

IMPORTANT NOTICE
NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.

Supreme Court of Kentucky **FINAL**

2004-SC-0561-MR

DATE 3-16-06 E.A.G. Grant D.C.

ROBERT FITZGERALD DAWSON

APPELLANT

V. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE PAMELA GOODWINE, JUDGE
03-CR-01358

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Robert Fitzgerald Dawson, was convicted by a Fayette Circuit Court jury of first-degree possession of a controlled substance, and first-degree persistent felony offender (PFO). The jury recommended a twenty-year sentence, and the trial court entered judgment accordingly. Appellant appeals to this Court as a matter of right. Ky. Const. § 110 (2)(b).

FACTUAL BACKGROUND

In the early morning hours of September 28, 2003, Appellant was arrested for alcohol intoxication. Appellant was a passenger in a vehicle in which the driver was arrested for driving under the influence. At the jail, Appellant was searched prior to booking. The search disclosed a baggie containing one gram of crack cocaine tucked inside the cuff of Appellant's sweatpants. Consequently, Appellant was additionally charged with possession of a controlled substance.

The jury acquitted Appellant of alcohol intoxication, but convicted him of cocaine possession. His sentence was enhanced from five years to twenty years upon the jury's finding of first-degree PFO.

Appellant raises three claims of error on appeal: 1) trial court error in admitting testimony of the arresting officer; 2) trial court error in denying a directed verdict of acquittal; and 3) prosecutorial misconduct.

I.

Appellant asserts the trial court erred by allowing the arresting officer to testify regarding the circumstances of Appellant's arrest. At the conclusion of the officer's testimony, Appellant moved for suppression of the testimony. Appellant contends probable cause was lacking to arrest Appellant for alcohol intoxication. Therefore, if the arrest was unconstitutional, then the search and seizure were unlawful, and the cocaine should have been excluded as evidence. We find Appellant's claim without merit.

KRS 222.202 proscribes the offense of alcohol intoxication:

(1) A person is guilty of alcohol intoxication when he appears in a public place manifestly under the influence of alcohol to the degree that he may endanger himself or other persons or property, or unreasonably annoy persons in his vicinity.

Probable cause is "defined in terms of facts and circumstances 'sufficient to warrant a prudent man in believing that the [suspect] had committed or was committing an offense.'" Gerstein v. Pugh, 420 U.S. 103, 111-12, 95 S.Ct. 854, 862, 43 L.Ed.2d 54 (1975) (citing Beck v. Ohio, 379 U.S. 89, 91, 85 S.Ct. 223, 225, 13 L.Ed.2d 142 (1964)). The arresting officer testified Appellant was staggering, unsteady on his feet, smelled of alcohol, and had to lean against the car to remain upright and keep from falling. It is apparent under these circumstances that the officer had reason to believe Appellant was "in a public place manifestly under the influence of alcohol" KRS 222.202.

Accordingly, we conclude the trial court properly allowed the testimony of the police officer because probable cause existed for the arrest.

II.

Appellant argues the trial court erred in denying a directed verdict of acquittal for possession of cocaine. Appellant contends there was insufficient evidence to prove Appellant unlawfully possessed cocaine. We disagree.

“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 Commonwealth presented sufficient evidence for determination by the jury. The jury heard testimony from the jail officer who conducted the search, as well as testimony from a Kentucky State Police forensic chemist regarding the seized cocaine. Furthermore, the jail officer testified that Appellant denied the cocaine belonged to him. Consequently, it is not clearly unreasonable for the jury to convict Appellant of possession of cocaine. As a result, the trial court properly denied Appellant’s motion for directed verdict of acquittal.

III.

Appellant’s final claim alleges prosecutorial misconduct. Appellant asserts the Commonwealth interjected impermissible personal opinions into the closing argument and made statements unsubstantiated by the evidence. However, we find that Appellant does not have a viable claim. To warrant reversal, prosecutorial misconduct must be so egregious “as to render the entire trial fundamentally unfair.” Partin v. Commonwealth, 918 S.W.2d 219, 224 (Ky. 1996). The reviewing court “must focus on the overall fairness of the trial, and not the culpability of the prosecutor.” Slaughter v.

Commonwealth, 744 S.W.2d 407, 411-12 (Ky. 1988). A prosecutor has wide latitude to comment on trial strategy, evidence, as well as the tactics of the defense. Id. at 412. After review of the record, we find the prosecutor's comments do not constitute reversible error.

CONCLUSION

For the reasons stated herein, the judgment and sentence of the Fayette Circuit Court are affirmed.

All concur.

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