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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-000916-MR

SHAWN HENRY — APPELLANT

v.

APPEAL FROM HOPKINS CIRCUIT COURT
HONORABLE CHARLES BOTELER, JUDGE
ACTION NO. 99-CR-00175

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING
** ** ** ** **

BEFORE: COMBS, GUIDUGLI AND MILLER, JUDGES.

GUIDUGLI, JUDGE. Shawn Henry (Henry) appeals his conviction for first-degree trafficking in a controlled substance. Following a trial by jury on February 9, 2000, Henry was found guilty of the stated charge and sentenced to five years' imprisonment. The sole issue raised on appeal is the admission of evidence that the alleged drug transaction occurred in a high-trafficking area and that he was seen in that area again after the date alleged in the indictment. We have thoroughly reviewed the record in this matter and affirm.

Testimony at trial reveals that the Kentucky State Police, with cooperation from local police agencies, were

conducting a narcotics investigation in several Western Kentucky counties, including Hopkins County. State police detective Larry Allen (Allen) coordinated the investigation and recruited Michael Wilson (Wilson)as a confidential informant. As a result of a tip received earlier that day, Allen and Wilson drove to the Pride Apartments located in Madisonville on the evening of June 3, 1998. Once there they made contact with Henry at a location locally referred to as "the hole." The hole was located in the parking lot of the Pride Apartment Complex and was known to be an area where drug trafficking frequently occurred. While there, Allen made contact with an individual whose street name was "Hen" or "Low." Allen made a hand to hand buy from Hen of a rock of crack cocaine for thirty dollars. Wilson also observed the drug transaction. After the drug deal had been completed, Allen left the area and filled out his report and placed the rock of crack cocaine in an evidence bag. Later, after consulting with the Madisonville Police Department, both Wilson and Allen identified Henry as the individual who sold the crack cocaine on June 3, 1998.

Since this was an on-going narcotic investigation, the evidence was not presented to the grand jury until a much later date. The grand jury returned an indictment against Henry on May 25, 1999. Henry denied the allegations and claimed he was visiting his mother in Clarksville, Tennessee, on the day in question. A jury trial was scheduled for February 9, 2000. On January 26, 2000, the Commonwealth filed a "notice" pursuant to

KRE 400(b) that during the prosecution of this case the following information concerning the identity of Henry may be solicited:

> The police and the informant will testify that they were present at the "hole" near Pride Place Apartments in Madisonville, Kentucky on several different occasions and that the defendant, Shawn Henry a.k.a. "Hen" and a.k.a "Low" were (sic) present on those occasions and the informant and the police officer recognized the defendant as the person who made the drug deal. As it might be argued that the presence of the defendant on earlier and subsequent occasions at a known drug trafficking location might constitute "other bad acts" the Commonwealth gives notice of its intent to address this issue to insure the identity of the individual who purchased the narcotics from the undercover officer.

(Trial record pp. 35-36). A hearing was held on this matter in the judge's chambers prior to the start of the jury trial. The Commonwealth stated it was not sure that KRE 404(b) was applicable but for "safety purposes" had filed the motion. It further argued that since Henry was making an alibi defense and identification was a crucial issue, that such evidence should be permitted as an exception to KRE 404(b) for the sole purpose of showing identification. Henry's attorney argued that notice was an issue in that she did not know what the Commonwealth would actually present to the jury. In response, the Commonwealth stated generally that its witnesses would say they saw Henry in that area (the hole) after the June 3rd transaction and that he is the same person who sold the crack cocaine on that day. The Commonwealth agreed that the officer observed Henry engage in no other criminal activity after June 3,1998. The trial court

indicated that this evidence might be considered bad acts, but really was not, and granted the Commonwealth's motion.

During the trial, several statements were made by Allen and Wilson as to the seriousness of the narcotic trafficking in the hole. No objection was made to these statements. As to the specific testimony of Henry being in the hole after June 3, 1998, it was only mentioned twice; once, in response to a question of how many cases (indictments) were filed in Hopkins County as a result of this drug investigation and once by Henry himself. In the first incident, Allen, in a lengthy response, stated in part "...only one buy off this individual, I saw him after this, around there and everything, but a hand to hand buy when a state trooper makes the buy, what's the point of buying two times, its really pointless...." Again, no objection was made at this time. The only other reference to this matter came from Henry himself when, on cross-examination, the following exchange took place:

> COMMONWEALTH ATTORNEY: Did you hang out at the apartments?
>
> HENRY: I've been down there a couple of times...like to go to the store.
>
> COMMONWEALTH ATTORNEY: So if the officer said [he] saw you there [he] would have seen you there?
>
> HENRY: Not on that day.
>
> COMMONWEALTH ATTORNEY: So it is your testimony that this officer did not see you there?
>
> HENRY: Yes, sir.

