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Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-001047-MR

TIM WAYNE BROCK — APPELLANT

v.

APPEAL FROM BELL CIRCUIT COURT
HONORABLE JAMES L. BOWLING, JUDGE
ACTION NO. 99-CR-00089

COMMONWEALTH OF KENTUCKY — APPELLEE

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

BEFORE: JOHNSON, MILLER AND SCHRODER, JUDGES.

JOHNSON, JUDGE: Tim Wayne Brock has appealed from a judgment and sentence pursuant to jury verdict entered in the Bell Circuit Court on April 27, 2000. Brock was convicted of two counts of trafficking in controlled substance in the first degree (cocaine)[1], and one count of trafficking in controlled substance in the first degree (ocxycodone).[2] The jury recommended a

[1]Kentucky Revised Statutes (KRS) 218A.1412.

[2]KRS 218A.1412.

sentence of ten years on each conviction to run consecutively, but the trial court ordered that the sentences run concurrently.

Brock has raised the following claims of error: (1) the trial court erred when it failed to grant Brock's request to change counsel and refused to grant a continuance to allow his replacement counsel adequate time to prepare; (2) the Commonwealth's Attorney made highly improper, unfair, and prejudicial opening and closing statements; (3) the Commonwealth failed to established the proper chain of custody of the drugs; (4) the Commonwealth did not lay the proper foundation for the introduction of the video and audio recordings of the drug transactions; (5) Brock was prejudiced by members of the jury sleeping during the trial; (6) the Commonwealth failed to show that the proper venue was Bell County; (7) the trial court committed error when it failed to dismiss the case when it became apparent that all of the evidence had been submitted to the Kentucky State Police Laboratory before the purported occurence of the last transaction. Having concluded that none of these claimed errors warrant any relief on appeal, we affirm.

At trial, the evidence showed that in October of 1998, Detective Mickey Hatmaker of the Kentucky State Police began a drug trafficking investigation in Bell County with the aid of paid informants. Det. Hatmaker used former drug users Jackie Miller and Chris Bailey as confidential informants and paid them each $100.00 for every successful drug purchase. Miller had prior years of experience as a paid informant and had been

working with Det. Hatmaker from October 1998 until May 1999. Bailey worked with Det. Hatmaker from January 1999 to May 1999.

On February 10, 1999, Det. Hatmaker met with Miller and Bailey in Pineville, Bell County, Kentucky. After a thorough search of their vehicle and their persons, Det. Hatmaker followed Miller and Bailey to Kentucky Avenue in Pineville, where they stopped at a bar named the Wildcat Den. The vehicle driven by Miller had been previously equipped with a hidden video and audio recorder. When Miller and Bailey went to the Wildcat Den, they had no particular drug seller in mind as being the person from whom they would seek to purchase drugs. After sitting in the parking lot for a few minutes, Brock approached their vehicle. Det. Hatmaker was parked nearby in an unmarked car monitoring the transaction.

After approaching Miller and Bailey's car, Brock questioned them as to what types of drugs they were interested in purchasing. Brock told them that he would sell them two Percocets for $25.00. On the video tape Miller can be seen handing Brock something which appears to be money, and then Miller and Bailey drive off. A few minutes later, Miller and Bailey returned to the parking lot of the Wildcat Den; and Brock approached the car and discreetly put his hand into the car and handed Miller an item. It is not clear from the video tape what this item was, but Miller testified that it was the two Percocets that she had previously agreed to purchase.

On February 12, 1999, Det. Hatmaker met with Miller and Bailey in Pineville and again searched both of their persons and their vehicle, and then followed them back to the Wildcat Den. After arriving, Brock approached their vehicle and asked them what drugs they wanted to purchase. Brock got into their vehicle and told them to drive to another location. Brock asked them to stop at the residence of Kenneth Jarvis. Brock got out of the car and said he was going into the house to get cocaine. After getting back in the car, Brock sold Miller and Bailey one gram of cocaine for $100.00. Miller and Bailey drove Brock back to the Wildcat Den and dropped him off.

