RENDERED: November 21, 2001; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-002123-MR

ALBERT DARYL SPILLMAN — APPELLANT

v.

APPEAL FROM GARRARD CIRCUIT COURT
HONORABLE C. HUNTER DAUGHERTY, JUDGE
ACTION NO. 00-CR-00002

COMMONWEALTH OF KENTUCKY — APPELLEE

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

BEFORE: GUIDUGLI, MILLER AND SCHRODER, JUDGES.

GUIDUGLI, JUDGE. Albert Darryl Spillman (Spillman) appeals his conviction and sentence of fifteen (15) years entered by the Garrard Circuit Court following a trial by jury. We affirm.

Spillman was convicted of three counts of trafficking in a controlled substance in violation of Kentucky Revised Statutes (KRS)218A.1412. The jury sentenced him to seven years on each of the trafficking offenses, but enhanced each sentence to fifteen (15) years after determining that he was a persistent felony offender (PFO), second degree. Each of the fifteen years sentences was ordered to run concurrently.

The indictment charged that during two separate occasions on May 12, 1999, Spillman sold a quantity of cocaine, a schedule II narcotic, to a police informant and that on July 15, 1999, Spillman again sold cocaine to the same police informant. On appeal, Spillman raises four separate issues as to why his conviction should be overturned. We shall address each issue raised.

Spillman's first contention is that the trial court erred when it permitted the audio tape recording of the July 15, 1999, drug transaction to be admitted into evidence despite his claims that the Commonwealth failed to timely provide him the tape in violation of his discovery request [Rules of Criminal Procedure (RCr) 7.24(9)]. As stated in Spillman's appellate brief (page 3), this issue arose in the following manner:

> The morning of trial, defense counsel made a motion to dismiss count three of the indictment because the Commonwealth had failed to timely provide the recording of the drug buy of July 15, 1999, the Commonwealth having provided the tape on that very morning-the first day of trial. Defense counsel explained that although she had been provided with a transcript of the recording, after having heard the recording, she disputed the veracity of the transcript. Further, Mr. Spillman, had had no opportunity to listen to the recording at all, as he had been transported to the courtroom from the jail only thirty minutes before the trial was to begin.

Spillman requested that the July 15, 1999, trafficking charge be dismissed or severed and continued until a later date. He claimed he was unduly prejudiced by the alleged failure of the Commonwealth to provide the audio tape, that he could not properly prepare his defense, and that there is a "reasonable

probability" that his trial would have ended differently had the trial court granted his motion and severed the three trafficking charges. See generally, Kyles v. Whitley, 115 S.Ct. 1555 (1995). We disagree.

RCr 7.24(1) states:

> Upon written request by the defense, the attorney for the Commonwealth shall disclose the substance of any oral incriminating statement known by the attorney for the Commonwealth to have been made by a defendant to any witness, and to permit the defendant to inspect and copy or photograph any relevant (a) written or recorded statements or confessions made by the defendant, or copies thereof, that are known by the attorney for the Commonwealth to be in the possession, custody, or control of the Commonwealth, and (b) results or reports of physical or mental examinations, and of scientific tests or experiments made in connection with the particular case, or copies thereof, that are known by the attorney for the Commonwealth to be in the possession, custody or control of the Commonwealth.

In this case, despite Spillman's failure to file a written motion requesting discovery, the Commonwealth provided him with both a copy of the alleged audio tapes and a written transcript of each tape. Although Spillman contends he did not receive the audio tape of the July 15, 1999, transaction, the Commonwealth stated that it had sent a copy of that tape to the defendant on April 25, 2000, some three months prior to the trial date. Whether Spillman received the alleged audio tape mailed by the Commonwealth is not controlling in this issue. Since Spillman admits that he had been furnished a written transcript of the drug transaction in question, we do not believe he can reasonably argue that he was unduly prejudiced or unprepared for the

Commonwealth's use of the audio tape during the trial. Spillman had not complied with the rule himself by failing to file a written motion, and he had received at least two audio tapes and three written transcripts of the alleged drug transactions. He obviously was aware of how the Commonwealth intended to proceed at trial regarding the audio tape, and he if had any questions as to the existence of a third tape, he should have contacted the Commonwealth prior to the trial date or filed the appropriate written motion. "A discovery violation justifies setting aside a conviction only where there exists a "reasonable probability" that had the evidence been disclosed the result at trial would have been different." Weaver v. Commonwealth, Ky., 955 S.W.2d 72, 725 (1997) (citations omitted). In this case, we believe no discovery violation occurred, but even if it had, we do not believe there was a "reasonable probability" that the result of trial would have been different based on the discovery Spillman had received from the Commonwealth prior to trial and the overwhelming evidence of guilt presented at trial.

Spillman next contends that the trial court erred by allowing the drug evidence to be introduced without requiring the Commonwealth to prove a complete chain of custody. Spillman argues that after the cocaine had been tested at the Kentucky State Police Laboratory, the evidence was released to Kentucky State Police Sergeant Massey, who transported the drugs back to the evidence locker. Sergeant Massey did not testify at trial and Spillman contends this breach in the chain of custody mandates that the evidence be suppressed. We disagree.

