

RENDERED: OCTOBER 6, 2017; 10:00 A.M.  
NOT TO BE PUBLISHED

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

NO. 2015-CA-001672-MR

MICHAEL JOSEPH JAMES

APPELLANT

v. APPEAL FROM HENDERSON CIRCUIT COURT  
HONORABLE KAREN LYNN WILSON, JUDGE  
ACTION NO. 15-CR-00241

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
REVERSING

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BEFORE: KRAMER, CHIEF JUDGE; STUMBO, AND MAZE JUDGES.

KRAMER, CHIEF JUDGE: This appeal arises from a Henderson Circuit Court judgment convicting Michael Joseph James on charges of tampering with physical evidence, first-degree possession of a controlled substance and possession of drug paraphernalia. James argues he was entitled to a directed verdict on these charges.

After a careful review of the record, we reverse because James was entitled to a directed verdict on the charges against him.

### **Background**

On or about April 6, 2015, Detective Nathan Jenkin, of the Kentucky State Police's Narcotics Unit, received reports of possible drug activity at a residence on Letcher Street in the City of Henderson. Detective Jenkin, along with another detective and a trooper, went to the residence to investigate the reports. When approaching the house to conduct a "knock and talk," Detective Jenkin noticed James. James did not live at the house in question; he was walking in the area and towards a nearby alley. Detective Jenkin testified it appeared that James was walking towards the residence but changed direction and veered to go down the alley when he noticed the officers. Detective Jenkin followed James into the alley and observed another individual walking in the same direction as James. This other man turned out to be Jason James, James's son. Detective Jenkin identified himself as State Police and yelled for James and his son to stop. James ignored Detective Jenkin's orders and continued walking away.

Once James stopped, the two detectives ordered James to show them his hands. James kept his hands at his waistline, and Detective Jenkin saw items dropping to the ground from James's waist. Detective Jenkin could not tell what

the items were specifically, but he saw with certainty a black canister fall. James was placed under arrest.

Detective Jenkin discovered that the black canister was an empty black diabetic test strip canister that contained a white residue. Approximately six to eight inches away from the black canister, Detective Jenkin found a glass pipe. The glass pipe had been burned. Jenkin testified that this all occurred around four o'clock in the afternoon during daylight and that nothing impaired his vision of what James was doing. He also testified that the black canister was clearly visible because it was a "black item on gray gravel, so it kind of stood out, it's not like we were in tall grass, or woods, or anything. We were in an alley."

The two items were sent to a Kentucky state crime lab to be tested. The pipe tested positive for methamphetamine, however the black canister did not. James is a diabetic, and no one disputes the black canister belonged to him. He denied, however, that the pipe was his. The September 16, 2015 jury trial lasted one day. James's counsel moved the court to grant a directed verdict at the close of the Commonwealth's case on all three charges, which was denied. Counsel then renewed the motion at the end of trial, and that motion was denied. James was found guilty of all three charges. James was sentenced on October 28, 2015 to two (2) years for tampering with physical evidence, two (2) years for first-degree possession of a controlled substance, and twelve (12) months for possession of

drug paraphernalia, with the felony convictions being served concurrently. This appeal followed.

### **Standard of Review**

On appellate review, a trial court's denial of a motion for directed verdict should only be reversed "if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt[.]" *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991) (citing *Commonwealth v. Sawhill*, 660 S.W.2d 3, 4-5 (Ky. 1983)). In determining whether to grant a motion for directed verdict, the trial court must consider the evidence as a whole, presume the Commonwealth's proof is true, draw all reasonable inferences in favor of the Commonwealth, and leave questions of weight and credibility to the jury. *Id.* To survive a motion for directed verdict, the Commonwealth must produce more than "a mere scintilla of evidence." *Id.*

### **Analysis**

On appeal, James makes two arguments. James's first argument is that the trial court erred in not granting his motion for directed verdict on the charges of first-degree possession of a controlled substance and possession of drug paraphernalia. His second argument is that the trial court erred in not granting his motion for directed verdict on the charge of tampering with physical evidence.

**A. First-Degree Possession of a Controlled Substance and Possession of Drug Paraphernalia**

James contends the prosecution did not produce sufficient evidence that he possessed the glass pipe containing methamphetamine to overcome a motion for directed verdict on the charges of first-degree possession of a controlled substance and possession of drug paraphernalia.

