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Supreme Court of Kentucky

2014-SC-000722-MR

SHAUN HENRY

APPELLANT

V. ON APPEAL FROM MUHLENBERG CIRCUIT COURT
HONORABLE BRIAN WIGGINS, JUDGE
NO. 14-CR-00160

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

A circuit court jury convicted Shaun Henry of first-degree criminal mischief, first-degree possession of a controlled substance, possession of marijuana, and being a first-degree persistent felony offender. For these crimes, he was sentenced to twenty years' imprisonment. Henry appeals to this Court as a matter of right.¹ Because we conclude Henry's claims of error have no merit, we affirm the trial court's judgment.

I. FACTUAL AND PROCEDURAL BACKGROUND.

Trooper John McGehee was on late-night patrol when he observed Henry sitting in a swing in the yard of a residence. Trooper McGehee testified that

¹ Ky.Const. § 110(2)(b).

when Henry became aware of the trooper's presence, he saw Henry "take a slim white object, approximately three inches in length, from his mouth and place it underneath his right shoe." This action seemed unusual or even suspicious to Trooper McGehee, prompting him to stop his cruiser, get out, and approach Henry.

Trooper McGehee then engaged Henry in conversation, asking "what's up, man." Henry replied that he had finished smoking a cigarette. Trooper McGehee then saw on the concrete pad underneath the swing a cigarette. He believed it to be a marijuana joint that Henry had placed there and covered with his shoe to conceal it from the trooper's gaze. The trooper asked Henry whether it was his. Henry did not respond. Henry got up from the swing, allegedly shoved Trooper McGehee aside, and took off running. The trooper chased Henry and subdued him after they wrestled in a ditch filled with water and mud. As a result of the altercation, Trooper McGehee suffered a minor injury, his uniform was damaged, and his Taser was destroyed. Further examination of the cigarette revealed it in fact contained marijuana laced with cocaine.

The grand jury indicted Henry on charges of assault in the third-degree, tampering with physical evidence, criminal mischief in the first-degree, possession of a controlled substance in the first-degree (cocaine), possession of drug paraphernalia, possession of marijuana, and first-degree persistent felony offender. Pending trial, Henry moved to suppress evidence of the charges against him on the theory that Trooper McGehee lacked reasonable suspicion

of criminal wrongdoing in the first instance, and as such, his initial conversation with Henry amounted to an illegal stop under *Terry v. Ohio*.² Following an evidentiary hearing, the trial court found that McGehee was free to approach Henry and engage him in conversation and Henry's apparent concealment of the suspected cigarette upon observing the presence of the trooper was sufficient to arouse a reasonable suspicion. Therefore, the trial court denied Henry's suppression motion.

The jury acquitted Henry of the third-degree assault charge but convicted him of first-degree criminal mischief, first-degree possession of a controlled substance, possession of marijuana, and of being a first-degree persistent felony offender.

II. ANALYSIS.

A. The Trial Court Properly Denied Suppression Motion.

1. *Standard of Review*

Henry filed a pretrial suppression motion contending that but for Trooper McGehee's illegal stop none of the events leading up to his arrest would have occurred. When reviewing a trial court's decision to deny a suppression motion, an appellate court accepts the lower court's finding of fact if not clearly erroneous and supported by substantial evidence.³ For questions of law we review the lower court de novo.

² *Terry v. Ohio*, 392 U.S. 1 (1968).

³ *Commonwealth v. Pride*, 302 S.W.3d 43, 49 (Ky. 2010); *Commonwealth v. Banks*, 68 S.W.3d 347, 349 (Ky. 2001); Rule of Criminal Procedure 8.27.

2. Reasonable, Articulate Suspicion.

In *Terry v. Ohio*, the United States Supreme Court sketched the parameters of police investigative conduct. The central issue in *Terry* was whether it is unreasonable for a policeman to seize a person and subject him to a limited search with less than probable cause for an arrest. Reasonable and articulable suspicion may support a proper *Terry* stop.⁴ Relevant contextual considerations in a *Terry* stop analysis fairly include: (1) the officer's experience or knowledge, and (2) nervous, evasive behavior by an individual.⁵

Henry claims there was no reasonable, articulable suspicion, based on the totality of circumstances. The Commonwealth counters that the possibility of drug possession, attempted concealment, and trespass meet the level of a reasonable articulable suspicion. Under the present facts, reasonable, articulable suspicion, was satisfied when the Trooper McGehee saw Henry place an unlit cigarette under his shoe in an attempt to conceal it. The follow-up McGehee performed, based upon this observation, confirmed his suspicion. The follow-up then became probable cause for arrest once Trooper McGehee noted the cigarette was a marijuana joint.

