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Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-001272-MR

PAUL KNOX — APPELLANT

v.

APPEAL FROM MADISON CIRCUIT COURT
HONORABLE WILLIAM G. CLOUSE JR., JUDGE
ACTION NO. 13-CR-00158

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, JOHNSON, AND TAYLOR, JUDGES.

ACREE, JUDGE: Paul Knox appeals from a Madison Circuit Court judgment imposing a two-year sentence after a jury found him guilty of being a convicted felon in possession of a firearm, and third-degree possession of a controlled substance. Knox argues, first, that the possession charge should have been dismissed because he was on pre-trial diversion at the time of his arrest and

therefore not a convicted felon and, second, that there was insufficient evidence to support the possession conviction. We disagree on both counts, and affirm.

In 2012, Knox was charged with second-degree assault in Powell Circuit Court. He was granted pre-trial diversion on a plea of guilty to second-degree assault under extreme emotional distress, a Class D felony. The diversion period was three years.

On April 3, 2013, Knox was involved in an automobile accident in Richmond, Kentucky. When police officer Norman Craig arrived at the scene, Knox's truck was on its side on a sidewalk. Officer Craig observed a shotgun in the bed of the truck, and another shotgun and the barrel of a third shotgun in the cab. Dispatch informed the officer that Knox's driver's license was suspended for fleeing and evading, and that Knox had a prior second-degree assault conviction. Officer Craig arrested Knox for being a felon in possession of a firearm and placed him in the back of the police cruiser.

A firefighter then advised Officer Craig that Knox had gone into a nearby gas station restroom after the accident. Officer Craig went into the restroom stall and saw six pills on the floor around the trash can. He believed them to be 1 milligram Alprazolam tablets. Officer Craig reviewed the gas station surveillance video from the time of the accident to the time Officer Craig entered the restroom. The video showed that Officer Craig and Knox were the only two people to enter the restroom during that period.

Officer Craig returned to his cruiser and advised Knox of his *Miranda*[1] rights. Knox waived them and told Officer Craig he must have dropped the Alprazolam on the floor. He thought the Alprazolam could be his because he had a prescription for it, although his prescription dosage was .25 milligram tablets. At trial, Knox testified that he did not confess to leaving the pills in the bathroom, and that he never agreed they were 1 milligram tablets, stating: "how could 1 milligram [pills] fall out of my pocket when I did not have a prescription for them?"

Knox was charged with third-degree possession of a controlled substance, namely the Alprazolam pills. He filed a motion to suppress the evidence. Following a hearing, the motion was denied, and a jury subsequently found Knox guilty of being a felon in possession of a firearm and third-degree possession of a controlled substance. This appeal followed.

Knox first argues that his 2012 guilty plea and the imposition of pretrial diversion did not constitute a felony conviction for purposes of the later felon in possession of a firearm charge. He points out that pretrial diversion is an interruption of prosecution, which allows a defendant to avoid a criminal conviction if he successfully completes diversion. *Derringer v. Commonwealth*, 386 S.W.3d 123, 126 (Ky. 2012).

In *Derringer*, the Kentucky Supreme Court held that a plea of guilty and the imposition of pretrial diversion cannot be used as the basis for a

[1] *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

subsequent conviction of being a persistent felony offender, but it affirmed its earlier holding in *Thomas v. Commonwealth*, 95 S.W.3d 828 (Ky. 2003) that it can be used as the basis for convictions of other offenses. The Court stated in pertinent part as follows:

> A defendant is required to enter an *Alford* plea or a guilty plea before pretrial diversion is granted. And, for certain purposes, the guilty plea required of the defendant as a condition of pretrial diversion is considered a felony conviction until completion of the diversion program.
>
> In *Thomas v. Commonwealth,* [95 S.W.3d 828 (Ky. 2003)], the defendant pled guilty to a felony and requested diversion. Before the trial court ruled on the defendant's request, he was arrested and charged with possession of a firearm by a convicted felon based on his guilty plea to the earlier felony. This Court held that upon pleading guilty, the defendant's "status as a 'convicted felon' was established . . . ." And the defendant would remain a convicted felon until the defendant successfully completed the diversion program.
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> . . . . In *Thomas,* the Court recognized that the guilty plea establishes a defendant's status as a convicted felon; "and all that [remains is] the imposition of a sentence."

