggregate weight of the packaged material purchased from him on the two

occasions exceeded two grams. He contended, however, the Commonwealth failed to establish he trafficked in more than two grams of methamphetamine because the lab technician did not conduct a qualitative analysis to establish the relative purity of the samples. The trial court reviewed the language of KRS 218A.010(25) and KRS 218A.1412 and concluded any substance containing any quantity of methamphetamine is methamphetamine no matter how much filling or cutting agent is added. Thus, the trial court denied McGuffin's motion. On the same basis, the trial court denied McGuffin's renewed motion for directed verdict made at the close of all of the evidence. On appeal, McGuffin contends the trial court erred in denying his motions for directed verdict based on a flawed interpretation of the interplay between KRS 218A.010(25) and KRS 218A.1412.

> On a 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 purposes 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 statute under which McGuffin was convicted, KRS 218A.1412, provides in relevant part:

> (1) A person is guilty of trafficking in a controlled substance in the first degree when he or she knowingly and unlawfully traffics in:
>
> . . .
>
> > (b) Two (2) grams or more of heroin or methamphetamine;

When KRS 218A.1412 was originally enacted in 1992, our legislature defined methamphetamine in KRS 218A.010(25) as "any substance that contains any quantity of methamphetamine, or any of its salts, isomers, or salts of isomers." While KRS 218A.1412 has been amended several times since its enactment, KRS 218A.010(25) remains unchanged.

When interpreting statutory language, all words and phrases—unless otherwise defined—must be construed according to their common meaning. KRS 446.080(4); *Dep't of Revenue, Fin. & Admin. Cabinet v. Shinin' B Trailer Sales, LLC*, 471 S.W.3d 309, 311 (Ky. App. 2015). Generally, a statutory definition declaring what a term "means" excludes any other meaning. *Colautti v. Franklin*, 439 U.S. 379, 392, 99 S.Ct. 675, 684, 58 L.Ed.2d 596 (1979). As statutory interpretation is a purely legal matter, our review is *de novo*. *Commonwealth v. Long*, 118 S.W.3d 178, 181 (Ky. App. 2003).

The list of definitions in KRS 218A.010 is prefaced with the phrase "as used in this chapter." Thus, the definition of methamphetamine was intended to be the exclusive definition throughout KRS Chapter 218A.

McGuffin contends use of the term "methamphetamine" as defined in KRS 218A.010(25) creates an absurd result when applied to KRS 218A.1412. He believes it is absurd to imagine the legislature intended a person found to have trafficked in 1.8 grams of 90% pure methamphetamine should receive a less severe punishment than one who trafficked in 2.5 grams of 10% pure methamphetamine simply because the latter added "a bit of baking soda." We disagree.

The legislative desire to punish those who distribute a greater quantity of a mixture containing methamphetamine more harshly than those who distribute a lesser quantity is reasonable and logical. Justification for emphasizing total weight as opposed to purity was expressed by the Supreme Court of Nevada which wrote:

> [t]he legislature enacted [the trafficking statute] to deter large-scale distribution of controlled substances, thus decreasing the number of persons potentially harmed by drug use. We note, however, that controlled substances are typically sold in a diluted state. In such cases as this, where the controlled substance has been "cut," the substance is rendered more harmful to society because the dilution increases the potential number of persons who will partake of the proscribed controlled substance. The increased potential for harm to society justifies the imposition of more severe penalties for the possession of large amounts of a diluted controlled substance than for smaller amounts of a pure controlled substance.

Sheriff of Humboldt County v. Lang, 763 P.2d 56, 58-59 (Nev. 1988) (citations omitted). In Kentucky, legislative intent to punish individuals with a greater amount of substances containing methamphetamine is evidenced by the 2012 amendments to KRS 218A.1412, establishing a two-gram threshold for trafficking

in methamphetamine as a Class C felony. Contrary to McGuffin's contention, we do not believe a more severe punishment for those who pose a greater threat to society constitutes an absurd result.

Prior to being amended, KRS 218A.1412 did not distinguish between felony classes based on the quantity of methamphetamine sold. The pre-2012 statute proscribed the unlawful trafficking in "a controlled substance that contains any quantity of methamphetamine, including it salts, isomers and salts of isomers[.]" Violation of the statute was a Class C felony.[3] However, subsequent to the 2012 amendment, a bifurcated punishment scale was introduced whereby trafficking in "two (2) grams or more of . . . methamphetamine" is punishable as a Class C felony, while trafficking in a lesser amount of methamphetamine constitutes a Class D felony.[4] The definition of methamphetamine contained in KRS 218A.010 was not amended.

McGuffin contends an inherent conflict exists between these two statutes based on his belief the two gram threshold contained in the amended version of KRS 218A.1412 requires proof of the quantity of pure methamphetamine—not to include the weight of any adulterants or cutting agents —while KRS 218A.010(25) does not require such proof based on the "any quantity" language contained therein. He argues the rules of statutory construction demand the alleged conflict be resolved in his favor.

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[3] Class C felonies are punishable by five to ten years' imprisonment. KRS 532.020.

[4] Class D felonies are punishable by one to five years' imprisonment. KRS 532.020.