Because Trooper McGehee's testimony at the suppression hearing supplied a factual basis of a reasonable and articulable suspicion in defense of his decision to approach Henry, and the trial court so found, we conclude there

⁴ *United States v. Arvizu*, 534 U.S. 266, 277 (2002) (citing *Illinois v. Wardlow*, 528 U.S. 119, 120 (2000)).

⁵ *United States v. Brignoni-Ponce*, 422 U.S. 873, 885 (1975).

was no *Terry* violation and the trial court did not abuse its discretion in denying the motion to suppress.

B. The Trial Court Did Not Abuse Its Discretion in Denying Henry's Request for a Continuance on the Day of Trial.

The trial court has broad discretion in determining whether to grant a continuance.⁶ In an in-chambers hearing on the morning of trial, the trial court considered Henry's motion to postpone the trial. Henry's counsel had filed the motion the preceding afternoon. He now argues that the trial court erred by denying this request.

Henry requested a continuance for two reasons: (1) defense counsel felt she could not proceed on Henry's behalf because she did not have adequate opportunity to prepare for the case, and (2) Henry claimed his sister hired private counsel for him the night before the scheduled trial. Kentucky Rule of Criminal Procedure (RCr) 9.04 and case law guide a trial court in deciding whether to grant a motion for a continuance.

We reject Henry's first argument that defense counsel felt she could not proceed on Henry's behalf because she did not have adequate opportunity to prepare for the case. Henry suggests in his brief that counsel was unable to meet with potential defense witnesses before to trial. RCr 9.04 allows a continuance if there are additional witnesses, but the rule is specific in its application. If a defendant's motion for a continuance is based on the "absence

⁶ *Rehm v. Clayton*, 132 S.W.3d 864, 869 (Ky. 2004).

of a witness, the affidavit must show what facts the affiant believes the witness will prove, and not merely the effect of such facts in evidence...”⁷

When seeking his continuance at trial, Henry mentioned the name of one additional witness. This witness, his girlfriend, previously did not keep her appointment with his counsel. And Henry failed to give any indication of the substance to which his girlfriend intended to testify. As recognized in *Hudson v. Commonwealth*, failure to comply with RCr 9.04, in combination with a failure to identify how a continuance would help mitigate the evidence against a defendant, weighs heavily against a motion for continuance.

Simply identifying one witness, without representing the testimony she intends to give, while further failing to identify any other witnesses, is insufficient for a continuance; and the trial court did not abuse its broad discretion when it rejected this argument.

Henry’s second argument, that his sister had hired private counsel for him the night before the scheduled trial, is also unpersuasive. Henry failed to establish to the trial court’s satisfaction that other competent counsel either existed or was ready to defend him at trial. Indeed, Henry could not identify his purported new counsel by name, only offering that the attorney was in Tennessee. Furthermore, he gave no justifiable reason as to why he had not made an effort to hire an attorney in the months before trial. The trial court did not abuse its discretion by rejecting this basis for continuing the trial.

⁷ Rule of Criminal Procedure 9.04.

C. The Trial Court Properly Denied Henry's Motion for a Directed Verdict.

Henry argues that the trial court erred by failing to direct a verdict of acquittal on the charges of possession of a controlled substance and first-degree criminal mischief. When deciding a motion for a directed verdict, the trial court must take as true all evidence favoring the Commonwealth and determine whether that evidence is sufficient to induce a reasonable jury to believe beyond a reasonable doubt that the defendant is guilty.⁸ In *Commonwealth v. Benham* we stated that "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."⁹ In applying the standard, we reject Henry's argument that he was improperly denied a directed verdict.

Henry first contends that he was entitled to a directed verdict on the criminal mischief charge. Henry argues the Commonwealth failed to introduce evidence that he acted intentionally or wantonly in regard to the damage or destruction of Trooper McGehee's uniform and Taser. Taking the proof in the light most favorable to the Commonwealth, we find Henry's argument unpersuasive.

