

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 1998-CA-001485-MR

BOBBY FELTY

APPELLANT

v. APPEAL FROM OHIO CIRCUIT COURT  
HONORABLE RONNIE C. DORTCH, JUDGE  
ACTION NO. 98-CR-00009

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING  
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BEFORE: EMBERTON, GUIDUGLI, AND MILLER, JUDGES.

MILLER, JUDGE: Bobby Felty (Felty) brings this appeal from a June 1, 1998, judgment of the Ohio Circuit Court. We affirm.

Felty was indicted by the Ohio County Grand Jury on January 26, 1998, for trafficking in a controlled substance within 1,000 yards of a school. Ky. Rev. Stat. 218A.1411. A jury trial ensued on May 21, 1998. The prosecutor stated during his opening statement that the charge against Felty was the result of one of many undercover drug investigations conducted during a certain time period. The prosecutor indicated that he recognized some of the jurors from previous trials concerning other investigations conducted during the same period. He informed those jurors that the audio tape to be played in this

case was of better quality than those played in the previous trials. No objections were made concerning these remarks.

During the prosecution's case-in-chief, the detective in charge of the case discussed how the overall operation was handled. He explained how he monitored and tape recorded the drug transaction between Felty and a confidential informant (CI). He also said Felty was not arrested until several months after the drug transaction in order to maintain covertness of the entire operation. The CI later took the stand and identified Felty as the individual who sold him drugs.

Felty testified that he did not sell drugs to, and was not with, the CI on the date the transaction occurred. On cross-examination, the prosecutor asked Felty whom he was with at the time in question. Felty named several friends. The prosecutor then asked whether he knew that one of those persons had drug charges pending against him. Felty replied in the affirmative. Again, defense counsel made no objection. Concluding cross-examination, the prosecutor repeated the name of that individual along with another and stated they were Felty's friends. At this point, Felty's counsel objected and same was overruled. Felty was found guilty and sentenced to four years' imprisonment. This appeal followed.

Felty argues that he was denied a fair trial and due process of law when the prosecutor commented on his friend's pending drug charges. Felty maintains the prosecutor's comments constituted prosecutorial misconduct and were intended to convince the jury of his guilt through his association with drug dealers. As Felty did not timely object to the prosecutor's

first remark, any error is deemed to be waived. See Blakeman v. Joyce, Ky., 511 S.W.2d 112 (1974). Moreover, we are not persuaded by Felty's assertion that said statement constituted palpable error. Ample competent evidence of Felty's guilt was introduced. Hence, we do not believe the prosecutor's statement demands reversal. Ky. R. Crim. P. (RCr) 10.26; see Deemer v. Finger, Ky., 817 S.W.2d 435 (1990). Also, because there was other competent evidence to sustain the conviction, we believe the prosecutor's latter reference to Felty's friend was harmless error. See Crane v. Commonwealth, Ky., 726 S.W.2d 302 (1987).

Felty next asserts that the prosecutor's aforementioned opening statements constituted palpable error. Felty maintains that the error resulted in manifest injustice. We disagree. Opening statements are not evidence. See Ruppee v. Commonwealth, Ky., 821 S.W.2d 484 (1991). The purpose of an opening statement is to give each party an opportunity to summarize the case so that the jury can follow and understand the evidence as it is presented. See Turner v. Commonwealth, Ky., 240 S.W.2d 80 (1951). Information regarding the overall drug operation was admitted into evidence to help explain the actions of the police. It was never suggested that Felty acted in collusion with the suspects involved in the other cases. As such, we believe reference to same was proper during opening statement and did not constitute palpable error.

Further, it is our opinion that the prosecutor's remarks about certain jurors having previously sat on other drug cases does not require reversal. Those jurors were obviously

already aware of same. Nor do we believe the prosecutor's comparison of the audio tapes' quality requires reversal.

Finally, we ascribe no merit to Felty's cumulative effect argument.

For the foregoing reasons, the judgment of the Ohio Circuit Court is affirmed.

ALL CONCUR.

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