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RENDERED: FEBRUARY 23, 2011
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2010-SC-000067-MR

WALTER LIONEL BUCKNER — APPELLANT

V.

ON APPEAL FROM DAVIESS CIRCUIT COURT
HONORABLE THOMAS O. CASTLEN, JUDGE
NO. 09-CR-00302

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING IN PART AND VACATING IN PART

Walter Buckner appeals as a matter of right from his convictions of first-degree trafficking in a controlled substance, subsequent offense; possession of drug paraphernalia; and being a first-degree persistent felony offender (PFO I), for which he was sentenced to a total of 50 years' imprisonment. Appellant's primary arguments are that: (1) there was insufficient proof that he knowingly possessed cocaine with the intent of selling, distributing, or dispensing it to another person to support a conviction of trafficking in the first-degree; (2) the jury's verdict violated double jeopardy principles; and (3) the trial court erred in

assessing a fine and court costs. For the reasons set forth herein, we affirm Appellant's convictions but vacate the imposition of a fine and court costs.

Owensboro police officer Fred Coomes began investigating Appellant's residence, located at 1032 Holly Avenue, due to anonymous tips that he received of possible drug activity. He began doing surveillance of the residence, on five or six occasions over two or three weeks, and noticed the Appellant coming and going at different times, as well as other people coming and going to the residence and staying for a very short time and leaving. In his experience, this activity was consistent with drug transactions; however, he did not record the license plates of the visitors' vehicles or otherwise track the visitors or interview them. At 4:15 a.m. on Monday, September 22, 2008, the morning of garbage collection, Coomes and Gary Mattingly, a detective with the street crimes division, conducted a "trash pull" at Appellant's residence,[1] for the purpose of discovering evidence of controlled substances or items related to using or trafficking in controlled substances. Coomes and Mattingly removed two bags of trash from the garbage can (referred to as a "trash toter") and left one bag of trash behind.

Mattingly and Coomes returned to the police station where they searched the two trash bags. In one of the trash bags they discovered a sandwich bag box which contained the following: approximately 40 sandwich bags with missing corners; a razor blade with a suspect residue on it; and a small plastic

[1] At trial, Mattingly explained that a trash pull involves removing trash bags from a garbage can left at the curb for garbage collection.

bag containing suspect residue.[2] Also found was a receipt, not located within the sandwich bag box but among the other trash, which was dated September 21, 2008. The receipt, which appeared to be for cell phone minutes, contained no address or any other information identifying the Appellant or his residence.[3] Because of the receipt, however, the officers believed that the trash in the trash bag had been recently discarded. There was nothing found in the trash with Appellant's name or address on it.

At approximately 9:00 a.m., Mattingly, Coomes, and Officer Heath Stokes returned to Appellant's residence to obtain a description of the premises in order to secure a search warrant. At that time, a white van stopped at Appellant's home, the driver knocked on the door, went inside for approximately 30 to 60 seconds, walked back to his vehicle, and then left. The white van was registered to Stephen Hanley. The van was not pursued.[4]

After the search warrant was obtained for the premises, Mattingly, Coomes, Stokes, two other uniformed patrol officers, and Detective Matt Conley from the Kentucky State Police returned to the residence at 10:20 a.m. to execute the search warrant. The residence was not occupied when they returned so they used a battering ram to enter the home. After speaking with

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[2] Mattingly testified that a corner of a sandwich bag can be torn off in order to package cocaine and a razor blade can be used to cut corners off sandwich bags or to cut cocaine into specific quantities.

[3] The officers did not investigate whether the cell phone actually belonged to Appellant.

[4] Coomes testified they did not pursue the driver of the white van, despite his belief that this activity was consistent with a drug sale, because he did not believe he had probable cause that a drug sale had in fact occurred.

Coomes on the phone, Agent Joseph Tocarz of the Drug Enforcement Agency (DEA) subsequently arrived at the scene to assist.

Appellant returned home shortly after the police began executing the search warrant. Appellant was searched, which revealed only an ID and a bank deposit slip. Appellant thereafter made several incriminating statements to the police officers, to the effect that he had possessed cocaine earlier in the day and had sold cocaine to Hanley that morning.

The search of Appellant's home, however, found no measurable quantity of cocaine. In the kitchen were found a Pringles can that had a "false bottom" or a secret compartment; a box of sandwich bags; and a bottle of Inositol powder, an over-the-counter supplement, which was recognized as a substance that can be used as a cutting agent for cocaine.[5] A sandwich bag with the corner cut off was found in the kitchen trash can. This bag did not appear to contain any residue. In the refrigerator was found a water bottle with a secret compartment containing white residue. In Appellant's bedroom was found a plastic container containing $142 in change. No pipes or paraphernalia used to consume drugs were found.

