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NOT TO BE PUBLISHED OPINION

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RENDERED: APRIL 23, 2009

NOT TO BE PUBLISHED

Supreme Court of Kentucky

2008-SC-000051-MR

FINAL

DATE 5/14/09 Kelly Klaber D.C.
APPELLANT

RONNIE LAMONT SEARIGHT

V. ON APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES D. ISHMAEL, JR., JUDGE
NO. 07-CR-00933

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

After a jury trial, Appellant Ronnie Searight was convicted of first-degree possession of a controlled substance, second-degree fleeing and evading, and of being a first-degree persistent felony offender (PFO). He raises three claims of error on appeal. Finding no reversible error, Appellant's conviction is affirmed.

I. Background

On May 16, 2007, Sergeant Clay Combs, an officer with the Lexington Police Department, observed Appellant leaning into a vehicle that was stopped in the road and blocking traffic. He testified that he saw Appellant reach into the vehicle and draw his hand back out, holding a small object. Appellant appeared visibly startled when he noticed the marked police vehicle. Sergeant Combs then turned on his lights, opened his door, and called over to Appellant. Upon hearing the officer's call, Appellant fled the scene. Sergeant Combs pursued Appellant across two parking lots and over multiple fences but

eventually lost sight of him. Ultimately, Appellant was found hiding in a trash can in a nearby yard, and he was then arrested and searched.

Another officer, Justin Burnette, actually performed the pat-down search of Appellant. Pursuant to police procedures, he reached into Appellant's pockets, the waistband of his shorts, and the waistband of his boxers. He also felt down Appellant's legs, starting at the thigh and crotch area and going all the way down to his shoes. Appellant was wearing baggy shorts and shoes but no shirt at the time of his arrest. During the search, no contraband or weapons were found on him. He was then placed in the back of Burnette's squad car.

The car had been detailed and vacuumed earlier that day and no one else had been in the back seat since the cleaning. While sitting in the car, Appellant began moving around in an unusual manner, lifting himself off the seat. The officers became suspicious and removed Appellant from the car for another search. When he exited the vehicle, the officers noticed a bag containing 683 milligrams of cocaine lying on the seat. Appellant immediately denied possession of the bag. The officers did not observe any hair or residue on the bag.

The grand jury handed down a four-count indictment against Appellant alleging (1) first-degree possession of a controlled substance, (2) first-degree fleeing/evading police, (3) third-degree criminal mischief, and (4) first-degree persistent felony offender.

A Fayette County jury found Appellant guilty of all the charges except criminal mischief. During the penalty stage, the jury recommended five years

in prison on the possession conviction, which was then enhanced to 20 years for the PFO conviction.

Appellant appeals to this Court as a matter of right. Ky. Const. § 110(2)(b).

II. Analysis

Appellant raises three issues on appeal: (1) that he should have received a mistrial because of Sergeant Combs's testimony about the initial charges; (2) that the Commonwealth failed to submit sufficient proof to support a finding that Appellant was a PFO; and (3) that there was not sufficient evidence to prove the possession charge.

A. Sergeant Combs's Testimony

During the Commonwealth's case-in-chief, Sergeant Combs testified that he charged Appellant with trafficking in crack cocaine after the arrest. The grand jury, however, declined to indict on that charge, opting instead to return a charge of possession. Appellant objected to the testimony and moved for a mistrial, arguing that the jury had been tainted and that he had been harmed irreparably by the testimony. Specifically, Appellant claimed the testimony was irrelevant and prejudicial in the sense that it reinforced the image of him as a drug dealer and not just a drug user.

The trial court chose not to grant a mistrial but did admonish the jury to disregard testimony on what the charges might have been. The court instructed the jury to consider only the charges of possession and fleeing/evading police.

The standard of review on appeal of a decision denying a mistrial is abuse of discretion. See Martin v. Commonwealth, 170 S.W.3d 374, 381 (Ky. 2005) (citing Maxie v. Commonwealth, 82 S.W. 3d. 860, 863 (Ky. 2002)). In Martin, this Court stated that “[a] manifest necessity for a mistrial must exist before it will be granted.” Id. at 381. There was no such manifest necessity in this case, especially since the trial court admonished the jury to disregard the objectionable testimony. Where the trial court admonishes the jury in lieu of the extreme remedy of a mistrial, “[i]t is presumed that the jury follows a trial judge’s admonition.” Id.

There are only two circumstances in which the “presumptive efficacy of an admonition falters.” Johnson v. Commonwealth, 105 S.W.3d 430, 441 (Ky. 2003). One situation is when “there is an overwhelming probability that the jury will be unable to follow the court’s admonition and there is a strong likelihood that the effect of the inadmissible evidence would be devastating to the defendant.” Id. The other situation arises when a “question [is] asked without a factual basis and [is] ‘inflammatory’ or ‘highly prejudicial.’” Id.

After reviewing the record, this Court finds no reason why the jury would have been unable to follow the trial court’s admonition. Furthermore, the comment made by Sergeant Combs was not inflammatory or highly prejudicial. Therefore, neither exception applies in this case and the presumption of an effective admonition stands, curing any error created by Sergeant Combs’s testimony. See Mills v. Commonwealth, 996 S.W.2d 473, 485 (Ky. 1999).

