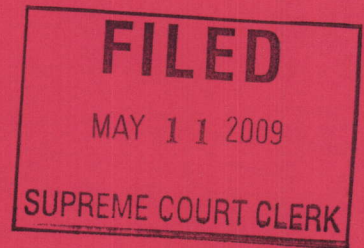


COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
CASE NO. 2008-SC-000749



HARRY FINN, JR.

APPELLANT

VS.

ON APPEAL FROM LOGAN CIRCUIT COURT
HON. TYLER L. GILL, JUDGE
INDICTMENT NO. 07-CR-00014

COMMONWEALTH OF KENTUCKY

APPELLEE

BRIEF FOR APPELLANT, HARRY FINN, JR.

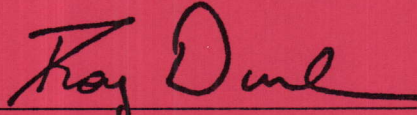
Submitted by

ROY A. DURHAM
ASSISTANT PUBLIC ADVOCATE
DEPARTMENT OF PUBLIC ADVOCACY
100 FAIR OAKS LANE, SUITE 302
FRANKFORT, KENTUCKY 40601
(502) 564-8006

COUNSEL FOR APPELLANT

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief for Appellant has been served by first-class mail upon Honorable Tyler L. Gill, Logan County Courthouse, P.O. Box 667, Russellville, KY 42276-0667; Hon. Kristy D. Vick-Stratton, Assistant Commonwealth Attorney, 329 West 4th Street, Russellville, KY 42276; Hon. Leilani M. Krashin, Trial Counsel for Appellant, 1100 South Main St., Hopkinsville, KY, 42240; and by messenger to Hon. Jack Conway, Attorney General, Criminal Appellate Branch, 1024 Capital Center Drive, Frankfort, Kentucky 40601 on this 11th day of May, 2009. I also certify that the record on appeal was returned to the Clerk of the Kentucky Court of Appeals on this date.



ROY A. DURHAM

INTRODUCTION

Harry Finn appeals from the Kentucky Court of Appeals' Opinion affirming the judgment of the Logan Circuit Court which convicted him of 1st Degree Possession of a Controlled Substance (Cocaine); Use of Drug Paraphernalia; Failure to Signal; Operating a Motor Vehicle While Under the Influence of a Substance which Impairs Driving Ability and Operating a Motor Vehicle without a License. Mr. Finn was sentenced to a total of 10 years.

STATEMENT CONCERNING ORAL ARGUMENT

Mr. Finn requests oral argument.

STATEMENT REGARDING CITATIONS TO TRIAL RECORDS

The record on appeal in this case includes one volume of record and one video tape. For purposes of this brief, citation to the record are made using the following formats; "TR, p. _" for citation to the Transcript of record and "VR No: date; time" for citations to the video record.

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STATEMENT OF THE CASE

On December 23, 2006, Officer Roger Lindsey of the Russell Police Department initiated a traffic stop on a green 1997 Chevrolet S-10 pick-up truck. (VR, 05/10/07; 11:00:10). Officer Lindsey's testimony was that he initiated the stop in an alley behind a residence located at 458 East Second Street after he observed the vehicle operating on East Fifth Street without its headlights on. (Id. at 11:00:35). As Officer Lindsey met the vehicle, it pulled to the curb and stopped. (Id.). Officer Lindsey turned around and followed the vehicle which was now operating north bound on North Morgan Street. (Id.). Officer Lindsey testified that the vehicle made a quick turn into an alley and failed to use his turn signal. (Id.).

Officer Lindsey made contact with the driver, Harry Finn, and detected a strong odor of alcohol in the vehicle and a slight odor of marijuana on Mr. Finn. (Id. at 11:01:10). The time of the stop on Mr. Finn's vehicle was 12:50 a.m. (Id. at 11:10:45). Officer Lindsey's testimony was that Mr. Finn had just left a suspected crack house. (Id. at 11:14:35). Mr. Finn displayed blood-shot eyes and slurred speech. (Id. at 11:01:15). Officer Lindsey gave Mr. Finn a portable breathalyzer test which indicated that Mr. Finn did not have any alcohol in his system according to the preliminary breath test unit. (Id. at 11:15:00).