Where the meaning of the statute is clear and unambiguous, we need not resort to the rules of statutory construction to determine legislative intent, because the exact language of the statute must be followed. *Griffin v. City of Bowling Green,* 458 S.W.2d 456 (Ky. 1970). The language of KRS 218A.1412, as amended, shows the General Assembly clearly intended to distinguish serious drug trafficking from mere peddling, as evidenced by the reduction in penalties for trafficking in smaller quantities of methamphetamine. Nowhere in the statute do we discern an intention to amend the definition of methamphetamine to require proof of the weight of the pure illegal substance. That KRS 218A.010(25) was not amended, further bolsters our decision. Had the General Assembly wished to base the level of punishment on the weight of the pure, unadulterated controlled substance, it could have easily said so. It did not. "We are not at liberty to add or subtract from the legislative enactment or discover meanings not reasonably ascertainable from the language used." *Beckham v. Board of Educ.*, 873 S.W.2d 575, 577 (Ky. 1994). Thus, we reject McGuffin's invitation to graft additional requirements onto the statute when the Legislature itself chose not to do so.

The Commonwealth proved McGuffin sold more than two grams of methamphetamine pursuant to the definition contained in KRS 218.010. The trial court did not err in denying McGuffin's motion for a directed verdict.

B. PFO Sentencing

McGuffin next argues the court erred when it failed to instruct the jury to recommend a sentence for the underlying felony before determining guilt on the

PFO I charge. The jury found McGuffin guilty of first-degree trafficking in a controlled substance and then being a PFO I. The jury was not required to recommend a sentence on the underlying conviction and instead recommended a sentence of twelve years on the PFO. McGuffin now claims his right to due process under the Fourteenth Amendment was violated and requests reversal for a new penalty phase. McGuffin concedes this issue is unpreserved, but requests palpable error review under RCr 10.26.

In *Montgomery v. Commonwealth*, 320 S.W.3d 28, 49 (Ky. 2010), our Supreme Court held where there is no possibility the PFO sentence is unlawful, any error in not requiring the jury to fix an underlying sentence is a mere procedural defect which does not entitle an appellant to palpable error relief. Here, McGuffin does not claim, nor does it appear, his twelve-year sentence for being a PFO I is illegal. Therefore, the trial court's slight is a mere procedural defect and McGuffin is not entitled to relief pursuant to RCr 10.26.

C. Jury Panel

Prior to trial, it was revealed the Commonwealth Attorney was part of the jury pool. On the morning of McGuffin's jury trial, McGuffin moved *in camera* to dismiss the entire jury panel as a result. When asked by the trial judge if there were any allegations the prosecutor had communicated to any of the potential jurors about the case, McGuffin stated the defense had no knowledge of any communications whatsoever. He nevertheless requested the trial court declare the entire jury panel tainted. The trial judge stated the prosecutor had been excused

from the jury pool and McGuffin could question the potential jurors about whether the prosecutor sitting on the jury panel affected their ability to be fair and impartial. After *voir dire* began it was revealed the present trial was the jury panel's first. McGuffin did not question the panel regarding the Commonwealth Attorney.

Following trial, McGuffin moved for judgment notwithstanding the verdict based, in part, on the Commonwealth Attorney being part of the jury pool. The court noted there was no evidence the Commonwealth Attorney had any contact or communications with the jurors. The court reminded McGuffin it had given him the opportunity to make a record, but he chose not to do so—not even making an avowal of how the jury might have been impacted. The court denied McGuffin's motion.

McGuffin now claims he was denied his right to be tried by an impartial jury. Specifically, he alleges the entire jury was potentially tainted and rendered partial because the prosecutor was a member of the jury panel. He insists dismissing the entire jury panel was the only way the court could have insured a fair and impartial jury was seated.

In challenging a trial court's denial of a motion to dismiss a jury pool, a defendant has the burden of showing actual or implied bias that tainted the jury pool. *Shegog v. Commonwealth,* 142 S.W.3d 101, 110 (Ky. 2004). "The trial court has broad discretion in determining whether a jury panel should be

dismissed, and its ruling should not be disturbed absent a clear abuse of discretion." *Tabor v. Commonwealth*, 948 S.W.2d 569, 571 (Ky. App. 1997).

In the present case, we cannot conclude the trial court abused its discretion in denying McGuffin's request for relief because McGuffin failed to meet his burden of demonstrating the jury pool was tainted by actual or implied prejudice. The trial court invited McGuffin to question potential jurors about any possible effect from the prosecutor initially being part of the jury panel. However, McGuffin declined to ask panel members whether the presence of the Commonwealth Attorney in any way influenced them. "The principal purpose of *voir dire* is to probe each prospective juror's state of mind and to enable the trial judge to determine actual bias and to allow counsel to assess suspected bias or prejudice." *Shegog*, 142 S.W.3d at 110. Had McGuffin taken advantage of *voir dire* questioning to explore the issue perhaps he could have met his burden of showing actual or implied bias that tainted the jury pool. However, for reasons unknown, McGuffin failed to avail himself of the opportunity.

We discern no basis for reversing McGuffin's conviction based on a violation of his right to a fair trial by an impartial jury. All of the evidence indicates the potential jurors had no idea the Commonwealth Attorney was a member of the jury panel. During *voir dire*, the trial court asked if anyone knew the Commonwealth Attorney and there was no response. The court further asked the venire if anyone had read, heard, or discussed anything concerning the allegations in this case. Again, no one responded. McGuffin cites no authority

requiring the trial court to order a mistrial under the circumstances presented here. Nor has he demonstrated contacts or communications that so prejudiced the venire against him as to deny him a fair trial. Accordingly, we conclude the trial court did not abuse its discretion in denying McGuffin's request.

For the foregoing reasons, the judgment of the Grayson Circuit Court is affirmed.

KRAMER, CHIEF JUDGE, CONCURS.

THOMPSON, JUDGE, DISSENTS WITHOUT SEPARATE OPINION.

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