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RENDERED: AUGUST 25, 2016
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2014-SC-000654-MR

FINAL

DATE 9/15/16 Kim Redmon DC
APPELLANT

JIMMY DALE HIGHTOWER, JR.

V.
ON APPEAL FROM LOGAN CIRCUIT COURT
HONORABLE TYLER L. GILL, JUDGE
NO. 13-CR-00071

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING IN PART, VACATING IN PART, AND REMANDING

Jimmy Dale Hightower, Jr., appeals as a matter of right from a judgment of the Logan Circuit Court sentencing him to a twenty-year prison term for tampering with physical evidence, possession of marijuana, and being a persistent felony offender in the first degree. Ky. Const. § 110(2)(b). Hightower alleges the trial court erred in three ways: (1) by permitting Hightower to be convicted of possession of marijuana and tampering with physical evidence; (2) by denying Hightower's motion for a directed verdict for the offense of tampering with physical evidence; and (3) by imposing a \$500 fine against Hightower despite his being indigent. After careful consideration of the record, we conclude that Hightower's convictions for possession of marijuana and tampering with physical evidence do not violate the constitutional or statutory proscriptions on double jeopardy, and he was not entitled to a directed verdict

on the tampering charge. However, the trial court abused its discretion by imposing a \$500 fine despite Hightower having been deemed indigent at all stages of the proceedings. As such, we affirm in part, vacate in part, and remand for further proceedings consistent with this Opinion.

FACTS AND PROCEDURAL HISTORY

The evidence presented by the Commonwealth at trial reflected the following facts. Early in the morning of February 18, 2013, Officer Steven Meredith of the Russellville Police Department was on patrol when he observed an automobile with its headlights and interior lights on, parked in the gravel driveway of an abandoned building. Officer Meredith observed that there were two individuals in the vehicle. In the driver's seat was James Pulley and he was accompanied in the front passenger seat by Hightower. Officer Meredith drove up behind the vehicle and approached on foot to investigate.

When he reached the vehicle, Officer Meredith detected an odor emanating from the car that he identified as burning marijuana. Officer Meredith then ordered Pulley to place his hands on the vehicle's steering wheel and for Hightower to place his hands on the dashboard. Simultaneously, Officer Meredith observed Hightower chewing. Officer Meredith twice ordered Hightower to stop chewing, but Hightower refused to comply. As a result, Officer Meredith approached the passenger side of the vehicle and ordered Hightower to exit the vehicle. Upon exiting the vehicle, Hightower informed Officer Meredith, that "[i]t's just weed," and "I just ate a joint when you pulled

up, dude.” Additionally, Officer Meredith recovered a small particle consistent with marijuana from Hightower’s mouth.

Subsequently, Hightower was charged with tampering with physical evidence, possession of marijuana, and with being a persistent felony offender in the first degree. After a jury trial, Hightower was found guilty of tampering with physical evidence and possession of marijuana. Following the penalty phase of the trial, the jury found Hightower guilty of being a persistent felony offender in the first degree and recommended a sentence of twenty years and a \$500 fine. The trial court sentenced Hightower in conformance with the jury’s recommendation, and Hightower now appeals as a matter of right.

ANALYSIS

I. Hightower’s Convictions For Tampering With Physical Evidence and Possession of Marijuana Do Not Constitute Double Jeopardy.

Hightower claims that his convictions for tampering with physical evidence and possession of marijuana violate the double jeopardy bar in the United States Constitution and the Kentucky Constitution. He also argues that the convictions are simply parts of the same course of conduct and require “inconsistent findings of fact to establish the commission of the offenses” in violation of Kentucky Revised Statute (KRS) 505.020. Although Hightower failed to preserve his constitutional argument before the trial court, “the constitutional protection against double jeopardy is not waived by failing to object at the trial level.” *Walden v. Commonwealth*, 805 S.W.2d 102, 105 (Ky. 1991) (*overruled on other grounds by Commonwealth v. Burge*, 947 S.W.2d 805 (Ky. 1996)). As for the alleged violation of Kentucky’s statutory protection

against double jeopardy, that is not a constitutional claim and thus any unpreserved error is subject to palpable error analysis under Kentucky Rule of Criminal Procedure (RCr) 10.26. *Kiper v. Commonwealth*, 399 S.W.3d 736, 741-742 (Ky. 2012) (citing *Cardine v. Commonwealth*, 283 S.W.3d 641 (Ky. 2009)). The palpable error rule mandates reversal when “manifest injustice has resulted from the error.” *Elery v. Commonwealth*, 368 S.W.3d 78, 98 (Ky. 2012) (quoting RCr 10.26). To determine whether there has been manifest injustice, the Court focuses “on what happened and whether the defect is so manifest, fundamental and unambiguous that it threatens the integrity of the judicial process.” *Martin v. Commonwealth*, 207 S.W.3d 1, 5 (Ky. 2006).

