Commonwealth of Kentucky
Supreme Court
No.2008-SC-749

HARRY FINN — **APPELLANT**

v.

Appeal from Logan Circuit Court
Hon. Tyler Gill, Judge
Indictment No. 07-CR-014

COMMONWEALTH OF KENTUCKY — **APPELLEE**

Brief for Commonwealth

Submitted by,

JACK CONWAY
Attorney General of Kentucky

JULIE SCOTT JERNIGAN
Assistant Attorney General
Office of Criminal Appeals
Office of the Attorney General
1024 Capital Center Drive
Frankfort, Kentucky 40601
(502) 696-5342

CERTIFICATE OF SERVICE

I certify that the record on appeal has been returned to the Clerk of this Court and that a copy of the Brief for Commonwealth has been mailed this 26th day of October, 2009 to Honorable Tyler Gill, Judge, Logan Circuit Court, P.O. Box 667, Russellville, KY 42276; via State Messenger Mail to: Hon. Roy A. Durham, 100 Fair Oaks Lane, Ste 302, Frankfort, KY 40601 and served via e-mail to Hon. Gail Guiling, Commonwealth's Attorney, 329 W. 4th St., P.O. Box 1133, Russellville, KY 42276-1133.

Julie Scott Jernigan
Assistant Attorney General

INTRODUCTION

Appellant, HARRY FINN was convicted by a jury of Possession of Controlled Substance (Cocaine), 1st degree, 2nd offense, Possession of Drug Paraphernalia, Operating a Motor Vehicle under the Influence, Operating a Motor Vehicle on a Suspended License and Failure to signal. He appealed the trial court's denial of his Motion for Directed Verdict. The Court of Appeals affirmed his conviction in a September 12, 2008 unpublished opinion. His motion for discretionary review was granted on March 11, 2009.

STATEMENT CONCERNING ORAL ARGUMENT

The Commonwealth does not desire oral argument in this case, believing that this appeal may be resolved by reference to the record and the briefs of counsel. The Commonwealth does stand ready to present oral argument if so ordered.

COUNTERSTATMENT OF POINTS AND AUTHORITIES

COUNTERSTATEMENT OF THE CASE

Commonwealth's counterstatement of the case, as presented to the Court of Appeals, is as follows:

Officer Roger Lindsey of the Russellville City Police Department came in contact with Appellant at 12:50 am on December 23, 2006 (VR 5-21-07 11:00:15). He initially observed Appellant traveling on East Fifth Street without headlights. After observing Appellant turn into an alleyway without signaling, Officer Lindsey initiated a traffic stop. Officer Lindsey testified that he detected the odor of marijuana about Appellant's person and asked him to step out of the vehicle. Other officers, including Sargent Todd Ramer and Patrolman Mike Cannon, responded to assist Officer Lindsey. Appellant performed poorly on field sobriety testing and was arrested for DUI and Operating on a Suspended license. At that time officers searched Appellant's truck. Sargent Ramer located a cigarette package containing marijuana, chore boy, a glass pipe containing suspected cocaine residue and about 4 grams of marijuana in a glove in the front seat of the vehicle (VR 5-21-07 11:04:57). Officer Lindsey also found, on Mr. Finn's person, an ink pen casing containing suspected cocaine reside (VR 5-21-07 11:05:26). It was established on cross examination that the ink pen casing was the only evidence found on Appellant's person (VR 5-21-07 11:14:02). Mr. Finn admitted that the ink pen casing was his "push rod", used to clear the filter of the pipe he used for smoking crack cocaine (VR 5-21-07 11:05:33). Officer Lindsey noted that there was burnt residue in the pipe, and that the end of the pen was discolored and rough from being used as a push rod, (VR 5-21-07 11:18:13). Appellant admitted using the pipe and the push rod

earlier in the evening to consumed cocaine (VR 5-21-07 11:18:56). Appellant was transported, first to Logan Memorial Hospital for a blood draw and then to the Logan County Detention Center Sargent Todd Ramer, also of the Russellville Police Department, testified that he assisted with the traffic stop (VR 5-21-07 11:23:23). He stated that Appellant was doing field sobriety testing when he arrived (VR 5-21-07 11:23:56). He searched the front of the vehicle and discovered a pair of gloves on the seat of the truck containing a cigarette pack (VR 5-21-07 11:24:36) He noted that the cigarette pack contained a pipe, marijuana and chore boy. (VR 5-21-07 11:26:03)

At the close of Sargent Ramer's testimony, a juror approached the bench. In response to the juror's questions, which are inaudible on the tape, the trial court questioned the officer regarding the type and location of the gloves containing the cigarette pack, whether they belonged to a man or a woman and what size they were. (VR 5-21-07 11:32:35) Ramer noted that the gloves were located between Appellant and his passenger (VR 5-21-07 11:34:57)

To establish the results of the forensic testing, the Commonwealth called Joe Tanner, a technician at the Kentucky State Police Laboratory (VR 5-21-07 12:50). He acknowledged that the amounts of cocaine on the white pen casing were not visible to the naked eye (VR 5-21-07 12:57:46). He also testified that, because the glass pipe and the white pen casing were transported to the lab in the same bag, cross-contamination of the items was possible (VR 5-21-07 12:55:46).