On February 16, 1999, Det. Hatmaker again met with Miller and Bailey in Pineville. After Det. Hatmaker searched their vehicle and their persons, they drove back to the Wildcat Den to purchase more drugs. Upon arrival, Brock spoke with Miller and Bailey and then got into their vehicle and they drove off. Brock led them to a nearby residence where he went into the house and returned with one-half gram of cocaine which he sold to them for $60.00.

On August 23, 1999, Brock was indicted by the Bell County grand jury on three counts of trafficking in a controlled substance in the first degree. On April 6, 2000, a jury trial was held in the Bell Circuit Court. Brock was convicted on all three counts and sentenced to serve ten years on each count to run concurrently. This appeal followed.

Brock's first claim of error is that trial court failed to allow him to substitute counsel and refused to grant a continuance on the morning of the trial. Before the trial began, Cotha L. Van Doren, Brock's appointed counsel, Barbara E. Yeager, private counsel, and Commonwealth's Attorney Karen Blondell, approached the bench. The following colloquy occurred:

> Trial Court: What is going on here?
>
> Barbara E. Yeager: Good Morning.
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> Cotha L. Van Doren: Judge, I am completely in the dark.
>
> Trial Court: Who is the lawyer here?
>
> Yeager: Your Honor, I was out-of-town yesterday and last night until 9:00. A present client had contacted my secretary. She had been in touch with Mr. Brock and he had indicated that he would like for me to come over here this morning, with the potential of representing him. I got word back to him that there was not any way that I could really talk to him, since he was already represented by an attorney, and that would be an ethical violation. However, I did pass along word that I would be over here this morning. I indicated to him just briefly out in the hall that I cannot and will not represent him, if I am unable to obtain a continuance in the case, because it goes without saying that I could not try the case today. I spoke briefly with Mrs. Blondell about it. And she has indicated the Commonwealth would object to a continuance, so it is purely at your discretion.
>
> Van Doren: Your Honor, I have heard nothing from Mrs Yeager at all, not a courtesy call or a thing. I spoke with Mr. Brock most of yesterday afternoon in a sufficient amount of time. He has been in my office many times to prepare for trial; however, in various states of intoxication, but yesterday, he was sober. I don't feel, given the fact that he has gone to another attorney and if he feels that I

cannot do my job, that I can possibly go forward today.

Trial Court: Are you prepared for trial today?

Van Doren: Yes.

Trial Court: Okay.

Yeager: Your Honor, with regards to her comments, I called her office, after I got over here and talked with Mrs. Blondell. She was not in, but they indicated she would be along shortly.

Karen Blondell: I asked Mrs. Yeager if she had talked with Mrs. Van Doren, and suggested that she call her, before we proceed.

Yeager: Right.

Trial Court: Mr. Brock contacted you when?

Yeager: He did not contact me. Family members, through a present client of mine were attempting to contact me yesterday and I was out-of-town. I didn't know about it, until 9:00 last night.

Trial Court: Well, it would appear that — is the Commonwealth ready to proceed to trial today?

Blondell: Yes, Your Honor.

Van Doren: But, Your Honor, again, I don't think I can represent this man. We had differences yesterday. We have had differences in the past, because he would not come to my office sober. Yesterday, he asked me to do something, but I told him that I valued my law license way too much. And I do not feel that I can represent Mr. Brock.

Trial Court: Well, but you told me you were prepared for trial?

Van Doren: Your Honor, I was as prepared for this drug case, as I have been for all of them, but I cannot represent Mr. Brock, I do

> not believe. I can prepare his defense, but it should be his decision.
>
> Trial Court: Well, we are going to trial today. We are not going to switch horses the day before the trial. The only— the only possible reason for this, would be for the purposes of delay. And this thing has been here since August, he was indicted in August of last year, I believe.

The trial judge is vested with wide discretion in the conduct of trial.[3] The granting of a motion for a continuance rests within the sound discretion of the trial court, and the action will not be disturbed except where it is clearly shown to be an abuse of discretion and results in manifest injustice.[4]

The present case closely resembles Snodgrass v. Commonwealth.[5] On the afternoon before trial, Snodgrass telephoned his attorney and left a message requesting a continuance so he could replace his public defender with a private attorney. The public defender did not get the message until late in the afternoon and made the request for a continuance on the morning of the trial. The trial court questioned the public defender as to whether he was ready and prepared for trial. The public defender stated that he was ready for trial, but he admitted that there was several pieces of

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[3]Davidson v. Commonwealth, Ky., 555 S.W.2d 269, 271 (1977) (citing Kentucky Rules of Criminal Procedure (RCr) 9.04).