Derringer, 386 S.W.3d at 128-29 (footnotes and internal citations omitted).

Knox nonetheless seeks to distinguish the facts of his case from those of *Thomas*. In *Thomas*, the appellant moved the trial court to consider drug court diversion only after he had entered his guilty plea. By contrast, Knox points out he moved for pretrial diversion under KRS[2] 533.250-533.262 as part of his guilty plea, and entered the plea pursuant to an agreement with the Commonwealth and

[2] Kentucky Revised Statutes.

with the expectation that he would receive pretrial diversion without being sentenced. We find this to be a distinction without meaning.

Like the defendant in *Thomas*, Knox indisputably entered a guilty plea to the felony charge of second-degree assault under extreme emotional distress. The order of September 10, 2012, granting pretrial diversion, plainly states that "Defendant has freely, knowingly, voluntarily and intelligently entered a plea of guilty[.]" And our Supreme Court made clear in *Derringer* that "a defendant is considered convicted of the offense, for certain purposes, once he enters the guilty plea . . . ." 386 S.W.3d at 129. Accordingly, at the time of his arrest Knox was a convicted felon for purposes of the subsequent felon in possession of a firearm charge. *Id.*; *Thomas*, 95 S.W.3d at 829-30.

Knox also points out that the language used in the drug court diversion program (the diversion program at issue in *Thomas*) differs from the language used in the pretrial diversion program (the diversion program at issue here). Under the drug court deferred prosecution program, "[t]he defendant shall not be required to plead guilty or enter an Alford plea as a condition of applying for participation in the deferred prosecution program[.]" KRS 218A.14151(1)(b). Under the pretrial diversion statute, "[a]ny person shall be required to enter an Alford plea or a plea of guilty as a condition of pretrial diversion[.]" KRS 533.250(1)(f). But KRS 218A.14151(1)(b) did not become effective until 2011, eight years after *Thomas*. While referenced in *Thomas* as "drug court diversion," the diversion statute involved was KRS 533.258 *et seq*., the same statutory scheme

at issue in this case. The underlying reasoning of *Thomas* and *Derringer* is still fully applicable to the facts of Knox's case.

Second, Knox argues that the trial court erred in denying his motion to suppress the evidence of the pills recovered from the gas station restroom, and that he was entitled to a directed verdict on the possession of a controlled substance charge. Essentially, he argues that the Commonwealth failed to prove that he had either actual or constructive possession of the pills.

"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." *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky.1991). The evidence presented by the prosecution must be more than a mere scintilla. *Id*. at 188.

> A motion for a directed verdict of acquittal should only be made (or granted) when the defendant is entitled to a complete acquittal[,] i.e., when, looking at the evidence as a whole, it would be clearly unreasonable for a jury to find the defendant guilty, under any possible theory, of any of the crimes charged in the indictment or of any lesser included offenses.

Acosta v. Commonwealth, 391 S.W.3d 809, 817 (Ky. 2013) (quoting *Campbell v. Commonwealth*, 564 S.W.2d 528, 530 (Ky. 1978)).

A jury could reasonably have deduced from the evidence that Knox had discarded the pills in the restroom, based on the surveillance footage which showed no one entering the restroom after he had left and before Officer Craig entered. His admission at the scene that he had a prescription for the medication,

albeit in a lower dosage, was additional evidence that the pills were his. "[J]udgment as to the credibility of witnesses and the weight of the evidence are left exclusively to the jury." *Fairrow v. Commonwealth*, 175 S.W.3d 601, 609 (Ky. 2005).

For the foregoing reasons, the trial court did not err in denying the suppression motion or the motion for a directed verdict. We affirm.

ALL CONCUR.

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