

RENDERED: February 27, 1998; 10:00 a.m.  
NOT TO BE PUBLISHED

NO. 97-CA-0426-MR

GARY BAUTISTA

APPELLANT

V. APPEAL FROM PULASKI CIRCUIT COURT  
HONORABLE DANIEL J. VENTERS, JUDGE  
INDICTMENT NO. 95-CR-00016

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: DYCHE, HUDDLESTON and KNOPF, JUDGES.

DYCHE, JUDGE. Gary Bautista brings this direct appeal of a final judgment of the Pulaski Circuit Court entered on February 7, 1997, following his conviction by a jury for trafficking in marijuana over eight ounces, Kentucky Revised Statute (KRS) 218A.1421. After reviewing the record, the briefs of counsel and the applicable law, we affirm.

In August 1995, law enforcement officials in Pulaski County conducted a marijuana eradication operation. On August 30, 1995, Sheriff Sam Catron, while performing aerial surveillance utilizing a helicopter, spotted marijuana plants growing in a wooded area. He directed two police officers on the ground, Pulaski County Sheriff's Detective Lewell Marcum and Detective

Brett Whitaker, to the area. In order to reach the marijuana patch, the two officers had to walk across a yard next to the residence of Gary Bautista and onto a pathway leading from behind the residence into the wooded area. After travelling approximately fifty (50) feet beyond a fork in the pathway, they encountered the marijuana patch containing 116 female plants that were still growing, and approximately 40 male plants that had been extracted from the ground and were lying at the edge of the patch. The marijuana patch was approximately two-hundred (200) yards from Bautista's residence.

Detectives Marcum and Whitaker went to Bautista's residence to speak to the occupants. After Detective Marcum knocked on the door, Bautista answered and spoke with the police. They explained to him why they were there. Bautista indicated that members of his family were the only persons who used the path, and they used it primarily for access to a fishing pond. Bautista denied any knowledge of the marijuana patch and initially consented to a general search of the area by the police. While Detective Marcum went to retrieve a consent to search form from his police vehicle, Bautista changed his mind and refused to allow a search inside the residence.

After Bautista refused to allow the police inside the residence, they began the process of requesting a search warrant with the assistance of an associate, while Detectives Marcum and Whitaker remained at Bautista's residence. After obtaining a search warrant, the officers seized the following items in the

residence: a bread bag containing a ziplock plastic bag with 92.5 grams or 3.26 ounces of marijuana plant leaf and stalk material in the kitchen refrigerator freezer, a plastic baggie containing 12.5 grams or .44 ounces of marijuana behind the heating stove, one large plastic bag containing 149 grams or 5.25 ounces of marijuana in the kitchen, and two large plastic bags containing a total of 441 grams or 15.55 ounces of marijuana plant material in the deep freezer. In addition to the marijuana, the police found two small weight scales and a mirror. Bautista and his wife were arrested.

On September 27, 1995, the Pulaski County Grand Jury indicted Bautista on one misdemeanor count of cultivating marijuana (KRS 218A.1423) and one felony count of trafficking in marijuana over eight ounces (KRS 218A.1421). During the trial held on January 14, 1997, the trial court granted Bautista's motion for a directed verdict in part by dismissing the charge of cultivating marijuana. The jury found Bautista guilty of trafficking in marijuana and recommended a penalty of four years' imprisonment.<sup>1</sup> On February 7, 1997, the circuit court entered a final judgment of conviction and order sentencing Bautista to serve four years in prison. This appeal followed.

The sole issue on appeal is whether the trial court erred by refusing to grant Bautista a directed verdict on the charge of trafficking in marijuana.

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<sup>1</sup> Bautista's wife also was found guilty of a misdemeanor offense of possession of marijuana.

In Commonwealth v. Benham, Ky., 816 S.W.2d 186 (1991), the Kentucky Supreme Court reiterated the standard for consideration of motion for directed verdict. It stated:

On motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. 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 to the jury questions as to credibility and weight to be given to such testimony.