Neither the box of sandwich bags found in the kitchen cabinet, nor the single sandwich bag with a corner missing found in the kitchen trash can, were tested for cocaine residue. However, laboratory testing revealed that the residue on the razor blade and in the small plastic bag found in the trash toter

[5] Coomes testified that Inositol powder looks like cocaine and could be used as a cutting agent to increase the weight of cocaine.

tested positive for cocaine. The water bottle with the secret compartment found inside the refrigerator also tested positive for cocaine. The Pringles can tested negative for illegal substances.

On June 2, 2009, an indictment was returned charging Appellant with first-degree trafficking in a controlled substance, second or subsequent offense; possession of drug paraphernalia;[6] and being a first-degree persistent felony offender. A jury trial commenced on November 16, 2009.

In addition to the aforementioned testimony regarding the trash pull and search, Officers Coomes, Mattingly, and Stokes testified as to various incriminating statements made by Appellant. Coomes testified that when Appellant arrived home, he (Coomes) read the search warrant to him and gave him *Miranda* warnings. Appellant was searched, and a bank deposit slip was found in Appellant's pants pocket showing that he had deposited $497 cash that morning. Appellant was directed to sit on the couch. Coomes testified that he asked Appellant if he was employed and that Appellant said he was not. He then asked Appellant what the money was from, and Appellant replied that it was from selling cocaine. Coomes testified that Appellant told him that he (Appellant) thought the police would be coming because when he had gone out to put more trash in the toter, he saw that some of his trash was missing and assumed the police had taken it. Coomes asked Appellant if he had any more cocaine in the house, and Appellant said he got rid of it. First, Appellant

[6] For the corner baggies.

explained that Hanley had come earlier that day and bought the last $40 of cocaine that he had, but that he previously had about $500 worth. Coomes testified that later Appellant said that he had taken what other cocaine he had to someone's house that morning, but he would not say where. Coomes testified that Appellant told him that he stored his cocaine in a Pringles can and in a water bottle with a secret compartment.

Coomes testified that he spoke with Joseph Tocarz, a DEA agent that he was working with on another case, shortly after the search warrant was executed. Tocarz arrived shortly thereafter to assist. Coomes confirmed that Agent Tocarz spoke with Appellant while Appellant was seated on the sofa during the execution of the search.

Mattingly and Stokes testified that Appellant was subsequently escorted into the bedroom for purposes of taking a statement from him. Mattingly testified that he read Appellant his *Miranda* rights and that Appellant then signed a waiver and agreed to speak with them. Mattingly testified that he began asking questions, but that when they started getting into the facts of the case, Appellant asked to have the recorder turned off, saying he would speak freely if it was turned off. Mattingly testified that he turned the recorder off, after which Appellant confessed to selling Hanley forty dollars worth of cocaine that morning, and removing approximately five hundred dollars worth of cocaine from his residence prior to the search because he thought the police were coming.

Stokes similarly testified that, in the interview in the bedroom, Appellant stated that Hanley had come by that morning and that he (Appellant) had sold him a $40 piece of crack cocaine.[7] Stokes also recalled that Appellant said he had taken cocaine to a friend's house that morning. Differing from the account given by Mattingly, however, Stokes testified that the interview in the bedroom was not recorded because they did not have recording equipment with them at the scene. Stokes testified that after Appellant was taken to the police station, he and Mattingly interviewed him again. Stokes testified that they began to record this interview, but that Appellant asked that the recorder be turned off.[8]

Appellant testified in his own defense. Appellant stated he had lived at 1032 Holly Avenue for two and a half months prior to the search. He indicated that he had various friends, including Jerome Green, who stayed with him during that time when they did not have any other place to stay. Appellant testified that on the weekend prior to September 22, 2008 (the day of the trash pull), Green co-hosted a barbeque at his (Appellant's) home and that Green had moved a "trash toter," a large heavy-duty trashcan on wheels, to the curb in order to make room for a grill on the concrete slab on the side of the home where the trash toter had originally been located. Appellant stated that the trash toter remained at the curb over the weekend. Appellant denied that the razor blade, box of sandwich bags with the corners off, and the bag containing cocaine residue found in the trash toter were his, and stated that he had never

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[7] Stokes recalled that Coomes talked to Appellant first.