In the case of Pendland v. Commonwealth, Ky. App., 463 S.W.2d 130 (1971), this Court stated that "while it is true that items offered in evidence must be properly identified and their integrity must be properly preserved, the burden of the state to prove the integrity of the evidence is not absolute. All possibility of tampering does not have to be negated. It is sufficient if efforts taken to preserve the integrity are reasonable under the circumstances." Id. at 133. The more recent case of Rabovsky v. Commonwealth, Ky., 973 S.W.2d 6 (1998), stated:

> Even with respect to substances which are not identifiable or distinguishable, it is unnecessary to establish a perfect chain of custody or to eliminate all possibility of tampering or misidentification, so long as there is persuasive evidence that "the reasonable probability is that the evidence has not been altered in any material respect." United States v. Cardenas, 864 F.2d 1528, 1532 (10th Cir. 1989), cert. denied, 491 U.S. 909, 109 S.Ct. 3197, 105 L.Ed.2d 705 (1989). See also Brown v. Commonwealth, Ky, 449 S.W.2d 738, 740 (1969). Gaps in the chain normally go to the weight of the evidence rather than to its admissibility. United States v. Lott, 854 F.2d 244, 250 (7th Cir. 1988).

Id. at 8.

In this case, the testimony revealed that the officers followed normal procedures in securing, identifying and maintaining the evidence obtained from the Spillman drug transactions. There was nothing presented by Spillman which indicated that anyone had a reason or opportunity to tamper with the drug samples and no showing that the integrity of the evidence had been compromised. See Reneer v. Commonwealth, Ky.,

784 S.W.2d 182 (1990). The trial court did not err in admitting the test results and the drugs obtained from Spillman into evidence.

Spillman's third issue on appeal is that his trial attorney had a conflict of interest which adversely affected her performance in representing his interests. On the second day of trial, Spillman's attorney, Ms. Heather Vanderford, made the following statement to the court:

> I am sorry, judge, but I just wanted to state on the record that when all these drug cases came up, and Suzanne's [McCollough] office had a conflict of interest and that is why I was appointed. When I moved to Suzanne's office, I wrote Mr. Spillman a letter and advised him that we could hire him another attorney. He told me that he did not want to do that, verbally, but I had neglected to put a written waiver in, and this is what I am doing now. That's where he has signed that he understands that Suzanne represents Mr. Ballew, and he declined for us to hire him someone else.

Spillman's attorney on appeal now contends this statement and the signing of the waiver of dual or multiple representation [RCr 8.30(1)] on the second day of trial creates an impermissible conflict of interest mandating reversal. We disagree. Spillman maintains that this alleged conflict of interest led to his attorney being impaired in her ability to provide him with the zealous representation to which he was entitled. Spillman has cited no case law in which a situation as presented by the lawyers in this case was deemed a conflict of interest. Furthermore, he has failed to point to any specific action or lack of action on the part of his attorney which would indicate she failed to aggressively and adequately represent him or any

action on her part that resulted in prejudice to him due to her representation. When the trial court addressed this issue, it was clear that Ms. Vanderford had properly and adequately advised him of her situation and afforded him the opportunity to retain other counsel. Spillman responded that he was satisfied with her, did not want another attorney and knowingly and voluntarily signed the waiver. While we do not believe an actual conflict of interest existed, we believe Ms. Vanderford properly advised Spillman of the situation and rightfully, in an abundance of caution, had him sign a waiver of dual representation. While it would have been more prudent to have the waiver signed immediately upon her assuming his representation or at least prior to trial, we see nothing that would require reversal with him signing the waiver during the trial itself.

Spillman's final issue deals with redaction of the certified copies of judgments being introduced into evidence to prove the PFO charge. Spillman originally objected to the introduction of certain prior judgments. When the trial court denied his objection, he requested that certain portions of the judgments be redacted. The court granted that motion and the objectionable portions of the judgments were blackened with a marker. No further objection was raised.

On appeal, Spillman now contends that the redaction was not completed in that if one looks at the sections blackened out one can discern what the original document states. The Commonwealth mistakenly argues that the redacted exhibits were not included in the record. The redacted judgments are in the

record on appeal and if one holds the document to the light, the objectionable material can be seen. However, it is obvious that this issue has not been preserved for appeal. During the trial, Spillman's motion to redact his prior judgments of conviction was sustained and he received the relief he sought. No further relief was requested or sought. He was satisfied with the court's action in redacting the judgments. RCr 9.22. Had Spillman brought the alleged problem of insufficient redaction to the trial court's attention, further steps could have been taken at that time to avoid the problem now at issue. However, since Spillman's motion to redact was granted and he was satisfied with the relief granted at that time, he cannot now raise the issue of inadequate relief.

For the foregoing reasons, we affirm the judgment of conviction and sentence entered by the Garrard Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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