[4]Id. (citing Cornwell v. Commonwealth, Ky., 523 S.W.2d 224 (1975)). See also, Adams v. Commonwealth, Ky., 424 S.W.2d 849, 850 (1968) (citing Toler v. Commonwealth, 295 Ky. 105, 173 S.W.2d 822 (1943); Dunn v. Commonwealth, Ky., 350 S.W.2d 709 (1961); and Bagby v. Commonwealth, Ky., 424 S.W.2d 119 (1968)).

[5]Ky., 814 S.W.2d 579 (1991).

evidence that he had not viewed and there was a potential witness that he had not contacted. The trial court denied the motion for a continuance.

Reviewing that decision, the Supreme Court of Kentucky stated:

> RCr 9.04 allows a trial to be postponed upon a showing of sufficient cause. The decision to delay trial rests solely within the court's discretion. Williams v. Commonwealth, Ky., 644 S.W.2d 335 (1982); Cornwell v. Commonwealth, Ky., 523 S.W.2d 224 (1975). Whether a continuance is appropriate in a particular case depends upon the unique facts and circumstances of that case. Ungar v. Sarafite, 376 U.S. 575, 589, 84 S.Ct. 841, 849, 11 L.Ed.2d 921 (1964). Factors the trial court is to consider in exercising its discretion are: length of delay; previous continuances; inconvenience to litigants, witnesses, counsel and the court; whether the delay is purposeful or is caused by the accused; availability of competent counsel; complexity of the case; and whether denying the continuance will lead to identifiable prejudice. Wilson v. Mintzes, 761 F.2d 275, 281 (6th Cir.1985). To warrant substitution of counsel, appellant must show: (1) complete breakdown of communications between counsel and himself, (2) a conflict of interest, or (3) that his legitimate interests are being prejudiced. Baker v. Commonwealth, Ky.App., 574 S.W.2d 325, 327 (1978).[6]

We believe Brock has failed to meet the requirements set forth in Snodgrass. In the case sub judice, there is no evidence that Van Doren was not prepared to go forward with Brock's defense. The record reflects that Van Doren was adequately prepared for Brock's defense. The record further reflects that as of the morning of the trial Van Doren and Brock

[6]Id. at 581.

were still communicating with each other and there is no evidence of a conflict of interest. Finally, there is no evidence that Brock's rights were being violated by failing to grant his motion for a continuance. The record reflects that the trial court made the necessary determinations under Snodgrass that Van Doren was prepared to proceed.

Brock alleges several other grounds for reversal. While he freely acknowledges that these claims have not been preserved for appellate review, he argues that the alleged errors should be considered on appeal under the palpable error standard as set forth in RCr 10.26:

> A palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error.

This approach to attacking a judgment was addressed by our Supreme Court in Humphrey v. Commonwealth,[7] with Justice Lambert writing for a unanimous Supreme Court and stating, "[a]ppellant's wholly unpreserved claims will not be considered on this direct appeal but this does not preclude their consideration in a proper collateral attack proceeding." The Supreme Court went on to state, however, that unpreserved errors

[7]Ky., 962 S.W.2d 870, 872 (1998).

may be presented on direct appeal "if such could [be] done in good faith, as palpable error under RCr 10.26."[8]

The palpable error test is a very strict standard.

> As our Supreme Court has stated, the requirement of 'manifest injustice' as used in RCr 10.26 (formerly RCr 9.26) [ ] means[s] that the error must have prejudiced the substantial rights of the defendant, Schaefer v. Commonwealth, Ky., 622 S.W.2d 218 (1981), i.e., a substantial possibility exists that the result of the trial would have been different. Partin v. Commonwealth, Ky., 918 S.W.2d 219, 224 (1996). One federal court has interpreted FRE 103(e), which is identical to KRE 103(e) as requiring that the error must seriously affect the fairness, integrity or public reputation of judicial proceedings. United States v. Filani, 74 F.3d 378 (2nd Cir.1996).[9]

In Partin, supra, the Supreme Court of Kentucky stated that "upon consideration of the whole case, the reviewing court must conclude that a substantial possibility exists that the result would have been different in order to grant relief."[10]

We will address Brock's alleged errors in the order they appear in his brief. First, Brock claims that the Commonwealth's Attorney made statements regarding "incompetent" evidence. Specifically, Brock alleges that the Commonwealth's Attorney improperly stated in both opening and closing statements

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[8]Id. at 873.