The Fifth Amendment of the United States Constitution guarantees 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. The same protection is provided by Section Thirteen of the Kentucky Constitution. Ky. Const. § 13. To decide if a person has been in jeopardy for the same offense twice, we apply the test set forth in *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180 (1932); see also *Beaty v. Commonwealth*, 125 S.W.3d 196, 211 (Ky. 2003) (“Our Rule against multiple prosecutions for the same course of conduct parallels the federal rule announced in *Blockburger v. United States*.”). Under *Blockburger*, “[t]he applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.” 284 U.S. at 304. As such, to

consider Hightower's double jeopardy claim it is necessary to compare the statutes under which he was convicted.

KRS 218A.1422—the statute that concerns the possession of marijuana—is violated when a person knowingly and unlawfully possesses marijuana. To assure that these elements were correctly proved, the trial court gave the following jury instruction:

You will find the Defendant Guilty of Possession of Marijuana under this Instruction if, and only if, you believe from the evidence beyond a reasonable doubt, all of the following:

A. That in Logan County on or about February 18, 2013 he had in his possession a quantity of marijuana;

And

B. That he knew the substance so possessed by him was marijuana.

To convict Hightower of tampering with physical evidence, as codified under KRS 524.100, the Commonwealth alleged that he ate the marijuana to prevent its seizure by Officer Meredith. To prove a violation of KRS 524.100, the Commonwealth must demonstrate that a person believing that an official proceeding is pending or may be instituted, “destroys, mutilates, conceals, removes or alters physical evidence which he believes is about to be produced or used in the official proceeding with intent to impair its verity or availability in the official proceeding.” The jury instruction for this offense was:

You will find the Defendant Guilty of Tampering with Physical Evidence under this instruction if, and only if, you believe from the evidence beyond a reasonable doubt, all of the following:

A. That in Logan County on or about February 18, 2013 he put a marijuana joint in his mouth and chewed it to prevent the officer from detecting it, which he believed may be produced or used in an official proceeding;

And

B. That he did so with the intent to impair its availability in the proceeding.

Application of the *Blockburger* test requires that we conclude that Hightower was properly convicted of two distinct crimes. Possession of marijuana requires the Commonwealth to prove that Hightower knowingly possessed marijuana, a fact that is not required to establish the offense of tampering with physical evidence. Likewise, tampering with physical evidence requires the Commonwealth to prove that Hightower destroyed, mutilated, concealed, removed or altered physical evidence, which is not a fact required to prove possession of marijuana. As such, Hightower's convictions do not violate federal and state constitutional protections against double jeopardy.

In addition to his constitutional argument, Hightower alleges that his convictions run afoul of Kentucky's statutory protection against double jeopardy. KRS 505.020 expresses Kentucky's statutory structure for examining whether multiple convictions for the same course of conduct are permissible. *See Kiper v. Commonwealth*, 399 S.W.3d at 742. Hightower argues that it was impermissible for him to be found guilty of possession of marijuana and tampering with physical evidence as they were part of the same course of conduct (KRS 505.020(1)(c)) and that a conviction for each offense would require inconsistent findings of fact (KRS 505.020(1)(b)). As to the "inconsistent findings" theory, Hightower alleges that the Commonwealth was required to prove two separate *mens rea*; that Hightower intended to both possess and to destroy the same quantity of marijuana.

Hightower is mistaken because his convictions for tampering with physical evidence and possession of marijuana are not predicated upon inconsistent factual theories. To be convicted of possession of marijuana requires that an individual knowingly possess marijuana. In the case at bar, Hightower admitting to possessing marijuana which he consumed when Officer Meredith approached the vehicle. The jury could have believed that Hightower possessed the marijuana as he was consuming it thereby also tampering with physical evidence. Alternatively, the jury could have believed that Hightower possessed marijuana immediately prior to Officer Meredith approaching the vehicle. The jury could have concluded that Hightower's possession ended when he decided to consume the marijuana to prevent its seizure. As such, the jury properly could have convicted Hightower for his admission of possessing marijuana prior to Officer Meredith's arrival and then for tampering with physical evidence based on his subsequently consuming said marijuana.

