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Commonwealth of Kentucky

Court of Appeals

NO. 2023-CA-0680-MR

LESLEY RYAN CORNETT — APPELLANT

v.

APPEAL FROM PERRY CIRCUIT COURT
HONORABLE ALISON C. WELLS, JUDGE
ACTION NO. 22-CR-00205

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, EASTON, AND GOODWINE, JUDGES.

ACREE, JUDGE: A jury convicted Appellant, Lesley Ryan Cornett, of first-degree possession of a controlled substance. Cornett contends the trial court erred: (1) by denying his motion for a directed verdict; and (2) by denying him probation. We affirm.

BACKGROUND

Perry County law enforcement stopped a vehicle Cornett was driving. He was arrested and his vehicle was searched.[1] Neither the stop nor the arrest and search are contested on appeal.

Among other things, the arresting officer discovered what he initially believed to be a Suboxone strip tucked inside a cigarette pack in the driver's side door. Laboratory analysis determined the controlled substance was, in fact, lysergic acid diethylamide, or LSD.

Cornett was indicted on two counts, but a jury only convicted him on a single count of first-degree possession of a controlled substance (LSD). KRS[2] 218A.1415(1)(d). He believes the circuit court erred by failing to grant his motion for directed verdict. He argues here, as he argued before the circuit court, that the Commonwealth failed to present sufficient proof of one element of the crime – knowledge that he was in possession of the specific controlled substance, LSD.

For the following reasons, we reject his premise that, to satisfy the "knowing" element of the charge of possession, the Commonwealth must prove more than that the defendant knowingly possessed a controlled substance.

[1] The search was conducted pursuant to the arrest. However, the arresting officer requested, and Cornett consented to, the search.

[2] Kentucky Revised Statutes.

STANDARD OF REVIEW

The standard for appellate review of the denial of a properly preserved directed verdict motion is whether 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." *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991). As an appellate court, we must be mindful that weight and credibility of evidence are matters within the sole province of the jury. *Reynolds v. Commonwealth*, 113 S.W.3d 647, 650 (Ky. App. 2003).

However, to the extent statutory interpretation becomes necessary, then a question of law arises, and our review is *de novo*. *Revenue Cabinet v. Hubbard*, 37 S.W.3d 717, 719 (Ky. 2000).

ANALYSIS

1. *Circuit Court did not err by denying Cornett's motion for directed verdict*.

Cornett claims he was entitled to a directed verdict because the only proof of this element of the crime – knowledge – was Cornett's own testimony that he believed he purchased and was in possession of a different controlled substance, Suboxone, not LSD. He also noted the arresting officer's testimony to his initial belief that the substance in question was Suboxone.

In response, the Commonwealth pointed to evidence: that the cigarette pack containing the LSD strip was in the driver's door; that the arresting

officer was not sure what the substance was and sent it to the lab; and a lab technician, upon seeing the strip, immediately knew it was not Suboxone but, in fact, it contained LSD. Its legal argument is that "the Commonwealth can prove all the elements of a crime by circumstantial evidence." *Commonwealth v. Goss*, 428 S.W.3d 619, 625 (Ky. 2014).

Of course, this is so. We would even add that "[m]ost courts accept the proposition that knowledge that the substance possessed is an illicit drug can be inferred from the same [direct or circumstantial] evidence offered to prove possession." 2 Uelmen and Haddox, DRUG ABUSE AND THE LAW SOURCEBOOK § 7:12 (2024). We count Kentucky among those courts. *See, e.g.*, *Hampton v. Commonwealth*, 231 S.W.3d 740, 751 (Ky. 2007) ("That Appellant knew he had the pipe when he went into the jail is a reasonable inference from the fact that it was in his own pocket."); *Commonwealth v. Shivley*, 814 S.W.2d 572, 574 (Ky. 1991) ("[P]ossession of cocaine residue (which is cocaine) is sufficient to entitle the Commonwealth's charge to go to a jury when there is . . . the inference that defendant knowingly possessed the controlled substance.").

However, both parties' arguments appear to presume the Commonwealth was required to present evidence of Cornett's knowledge he was in possession of LSD, specifically. We reject that premise, and we do so after interpreting the legislative intent underlying the relevant statute, KRS 218A.1415.

Cornett admitted he intended to purchase, believed he did purchase, and thought he was in possession of a controlled substance. Under the relevant statute, that is enough. The Commonwealth is not required to further prove a defendant knew which controlled substance he possessed. We conclude as much from our examination of the legislative scheme's intention. That conclusion is reinforced by examining jurisprudence from sister jurisdictions that already have addressed this issue, an issue of first impression in Kentucky.

