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NOT TO BE PUBLISHED

OPINION OF DECEMBER 14, 2018, WITHDRAWN

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-001687-MR

ROBERT H. RAY

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE A.C. MCKAY CHAUVIN, JUDGE
ACTION NO. 12-CR-001506

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING

** ** * ** * ** *

BEFORE: LAMBERT AND MAZE, JUDGES; HENRY, SPECIAL JUDGE.¹

MAZE, JUDGE: Robert Ray appeals from an order of the Jefferson Circuit Court revoking his probation and imposing his remaining fifteen-year sentence. We

¹ Special Judge Michael L. Henry sitting by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

agree with Ray that the Commonwealth failed to prove that he knowingly possessed a handgun found in the place where he was living. We further conclude that allegations contained in an executed search warrant, standing alone, are not sufficient to establish a probation violation by a preponderance of the evidence. Hence, we reverse the trial court's order revoking Ray's probation.

On August 7, 2013, Ray entered an *Alford*² plea to one count each of trafficking in a controlled substance – heroin – two or more grams, possession of drug paraphernalia, and reckless driving. In accord with the Commonwealth's offer, the trial court sentenced him to a total of fifteen years' imprisonment. However, the court probated the sentence for a period of five years subject to numerous conditions. In January 2016, Ray stipulated to several violations of his probation. The trial court declined to revoke his probation at that time but ordered Ray to serve sixty days in jail. Upon appearing to serve the sentence, Ray admitted to using marijuana. The trial court again declined to revoke his probation but extended his probation by six months.

In August 2017 the Commonwealth filed a new motion to revoke based upon his alleged possession of a handgun. At the revocation hearing, Detective Joe Lamb of the Louisville Metro Police Department testified that officers executed a search warrant at 6209 Tabor Drive on August 18, 2017.

² See *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

Several days earlier, Ray provided that address to his probation officer as his new address. Detective Lamb stated that the warrant was based on reports that Ray was selling narcotics from the residence. The search did not reveal any narcotics, but a semi-automatic handgun was found in a nightstand in the master bedroom.

Ray's girlfriend, Kashmir Nash, arrived at the residence and told the officers that Ray had lived there "the past couple months." She also stated that the gun was hers and that her brother, Antwan Sartin, had purchased it in 2010. At the hearing, Nash testified that she normally kept the gun in her car, but she had moved it to the nightstand on the day in question because she was taking the car in for service. She further testified that Ray was not aware of the gun. Ray also testified that he was unaware that Nash had a gun.

At the conclusion of the hearing, the trial court granted the Commonwealth's motion to revoke Ray's probation. The court stated that Ray should have been aware of the gun's presence in the residence. In its written order, the trial court added that it found the testimony that Ray was unaware of the gun to be "incredible" and suggested that Ray recruited Nash to lie to protect him. Over Ray's objection, the court also found that the search warrant provided probable cause to believe that Ray was engaging in other criminal activity. Ray now appeals from the order revoking his probation.

This Court reviews a circuit court’s decision to revoke probation or conditional discharge for abuse of discretion. *Wills v. Commonwealth*, 396 S.W.3d 319, 322 (Ky. App. 2013). An abuse of discretion occurs when the decision was “arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” *Miller v. Eldridge*, 146 S.W.3d 909, 914 (Ky. 2004) (quoting *Goodyear Tire & Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000)). More specifically, a court abuses the discretion afforded it when “(1) its decision rests on an error of law . . . or a clearly erroneous factual finding, or (2) its decision . . . cannot be located within the range of permissible decisions.” *Id.* at 915, n.11. (cleaned up).

In the current case, the trial court primarily found that Ray possessed a handgun in violation of the conditions of his probation. The Commonwealth concedes that there was no evidence that Ray actually possessed the handgun. Based on the paperwork found with the gun, the Commonwealth also concedes that Nash’s brother purchased the gun in 2010 and that Nash was the lawful owner of the gun.

Rather, the Commonwealth maintains that its presence in the nightstand next to the bed was sufficient to warrant an inference that Ray was aware of it, and thus was in constructive possession of it. Possession may be proven through either actual possession or constructive possession. *Johnson v. Commonwealth*, 90 S.W.3d 39, 42 (Ky. 2002), *overruled on other grounds by*

McClanahan v. Commonwealth, 308 S.W.3d 694 (Ky. 2010). “Constructive possession exists when a person does not have actual possession but instead knowingly has the power and intention at a given time to exercise dominion and control of an object, either directly or through others.” *Id.* (quoting *United States v. Kitchen*, 57 F.3d 516, 520 (7th Cir. 1995)).

At the hearing, the trial court took the position that Ray should have known about the gun due to its presence in the nightstand in the master bedroom. But contrary to the assertion in the Commonwealth’s petition for rehearing, Nash did not testify that Ray was sharing the master bedroom at the time the search. But contrary to the assertion in the Commonwealth’s petition for rehearing, Nash did not testify that Ray was sharing the master bedroom at the time the search was conducted. And regardless of the credibility determination, there was no evidence that, at the time of the search, Ray had access to any of the closed drawers in the master bedroom, or even to the bedroom itself. Indeed, there was no evidence of any of his possessions in the master bedroom. Unlike in *Johnson*, Ray’s brief residence at Nash’s house was not so established as to warrant an inference that he had access to and knowledge of everything in the house. Unlike in *Johnson*, Ray’s brief residence at Nash’s house was not so established as to warrant an inference that he had access to and knowledge of everything in the house.

Contrary to the trial court's reasoning, Ray cannot be charged with knowledge of the gun as he would be with household appliances or furniture in the residence. There must be some evidence, direct or circumstantial, establishing that he knowingly had access to the gun. Unlike in *Johnson*, Ray's brief residence at Nash's house was not so established as to warrant an inference that he had access to and knowledge of everything in the house. Furthermore, we find no evidence, direct or circumstantial, to support the trial court's speculation that Ray "recruited" Nash to lie over the gun. Nash consistently claimed ownership of the gun, even before Ray was even aware that the search had taken place. And the objective evidence clearly established that Nash was the owner of the gun. Therefore, we conclude that the Commonwealth failed to meet its burden on this issue.

Finally, we also agree with Ray that the trial court erred in relying on the search warrant to establish a probation violation. First, the warrant was never introduced as evidence, and the allegations contained in the warrant were only introduced, very generally, through the testimony of Detective Lamb. And as noted above, no narcotics or other evidence of drug trafficking was found in the residence. Ray also correctly notes that the Commonwealth never provided advance notice that it intended to rely on the search warrant as a basis to revoke his probation.

Moreover, a search warrant may be issued upon a showing of probable cause. The test for probable cause is whether there is a fair probability that contraband or evidence of a crime will be found in a particular place. *Moore v. Commonwealth*, 159 S.W.3d 325, 239 (Ky. 2005). In contrast, a probation revocation requires proof, by a preponderance of the evidence, that a violation has occurred. *Hunt v. Commonwealth*, 326 S.W.3d 437, 439 (Ky. 2010).

As a matter of law, we conclude that allegations in an executed search warrant, standing alone, cannot meet the standard of proof necessary to support a probation revocation. Otherwise, the Commonwealth could obtain a probation with less than a preponderance of the evidence. The standard may be met if some evidence corroborating the search warrant affidavit is offered at the revocation hearing. But in this case, the specific allegations contained in the affidavit were never introduced into evidence, much less any corroborating evidence. Consequently, we conclude that the trial court abused its discretion by finding that the search warrant was sufficient evidence of another probation violation.

Accordingly, we reverse the order of the Jefferson Circuit Court revoking Ray's probation.

ALL CONCUR.

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