Brenda McCormick, a female passenger in the vehicle, was the one that was emanating the odor of alcohol according to Officer Lindsey. (Id. at 11:15:15). Officer Lindsey requested Mr. Finn to perform a standardized field sobriety test and upon conclusion of those tests, Mr. Finn was placed under arrest for D.U.I. without incident.

(Id. at 11:01:35). The time of arrest was 1:03 a.m. (Id. at 11:10:45). Brenda McCormick was arrested for alcohol intoxication in a public place. (Id. at 11:08:40).

Mr. Finn's license was suspended at the time. (Id. at 11:04:00). Once Mr. Finn was placed under arrest, his vehicle was searched under the theory of search incident to arrest. (Id. at 11:04:45). During the search, Sergeant Todd Ramer located a cigarette pack concealed inside a work glove in the front seat of the vehicle. (Id.). The glove was not seized and Sergeant Ramer could not recall whether they were men's or women's gloves. (Id. at 11:33:20). A glass pipe containing suspected cocaine residue, Chore Boy and a clear baggy containing approximately four grams of marijuana were seized. (Id. at 11:05:00).

According to the testimony of Officer Lindsey, the evidence was found in an area of the vehicle that was accessible to both people in the car. (Id. at 11:14:00). Officer Lindsey also seized a white plastic ink pen casing also containing suspected cocaine residue from the person of Mr. Finn. (Id.). No other cocaine, other than the residue, was found on anybody or in the vehicle. (Id. at 11:18:40). Mr. Finn stated that the ink pen casing was his push rod. (Id. at 11:05:30). Mr. Finn immediately and freely admitted that he had used the pen casing in the process of ingesting cocaine at an earlier time and had consumed all of the cocaine. (Id. at 11:18:40).

Mr. Finn was transported to Logan Memorial Emergency Room and Officer Lindsey read him his implied consent and requested Mr. Finn to submit to a blood and urine test. (Id. at 11:09:10). Mr. Finn submitted to all of the tests. (Id.). The time the tests were taken was 1:50 a.m. according to the toxicology report. (Id. at 11:12:43).

Officer Lindsey then transported Mr. Finn to the Logan County Detention Center. (Id. at 11:09:31).

The evidence was sent to the lab and the substance in the clear baggy came back as positive for marijuana. (Id. at 12:52:55). Since the glass pipe and pen casing were sent in the same evidence bag, it was possible for cross-contamination between the two meaning whatever residue was in one could have easily contaminated the other; therefore only one swab was taken of both. (Id. 12:54:30). The glass pipe and the pen casing came back positive for cocaine. (Id. at 12:52:45). The actual amounts of the cocaine were on a microscopic level as they were not visible by the naked eye. (Id. at 12:57:33).

The blood and urine was sent to the Kentucky State Police Center Forensic Laboratory. (Id. at 12:59:53). The drug content of the urine tested positive only for cocaine. (Id. at 01:02:10). There were no drugs detected in the blood. (Id.). According to the testimony of LaShanda Neymour of the Kentucky State Police Center Forensic Laboratory, if a drug is not in the blood but is in the urine, it would indicate that whatever was in the system had cycled out. (Id. at 01:04:00).

After the conclusion of the case for the Commonwealth, defense counsel made a motion for directed verdict stating, even when taking all of the evidence most favorable to the Commonwealth, the burden of proof cannot be met with regard to the felony case of possession of Cocaine and that the only evidence that can be solely attributed to Mr. Finn was the white pen casing which could have been contaminated by the glass pipe. (Id. at 01:14:00). The trial court overruled the motion for directed verdict. (Id. at 01:16:00).

The jury returned a not guilty verdict on the possession of marijuana; however they returned guilty verdicts on possession of cocaine, use of drug paraphernalia, failure to signal, operating a motor vehicle under the influence of a substance which impairs driving ability and operating a motor vehicle without a license. (Id. at 03:08:05). During the penalty phase, Mr. Finn was found guilty of possession of cocaine, 2nd offense, and his sentence was enhanced from one year to ten years. (Id. at 04:45:41). Based upon the recommendation of the jury, Mr. Finn was sentenced to 10 years. (VR: 06/14/07; 01:32:00).