The three Kentucky statutes defining the crime with which Cornett was charged use the identical language to explain the circumstances under which "[a] person is guilty of possession of a controlled substance . . . ." KRS 218A.1415(1); KRS 218A.1416(1); KRS 218A.1417(1). Each of those statutes requires that the person "knowingly" possess a controlled substance. *Id.* "Knowingly" is defined as follows: "A person acts knowingly with respect to conduct or to a circumstance described by a statute defining an offense when he is aware that his conduct is of that nature or that the circumstance exists." KRS 501.020(2).[3]

[3] Although "knowingly" is not defined in the definitions section of Chapter 218A, KRS 218A.010, the subsequent section, KRS 218A.015 says: "When used in this chapter, the terms 'intentionally,' 'knowingly,' 'wantonly,' and 'recklessly,' including but not limited to equivalent terms such as 'with intent,' shall have the same definition and the same principles shall apply to their use as those terms are defined and used in KRS Chapter 501." KRS 218A.015. Hence, that definition is quoted here.

"[P]ossession of a controlled substance" is the "circumstance described by [the applicable] statute defining [the] offense" with which Cornett was charged; therefore, the Commonwealth only needed to present evidence sufficient to justify the inference that Cornett "[wa]s aware that his conduct [wa]s of that nature or that the circumstance exist[ed]." KRS 218A.1415(1); KRS 218A.1416(1); KRS 218A.1417(1); KRS 501.020(2). After acknowledging awareness (mistaken as it may have been) that he was in possession of Suboxone – a controlled substance – he can hardly be heard to claim lack of knowledge of being in possession of a controlled substance or even that it was his intention to possess a controlled substance, only that it was not the controlled substance he thought he acquired.

The relevant statute, KRS 218A.1415, is a part of Kentucky's version of the Uniform Controlled Substances Act. UNIF. CONTROLLED SUBSTANCES ACT, 9 U.L.A.[4] 1 (2007) (showing Kentucky adopted this uniform act in 1972). That uniform act proposes that it "be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this [Act] among States enacting it." *Id.* § 706, 9 U.L.A. 778. With that aspiration in mind, we considered, for their persuasiveness only, opinions from courts in many sister

[4] Uniform Laws Annotated.

states which also adopted the uniform act. Each opinion we found reached the same conclusion we pronounce here.

Perhaps the clearest, most concise articulation comes from the Supreme Court of Wisconsin, which said:

> [T]he only knowledge that the State must prove beyond a reasonable doubt in a possession of a controlled substance case is the defendant's knowledge or belief that the substance was a controlled or prohibited substance. The State is *not* required to prove the defendant knew the exact nature or precise chemical name of the substance.

Wisconsin v. Sartin, 546 N.W.2d 449, 455 (Wis. 1996) (emphasis original).

A California defendant facing more serious charges than Cornett made the same argument he now makes. That Californian believed he was in possession of cocaine when, in fact, he possessed PCP (phencyclidine). He was charged with and convicted of possession of PCP with intent to sell. Affirming his conviction, the appellate court said:

> Defendant next contends that the court should have instructed the jury that the prosecution had to prove defendant knew the controlled substance he possessed was PCP. Defendant reasons that because he did not know the drug was PCP, "he did not have the requisite knowledge" to be convicted of possession of PCP for sale . . . . This position has been rejected . . . . [The California Supreme C]ourt wisely determined that knowledge for the purpose of conviction under [California's version of the Uniform Controlled Substances Act] is knowledge of the controlled nature of the substance and not its precise chemical composition. Although th[at previous case] dealt with

> mere possession rather than possession for sale, the knowledge element is the same.

California v. Guy, 107 Cal. App. 3d 593, 600-01, 165 Cal. Rptr. 463, 467-68 (1980) (citing *California v. Garringer*, 48 Cal. App. 3d 827, 121 Cal. Rptr. 922 (1975)).