At the close of Commonwealth's case, Appellant moved for directed verdict (VR 5-21-07 1:10:45). Appellant argued grounds for the directed verdict only as to the issue of residue (VR 5-21-07 1:14:23).

The Court of Appeals affirmed his conviction in a September 12, 2008 unpublished opinion. His motion for discretionary review was granted on March 11, 2009. In his brief on discretionary review, Appellant continues to argue only the statutory question relating to residue. Commonwealth has responded accordingly, based upon its belief that all other issues have been abandoned.

ARGUMENT

I.

THE COURT OF APPEALS DID NOT ERR WHEN IT AFFIRMED THE TRIAL COURTS RULING ON THE MOTION FOR DIRECTED VERDICT.

The Appellant argued at the Court of Appeals, and here that the conviction for Possession of Controlled Substances was inappropriate because the amount of cocaine found on Appellant was 'residue' from use, as opposed to a usable quantity. Put differently, Appellant argues that because he had already smoked cocaine (he admitted doing so earlier in the evening) he could not be convicted for possessing those amounts left behind that were too small for further consumption. Commonwealth contends that this is akin to arguing that one did not have cake if only the crumbs remain.

The trial court rejected this argument when it was presented by way of a directed verdict. The Court of Appeals affirmed that ruling. They judges correctly identified that standard of review for Motions for Directed Verdicts, relying upon

Commonwealth v. Sawhill (660 S.W.2d 3 (Ky. 1983) and Commonwealth v. Benham 816 S.W.2d 186 (Ky. 1991). They analyzed the case based upon that standard and existing precedent as set forth in Shivley v. Commonwealth, 814 S.W.2d 572, (Ky. 1991) and its progeny.

Shivley v. Commonwealth, 814 S.W.2d 572, (Ky. 1991), does not hold, as Appellant suggests, that cocaine residue must be visible to the naked eye. Expressly rejecting the "usable quantity" theory espoused in that case, this Court stated that "[appellant] maintain [s] that the courts... have correctly ascertained the General Assembly's intent that there is some minimum amount of a controlled substance, possession of which is not criminal, particularly where the substance is residue attached to other items..." Id. at 573.

Further, "we should not disregard the unequivocal requirements of the statute. If the language is plain and unambiguous it must be given effect. There are no exceptions designated in the statute and, therefore, we read none therein under the argument of [liberal construction]". This Court went on to say that " the appellees view the 'any amount' theory as an infringement of individual rights. We view this statute as an exercise of the police power in the area of public health.... to permit the possession of an amount of cocaine insufficient for use can in no way be justified to promote public health" Id. at 573, 574.

The Shively Court also cites to Morrison v. Commonwealth, 607 S.W.2d 114 (Ky. 1980), stating that the trial court should not have dismissed a Possession of Controlled Substance charge "as possession of cocaine residue (which is cocaine) is

sufficient to entitle the Commonwealth's charge to go to a jury when there is other evidence or the inference that defendant knowingly possessed the controlled substance" Id.

This Court continues to maintain its position as stated again in Bolen v. Commonwealth, 31 S.W.3d. 907 (Ky. 2000). Citing Shively, supra, Bolen held that "the quantity of the controlled substance possessed is immaterial to the criminality of the act". Id at 910.

In Martin v. Commonwealth, 2007 WL 1532333 an unpublished opinion attached hereto in accordance with the rules, this Court stated very specifically that it would not readdress its holdings in Shivley and Bolen. The Martin court was not persuaded by either the cash in circulation argument, or the legislative intent argument that Appellant also raises in his brief. It is notable that neither of these arguments (cash in circulation or legislative intent) were presented to the trial court in this case.

Finally, as lately as May, 21, 2009, this court once again reaffirmed its previous holdings. In Commonwealth v. Riley, another unpublished opinion attached in accordance with the rules, this court held that "we stand by our prior decision in Shively and its progeny, and hold that to be convicted of a violation of KRS 218A.1415 one must only have possession of residue of a narcotic drug." 2009 WL 1451931 (Ky.)) at page 4.

Appellant may argue that the jury verdict was inconsistent, or he may speculate on what the jury believed, but he does not and cannot provide any evidence that either the trial court or the Court of Appeals erred in their rulings. Given this Court's

ongoing reaffirmation of cases contrary to his position, and that the lower courts were evaluating a Motion For Directed Verdict, Appellant's position is groundless.

CONCLUSION

WHEREFORE, the Final Judgment of the Court of Appeals and the Logan Circuit Court must be AFFIRMED.

Respectfully submitted,

JACK CONWAY
Attorney General of Kentucky

JULIE SCOTT JERNIGAN
Assistant Attorney General
Office of Criminal Appeals
Office of the Attorney General
1024 Capital Center Drive
Frankfort, Kentucky 40601-8204
(502)696-5342

Counsel for Appellee