[9]Castle v. Commonwealth, Ky.App., 44 S.W.3d 790, 793-94 (2000) (citing Brock v. Commonwealth, Ky., 947 S.W.2d 24, 28 (1997)).

[10]See also Byrd v. Commonwealth, Ky., 825 S.W.2d 272, 276 (1992); and Jackson v. Commonwealth, Ky.App., 717 S.W.2d 511, 514 (1986).

that he was "jonesin bad." Furthermore, Brock alleges that the Commonwealth's Attorney improperly stated that each of the offenses occurred in Bell County, a statement that it failed to sufficiently prove.

Brock's claims fail to meet the first prong of the palpable error test. The alleged errors in the Commonwealth's opening and closing statements did not cause a manifest injustice. The statement that Brock was "jonesin bad" was proven by competent evidence during the trial. First, Brock makes the statement on the video tape that was introduced at trial. Second, Det. Hatmaker stated that "jonesin" means "coming down", or that he has not used drugs recently. As a matter of fact, Brock stated on the video tape that he had not used drugs for two days. Det. Hatmaker testified that "jonesin is going through DT's when they are coming off, or having withdrawal from coming off the drugs."

We believe that there was credible and sufficient evidence as to what "jonesin bad" means to allow the Commonwealth to mention it in opening and closing arguments. We also do not believe that the Commonwealth erred by stating that the charges against Brock occurred in Bell County. We will address this issue separately later in this Opinion in relation to Brock's argument that Bell County was not the proper venue for the trial.

Next, Brock claims that the trial court erred by admitting into evidence against him the alleged seized drugs and video recordings because their chain of custody was not

sufficiently established. Initially, we must observe that these two issues were not properly preserved for appellate review because defense counsel failed to object to their introduction on improper chain of custody grounds. However, it is inconsequential because Brock also loses on the merits of this argument. Brock argues that the Commonwealth introduced the alleged drugs he sold Miller and Bailey and the video and audio recordings of the transactions without laying the proper foundation of the chain of custody. We believe that the chain of custody for both the recordings and the drugs seized was sufficiently established to allow their introduction into evidence.

In Reneer v. Commonwealth,[11] the defense counsel objected to introduction of drug-related evidence because the officer who originally collected the items was deceased at the time of the trial. Ruling that the evidence was admissible, the Supreme Court stated:

> Here the pillbox and the morphine exhibit were in secure police custody and in the same condition, except for the necessary consumption of part of the morphine in laboratory testing. The evidence was checked into the collection unit by the deceased officer and taken from the unit the following month by his successor for analysis and returned to the unit. The integrity of the evidence was not compromised. Pendland v. Commonwealth, Ky. 463 S.W.2d 130 (1971). There was no showing that anyone could have a reason or opportunity to tamper with the evidence. The proof was reasonable under the circumstances.

[11]Ky., 784 S.W.2d 182, 185 (1990).

Det. Hatmaker testified at trial that he delivered the drug samples to the Kentucky State Police Lab. Under direct examination he testified:

> Det. Hatmaker: At night, when we come back in the evening, I collected the evidence. I got the tapes, the drugs and everything from the vehicle.
>
> Commonwealth's Attorney: Did you secure all those items into evidence?
>
> Det. Hatmaker: Yes, ma'am, I did.
>
> Commonwealth's Attorney: On the drugs, we are testifying about and filing, did you submit all those items to the Kentucky State Police Lab for analysis?
>
> Det. Hatmaker: Yes, ma'am, I hand delivered them to Carl Lawson where he signs as received, and then I have his analysis there and the results.