The criminal-mischief charge arises from Henry intentionally or wantonly destroying Trooper McGehee's uniform and equipment. This Court has repeatedly held intent can be inferred from the act itself and the surrounding

⁸ *Pollini v. Commonwealth*, 172 S.W.3d 418, 429 (citing *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991)).

⁹ *Benham*, 816 S.W.2d at 187.

circumstances.¹⁰ Likewise, a person is presumed to intend the logical and probable consequences of his conduct, a person's state of mind may be inferred from his actions preceding and following the charged offense.¹¹ In Henry's case, Trooper McGehee arrived at the scene in a marked cruiser and wearing a full police uniform. Henry attempted to conceal the marijuana he had when Trooper McGehee approached him, recognizing that he was law enforcement official. Henry then attempted to flee and in the process rolled Trooper McGehee into a drainage ditch. Viewing the above facts in a light most favorable to the Commonwealth, a reasonable juror could find that Henry committed criminal mischief. So the trial court did not err when it denied a directed verdict of acquittal.

Next, Henry argues that the trial court should have granted a directed-verdict motion as to the charge of possession of a controlled substance because he claims he did not knowingly possess cocaine. Henry submits that: (1) there was no cocaine or marijuana residue on his person, suggesting he did not roll the cigarette, (2) Trooper McGehee's breaking open the cigarette was the only way to know there was cocaine inside, and (3) the amount of cocaine was small, suggesting it would have been very easy for someone to knowingly possess the marijuana cigarette without also knowingly possessing the cocaine inside.

¹⁰ *Mills v. Commonwealth*, 996 S.W.2d 473, 490 (Ky. 1999).

¹¹ *Parker v. Commonwealth*, 952 S.W.2d 209, 212 (Ky. 1997).

Though these arguments may be persuasive in isolation, they are not sufficient to meet the high standard for a directed verdict.¹² As the Commonwealth notes, a juror could have reasonably inferred that Henry rolled the joint and placed the cocaine inside it himself, thus knowingly possessing cocaine. Because a reasonable juror could find that Henry satisfied the elements for a possession of a controlled substance charge, we do not find the denial of a directed verdict improper.

D. The Sentence Rendered by the Trial Court Does Not Offend the Constitution.

Henry was convicted of first-degree criminal mischief, a Class D felony.¹³ The jury then determined that he was a first-degree persistent felony offender, for which it recommended a twenty-year enhanced sentence.¹⁴ Accordingly, the sentence imposed by the trial court is the sentence recommended by the jury and within the maximum allowed by statute.

We recognized in *Riley v. Commonwealth*, “[I]f the punishment is within the maximum prescribed by statute violated, courts generally will not disturb the sentence.”¹⁵ Even more damaging to Henry’s claim is *Sizemore v. Commonwealth*.¹⁶ In *Sizemore* we stated, “[i]f the statute itself is not unconstitutional, then no punishment inflicted in accordance with it can be

¹² *Benham*, 816 S.W.2d at 187.

¹³ KRS 512.020(2).

¹⁴ KRS 532.080(6)(b).

¹⁵ *Riley v. Commonwealth*, 120 S.W.3d 622, 633 (Ky. 2003).

¹⁶ *Sizemore v. Commonwealth*, 485 S.W.2d 498, 500 (Ky. 1972).

adjudged excessive.”¹⁷ And in *Turpin v. Commonwealth* we recognized, “The [United States Supreme Court] has upheld, however, recidivist sentences only slightly less extreme than life without parole, even for minor predicate offenses.”¹⁸ While Henry notes the nature of his prior felony offenses, we do not find the statute under which he was punished as a persistent felony offender unconstitutional. Nor do we find Henry’s sentence under the statute unconstitutional.

Because Henry’s sentence properly falls within the statutory scheme, and we are reluctant to disturb a proper sentence, we affirm the trial court’s sentence.

III. CONCLUSION.

For the foregoing reasons stated above, we affirm the rulings of the lower court.

All sitting. All concur.

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¹⁷ *Id.* at 500.

¹⁸ *Turpin v. Commonwealth*, 350 S.S.3d 444, 448 (Ky. 2011).