On appeal, Finn argued the trial court erred by failing to grant his motion for Directed Verdict because the Commonwealth failed to prove a number of necessary elements of the crime, to wit: that Harry Finn Committed the offense in Logan County; that the amount of cocaine was immeasurable and the jury returned an inconsistent verdict.

The Court of Appeals found as to the first part that the evidence, even if circumstantial, was clearly sufficient as to allow a jury to reasonably infer that the crimes were committed in Logan County. As to the possession charge, the Court stated that Kentucky subscribes to the “any amount” test, rather than the “usable quantity” approach. Therefore the trial court did not err based on the amount of cocaine residue found, even though it was only microscopic. Finally, the Court of Appeals found that it was neither unreasonable nor inconsistent for the jury to find Finn to be in possession of the cocaine and not be in possession of the marijuana beyond a reasonable doubt. Appellant filed MDR which was granted on March 11, 2009.

Any additional facts may be mentioned in the argument section below, as necessary.

ARGUMENT

THE COURT OF APPEALS ERRED WHEN IT AFFIRMED THE TRIAL COURT'S FINDING THAT MICROSCOPIC AMOUNTS OF COCAINE IS SUFFICIENT TO JUSTIFY CONVICTING MR. FINN OF POSSESSION OF A CONTROLLED SUBSTANCE AND USE OF DRUG PARAPHERNALIA.

Preservation. Defense Counsel preserved this issue by motion and ruling. (VR, 05/21/07; 01:14:00).

Law.

“Any person accused of a crime is presumed to be innocent of the charge unless and until his guilt has been established by proof beyond a reasonable doubt. The Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.” In Re Winship, 397 U.S. 358, 364 (1970). The Due Process Clause of the Fourteenth Amendment safeguards against dilution of this principle and requires that guilt be established by probative evidence. Taylor v. Kentucky, 436 U.S. 478 (1978).

When the accused enters a plea of not guilty, “that plea puts in issue every fact necessary to a conviction, and the burden of establishing those facts beyond a reasonable doubt remains with the Commonwealth throughout the trial and never shifts to the accused.” Commonwealth v. Gentry, 88 S.W.2d 273 (1935). The prosecution must prove every element included in the definition of the offense beyond a reasonable doubt, and it

may not shift the burden of proof to the defendant on those essential elements. Patterson v. New York, 432 U.S. 197 (1977).

When ruling on a directed verdict motion, the trial court must assume the evidence for the Commonwealth is true and draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. Commonwealth v. Benham, 816 S.W.2d 186, 187 (Ky. 1991) (citing Commonwealth v. Sawhill, 660 S.W.2d 3 (Ky. 1983)) “On appellate review, the test for a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt. Id. In Sawhill, the Court established the scintilla standard for evaluating the sufficiency of the evidence under the directed verdict test. There must be evidence of substance, and the trial court is expressly authorized to direct a verdict for the defendant if the prosecution produces no more than a scintilla of evidence. Id. at 187 – 188. See also Adkins v. Commonwealth, 230 S.W.2d 453 (1950) (conviction must not be based on speculation, suspicion or conjecture).

KRS 218A.1415(1) states that a person is guilty of Possession of a Controlled Substance in the First Degree “when he knowingly and unlawfully possesses a controlled substance that contains **any quantity** of” a Schedule II drug, such as cocaine or crack cocaine. (Emphasis added). In *Webster’s Third New International Dictionary* 1976, quantity is defined as: “[t]he character of something that makes it possible to measure or number it or to determine that it is more or less than something else.” “Residue” is defined as “something that remains after a part is taken, separated or designated;” it is the remnant or remainder.

