

RENDERED: AUGUST 4, 2006; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2004-CA-000952-MR

BOBBY A. JONES

APPELLANT

ON REMAND FROM SUPREME COURT OF KENTUCKY
NO. 2005-SC-000821-DG

APPEAL FROM MONTGOMERY CIRCUIT COURT
HONORABLE WILLIAM B. MAINS, JUDGE
ACTION NO. 03-CR-00100
v.

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING AND REMANDING

** **

BEFORE: TAYLOR AND VANMETER, JUDGES; KNOPF,¹ SENIOR JUDGE.

TAYLOR, JUDGE: This matter is before us on remand by the Kentucky Supreme Court by Opinion and Order dated May 10, 2006. The Supreme Court vacated our opinion rendered July 1, 2005, and ordered us to reconsider in light of Potts v. Commonwealth, 172 S.W.3d 345 (Ky. 2005). Having reviewed Potts, we believe the facts in the instant appeal are distinguishable from the facts

¹ Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

in Potts. Unlike Potts, the error at issue in this appeal constituted a palpable error under Ky. R. Crim. P. (RCr) 10.26. Thus, upon reconsideration, we reverse and remand.²

Bobby A. Jones brings this appeal from an April 26, 2004, judgment of the Montgomery Circuit Court upon a jury verdict finding him guilty of possession of a firearm by a convicted felon and sentencing him to three years and six months' imprisonment. In 1995, appellant pled guilty to the felony charge of criminal mischief and was sentenced to five years' imprisonment which was probated. In April 2003, appellant pawned a Ruger .22 caliber rifle at a local pawn shop. He pawned the rifle for \$80.00. A detective from the Montgomery County Sheriff's Department discovered that appellant had pawned the rifle. The detective was aware of appellant's prior felony conviction. Thereupon, the detective secured a search warrant for appellant's home. No firearms were found during the search. The detective then filed a criminal complaint against appellant alleging possession of a firearm by a convicted felon.

² This is the same result reached by this Court in our original opinion rendered July 1, 2005. In Potts v. Commonwealth, 172 S.W.3d 345 (Ky. 2005), the defendant appealed a conviction for drug trafficking. On appeal, the defendant claimed the trial court erred in "overruling" his motion for directed verdict of acquittal due to insufficient evidence. However, as in this case, defendant's motion failed to state specific grounds as required by Ky. R. Civ. P. 50.01. The Supreme Court reviewed the issue for palpable error and concluded that it was not clearly unreasonable for the jury to find defendant guilty of drug trafficking. In this case, we believe it was unreasonable to find appellant guilty of possession of a firearm by a convicted felon where the Commonwealth failed to present evidence to prove a critical element of the offense charged.

Appellant was subsequently indicted upon the offense of possession of a firearm by a convicted felon and was convicted in a jury trial in March of 2004. By judgment entered April 26, 2004, the circuit court sentenced appellant to three years and six months' imprisonment, thus precipitating this appeal.

Appellant raises three allegations of error on appeal. We view appellant's second allegation of error as presenting a troublesome issue - whether appellant was entitled to a directed verdict of acquittal because the Commonwealth failed to present sufficient direct evidence demonstrating the .22 caliber rifle was capable of expelling "a projectile by the action of an explosive" as required under KRS 527.040 and KRS 527.010(4). For reasons hereinafter discussed, we are of the opinion that appellant was entitled to a directed verdict of acquittal upon the offense of possession of a firearm by a convicted felon under KRS 527.040.

A directed verdict is proper if under the evidence as a whole it would have been clearly unreasonable for the jury to have found appellant guilty of possession of a firearm by a convicted felon. See Commonwealth v. Benham, 816 S.W.2d 186 (Ky. 1991). The Commonwealth believes that this allegation of error was not properly preserved for our review. The record indicates that appellant moved for a directed verdict at the

close of the Commonwealth's case-in-chief and renewed the motion at the close of his case. However, the Commonwealth points out that appellant's trial counsel failed to state specific grounds for the motion. Even if the issue was not properly preserved, we are of the opinion that the failure of the trial court to grant appellant's motion for directed verdict constituted palpable error under RCr 10.26. An error is considered palpable if it affects the defendant's substantial rights and resulted in manifest injustice.

The offense of possession of a firearm by a convicted felon is codified in KRS 527.040 and states, in relevant part, as follows:

(1) A person is guilty of possession of a firearm by a convicted felon when he possesses, manufactures, or transports a firearm when he has been convicted of a felony, as defined by the laws of the jurisdiction in which he was convicted, in any state or federal court and has not:

(a) Been granted a full pardon by the Governor or by the President of the United States;

(b) Been granted relief by the United States Secretary of the Treasury pursuant to the Federal Gun Control Act of 1968, as amended.

A firearm is defined by KRS 527.010(4) as meaning "any weapon which will expel a projectile by the action of an explosive."

Appellant argues that he was entitled to a directed verdict of acquittal because the Commonwealth failed to present

evidence that the .22 caliber rifle was capable of being fired. Appellant reminds this Court that the Commonwealth has the burden of proving each and every element of a charged offense beyond a reasonable doubt. See Goodhue v. Commonwealth, 415 S.W.2d 845 (Ky. 1967). There was no direct evidence concerning the functionality of the .22 caliber rifle. There was evidence presented that appellant pawned a .22 caliber rifle and received \$80.00 from the pawn shop for the rifle. The evidence presented by the Commonwealth, however, is simply insufficient to support the jury's finding that the rifle was functional and capable of being fired. Simply put, the Commonwealth failed to sustain its burden of proving the functionality of the rifle beyond a reasonable doubt.

It is well-established that the failure of the Commonwealth to prove each element of an offense beyond a reasonable doubt results in palpable error which affects the substantial rights of a defendant under RCr 10.26. Perkins v. Commonwealth, 694 S.W.2d 721 (Ky.App. 1985). As the Commonwealth failed to prove an essential element (functionality of the rifle) of the indicted offense, we hold the failure of the trial court to direct a verdict constituted palpable error and reverse appellant's conviction upon possession of a firearm by a convicted felon under KRS 527.040.

For the foregoing reasons, the judgment of the Montgomery Circuit Court is reversed and this cause remanded for proceedings not inconsistent with this opinion.

ALL CONCUR.

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