In Poteet v. Commonwealth,[12] the Supreme Court, addressed a similar chain of custody argument regarding tape recordings and stated:

> Tape recordings, on the other hand, are unique and readily identifiable. In this case, Stocking recorded the conversations between him and Poteet. The tapes were delivered to Agent Neihaus. Neihaus sent them to a laboratory in Washington. They were returned. The cassettes introduced in evidence were audible. Where then was the broken link in the chain of evidence?

In the case sub judice, Brock identified himself on the video and audio recordings. We believe that Det. Hatmaker sufficiently established the chain of custody for both the drugs seized and the video and audio recordings.

[12]Ky., 556 S.W.2d 893, 895 (1977).

Brock claims that he was prejudiced by three jurors sleeping during the trial. In his brief, Brock states that "it has been reported by observers that three of the jurors slept through much of the trial." We note that this error has not been preserved and Brock claims that we should review his claim under the palpable error rule. The first problem for Brock is that he makes a bare allegation without any support in the record. Such a claim of juror misconduct must first be properly presented to the trial court for its consideration.[13] This Court cannot review an issue the trial court has not even considered.[14]

Brock also claims that it was error to permit a finding of guilt, when the Commonwealth failed to prove that the alleged drugs sales took place in Bell County, Kentucky. Initially, we note that this error was not preserved for appellate review. KRS 452.650 states:

> The venue of the prosecution may be waived by the defendant and the failure to make a timely motion to transfer the prosecution to the proper county shall be deemed a waiver of the venue of the prosecution.

Moreover, in Sebree v. Commonwealth,[15] the Supreme Court stated:

> While it is necessary to prove the venue of the offense as laid in the indictment, yet, since it does not affect the issue of

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[13]Sanborn v. Commonwealth, Ky., 975 S.W.2d 905, 911 (1998).

[14]Regional Jail Authority v. Tackett, Ky.App., 770 S.W.2d 225, 228 (1989).

[15]200 Ky. 534, 255 S.W. 142, 144 (1923).

> guilt or innocence, this court and others have said that --
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> > 'Slight evidence will be sufficient to sustain the venue, and slight circumstances from which the jury might infer the place where the crime was committed are held to sufficient' [citations omitted].

In the case sub judice, Det. Hatmaker and Miller testified that the transactions took place at the Wildcat Den in Pineville, which is located in Bell County, Kentucky. On two of the occasions Brock entered the car with Miller and Bailey and drove to "Flat Lick" and "Four Mile Hollow." There was no evidence of record that these two locations were in Bell County. However, KRS 452.550 states:

> Where an offense is committed partly in one and partly in another county, or if acts and their effects constituting an offense occur in different counties, the prosecution may be in either county in which any of such acts occurs.

After reviewing the record it is clear that at least part of each transaction, if not the entire transaction, took place in Bell County. Thus, venue would have been proper in Bell County under KRS 452.550, even if Brock had made a timely objection.

Finally, Brock claims that the trial court erred when it failed to dismiss the case because all of the evidence against had been was submitted to the Kentucky State Police Laboratory before the occurrence of the last transaction. Once again, this error was not preserved for appellate review. In his brief, Brock states:

> Carl Lawson, of the Kentucky State Police Lab, testified that he received the physical evidence on February 16, 1999, at 15:00 hours, from Detective Micky Hatmaker. However, in his preliminary hearing testimony, Det. Hatmaker, testified that the allegations contained in Count III, of the Indictment occurred on February 16, 1999, at 6:45 p.m. That is approximately 3 hours and 45 minutes after the evidence was logged in by Mr. Lawson at the Kentucky State Police Lab. Also, the audio tape recording of the February 16, 1999, purported "transaction" shows that the events commenced at 6:00 p.m. [citations to record omitted].

In his argument, Brock is assuming that the evidence of all three transactions were received at 3:00 p.m. on February 16, 1999. However, it is clear after reviewing the record that Lawson stated the evidence from the first two transactions were received by him at 3:00 p.m. on February 16, 1999. Although Lawson is questioned as to his analysis of the evidence seized during the third transaction, he does not state what time he received the evidence at the Kentucky State Police Lab. At trial, Brock's counsel failed to object to this evidence. We believe any error that occurred was harmless and certainly does not rise to the palpable error standard previously discussed.

For these reasons, the judgment of the Bell Circuit Court is affirmed.

ALL CONCUR.

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