In Shivley v. Commonwealth, 814 S.W.2d 572 (Ky. 1991), this Court decided a case somewhat similar to the case at bar. In Shivley, “laboratory examination confirmed

that the pipe and the test tube contained cocaine, with the white cocaine **residue being visible** on the test tube prior to use of a methanol rinse.” (Id. at 572); emphasis added. The Court further stated, “the residue could not be accurately weighted, but it was stipulated that a sufficient amount of the residue remained available for testing.” (Id.) The Court rejected the “usable quantity” approach and held that the quantity in question was sufficient to support the possession charge.

In Bolen v. Commonwealth, 31 S.W.3d 907 (Ky. 2000), Paducah police responding to a domestic disturbance call saw Bolen drop what was thought to be a crack pipe. Yet another crack pipe was found on his person. Tests on the crack pipes showed that both contained “**cocaine residue**.” (Id., at 908); emphasis added. This Court said that testing in the Bolen case “similar[ly]” to Shivley, showed that while present, the residue “could not be accurately weighed.” (Id., at 910).

By contrast, Officer Lindsey testified that he found one glass crack pipe containing suspected cocaine residue and one white plastic ink pen casing also containing cocaine residue. (VR, 05/21/07; 11:05). Joseph Tanner of the Kentucky State Police Western Regional Crime Lab testified that in actuality, the amounts here were on a microscopic level and not visible by the naked eye. (Id. at 12:57:33).

The starting point of statutory construction is the language of the statute itself. United States v. Health Possibilities, P.S.C., 207 F.3d 335, 338-39 (6th Cir. 2000), Kotila v. Commonwealth, 114 S.W.3d 226 (Ky. 2003). “No rule of statutory construction has been more definitely stated or more often repeated than the cardinal rule that significance and effect shall, if possible, be accorded to every part of [an] Act.” George v. Scent, 346 S.W.2d 784, 789 (Ky. 1961). McElroy v. Taylor, 977 S.W.2d 929, 931 (Ky. 1998). “In

cases involving statutory interpretations, the duty of the court is to ascertain and give effect to the intent of the General Assembly. We are not at liberty to add or subtract from the legislative enactment or discover meanings not reasonably ascertainable from the language used.” Commonwealth v. Harrelson, 14 S.W.3d 541, 546 (Ky. 2000).

In other words, this Court is required to give the words of a statute their plain meaning. Bailey v. Reeves, 662 S.W.2d 832, 834 (Ky. 1984). If the words of a statute are clear, they are determinative of legislative intent. Gateway Construction v. Wallbaum, 356 S.W.2d 247, 249 (Ky. 1962); Goodpaster v. United States Mortgage Bond Co., 192 S.W.2d 35, 37 (Ky. 1917).

In KRS 218A.500(1), the General Assembly defined “drug paraphernalia” as “all equipment, products and materials of any kind that are used, intended for use or designed for use in. . . .ingesting, inhaling, or otherwise introducing into the human body a controlled substance in violation of this chapter.” The General Assembly used the phrase “the existence of any residue of controlled substances on the object” in KRS 218A.510 (5) when describing a factor to be used in determining whether an object is drug paraphernalia. Id., emphasis added. While the legislature could have defined the term “residue” in KRS 218A.510 (5) as “any quantity,” it did not.

This suggests that the legislature had a desire to punish the intent to use or use of illicit drugs, but did not wish to punish those persons who possessed drug paraphernalia with a filmy residue as harshly as someone who possessed rock or powder cocaine, pills or methamphetamine, for that matter. Moreover, most Americans have daily contact with cocaine residue.

“[T]ests showed that more than 95% of the cash in circulation is cocaine-contaminated because residue from the drug remains long after the initial exposure.” Wall Street Journal, June 2, 1993, “Cocaine-Tainted Cash Faulted as Evidence”, Arthur S. Hayes, A-5. In United States v. \$5000.00 in U.S. Currency, 40 F.3d 846 (6th Cir. 1994), a case in which the defendant challenged use of a drug sniffing dog, the Sixth Circuit held that the evidentiary value of the dog’s alert that cocaine was present should be minimal. As support for its holding, the Court noted a similar statistic: “some indication that residue from narcotics contaminates as much as 96% of the currency currently in circulation.” (*Id.*, at 849), citing United States v. \$80,760.00 in United States Currency, 781 F.Supp. 462, 475 & n. 32 (N.D.Tex.1991). The Court also cited to a study by Lee Hearn, Chief Toxicologist for the Dade County, Florida Medical Examiner’s Office, which found that 97% of bills from around the country tested positive for cocaine and that banks played a role in spreading cocaine residue when tellers counted and recounted money, which caused bills to rub against each other. Dirty Money, United States Banker, October 1989, at 10.