[8] No recordings were played at trial.

seen these things before. He testified that he had seen the water bottle in the freezer door, but that it belonged to someone else who had stayed with him, and had simply appeared to him (Appellant) to have frozen water in it. Appellant stated he kept money in the Pringles can, because his house had been broken into.

Appellant testified that Hanley had stopped by his residence the morning of September 22, 2008, to offer him a ride to the bank, which he (Appellant) declined, and he stated that he did not sell cocaine to Hanley. Appellant testified that he later walked to the bank to make a deposit and met up with Green in order to borrow Green's car. Appellant testified that the $497 which he deposited was from selling clothing and washing cars.

Appellant testified that Agent Tocarz approached him while he was seated on the couch in the living room during the search. At this point, Officer Tocarz flashed his badge and told Appellant that he was no longer dealing with the street crimes unit but was dealing with the DEA. Appellant testified that Agent Tocarz demanded to know who had "given him a heads up" that the police were coming to search his residence because his residence was "too clean." He stated that Agent Tocarz accosted him verbally, insisted that he was lying when he denied having any drugs in his home, and told him that he was going to smash his "f-ing" face in if he did not start telling the truth. Appellant testified that at this point, he started "making stuff up" to appease Agent

Tocarz, including falsely telling him that Hanley "came and got a forty." Tocarz did not testify at the trial.

Appellant denied making the incriminating statements attributed to him by Coomes, Mattingly, and Stokes. Appellant further testified that he was not read his rights until Stokes and Mattingly did so in the bedroom.[9] Appellant testified that this, however, was after Tocarz had threatened him and he had started making things up to appease him. Appellant testified that Mattingly and Stokes tried to get him to repeat what he told Tocarz, but that he did not want to repeat the lies he told Tocarz, so he tried to avoid the questions. Appellant testified that he did not sell cocaine to Hanley, had not taken $500 of cocaine to a friend's house, and that he does not sell cocaine.

The jury was instructed on first-degree trafficking in a controlled substance, with possession of a controlled substance as a lesser included offense; and possession of drug paraphernalia. The jury found Appellant guilty of first-degree trafficking and possession of drug paraphernalia. The jury subsequently found the trafficking offense to be a second or subsequent offense, and additionally found Appellant to be a first-degree persistent felony offender.

Per the jury's recommendation, the trial court sentenced Appellant to twenty years for trafficking in a controlled substance in the first degree, subsequent offender, enhanced to fifty years by his status as a persistent

[9] For reasons unknown, no motion to suppress Appellant's statements was filed.

felony offender, and twelve months and a $500 fine for possession of drug paraphernalia. The trial court also imposed court costs. The trial court sentenced Appellant in accordance with the jury's recommendation. He appeals to this Court as a matter of right.

THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTION FOR DIRECTED VERDICT

Appellant argues that the trial court erred in denying his motion for directed verdict on the trafficking charge, as the evidence was insufficient to prove he possessed cocaine with the intent of selling, distributing, or dispensing it to another person. In support, Appellant argues that the search of his home failed to turn up any quantity of cocaine beyond a residue; that the items found in the trash toter, which had sat at the curb for three days, could not be connected to him other than by speculation; and because the incriminating statements he made during the search - which he testified at trial were false - were not corroborated by independent proof that the crime of trafficking had been committed, as required by RCr 9.60.

In a criminal case, the Constitution of the United States mandates the government must prove every element of the charged offense beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364 (1970); *Miller v. Commonwealth*, 77 S.W.3d 566, 576 (Ky. 2002). *See also* KRS 500.070(1). Failure to do so violates the accused's right to Due Process. *In re Winship*, 397 U.S. at 364.

To convict Appellant of trafficking in a controlled substance in the first degree, the Commonwealth had to prove beyond a reasonable doubt that the Appellant either: (1) manufactured, distributed, dispensed, sold, or transferred a controlled substance, or (2) that he possessed a controlled substance with intent to manufacture, distribute, dispense, or sell. *See* KRS 218A.010(47);[10] KRS 218A.1412. The jury was instructed under both theories of guilt as alternatives. The jury acquitted the Appellant under the first theory, finding that the evidence was insufficient to prove that he manufactured, distributed, dispensed, sold, or transferred a controlled substance; however, they found him guilty under the second theory, namely, possession of a controlled substance with intent to distribute, dispense, or sell.