The same issue arose in Nebraska in *Nebraska v. Lomack*, 545 N.W.2d 455 (Neb. App. 1996). The defendant claimed he did not know specifically what he possessed, and certainly did not know it was the controlled substance named in the indictment – cocaine. The court said:

> That Lomack had possession of the baggie which contained the controlled substance is undisputed. While testifying that he did not know exactly what was in the baggie, Lomack did admit that he believed it was "something illegal." He seems to argue that it was necessary for the State to prove that he was aware the baggie contained cocaine in order to be convicted. With this, we disagree. A similar argument was made in [*Nebraska v.*] *Neujahr*, [540 N.W.2d 566 (Neb. 1995)], and was soundly rejected. In *Neujahr*, the defendant requested an instruction which, in substance, required that the jury find that Neujahr knew that the pills in his possession were clorazepate. The Supreme Court held that the State need only prove that the defendant knowingly possessed a substance and that he knew of the nature or character of the substance, *i.e.*, he knew it was a controlled substance. It specifically rejected the notion that the State must prove that the defendant knew of the precise type of controlled substance in order to sustain a conviction. Similarly, in this case, it was unnecessary for the State to prove that Lomack knew the substance in the baggie was cocaine. It was sufficient for the State to prove that Lomack knowingly possessed the substance and that he

> knew of the nature or character of the substance as being a controlled substance.

Id. at 468-69 (citing *Neujahr*, 540 N.W.2d at 572 ("[T]he State must prove that Neujahr knew the pills he possessed were a controlled substance, not that he knew the pills were clorazepate.")).

There are more than a handful of additional opinions from sister states that effectively reach the same result. *See, e.g.*, *In re Ondrel M.*, 918 A.2d 543, 548 (Md. App. 2007) (defendant need only know "the general character or illicit nature of the substance"); *Massachusetts v. Rodriguez*, 415 Mass. 447, 454, 614 N.E.2d 649, 653 (1993) ("Commonwealth must prove that the defendant . . . knew it was a controlled substance. Proof that the defendant knew the exact nature of the controlled substance is not an element of the crime."); *Cooper v. Georgia*, 728 S.E.2d 289, 291 (Ga. App. 2012) (footnote omitted) (Defendant "incorrectly claims . . . his testimony that he believed he possessed a different Schedule I controlled substance, ecstasy, renders the State's evidence against him [of possessing N-Benzylpiperazine] insufficient as a matter of law.").

Similarly, in the federal system, "[a] defendant need not know the exact nature of the substance in his custody in order to be convicted of possession of a controlled substance." *United States v. Berick*, 710 F.2d 1035, 1040 (5th Cir. 1983), *certiorari denied* 104 S. Ct. 255, 464 U.S. 899, 78 L. Ed. 2d 241 (1983), *certiorari denied* 464 U.S. 918, 104 S. Ct. 286, 78 L. Ed. 2d 263 (1983). "[T]he

law is settled that a defendant need not know the exact nature of a drug in his possession to violate [federal law prohibiting possession of controlled substances]; it is sufficient that he be aware that he possesses some controlled substance." *United States v. Morales*, 577 F.2d 769, 776 (2d Cir. 1978).

Summarizing, a circuit court does not err by denying a directed verdict motion when the Commonwealth satisfied its burden of presenting evidence from which a jury could infer the defendant's knowledge he was in possession of a controlled substance. Although the Commonwealth must still prove the defendant was *in possession* of a specific controlled substance, it is not required to prove the defendant had knowledge of the specific nature, character, or chemical makeup of that controlled substance.

2. The issue whether the circuit court erred by denying probation is moot.

It is undisputed that Cornett served his sentence in full. As Cornett himself notes, under such circumstances, any issue regarding the propriety of denying probation is moot. *Jones v. Commonwealth*, 319 S.W.3d 295, 296 (Ky. 2010).

However, citing *Commonwealth v. Collinsworth*, Cornett argues an exception to the mootness doctrine applies because this issue falls within "the contours of the 'capable of repetition, yet evading review' exception" to the

mootness doctrine. 628 S.W.3d 82, 86 (Ky. 2021) (citing *Morgan v. Getter*, 441 S.W.3d 94, 96-97 (Ky. 2014)). We disagree.

The specific issue Cornett raises is the interplay of the presumption of probation contained in KRS 218A.1415(2)(b)2. and the requirement of factfinding when presumptive probation is denied, found in KRS 218A.010(44). Not only do we agree with Cornett this issue is capable of repetition, we note it was addressed in *Jones v. Commonwealth*, 413 S.W.3d 306, 309 (Ky. App. 2012). *See also Reilly v. Commonwealth*, No. 2011-CA-001608-MR, 2013 WL 1688381, at *2 (Ky. App. Apr. 19, 2013), *rev. denied, opin. not to be pub*., No. 2013-SC-0597-D (Ky. Nov. 13, 2013).