American citizens come into contact with residue on any given day of life. Given the prevalence of cocaine residue in ordinary society and the easy transferability of cocaine residue, surely the use of the word “residue” in KRS 218A.510(5) was not meant to apply to a person whose “possession” of drug paraphernalia—the crack pipe and pen casing—included a film of cocaine residue, which then made him eligible for indictment and conviction for possession of a controlled substance.

Practical considerations require that the “any quantity” provision of KRS 218a.1415(1) and the use of the word “residue” in KRS 218A.510(5) are to be defined in

different manners. The “any quantity” provision must be construed to mean at least more than mere film or microscopic levels. Such punishment would better fit under the proscription against possessing drug paraphernalia than that against possession of a controlled substance.

While there are no Kentucky cases dealing with possession of microscopic levels, the case of Coleman v. State 545 S.W.2d 831 (Tex. App) (See Appendix) is directly on point. In Coleman, Appellant was stopped for the purpose of being served a misdemeanor arrest warrant for gambling. (Id. at p. 832). The officer testified that immediately upon shining the flashlight into the window of appellant’s car, a small vial on the floor appeared in ‘plain view.’ (Id.). The vial was admitted under this doctrine however the “unweighable trace amount of cocaine was not introduced into evidence”. (Id.). The Court of Criminal Appeals of Texas held that “It would be a harsh rule, indeed, that would charge appellant with knowingly possessing that which it required a microscope to identify”. (Id. at 835)(citing Pelham v. State, 298 S.W.2d 171, 173 (Tex. App. 1957).

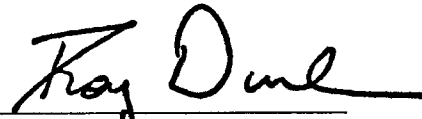
The testimony and the evidence presented at trial was that the marijuana that was seized was located in the cigarette pack along with the glass pipe and the Chore Boy. (Id. at 11:05:00). The only evidence that was found on the person of Mr. Finn was the white pen casing. (Id. at 11:08:00). Joseph Tanner of the Kentucky State Police Western Regional Crime Lab testified that since the glass pipe, that was found in the cigarette pack, and the pen casing, that was found on Mr. Finn, was transported in one evidence bag, it was possible that cross-contamination occurred between the two. (Id. at 12:54:28).

Defense counsel argued during the motion for Directed Verdict that the only evidence that can be solely attributed to Mr. Finn was the white pen casing. (VR, 05/21/07; 01:14:40). The jury returned a not guilty verdict for the possession of marijuana. (Id. at 03:08:00). This was part of the evidence that was discovered in the cigarette pack that was located in the glove. It is inconsistent for the jury to find that Mr. Finn was in possession of the glass pipe in the cigarette pack but not the marijuana therefore the jury must have also determined that Mr. Finn was not in possession of the glass pipe or Chore Boy and determined him guilty of the pen casing only. However, given that cross contamination could have occurred, there was insufficient evidence presented to find Mr. Finn guilty of the microscopic cocaine residue on the pen casing.

Conclusion

The trial court's failure to grant a directed verdict on the possession of cocaine charge based on an immeasurable amount of cocaine denied Harry Finn his due process rights under the Fifth and Fourteenth Amendments to the United States Constitution and §§2, 3, and 11 of the Kentucky Constitution. Reversal is required.

Respectfully submitted,



ROY ALYETTE DURHAM II
ASSISTANT PUBLIC ADVOCATE
DEPARTMENT OF PUBLIC ADVOCACY
100 FAIR OAKS LANE, SUITE 302
FRANKFORT, KENTUCKY 40601

COUNSEL FOR APPELLANT
HARRY FINN