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NOT TO BE PUBLISHED OPINION

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RENDERED: AUGUST 23, 2007
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL
DATE 9-13-07 ELA Group P.C.

2005-SC-000387-MR

KYLER BURSE — APPELLANT

V.

ON APPEAL FROM CHRISTIAN CIRCUIT COURT
HONORABLE JOHN L. ATKINS, JUDGE
NO. 04-CR-000150

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

This case is on appeal from the Christian Circuit Court where Appellant, Kyler Burse, was convicted of first-degree trafficking in cocaine, second offense. Appellant raises four claims of error: (1) that evidence found as a result of an unreasonable strip search was improperly admitted; (2) that unduly prejudicial hearsay was improperly introduced; (3) that "expert" testimony was improperly introduced; and (4) that there was insufficient evidence of first-degree trafficking in cocaine. The first, second and third claims of error are unpreserved, no manifest injustice occurred, and thus no palpable error can be found. Addressing claim four, we find no error.

I. Background

Appellant's conviction arose from charges brought against him for alcohol intoxication and trafficking in cocaine, second offense. Appellant, Kyler Burse (hereafter

"Burse"), a young African-American male, was a passenger in a car that was the subject of a D.U.I. stop. Burse was a resident of the neighborhood where the stop occurred.

Burse had an odor of alcohol on his breath and otherwise appeared intoxicated. He was arrested for Alcohol Intoxication and was searched incident to arrest at the scene. A police property sheet indicated $154 was taken from Burse at the time of arrest. The Uniform Citation listed his occupation as a student at Hopkinsville College.

Burse was taken to the Christian County jail and a pat-down search was conducted as part of the booking process. The arresting officer asked the jail staff to perform a strip search on Burse because the arrest took place in a high drug trafficking area. When Burse was instructed to squat on the floor, three small bags containing a white substance dropped from his buttocks. Lab testing indicated there was a total of about three grams of crack cocaine in the bags. The Uniform Citation described the crack cocaine as consisting of twenty-one small rocks and one larger rock.

Burse was found guilty of first-degree trafficking in cocaine. At the sentencing phase, the jury found this to be a second offense and imposed the enhanced penalty of twenty years. Burse now appeals to this Court as a matter of right. Ky. Const. § 110(2)(b).

II. Analysis

A. Elements of First-Degree Trafficking

Burse argues that the jury's finding of guilt on trafficking was clearly unreasonable, and alleges there was no evidence to support intent to sell, distribute, dispense or transfer. There is no merit to this claim.

Essentially, Burse is arguing that he was entitled to a directed verdict. The trial court is authorized to direct a verdict for the defendant only if the Commonwealth

produces no more than a mere scintilla of evidence. Commonwealth v. Benham, 816 S.W.2d 186, 187-88 (Ky. 1991). If the evidence is such that a reasonable juror could believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given. The matters of weight of the evidence and the credibility of the witnesses are reserved for the jury. Id. at 187.

Under this standard, this matter was properly submitted to the jury. Burse possessed twenty-one rocks of crack cocaine and $154 when he was arrested. Whether or not the amount of crack cocaine was an unreasonable amount for personal use or whether $154 was an unreasonable amount of cash for Burse to be carrying are matters for the jury to decide. A reasonable jury could, and did, conclude from the evidence that Burse was trafficking in cocaine. There was no error.

B. Palpable Error

Burse argues that evidence found as a result of an unreasonable strip search was improper, and that prejudicial hearsay and "expert" testimony were improperly introduced.

Because these alleged errors were not preserved for appellate review, the Court will reverse because of them only if they constitute palpable error under RCr 10.26. A palpable error is one that "affects the substantial rights of a party" and will result in "manifest injustice" if not considered by the court. Schoenbachler v. Commonwealth, 95 S.W.3d 830 (Ky. 2003) (citing RCr 10.26). Recently this Court clarified that the key emphasis in defining such a palpable error under RCr 10.26 is the concept of "manifest injustice." Martin v. Commonwealth, 207 S.W.3d 1, 3 (Ky. 2006). "[T]he required showing is probability of a different result or error so fundamental as to threaten a defendant's entitlement to due process of law." Id. Having reviewed Appellant's

argument, the Court concludes that there was no manifest injustice. Therefore, the alleged errors cannot be considered palpable and are not grounds for reversal.

III. Conclusion

For the reasons set forth herein, the judgment of the Christian Circuit Court is affirmed.

All sitting. Lambert, C.J.; Minton, Noble and Scott, JJ., concur. Cunningham, J., concurs by separate opinion. Schroder, J., dissents by separate opinion.

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CONCURRING OPINION BY JUSTICE CUNNINGHAM

I concur with the result, but write to specifically express that I do not believe there was error at all, palpable or otherwise, in the cavity search. Administrators of detention facilities are granted great leeway in conducting these types of searches, even of pretrial detainees. The U. S. Supreme Court has said so. Visual or body cavity searches during the processing or incarceration of jail inmates can be conducted on less than probable cause. Bell v. Wolfish, 441 U.S. 520, 560 (1979). Consequently, in my opinion, there was no error in this case, palpable or otherwise.

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DISSENTING OPINION BY JUSTICE SCHRODER

I disagree with the majority's conclusion that there was no manifest injustice where the defendant was strip searched solely because he was charged with alcohol intoxication in a high drug trafficking area. The Supreme Court of the United States has stated the following regarding strip searches:

> The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application. In each case it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted.

Bell v. Wolfish, 441 U.S. 520, 558-559, 99 S.Ct. 1861, 1884, 60 L.Ed.2d 447 (1979).

Relative to strip searches for minor misdemeanor charges or traffic offenses, the Sixth Circuit recognized in Dobrowolskyj v. Jefferson County, 823 F.2d 955, 957 (6th Cir.1987), cert. denied, 484 U .S. 1059, 108 S.Ct. 1012, 98 L.Ed.2d 978 (1988):

> The majority of the circuits have held unconstitutional blanket strip search policies of all inmates including those detained only on minor misdemeanor charges or traffic offenses. These courts have held that automatic strip searches of all detainees violate the fourth amendment without a reasonable suspicion, based on the nature of the charge, the characteristics of the detainee, or the circumstances of the arrest, that the detainee is concealing contraband.

Similarly, in Masters v. Crouch, 872 F.2d 1248, 1255 (6th Cir.1989), cert. denied, 493 U.S. 977, 110 S.Ct. 503, 107 L.Ed.2d 506 (1989), the Court held that:

> authorities may not strip search persons arrested for traffic violations and nonviolent minor offenses solely because such persons will ultimately intermingle with the general population at a jail when there were no circumstances to support a reasonable belief that the detainee will carry weapons or other contraband into the jail.

It is hard for me to believe that the majority approves a strip search of a passenger in a car who was arrested merely for alcohol intoxication, a violation or minor misdemeanor offense. KRS 222.202; KRS 222.990. The driver in this case was subject to a D.U.I. stop while passing through a high drug trafficking area. The passenger happened to be a college student with $154.00 in his pocket. There was no indication of drugs or drug-related activity in the car, and there was no evidence that the passenger or the driver was carrying weapons or any other contraband. There was no evidence that the passenger was being uncooperative or even acting suspicious. The strip search in this case was clearly unlawful and I believe rose to the level of palpable error. RCr 10.26; see Martin v. Commonwealth, 207 S.W.3d 1, 4-5 (Ky. 2006). The last time I checked, the Fourth Amendment to the United States Constitution still applies in Kentucky. I would vacate the conviction and remand for suppression of the evidence obtained pursuant to the unlawful strip search.