

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-000532-MR

CURTIS DANSBY

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE GARY D. PAYNE, JUDGE
ACTION NO. 97-CR-001112

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING
** ** * * * * *

BEFORE: GARDNER, HUDDLESTON, AND JOHNSON, JUDGES.

JOHNSON, JUDGE: Curtis Dansby (Dansby) has appealed from the judgment of the Fayette Circuit Court entered on February 23, 1998, which found him guilty of the crimes of trafficking in a controlled substance (cocaine), first degree, (Kentucky Revised Statutes (KRS) 218A.1412), possession of marijuana, (KRS 218A.1422), selling alcoholic beverages without a license, (KRS 243.020), and being a persistent felony offender in the first degree, (KRS 532.080), and which sentenced him to prison for a term of fifteen years. We affirm.

On August 31, 1997, after receiving information from a confidential informant that a person named "Tiny" was conducting

a bootlegging operation at 246 Warnock Street, Detective Guy Greene (Detective Greene), of the Lexington-Fayette Urban County Division of Police (Division of Police), obtained a warrant to search the dwelling located at that address. The warrant provided that police could search for "any writings, documents, safes, alcoholic beverages, monies, or any other items that may indicate proof of a bootlegging operation." When Detective Greene and other officers arrived that same day to conduct the search, Dansby identified himself as "Tiny." The officers found in the house a large quantity of products containing alcohol, including nearly 300 cans and/or bottles of various brands of beer. They also found over \$1,000 in cash, several 1" x 1" zip-lock bags, two bags containing marijuana, and a bag of cocaine.

Detective Greene found the bag of cocaine in a small zippered compartment of a duffle bag. Detective Greene testified that Dansby identified the duffle bag as his "work bag", and the bag was located in a bedroom which Dansby identified as the bedroom he shared with his girlfriend. One of the bags of marijuana was found in Dansby's bedroom and the other was discovered in the bedroom identified as belonging to the son of Dansby's girlfriend. Detective Greene testified that he asked Dansby how much cocaine was in the bag and that Dansby responded, "an eight-ball," that is, about 3.5 grams. The detective also stated that Dansby told him that he had paid about \$150 for the cocaine. As a result of the search, Dansby was arrested and ultimately indicted on the various drug and alcohol charges.

Prior to trial, Dansby attempted to suppress the evidence discovered in his work bag by arguing that the police exceeded the scope of the search by looking in the bag's small compartments. After a hearing, the trial court denied the motion to suppress on the grounds that the large amount of alcohol seized gave the officers justification for looking in the bag for money, receipts, or other records related to the bootlegging operation.

Dansby's trial was held in January 1998. The Commonwealth offered the testimony of Laura Sudkamp from the state police crime lab, who stated that the white powder seized from Dansby's work bag was cocaine. However, she also testified that it weighed 6.63 grams, nearly twice the amount Dansby told Detective Greene he purchased. In addition to the testimony of Detective Greene and the other officers involved in executing the search warrant, the Commonwealth, through Lieutenant Michael Bosse (Lt. Bosse) of the narcotics unit of the Division of Police, offered expert testimony about the various forms and uses of cocaine and its means of distribution. Lt. Bosse testified that the cocaine had a street value of over \$600 and that the amount Dansby possessed exceeded that which an individual user would keep for personal use. Lt. Bosse also opined that other circumstances, such as the lack of paraphernalia or containers with residue, were indicative of possession with intent to sale. Dansby did not testify.

At the conclusion of the guilt phase, the jury found Dansby guilty on all three underlying charges and recommended his

punishment on the two misdemeanors be set at 90 days in jail and a fine of \$250. Dansby pled guilty to the persistent felony charge in exchange for the Commonwealth's recommendation that he serve 10 years on the trafficking count, enhanced to 15 years on the persistent felony count. At sentencing, the trial court imposed the recommended 15-year sentence and the two 90-day sentences, all to run concurrently. It did not impose the fines.

Dansby has raised three issues in this appeal from the final judgment and sentence. He first argues that his conviction is tainted by certain alleged improper comments made by the prosecutor in her closing argument. Specifically, he objected to the following argument made by the prosecutor:

There's absolutely no proof to the contrary that that marijuana belonged to Curtis Dansby. None. He told them, "That's my work bag." He never said anything else. There was never any proof put on by the defense to say, "This was somebody else's." This was clearly Curtis Dansby's marijuana and he possessed marijuana.

And finally, you look at the issue of the cocaine. Again this is clearly his. Mr. Bradbury¹ wants you to think that the issue is whether or not its [Dansby's]. It is his. And how do we know that? Again, it's in his work bag. It's in his bedroom and he tells Detective Green how much he thinks is there and how much he paid for it.

Dansby insists that this closing argument, in effect, placed the burden of proof on him and as a result denied him due process of the law. We disagree and discern no error in the trial court's ruling.

¹Attorney Todd Bradbury was Dansby's trial counsel.

Initially, we note our agreement with the Commonwealth's observation that Dansby's objection, coming at the end of the prosecutor's closing argument and not contemporaneously to the alleged offensive comment, was not properly preserved for appellate review. See Stringer v. Commonwealth, Ky., 956 S.W.2d 883, 888 (1997) (an objection to testimony contained four pages prior to the objection did not "timely inform the trial judge of the alleged error and request the relief to which [the defendant] consider[ed] himself entitled"). However, even if the issue were properly preserved for review, we would find no reversible error in the trial court's refusal to grant Dansby any relief.