KRS<sup>1</sup> 218A.1415(1)(c) states that, “a person is guilty of possession of a controlled substance in the first degree when he or she knowingly and unlawfully possesses . . . methamphetamine[.]” An individual can be found guilty of possession of drug paraphernalia if that individual possesses, with intent to use, drug paraphernalia, which is defined in relevant part to mean “all equipment, products and materials of any kind which are used, intended for use, or designed for use in . . . inhaling, or otherwise introducing into the human body a controlled substance . . . .” KRS 218A.500(1) and (2). Actual possession, however, is not required. *Hargrave v. Commonwealth*, 724 S.W.2d 202, 203 (Ky. 1986) (citing *Rupard v. Commonwealth*, 475 S.W.2d 473, 475 (Ky. 1971)). It is sufficient if the defendant had constructive possession, meaning “the contraband involved was subject to his dominion or control.” *Id.* The Kentucky Supreme Court has clearly stated that in determining whether to grant a motion for directed verdict,

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<sup>1</sup> Kentucky Revised Statutes.

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 such testimony.

*Benham*, 816 S.W.2d at 187.

Here, the evidence is insufficient to survive a directed verdict that the glass pipe was in the dominion or control of James, even for constructive possession. Drawing all fair and reasonable inferences from the evidence in favor of the Commonwealth, Detective Jenkin's testimony is lacking in a number of ways. He testified that he witnessed "objects" falling from James's waistline and that the glass pipe was in the vicinity where he saw these "objects" fall. He testified that he could not say that he saw the glass pipe fall. There was no testimony in this case regarding the approximate number of items that Detective Jenkin saw James drop (he merely stated that he had seen "multiple items" drop), or any description of the items he allegedly saw dropped (other than the black canister, which contained no drug residue). Detective Jenkin testified the glass pipe that was found on the ground was four to five inches long. However, he did not describe seeing any item that large being dropped, even though James was stopped around 4 o'clock in the afternoon. Detective Jenkin acknowledged

nothing impaired his vision of James's actions. Detective Jenkin attested that the glass pipe was found in an alley, which was a public area where there had been reports of possible drug activity coming from a nearby residence. Detective Jenkin also conceded there was other debris in the alley. This was not an area that would typically be in the control of a criminal defendant as opposed to a house, apartment, car, garage, etc. Although he testified that the glass pipe was found in the area where James was standing and near where he had dropped the canister, this Court has previously noted that "physical proximity to an area where drugs are found is insufficient on its own to support a finding that an accused had constructively possessed those drugs." *Haney v. Commonwealth*, 500 S.W.3d 833, 835 (Ky. App. 2016) (citing *United States v. Gordon*, 700 F.2d 215, 217 (5th Cir. 1983)). Consequently, James's motion for a directed verdict on first-degree possession of a controlled substance and possession of drug paraphernalia should have been granted.

### **B. Tampering with Physical Evidence**

Because we have concluded, *supra*, that there was no evidence that James ever possessed the glass pipe, it logically follows that he should not have been convicted of tampering with physical evidence for allegedly dropping the glass pipe in the alley. Consequently, a directed verdict should have been granted on the charge of tampering with physical evidence.

## **Conclusion**

Accordingly, the judgment of the Henderson Circuit Court is reversed, with directions to enter a new judgment granting James's motion for a directed verdict on the charges of first-degree possession of a controlled substance, possession of drug paraphernalia, and tampering with physical evidence.

STUMBO, JUDGE, CONCURS.

MAZE, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

MAZE, JUDGE, DISSENTING: I respectfully, but strongly, dissent from the Majority's conclusion that there was not sufficient evidence to survive a directed verdict motion on the issue of possession. With all due respect to my colleagues, should this Majority view be adopted the next thing you will hear will be the sound of contraband being dropped to the ground in an effort to prevent prosecution. As such I strongly dissent, and it is my hope that the Supreme Court will provide guidance on this issue for our lower courts.

It is my opinion that sufficient facts are present which support the finding of the jury who heard the case. Detective Jenkin saw items drop to the ground from James's waistline. He could not identify what the items were as they fell, other than a black canister. After placing James under arrest, the detective approached the fallen items. He discovered the black canister, and within six to eight inches of that canister he discovered the glass pipe, which contained what



turned out to be methamphetamine residue. In summary, Detective Jenkin's testimony indicates that he saw items fall from James's waistline and when he approached these same items he discovered one of the items was the glass pipe. To me, this supports the jury's finding of possession.