This latter scenario also resolves Hightower's last double jeopardy argument—that the convictions were a “continuing course of conduct uninterrupted by legal process” and therefore it was impermissible for Hightower to be convicted of both charges. As demonstrated in the latter scenario, the jury could have believed that Hightower possessed the marijuana for smoking and then in a separate act consumed it to prevent its recovery by Officer Meredith. Accordingly, Hightower's convictions for tampering with physical evidence and possession of marijuana did not constitute double

jeopardy. No error occurred, let alone palpable error resulting in manifest injustice.

II. The Trial Court Properly Denied Hightower's Motion for a Directed Verdict of Acquittal.

Hightower alleges that the trial court erred in denying his motion for directed verdict. Specifically Hightower argues that there was insufficient evidence to support a guilty verdict for tampering with physical evidence. The Due Process Clause of the Fourteenth Amendment to the United States Constitution requires that a conviction be sustained by proof of guilt beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 309, 99 S. Ct. 2781 (1979). "The question on appeal is whether, after viewing the evidence in the light most favorable to the Commonwealth, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Commonwealth v. Jones*, 283 S.W.3d 665, 668 (Ky. 2009) (citing *Commonwealth v. Benham*, 816 S.W.2d 186 (Ky. 1991)). Questions pertaining to "the credibility of witnesses and the weight to be given to sworn testimony are for the jury to decide." *Young v. Commonwealth*, 50 S.W.3d 148, 165 (Ky. 2001) (citing *Commonwealth v. Smith*, 5 S.W.3d 126, 129 (Ky. 1999)).

In the case at bar, Hightower contends that his consumption of the marijuana was insufficient to sustain a conviction for tampering with physical evidence. At trial the Commonwealth alleged that Hightower consumed the marijuana to prevent its seizure by Officer Meredith. There was evidence that Officer Meredith perceived the odor of burning marijuana emanating from the

vehicle that Hightower occupied. Further, after Officer Meredith approached the vehicle he observed Hightower chewing and twice ordered him to stop. Hightower refused to comply. After Hightower exited the vehicle, Hightower confirmed Officer Meredith's suspicions by informing him that "[i]t's just weed," and "I just ate a joint when you pulled up, dude."

Hightower's consumption of the marijuana under these circumstances is sufficient proof of the destruction of evidence for the purposes of a conviction for tampering with physical evidence. See *Phillips v. Commonwealth*, 17 S.W.3d 870 (Ky. 2000) (conviction for tampering with physical evidence predicated in part on defendant's disposal of crack cocaine by ingestion); *Williams v. Commonwealth*, 336 S.W.3d 42 (Ky. 2011) (tampering conviction based on arrestee's attempt to eat cocaine while being transported to the police station). In short, the jury could readily conclude that Hightower consumed the marijuana in an effort to prevent it from being used in a criminal proceeding against him.

Additionally, Hightower argues that his transparency in immediately confessing his criminal activity to Officer Meredith, demonstrates that he lacked the required intent to tamper with the marijuana to preclude its availability in court. However, the jury was in the best position to evaluate whether Hightower was intending to prevent the marijuana from being used against him at a future proceeding despite his statements to Officer Meredith. As such, the directed verdict motion was properly denied.

III. The Trial Court Erred in Assessing a Misdemeanor Fine.

Hightower's final argument is that that the trial court erroneously levied a misdemeanor fine against him.¹ He argues that it is impermissible to impose a misdemeanor fine against an indigent defendant. Although Hightower failed to preserve this challenge before the trial court, his claim is properly before this Court; as "sentencing is jurisdictional it cannot be waived by failure to object." *Travis v. Commonwealth*, 327 S.W.3d 456, 459 (Ky. 2010) (quoting *Wellman v. Commonwealth*, 694 S.W.2d 696, 698 (Ky. 1985)).

As part of the trial court's judgment of conviction, Hightower was ordered to pay a \$500 fine for his possession of marijuana. The imposition of fines for misdemeanors and violations is governed by KRS 534.040. Subsection (4) of KRS 534.040 states that "[f]ines required by this section shall not be imposed upon any person determined by the court to be indigent pursuant to KRS Chapter 31." Hightower was deemed indigent, and throughout the trial proceedings, he was represented by the Department of Public Advocacy. Additionally, Hightower was granted in *forma pauperis* status on appeal. As such, Hightower was clearly indigent and the trial court erred in imposing a fine, which we now vacate.

¹ The Commonwealth agrees that pursuant to controlling law Hightower was not subject to the fine assessed.

CONCLUSION

For the foregoing reasons, the conviction and sentence of the Logan Circuit Court is affirmed in part, vacated in part, and this case is remanded to the circuit court for entry of a new judgment consistent with this Opinion.

All sitting. All concur.

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