On a motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth, and 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 for the jury questions as to the credibility and weight to be given such testimony. *Commonwealth v. Benham,* 816 S.W.2d 186, 187–88 (Ky. 1991). "On appellate review, the test of a directed verdict is, if under the evidence as a whole, it

[10] Formerly KRS 218A.010(40).

would be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal." *Id.* at 187.

It is unnecessary for a conviction of trafficking in a controlled substance that the controlled substance be seized by the police or that it be introduced at trial. *Graves v. Commonwealth,* 17 S.W.3d 858, 862 (Ky. 2000) (citing *Howard v. Commonwealth,* 787 S.W.2d 264 (Ky. App. 1989)). Conviction can be premised on circumstantial evidence of such nature that, based on the whole case, it would not be clearly unreasonable for a jury to find guilt beyond a reasonable doubt. *Id.*

RCr 9.60 provides that "[a] confession of a defendant, unless made in open court, will not warrant a conviction unless accompanied by other proof that such an offense was committed." RCr 9.60. However, this Court has repeatedly held that RCr 9.60's requirement of corroboration "relates only to proof that a crime [i.e., the "*corpus delicti*"] was committed, not to whether the defendant committed it." *Lofthouse v. Commonwealth,* 13 S.W.3d 236, 242 (Ky. 2000) (citing *Commonwealth v. Karnes,* 849 S.W.2d 539 (Ky. 1993) and *Slaughter v. Commonwealth,* 744 S.W.2d 407, 410 (Ky. 1987)). *Corpus delicti* "may be shown by circumstantial evidence but the circumstances must be more consistent with guilt than with innocence." *Dolan v. Commonwealth,* 468 S.W.2d 277, 282 (Ky. 1971) (citing *Goodman v. Commonwealth,* 285 S.W.2d 146 (Ky. 1955)). "Once the corpus delicti has been established, the fact that the defendant committed the crime can be proven entirely by his own

confession." *Lofthouse*, 13 S.W.3d at 242 (citing *Dolan, supra*). "Finally, the corroborative evidence need not be such that, independent of the confession, would prove the corpus delicti beyond a reasonable doubt; and proof of the corpus delicti may be established by considering the confession as well as the corroborating evidence." *Id.* (citing *Blades v. Commonwealth*, 957 S.W.2d 246, 250 (Ky. 1997)).

Evidence at trial included the testimony of police officers Coomes, Mattingly, and Stokes that Appellant admitted to selling Hanley a $40 piece of crack cocaine that morning; that he had sold Hanley the last piece he had, but that he had previously had $500 worth of cocaine; that the $497 he had deposited in the bank that morning were proceeds from selling cocaine; and that he had a quantity of cocaine which he took to a friend's house that morning.

Evidence introduced at trial retrieved from the trash toter included 40 sandwich bags with missing corners; a razor blade with cocaine residue; and a small plastic bag containing cocaine residue. Mattingly and Coomes testified that a corner of a sandwich bag can be torn off in order to package cocaine and a razor blade can be used to cut corners off sandwich bags or to cut cocaine into specific quantities. Items found during a search of the Appellant's house included a water bottle with a secret compartment containing a trace amount of cocaine residue; Inositol powder which Coomes testified can be used as a cutting agent by someone selling cocaine; and a sandwich bag with a missing

corner. While the aforementioned circumstantial evidence is not sufficient to prove beyond a reasonable doubt that the crime of trafficking occurred, we conclude that, under our present jurisprudence, it is sufficient corroborating evidence of Appellant's incriminating out-of-court statements to support a conviction for trafficking in cocaine. *Blades*, 957 S.W.2d at 250; RCr 9.60.

While Appellant and the police officers gave different versions of events, the credibility and weight to be given testimony is a question for the jury. *Commonwealth v. Sawhill*, 660 S.W.2d 3, 5 (Ky. 1983). Under the evidence as a whole, we cannot say that it would be clearly unreasonable for a jury to find that Appellant possessed cocaine with intent to manufacture, distribute, dispense, or sell. *Benham*, 816 S.W.2d at 187–88. Accordingly, the trial court did not err in denying Appellant's motion for directed verdict.

THE JURY'S VERDICT DID NOT VIOLATE DOUBLE JEOPARDY PRINCIPLES

Appellant next argues that his conviction for trafficking in a controlled substance violated double jeopardy principles under Section Thirteen of the Kentucky Constitution and the Fifth and Fourteenth Amendments to the United States Constitution. Appellant acknowledges that this issue was not preserved and asks for review for palpable error under RCr 10.26.

