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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2004-CA-000171-MR

GARY JACKSON, SR.

APPELLANT

v. APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE CRAIG Z. CLYMER, JUDGE
ACTION NO. 01-CR-00358

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: ABRAMSON, JUDGE; HUDDLESTON,¹ SENIOR JUDGE; HOWARD,²
SPECIAL JUDGE.

ABRAMSON, JUDGE: Gary Jackson, Sr., appeals from a December 23, 2003, judgment of the McCracken Circuit Court convicting him of first-degree trafficking in cocaine, in violation of KRS 218A.1412. Consistent with the jury's verdict, the trial court sentenced

¹ Senior Judge Joseph R. Huddleston sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110 (5) (b) of the Kentucky Constitution and KRS 21.580.

² Special Judge James I. Howard concurred in this opinion prior to the expiration of his Special Judge assignment effective February 9, 2007. Release of the opinion was delayed by administrative handling.

Jackson as a first-degree persistent felony offender (PFO) to ten years in prison. KRS 532.080. The Commonwealth accused Jackson of having sold about an eighth of an ounce of cocaine to a police informant. The informant testified to that effect, and the Commonwealth introduced audio and video recordings purportedly capturing the transaction in progress. Jackson contends that the trial court erred by denying his request for appointed counsel, by permitting the introduction of evidence at odds with the indictment, and by refusing to suppress the recordings as violative of either the Fourth Amendment to the United States Constitution or Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 1510-1520 (the Crime Control Act). Because the trial court neither abused its discretion by refusing to appoint counsel nor erred as Jackson otherwise contends, we affirm.

According to the Commonwealth's proof, a paid informant of the Paducah Police Department arranged to purchase a small amount of cocaine from Jackson on the evening of September 19, 2001. The informant was to meet Jackson at his residence at 2102 Old Cairo Road in Paducah and was to pay him \$175.00--\$150.00 for the drug and \$25.00 for Jackson's services. Some time prior to the scheduled meeting a Paducah police officer equipped with a video camera positioned himself in an antique store adjacent to Jackson's residence and with a view of the street on which it fronted. Two other police officers searched the informant and his car and equipped him with an audio transmitting device. The informant then drove to Jackson's, while the officers parked behind a nearby Eagles' Club where they were out of sight but could hear and record the informant's audio transmission. Jackson met the informant at the curb and told him to

come back in ten minutes because the supplier had not yet arrived. Ten minutes later, when the informant returned, Jackson again told him to come back in ten minutes. When the informant arrived at Jackson's for the third time, Jackson accepted the \$175.00 and told the informant to wait a few more minutes. Soon thereafter another car pulled up near the informant's car. According to the informant and the officer who made the video recording, Jackson climbed into this second car momentarily then immediately went back to the informant. The informant testified that Jackson handed him a small baggie of what proved to be crack cocaine, and at that point on the audio recording what the Commonwealth alleged was Jackson's voice can be heard assuring the informant that "it weighs good and is good."

The grand jury indicted Jackson in December 2001, and as Jackson notes the indictment charges that Jackson committed the offense of trafficking "when he knowingly and unlawfully sold a quantity of cocaine to an undercover police officer." Jackson's arguments to the contrary notwithstanding, the apparent discrepancy between the charge that Jackson sold to a "police officer" and the proof at trial that he sold to an informant does not invalidate Jackson's conviction. Jackson insists that the discrepancy implies that false or misleading evidence was presented to the grand jury, but he has failed to include the grand jury proceedings in the record on appeal. It is possible that the grand jury merely misunderstood the testimony and assumed that the informant was an officer, but in any event, absent a record to the contrary, this Court must presume that there was nothing irregular about the grand jury proceedings. *Commonwealth v. Thompson*, 697 S.W.2d 143 (Ky. 1985).

As the Commonwealth notes, furthermore, RCr 6.16 provides for the liberal amendment of indictments to conform to the proof, provided that the amendment does not charge an “additional or different offense,” and provided that the amendment does not otherwise prejudice “substantial rights of the defendant.” Our Supreme Court has observed that a variance between the indictment and the jury instructions does not invalidate a conviction if the indictment could have been amended under the rule and provided that the variance did not deprive the defendant of a fair opportunity to prepare and present a defense. *Baker v. Commonwealth*, 103 S.W.3d 90 (Ky. 2003) (concurring opinion by Justice Keller citing *Robards v. Commonwealth*, 419 S.W.2d 570 (Ky. 1967)). *See also Washington v. Commonwealth*, 6 S.W.3d 384 (Ky.App. 1999) (holding that failure to amend indictment is not a ground for relief unless prejudicial). Here, the indictment should, perhaps, have been amended, but the variance did not amount to charging Jackson with a different or additional offense and it did not prejudice Jackson’s substantial rights. The Commonwealth filed a Bill of Particulars on February 22, 2002, some twenty months before trial, in which it made clear its allegation that Jackson had sold cocaine to a “cooperating witness.” In August 2002, more than a year before trial, it disclosed the informant’s identity. Jackson was thus accorded fair notice of the case against him, so that its variance from the indictment does not entitle him to relief.