B. Proof of the PFO Charge

Appellant argues that the evidence presented by the Commonwealth was insufficient to prove an essential element of the PFO charge because it did not conclusively show that he was on parole from one of the prior felony sentences introduced by the Commonwealth at trial.

The jury was instructed on the PFO First Degree charge as follows:

You will find the Defendant guilty of being a Persistent Felony Offender, First Degree under this Instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:

A. That prior to May 16, 2007, the Defendant had been convicted of two or more felonies;

B. That he was eighteen years of age or older when he committed all of the offenses of which you believe he was so convicted;

C. That pursuant to those convictions, he was sentenced to a term of imprisonment of one year or more for each conviction;

D. That he was on parole from at least one such prior conviction at the time he committed the offense of which you have found him guilty in this case;

AND

E. That he is now twenty-one years of age or older.

During the penalty phase of the proceedings the Commonwealth read into the record relevant portions of certified documents from the Department of Corrections concerning Appellant's imprisonment, including felony convictions from 1993, 1994, 1996, and 2005. For the purpose of proving that Appellant was on parole when he was arrested on May 16, 2007, the Commonwealth specifically stated: "Defendant again entered prison on December 5, 2005 and was released on parole on January 17, 2007."

The Commonwealth reiterated this point in closing arguments, stating: “According to the documents from the Department of Corrections the Defendant was released on parole on January 17, 2007. So he was on parole when this possession of a controlled substance was committed.”

At no time during the trial did Appellant claim that he was not on parole when he was arrested. The trial record shows that after the Commonwealth presented its evidence during the penalty phase of the trial, Appellant was asked if there were any objections to the evidence presented. Appellant unambiguously responded in the negative. Appellant did not move for a directed verdict before the question of sentence was submitted to the jury. During his closing argument, Appellant’s attorney did not dispute that the PFO elements had been proven, choosing instead to seek sympathy from the jury and ask for the low end of the PFO penalty range. Therefore, the issue is not properly preserved for appellate review.

However, Appellant argues that the issue must be reviewed as palpable error pursuant to RCr 10.26. Palpable error, however, requires a showing of “manifest injustice,” which is a “probability of a different result or error so fundamental as to threaten a defendant’s entitlement to due process of law.” Martin v. Commonwealth, 207 S.W.3d 1, 3 (Ky. 2006).

Because this case is devoid of any evidence of “manifest injustice,” Appellant is not entitled to any relief. The records from the Department of Corrections indicate that Appellant was convicted of a felony offense on December 13, 2005 and sentenced to 4 years in prison. At the time he was released on parole (January 17, 2007), Appellant had served just over a year of

that sentence. Appellant had not been discharged by the parole board at the time he was arrested on May 16, 2007, nor had he been out of prison on parole a sufficient period of time to have been eligible for discharge by maximum expiration of his sentence under KRS 439.354.¹ Therefore, the record indicates Appellant was, in fact, on parole at the time he committed the felony for which he was convicted. While this may not have been the clearest evidence upon which to base a PFO conviction, there was no manifest injustice. Cf. Ruppee v. Commonwealth, 821 S.W.2d 484, 487 (Ky. 1991).

Because Appellant was on parole at the time of his arrest, all of the elements of first-degree PFO were met. Any technical insufficiencies of the evidence here do not constitute a manifest injustice.

C. Appellant's Motion for Directed Verdict

Appellant moved for a directed verdict at the end of the Commonwealth's case-in-chief and again at the close of all evidence. He claimed the Commonwealth failed to prove possession because it did not establish his dominion and control over the baggie of cocaine. The trial court overruled both motions.

¹ KRS 439.354 reads:

When any paroled prisoner has performed the obligations of his parole during his period of active parole supervision the board may, at the termination of such period to be determined by the board, issue a final discharge from parole to the prisoner. Unless ordered earlier by the board, a final discharge shall be issued when the prisoner has been out of prison on parole a sufficient period of time to have been eligible for discharge from prison by maximum expiration of sentence had he not been paroled, provided before this date he had not absconded from parole supervision or that a warrant for parole violation had not been issued by the board.

“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” Commonwealth v. Benham, 816 S.W.2d 186, 187 (Ky. 1991).

Appellant claims it is unreasonable to infer that he would discard a baggie of cocaine in a police vehicle rather than conceal it in a less detectable place before being arrested. He also argues it is not reasonable to infer that the baggie was hidden on his person since he was wearing baggy shorts and underwear at the time of the chase and it would have fallen out during such strenuous exertion. Furthermore, he was subjected to a thorough pat-down search prior to being placed in the police cruiser and the baggie had no residue on it which would indicate it had been in a body cavity.

However, taking into account the testimony presented at trial and viewing it in a light most favorable to the Commonwealth, this Court holds a reasonable jury could find that the Appellant exercised dominion and control over the cocaine in question. Therefore, the trial court’s decision to overrule Appellant’s motions for a directed verdict was not in error.

III. Conclusion

The trial court’s rulings denying Appellant’s motions for a mistrial and a directed verdict were not in error. Appellant’s claimed PFO error was not properly preserved in the trial court, and it was not manifest injustice so as to warrant relief based upon palpable error. Therefore, the judgment of the Fayette Circuit Court is affirmed.

All sitting. All concur.

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