The Double Jeopardy Clause of the Fifth Amendment provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb. . . ." U.S. Const. amend. V; see also Ky. Const. § 13 ("No person shall, for the same offense, be twice put in jeopardy. . . ."). The Fifth Amendment

applies to the states through the Fourteenth Amendment. *Benton v. Maryland*, 395 U.S. 784, 794 (1969). The Fifth Amendment and Section 13 of the Kentucky Constitution are "identical in the import of their prohibition against double jeopardy." *Jordan v. Commonwealth*, 703 S.W.2d 870, 872 (Ky. 1985).

Appellant's argument is that the jury's first verdict of "not guilty" of trafficking in a controlled substance under Instruction No. 1 and then "guilty" of trafficking in a controlled substance under Instruction No. 2, violated the principles of double jeopardy because it "twice placed [him] in jeopardy for the same offense." We disagree.

Although there is no U.S. Supreme Court case directly on point, several cases suggest that a defendant charged and tried under multiple alternative theories experiences the same jeopardy as one charged and tried on a single theory, and that when an individual is prosecuted for committing a single offense that can be committed in multiple ways, jeopardy attaches to the offense as a whole rather than to the particular form in which it is tried. *See, e.g. Schiro v. Farley*, 510 U.S. 222 (1994); *Cichos v. Indiana*, 385 U.S. 76 (1966). Although in the present case, the single offense also constituted a single criminal statute which may be violated in multiple ways, it is nevertheless true that the Appellant in the case was in jeopardy of a single conviction and subject to a single punishment for the offense charged.[11]

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[11] The jury instructions provided that the jury should only consider innocence or guilt under instruction two if they found him not guilty under instruction one. Thus, there was no risk of multiple punishments for the same offense.

In *Green v. United States*, the Supreme Court advised that double jeopardy principles protect the individual from the power and resources of the State from making "repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." 355 U.S. 184, 187-88 (1957).

In the present case, however, there was a single indictment, a single empanelled and duly-sworn jury, a single prosecution, a single deliberation, a single verdict as to each instruction, and a single penalty phase. The jury was not discharged after reaching a verdict of acquittal under the first instruction and therefore, Appellant's jeopardy was continuing. Appellant was not subjected to running a second gauntlet as contemplated by *Green*, as he suffered only a single prosecution, a single conviction for trafficking, and a single punishment for the offense for which he was convicted.[12] *Id.*

That the jury instructions separated the different means of committing the offense charged only served to protect Appellant's right to a unanimous

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[12] The instructions in this case, although perhaps confusing at first blush, are not unlike jury instructions on alternative theories of liability and lesser included offenses. For example, although double jeopardy principles would protect a defendant from being convicted of both murder and manslaughter for the same offense, the jury is permitted to consider both counts and an acquittal of murder does not bar a conviction of manslaughter. As is true in the present case, double jeopardy protection would arise only if the defendant were convicted under both theories, because it is only then that the defendant would be subjected to multiple punishments for the same offense.

jury verdict, by forcing the jury to announce under which theory, if any, they found that the evidence established the Appellant's guilt beyond a reasonable doubt. *Travis v. Commonwealth*, 327 S.W.3d 456 (Ky. 2010). In the present case, the Appellant was acquitted under one theory of trafficking, namely selling or transferring, but convicted under the alternative theory, possession with the intent to transfer. The wording of the jury instructions prohibited the jury from finding the Appellant guilty under both alternative theories, as the jury was told that they could not find him guilty under instruction two if they had found him guilty under instruction one. Therefore, there was no danger that the Appellant would be subject to multiple punishments for the same offense. Thus, the verdict in this case did not violate double jeopardy principles.

THE TRIAL COURT ERRED IN ASSESSING A FINE AND COURT COSTS

The Appellant's final argument is that the trial court erred in ordering the Appellant to pay a fine and court costs in sentencing him for possession of drug paraphernalia pursuant to KRS 534.040. In its brief, the Commonwealth concedes that the imposition of a fine and court costs was erroneous, and we agree. *See Payne v. Commonwealth*, 2011 WL 4430860 (Ky. 2011); *Simpson v. Commonwealth*, 889 S.W.2d 781, 784 (Ky. 1994). Accordingly, this Court vacates the assessment of a fine and court costs.

CONCLUSION

The judgment of the Daviess Circuit Court is hereby affirmed as to Appellant's convictions for first-degree trafficking in a controlled substance, being a first-degree persistent felony offender, and possession of drug paraphernalia; and vacated as to the sentence imposing a fine and court costs for possession of drug paraphernalia.

All sitting. All concur.

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