We conclude this issue does not evade review. That point is well made by Cornett himself when he quotes *Collinsworth* for the proposition that "that a meaningful difference exists between issues whose shelf life may be measured in days and those which are most often measured in months and years." *Collinsworth*, 628 S.W.3d at 86. Although Cornett was sentenced to serve one (1) year, he could have been required to serve the maximum sentence of three (3) years. KRS 218A.1415(2)(a). Therefore, the "shelf life" of this issue is measured in months and years, not in days. Just as in *Collinsworth*, given that KRS 218A.1415

> concerns felonies, which often carry stiff penalties and significant periods of incarceration, we can reasonably

> expect that future litigants will have an opportunity to bring this matter to the Court's attention [again] in a live controversy. Consequently, this case does not satisfy our "capable of repetition, yet evading review" standard.

Collinsworth, 628 S.W.3d at 86-87.

CONCLUSION

For the foregoing reasons, the Perry Circuit Court's denial of Cornett's motion for directed verdict and its denial of probation are AFFIRMED.

GOODWINE, JUDGE, CONCURS.

EASTON, JUDGE, CONCURS AND FILES SEPARATE OPINION.

EASTON, JUDGE, CONCURRING: I concur with the result in this case because the Commonwealth presented more than a scintilla of evidence about Cornett's knowledge of possessing LSD. The jury could have found Cornett not credible and combined that evidence with the testimony of the analyst about the packaging of the LSD as being different[5] from what is observed with prescribed Suboxone. A directed verdict was properly denied. I also agree with the rejection of Cornett's probation argument.

I differ with the announcement of a significant new rule of law for Kentucky to the effect that it does not matter what controlled substance a defendant believes he or she has. If the evidence supports a finding that it was any controlled

[5] The analyst immediately knew the item was not a Suboxone strip because the shape was wrong, and the film used was not of a pharmaceutical grade.

substance, then the defendant is guilty of possessing whatever controlled substance it turns out to be.

Kentucky enacted portions of the Uniform Controlled Substances Act ("UCSA") in 1972. In doing so, it made several changes from the standard text. The uniform act did not include any definition for the element of "knowingly" possessing a substance. Our General Assembly later clarified that the mental states used in our version of the UCSA were to be those also used in the Kentucky Penal Code, which had been adopted two years after the UCSA. *See* KRS 218A.015. As a result, the applicable definition of knowingly is found in KRS 501.020(2). Our Opinion discusses this definition, but I believe the discussion misapplies the language of the definition in the context of knowingly possessing a particular substance.

The Commonwealth must prove knowledge of an existing circumstance. The circumstance is possession of a controlled substance as our Opinion suggests, but, due in part to the penalty structure of our statutes governing controlled substances, we have for decades required identification of the substance in a jury instruction. Chapter 9 of Cooper and Cetrulo's seminal work of *Kentucky Instructions to Juries* (5th ed. 2012) is replete with this phrase: "That he knew the substance so possessed by him was _____ (**ID substance**)." (Emphasis added.)

Cornett cited *Finn v. Commonwealth*, 313 S.W.3d 89 (Ky. 2010). That case primarily addressed the issue of residue of cocaine being "any amount" to sustain a conviction. Even so, the Court noted "no reversible error because the evidence showed that Finn *knowingly* possessed *cocaine*." *Id*. at 92 (emphasis in the original as to knowingly and added as to cocaine). *See also Martin v. Commonwealth*, 409 S.W.3d 340 (Ky. 2013) (rejecting a claim of error for not defining *knowingly*, the Court approved an instruction including the wording that the defendant knew the substance he possessed was cocaine).

We now say that Cornett could be convicted of First-Degree Possession of a Controlled Substance, even if he did not know the substance he possessed was any one of the substances governed by KRS 218A.1415. Possession of Suboxone is a violation of a different statute, specifically KRS 218A.1416. Such a violation is punished as a misdemeanor. Possession of LSD is a felony.

It can be frustrating when a defendant faced with a lab result testifies that he or she did not know that was the substance he or she possessed but rather claims that it was something else. The solution may be to allow the jury to consider a lesser included offense based on the admission in case the jury believes it. But the solution is not a wholesale rule that knowledge of possession of any

controlled substance will sustain any level of controlled substance possession charge.

Under the logic of our Opinion, a person who bought a small baggie of marijuana truly not knowing that it was laced with cocaine, or some other similar substance may be punished not with the penalties of a limited Class B misdemeanor under KRS 218A.1422 but will instead be a felon subject to imprisonment. That is not a tenable interpretation of the law under Kentucky's Controlled Substances Act when read with the Kentucky Penal Code definition of knowingly.

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