816 S.W.2d at 187. See also Commonwealth v. Sawhill, Ky., 660 S.W.2d 3 (1983). The standard for appellate review of a denial of a motion for directed verdict based on insufficient evidence dictates that if under the evidence as a whole it would not be clearly unreasonable for a jury to find the defendant guilty, he is not entitled to a directed verdict of acquittal. Benham, 816 S.W.2d at 187; Perdue v. Commonwealth, Ky., 916 S.W.2d 148, 160, cert. denied, \_\_\_ U.S. \_\_\_, 117 S. Ct. 151, 136 L. Ed. 2d 96 (1996). Moreover, a conviction may properly be based on circumstantial evidence when that evidence is of such character that reasonable minds would be justified in concluding that the defendant was guilty beyond a reasonable doubt. Baker v. Commonwealth, Ky., 860 S.W.2d 760 (1993); Bussell v. Commonwealth, Ky., 882 S.W.2d 111, 114, cert. denied, 513 U.S. 1174, 115 S. Ct. 1154, 130 L. Ed. 2d 1111 (1994) (circumstantial evidence is sufficient to support a criminal conviction as long as the evidence taken as a whole shows that it was not clearly unreasonable for the jury to find guilt).

Bautista contends there was insufficient evidence of his intent to sell marijuana, as opposed to mere possession. During the trial, Bautista admitted that all of the marijuana found at the residence was his, but he testified that he intended to smoke it all for his own personal enjoyment. He asserted that he obtained the marijuana from friends. Under KRS 218A.010(24), a person trafficks in marijuana when he manufactures, distributes, dispenses, sells, transfers, or possesses with the intent to manufacture, distribute, dispense, or sell marijuana. For the purposes of the drug statutes, "sell" means to dispose of a controlled substance to another person for consideration, and "transfer" means to dispose of a controlled substance without consideration. KRS 218A.010(22) and (23). In addition, KRS 218A.1421(5) provides that the unlawful possession of eight or more ounces of marijuana is prima facie evidence of possession with intent to sell or transfer.

In the instant case, Bautista admitted to possession of over twenty-two (22) ounces of marijuana. Bautista conservatively estimated that this amount of marijuana could be used to make a few hundred marijuana cigarettes. The marijuana patch containing 116 female plants was just off a pathway leading directly to the Bautista's residence. Detective Marcum testified that the female plants produced a more potent and desirable product, so persons harvesting marijuana plants typically remove the male plants to promote growth of the female plants. The police found 35-40 male plants lying at the edge of the marijuana patch. Bautista's wife

testified that while Bautista periodically smoked marijuana, she had never seen him use it and she was not aware that he had accumulated the large amount seized by the police. Furthermore, the police found some marijuana hidden behind a heating stove and in a deep freezer, while other bags of marijuana were easily accessible in the kitchen area. The fact that some of the illegal drugs were in easily discernible locations while other large quantities were secreted is so incongruous that a jury justifiably could believe the secreted items were possessed for sale rather than personal use. See Dawson v. Commonwealth, Ky., 756 S.W.2d 935, 936 (1988) (involving illegal pills). Finally, during the search of the residence, the police found two small scales suitable for use to weigh drugs including marijuana. A jury has latitude to infer intent from the surrounding facts and circumstances. Dishman v. Commonwealth, Ky., 906 S.W.2d 335, 341 (1995). Viewing the evidence as a whole in the light most favorable to the prosecution, it was not clearly unreasonable for the jury to find Bautista guilty of trafficking.

Bautista's reliance on Commonwealth v. Collins, Ky., 821 S.W.2d 488 (1991) is misplaced. In Collins, the court indicated the statutory presumption of intent to sell based on cultivation of twenty-five (25) or more plants of marijuana could not be used to shift the burden of proof from the Commonwealth to the defendant as to any essential element of the crime. The court stated, however, that the statutory presumption could be used to provide a guide for the trial court in evaluating a motion for directed verdict. "When

the presumption applies, there is a prima facie case of an intent to sell, thus constituting a question of fact for the jury based on all the evidence." Id. at 490 (citations omitted).

The evidence in the case at bar was sufficient to create the statutory presumption expressed in KRS 218A.1421(5) that Bautista possessed the marijuana with intent to sell. The trial court did not err by denying Bautista's motion for directed verdict on the charge of trafficking in marijuana and submitting the question of guilt on that charge to the jury. As in Collins, the instructions did not refer to the presumption, and the ultimate issue of intent to sell was left to the jury. The jury was instructed on both trafficking and the lesser-included offense of possession of marijuana. The appellate court does not reevaluate the evidence or substitute its judgment as to credibility of the witnesses for that of the trial court or the jury. See Commonwealth v. Jones, Ky., 880 S.W.2d 544, 545 (1994). The decision whether to believe the defendant's or prosecution's story is for the jury. See Webb v. Commonwealth, Ky. 904 S.W.2d 226, 229 (1995). Bautista's claim that the Commonwealth relied solely on the presumption is without merit.

The judgment of the Pulaski Circuit Court is affirmed.

ALL CONCUR.

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