

RENDERED: SEPTEMBER 9, 2005; 2:00 p.m.  
NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2004-CA-002094-MR

KEVIN L. NEWTON

APPELLANT

v. APPEAL FROM GRAYSON CIRCUIT COURT  
HONORABLE ROBERT A. MILLER, JUDGE  
ACTION NO. 01-CR-00121

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: DYCHE AND GUIDUGLI, JUDGES; PAISLEY, SENIOR JUDGE.<sup>1</sup>

GUIDUGLI, JUDGE: Kevin Lee Newton appeals from a judgment of the Grayson Circuit Court following a jury verdict convicting him of one count of third-degree assault and one count of disorderly conduct. Newton argues that he was unable to form the requisite intent to commit the assault and disorderly

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<sup>1</sup> Senior Judge Lewis G. Paisley, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

conduct because he suffers from paranoid schizophrenia. For the reasons stated below, we affirm the judgment.

On December 4, 2001, the Grayson County grand jury indicted Newton on one count each of third-degree assault, possession of a weapon on school property, and disorderly conduct. The charges arose from an incident occurring on October 31, 2001, in Grayson County, Kentucky. On that date, Newton came to his son's elementary school and asked to see him. Principal Barry Anderson allowed Newton to see his son, Ryan. Newton also asked to see his ex-wife's son, Brandon.

Newton left the school and returned a few minutes later. The record indicates that Newton appeared somewhat agitated and that he indicated that he was worried for Ryan's safety. He became upset when he mistakenly believed that some parents were being allowed to pick up their children from school early. After Newton left again, Anderson became concerned about Newton's behavior and called the police.

Officer Todd Cave and Detective Gary Troutman arrived shortly thereafter. While they were speaking with Anderson, Newton returned. Newton demanded to see Ryan, and again was allowed by Anderson to see that Ryan and Brandon were safe.

Because the end of the school day was approaching, Anderson, Cave and Troutman decided that Newton should leave school property. When Newton refused to leave, Cave and

Troutman attempted to physically remove him. A struggle ensued, after which Newton was arrested. After the arrest, Cave found a loaded revolver and ammunition in Newton's car.

Trial on the charges was conducted on August 26, 2004. At the close of the Commonwealth's case, a directed verdict was granted in favor of Newton on the weapon charge. The remaining charges were submitted to the jury. The jury returned a guilty verdict on the assault and disorderly conduct charges. Newton's motion to alter, amend or vacate the verdict was denied. Newton was sentenced to five years on the assault charge and 90 days on the disorderly conduct charge, to be served concurrently for a total sentence of five years. This appeal followed.

Newton now argues that the circuit court committed reversible error in failing to grant a directed verdict on the assault and disorderly conduct charges. As a basis for the argument, he directs our attention to evidence presented at trial showing that he suffers from paranoid schizophrenia. He maintains that this illness removes him from criminal responsibility because he was unable to form the requisite intent to commit the crimes of assault and disorderly conduct.

Newton points to the testimony of his expert witness, Dr. Stephen Free. Dr. Free was a psychologist employed at the Kentucky Correctional Psychiatric Center, who opined that Newton suffered from schizophrenia and that the "illness gives him

substantial grounds to argue that he is not required to bear criminal responsibility." Newton also directs our attention to case law and statutory law which he maintains supports his claim of error, and seeks an order reversing his conviction.

KRS 504.020(1) states that, "[A] person is not responsible for criminal conduct if at the time of such conduct, as a result of mental illness or retardation, he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law." The burden rests with the defendant to prove the mental illness.<sup>2</sup> While the opinion of an expert witness can provide some evidence to support the defendant's claim of insanity, the jury may reject the testimony in whole or in part.<sup>3</sup>

In the matter at bar, evidence exists in support of Newton's claim that he was unable to form the requisite intent to be convicted of the charged crimes, but other evidence supports the Commonwealth's assertion that Newton failed to prove his claim of insanity on the date in question. Newton offered the testimony of Dr. Free, who opined that Newton suffered from schizophrenia, and Anderson's testimony that Newton claimed to hear his step-son's voice. On the other hand, Dr. Free stated on cross examination that there was no way to know if Newton was suffering from schizophrenia when the alleged

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<sup>2</sup> Wainscott v. Commonwealth, 562 S.W.2d 628 (Ky. 1978).

<sup>3</sup> Wiseman v. Commonwealth, 587 S.W.2d 232 (Ky. 1979).

crimes were committed, nor if Newton lacked the capacity to form intent. Similarly, evidence was presented that Newton used marijuana and steroids, which could affect cognitive ability while not rendering him incapable of forming criminal intent. And finally, the Commonwealth notes that Newton refused to participate in several of the tests Dr. Free sought to administer, and that Dr. Free only spent a few hours with Newton some 18 months after the October 31, 2001, incident.

As the parties are aware, Commonwealth v. Benham<sup>4</sup> sets forth the standard for reviewing motions for a directed verdict. It states that,

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 the credibility and weight to be given to such testimony.

On appellate review, the test of a directed verdict is, 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.

Under the evidence as a whole, it was not clearly

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<sup>4</sup> Commonwealth v. Benham, 816 S.W.2d 186 (Ky. 1991).

unreasonable for the jury to reject Newton's contention that he was unable to form criminal intent on October 31, 2001. The separation in time between Dr. Free's diagnosis and the crime, Newton's drug use, and the other evidence tendered by the Commonwealth formed a reasonable basis upon which the jury could have concluded that Newton should not be relieved of criminal liability. When drawing all fair and reasonable inferences from this evidence in favor of the Commonwealth, the circuit court properly determined that the motion for a directed verdict should be denied and that the matter should go before the jury. Accordingly, we find no error.

For the foregoing reasons, we affirm the judgment of the Grayson Circuit Court.

ALL CONCUR.

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