The standard for determining if the prosecutor has made an impermissible comment on a defendant's right not to testify is whether or not the comment was "manifestly intended to reflect on the accused's silence or [was] of such a character that the jury would naturally and necessarily take it as such to constitute prejudice." Byrd v. Commonwealth, Ky., 825 S.W.2d 272, 275 (1992) (citation omitted); see also Bowling v. Commonwealth, Ky., 873 S.W.2d 175, 178 (1993). It is apparent from a review of both closing arguments that the prosecutor was merely responding to the possibility, raised in Dansby's closing argument, that the cocaine might have belonged to one of the other four people in the house at the time of the search, two of whom actually lived there, and that one of them might have planted the drug in Dansby's bag when the police arrived.

The prosecutor's remarks did not directly address Dansby's failure to testify, nor suggest that contrary evidence of ownership of the cocaine would necessarily come from him. Further, although Dansby argued that the "jury was misled into thinking that [he] had failed to prove an element of the crime," the prosecutor's argument did not impermissibly shift the burden of proof. Instead, the prosecutor's comments merely highlighted the defense's failure to produce any evidence to contradict the Commonwealth's proof concerning the ownership of the work bag and its contents. This type of argument has long been determined as "proper," in this jurisdiction. Haynes v. Commonwealth, Ky., 657 S.W.2d 948, 953 (1983); see also, Tamme v. Commonwealth, Ky., 973 S.W.2d 13, 38 (1998) (prosecutor did not "'shift the burden of proof' by arguing during the guilt phase that the defendant failed to rebut the Commonwealth's evidence").

Next, Dansby contends that the trial court erred in allowing Lt. Bosse to testify as an expert witness for the Commonwealth.² The prosecutor convinced the trial court that Lt. Bosse's testimony was needed to inform the jury that the amount of cocaine found in Dansby's possession was a sufficient quantity from which it could reasonably infer that Dansby was involved in the sale of the drug rather than its mere use. The thrust of Dansby's argument is that Lt. Bosse's testimony was improper

²We will assume that Dansby objected to Lt. Bosse's appearance as an expert witness as there was a bench conference immediately prior to Lt. Bosse's testimony, although most of it is inaudible. However, the location of his counsel's objection to which this Court was referred in Dansby's brief is not even close to Lt. Bosse's actual testimony, and in fact, refers to a time when the jury was deliberating.

because Lt. Bosse was not personally involved in the investigation of Dansby or his arrest, and because Lt. Bosse was unable to be "independent and objective" considering that "his testimony [was] solicited to bolster prosecution of a defendant arrested by his fellow officers."

This Court's standard of review of a trial court's decision to admit evidence is whether the trial court abused its discretion. Mitchell v. Commonwealth, Ky., 908 S.W.2d 100, 102 (1995). Clearly, there was no abuse of discretion in the instant case. Dansby makes no argument concerning Lt. Bosse's qualifications as an expert in narcotics. Further, it has frequently been held in this jurisdiction that police officers may offer expert testimony on the issue of whether the quantity of drugs in a defendant's possession is indicative of trafficking as opposed to mere use. Sargent v. Commonwealth, Ky., 813 S.W.2d 801, 802 (1991); Kroth v. Commonwealth, Ky., 737 S.W.2d 680, 681 (1987); Jett v. Commonwealth, Ky.App., 862 S.W.2d 908, 911 (1993). More recently, in a case involving the same expert witness, Lt. Bosse, our highest court reiterated the relevance of the type of testimony offered in this case "to help the jury understand the nature and uses of cocaine" and "to prove that [the defendant] possessed the cocaine for the purpose of sale." Burdell v. Commonwealth, Ky., 990 S.W.2d 628, 634 (1999). The fact that Lt. Bosse was not personally involved in the investigation of Dansby's illegal activity has no bearing on his credentials to testify as an expert. Further, his association with the officers who arrested Dansby would go to the issue of

Lt. Bosse's credibility, an issue for the jury, and not to the admissibility of his testimony.

Finally, Dansby argues that the trial court erred in failing to suppress the evidence found in the small compartments of his work bag. He insists that a "small pocket" is "not a likely place to find bootlegged alcohol." Again, there is no merit to this argument. Because evidence of bootlegging could include items other than alcohol, the warrant specifically stated that the officers could search for such items as money, writings, and receipts at the address to be searched. The trial court found that the pockets in the work bag could contain such items as contemplated by the search warrant. The trial court's ruling was not clearly erroneous. See, Kentucky Rules of Criminal Procedure 9.78; Harper v. Commonwealth, Ky., 694 S.W.2d 665 (1985). Accordingly, we find no error in the trial court's denial of Dansby's motion to suppress the evidence found in the bag.

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

ALL CONCUR.

BRIEF FOR APPELLANT:

Hon. Sally Wasielewski
Lexington, KY

BRIEF FOR APPELLEE:

Hon. A. B. Chandler, III
Attorney General

Hon. Ian G. Sonogo
Assistant Attorney General