The Majority incorrectly finds that these facts are not sufficient to show actual or constructive possession because Detective Jenkin was not able to identify with specificity that the item falling to the ground was the glass pipe, that the pipe was in a public alley of a known drug area, and that there was other debris in the alley. To me, this would have made a wonderful closing argument to the jury. Additionally, the Majority's approach will set a dangerous precedent in any future cases that rely upon a finding of constructive possession. If the Majority's analysis becomes the yardstick to be measured on constructive possession cases, then no officer's testimony will be sufficient to meet this burden unless the officer can see with certainty each item as it is dropped or thrown to the ground in a pristine area. As the Majority correctly states, it is sufficient if a defendant had constructive possession of the contraband, meaning "the contraband involved was subject to his dominion or control." *Hargrave v. Commonwealth*, 724 S.W.2d 202, 203 (Ky. 1986) (citation omitted). I would conclude that Detective Jenkin's testimony supported a reasonable inference that James had constructive possession

of the glass pipe. The weight to be given to that inference was a matter for the jury to decide.

Additionally, the Majority quotes *Haney v. Commonwealth*, 500 S.W.3d 833, 835 (Ky. App. 2016), as support for their opinion that merely finding the glass pipe in the area where James was standing, where he had dropped the canister, is not sufficient. The majority emphasizes the discussion in *Haney* that “physical proximity to an area where drugs are found is insufficient on its own to support a finding that an accused had constructively possessed those drugs.” *Id.* In my view, this is an incorrect application of *Haney*. As in the *Haney* case, which involved a meth lab in a home garage, “this is not an instance of mere proximity, rather it is a situation where the evidence adequately supports the conclusion that [the defendant] both knew the items were present and intended exclusive control over them.” *Id.* at 836.

While I disagree with the Majority’s conclusion on the possession charge, I believe that the tampering with physical evidence charge is worthy of further discussion. I am of the opinion that the directed verdict on the charge of tampering with physical evidence should have been granted because the mere act of dropping contraband on the ground is insufficient to sustain a conviction for tampering with physical evidence.

While there is clearly Kentucky case law addressing the issue of tampering, there appears to be no controlling case law on the specific issue of dropping contraband when approached by police.<sup>2</sup> Other jurisdictions, however, have addressed this issue.<sup>3</sup> Those jurisdictions make clear that “courts considering effectively identical statutory language have uniformly concluded that when a defendant merely drops, throws down, or abandons evidence in the presence of law enforcement, such conduct will not sustain a conviction for tampering with physical evidence.” *State v. Lasu*, 768 N.W.2d 447, 451 (Neb. 2009).

Additionally, other jurisdictions have recognized that it is unlikely “the General Assembly intended the simple act of abandoning evidence in plain view of the police to constitute the commission of an additional crime of a greater degree.” *Commonwealth v. Delgado*, 679 A.2d 223, 225 (Pa. 1996). In *Cornelius v. Commonwealth*, 362 S.W.3d 382, 384 (Ky. App. 2012), we emphasized that “the Commonwealth cannot bootstrap a tampering charge onto another charge when there is no evidence of an active intent by the defendant to impair availability of

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<sup>2</sup> *Commonwealth v. Henderson*, 85 S.W.3d 618, 620 (Ky. 2002); *Mullins v. Commonwealth*, 350 S.W.3d 434, 442 (Ky. 2011); *Cornelius v. Commonwealth*, 362 S.W.3d 382, 384 (Ky. App. 2012); *Williams v. Commonwealth*, 486 S.W.3d 291, 298 (Ky. 2016); *Buchanan v. Commonwealth*, 399 S.W.3d 436, 445 (Ky. App. 2012).

<sup>3</sup> *State v. Hawkins*, 406 S.W.3d 121, 133-34 (Tenn. 2013) (citing *Boice v. State*, 560 So.2d 1383, 1384 (Fla. Dist. Ct. App. 1990)); *State v. Jones*, 983 So.2d 95, 99 (La. 2008); *Vigue v. State*, 987 P.2d 204, 206 (Alaska Ct. App. 1999); *State v. Lasu*, 768 N.W.2d 447, 451 (Neb. 2009); *Commonwealth v. Delgado*, 679 A.2d 223, 225 (Pa. 1996); *Pennewell v. State*, 977 A.2d 800, 803 (Del. 2009); *People v. Comage*, 946 N.E.2d 313, 318 (Ill. 2011).

evidence.” I am of the opinion that tampering with physical evidence requires some intentional act to destroy, mutilate, conceal, alter, or remove evidence from the scene. KRS<sup>4</sup> 524.100(1)(a). Merely dropping evidence to the ground in plain sight of officers does not meet this requirement.

For the reasons stated above, I respectfully dissent.

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<sup>4</sup> Kentucky Revised Statutes.