After a careful review of the video tape of the trial, this Court could not find any other references to Henry being seen at the

hole after June 3, 1998. It should also be noted that Henry's brief to this Court does not point out any additional reference to this matter.

On appeal, Henry claims reference to the hole as being an area where drug dealers congregate and sell their cocaine and the officer's one reference to seeing him there on another occasion are reversible error. The Commonwealth argues that the alleged error is not properly preserved, that the statements were admissible, and even if it was error it was harmless error. We find no merit with Henry's contention and, hence, affirm.

First we believe Henry's failure to object to any of the proffered testimony is fatal to his claims. RCr 9.22 requires a defendant to timely object, state his grounds for the objection, and make known to the Court the action desired by the defendant. Henry made no objections to the testimony of either Allen or Wilson. As stated in McDonald v. Commonwealth, Ky., 554 S.W.2d 84, 86 (1977):

> We are not at liberty to ignore the procedural prerequisites in preserving alleged errors for review by this court. RCr 9.22 and 10.12. In Turner v. Commonwealth, Ky., 460 S.W.2d 345 (1970), this court said:
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> > "* * * the policy of RCr 9.22 and 10.12 is to require a defendant in a criminal case to present to the trial court those questions of law which may become issues on appeal. The appellate court reviews for errors, and a non-ruling is not reviewable when the issue has not been presented to the trial court for decision. * * *"

In the case of Renfro v. Commonwealth, Ky., 893 S.W.2d 795 (1995), our Supreme Court addressed both unpreserved error and palpable error:

> This Court does not have to reach this question. Upon a review of the record, we find that defense counsel did not contemporaneously object when the witness stated that "[if] you told me it was 80 miles per hour, I wouldn't be surprised." RCr 9.22 requires a party to make "known to the court the action he desires the court to take or his objection to the action of the court." West v. Commonwealth, Ky., 780 S.W.2d 600, 602 (1989). Failure to comply with this rule renders an error unpreserved. Bowers v. Commonwealth, Ky., 555 S.W.2d 241 (1977). A party must timely inform the court of an error and request the relief to which he considers himself entitled. West, 780 S.W.2d at 602. Appellant took no steps to point the error out to the court, thus he is entitled to no relief. The alleged error is unpreserved.
>
> This Court may review an unpreserved error and grant appropriate relief provided this Court determines that manifest injustice resulted from that error. After examining the weight of the evidence, we find that the "error" complained of does not rise to a level of palpable error to warrant review pursuant to RCr 10.26.

Renfro, Id. at 796.

Finally, despite the fact that the issue was not preserved nor subject to palpable error, we further believe the statements were not proper subject of a KRE 404(b) notice. KRE 404(b) provides:

> Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible:
>
> (1) If offered for some other purpose, such as proof of motive, opportunity, intent,

> preparation, plan, knowledge, identity, or absence of mistake or accident; or
>
> (2) If so inextricably intertwined with other evidence essential to the case that separation of the two (2) could not be accomplished without serious adverse effect on the offering party.

There was no testimony that Henry committed other crimes, wrongs or acts. The trial court acknowledged this at the hearing on the motion prior to trial. Henry's reliance on Gordon v. Commonwealth, KY., 916 S.W.2d 176 (1995), is misplaced. Gordon did not involve a KRE 404(b) motion. In Gordon, counsel for the defendant objected to certain proffered testimony on the basis that it was hearsay. Our Supreme Court agreed and reversed the conviction, holding:

> Such testimony was admittedly based in part on hearsay and was thus unassailable by appellant. Admission of this evidence branded appellant a drug dealer, violated his right to confront and cross-examine witnesses, denied his right to be tried only for the crime charged, and in general, bolstered the credibility of the police informant to the point where appellant's denial of criminal conduct would have appeared preposterous.

Gordon, Id. at 179. (Emphasis added).

The testimony in this case was not subject to KRE 404(b) notice requirement. The testimony herein was never objected to and any alleged error was not palpable.

For the foregoing reasons, the judgment and sentence entered by the Hopkins Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Irvin J. Halbleib

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