Nor is Jackson entitled to relief because the police did not obtain warrants for their audio and video recordings. The Fourth Amendment is not implicated by disclosures voluntarily made to others, such as Jackson’s statements to the informant, or by activities carried on within a public place, such as the street outside Jackson’s

residence. *United States v. Lee*, 359 F.3d 194 (3rd Cir. 2004); *Rodriguez v. United States*, 878 F. Supp. 20 (S.D.N.Y. 1995). The court order requirement of the Crime Control Act, furthermore, contains an exception for electronically recorded conversations where a party to the conversation, such as the informant in this case, has given consent prior to the recording. 18 U.S.C. § 2511(2)(c); *United States v. Diaz-Diaz*, 433 F.3d 128 (1st Cir. 2005). The trial court did not err, therefore, by refusing to suppress the recordings.

We have reviewed Jackson's other allegations of error, and, with one exception, find them so clearly refuted by the record as not to require discussion. In particular, the Commonwealth adequately proved through a probation and parole officer Jackson's age and prior offense dates for the purposes of the PFO statute. The evidence suggesting that Jackson obtained the cocaine from someone in the second car that parked in front of his house did not constitute impermissible evidence of an uncharged crime, because that evidence was inextricably tied to the evidence of the alleged sale to the informant. The prosecutor did not improperly bolster the testimony by one of the police officers when he referred to him as "detective" rather than "patrolman" even though the officer had, at the time of trial, recently been demoted to that position. The prosecutor's use of "detective" is not apt to have had any affect on the jury, and in any event, on cross examination Jackson revealed to the jury the officer's actual situation. Although the video recording did not depict the actual exchange of drugs, which occurred inside the vehicles, the recording was still inculpatory, not exculpatory, because it tended to confirm the informant's testimony about Jackson's role in the transaction. The recording was also disclosed in discovery, and thus was not the source of a violation under *Brady v.*

Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L. Ed. 2d 215 (1963). And what Jackson contends are suspicious gaps in the trial court's video record are in fact merely the normal gaps occasioned by recesses and the movement of proceedings between the courtroom and the judge's chambers. Neither these gaps nor anything included in the record suggests any bias against Jackson on the part of the trial court or any interference with Jackson's efforts to defend himself.

We come then to Jackson's contention that the trial court abused its discretion by denying his request for appointed counsel. At Jackson's arraignment in January 2002, he appeared without counsel, and the trial court reiterated the finding it had made at an earlier bond-reduction hearing that because Jackson owned unencumbered real property in Kentucky, appraised, according to Jackson, at between \$20,000.00 and \$25,000.00, he could not be deemed indigent and so was not entitled to public representation. The court attempted to impress upon Jackson the seriousness of the charges he faced and urged him to obtain counsel as quickly as possible. The court repeated its warnings about the risks of proceeding without counsel at a March 2002 pretrial conference, but nevertheless Jackson appeared for trial on August 12, 2002, without representation. The trial court granted him a continuance for the purpose of obtaining counsel and rescheduled trial for April 16, 2003. At an April 11, 2003, review conference, Jackson still had not obtained counsel and moved the court to change his bond from \$10,000.00 cash to \$10,000.00 property so that he could apply the released bond money toward an attorney. The court granted the motion and again continued trial, this time until October 13, 2003. When on that date Jackson again appeared for trial

without a lawyer, the trial court had understandably reached the end of its rope. It found, again, that Jackson's ownership of real property disqualified him for a public defender and further found that despite having been warned of the risks Jackson had waived counsel by repeatedly failing to obtain one and in effect had opted to represent himself. The court denied Jackson's request for yet another continuance, and the matter was tried that day as scheduled with Jackson appearing *pro se*, although under protest. Jackson did not testify or otherwise present evidence on his own behalf, but he cross-examined the Commonwealth's witnesses; objected to instances of hearsay; sought to exclude the audio and video recordings of the transaction; and argued that the Commonwealth's case failed because neither of the recordings showed conclusively that a transaction had taken place, and because the informant, who admitted receiving compensation for each felony charge he brought about, was not to be believed. On appeal, Jackson contends that the trial court abused its discretion by refusing to appoint a public defender. We disagree.

Under KRS Chapter 31, the chapter establishing the Department of Public Advocacy, a person is "needy" and so entitled to public representation if, at the time his need is determined, he "is unable to provide for the payment of an attorney and all other necessary expenses of representation." KRS 31.100(3). At the time of Jackson's arraignment, in January 2002, KRS 31.120(3) provided that anyone who owned real property was presumptively "not needy" for these purposes. Apparently relying on this presumption, but noting as well that Jackson's realty was unencumbered, that Jackson's wife received SSI benefits of about \$550.00 per month, that Jackson is able bodied and capable of earning income, and that in his affidavit of indigency Jackson admitted an

income of about \$150.00 per week and stated that he had no dependents or outstanding debts, the trial court determined that Jackson had adequate resources to hire counsel and so was not eligible for public representation.

In July 2002, prior to Jackson's trial, the General Assembly revised KRS Chapter 31 by, among other changes, eliminating the presumption of nonindigency that had attached to the ownership of real property and providing instead that property ownership was just one factor among several that the court should consider in determining whether a person was entitled to a public defender. KRS 31.120(2). Other important factors include the person's income, his other assets, his obligations, the number and ages of his dependents, and the complexity of his case. *Id.*

In *Tinsley v. Commonwealth*, 185 S.W.3d 668 (Ky. App. 2006), this Court recently considered the revised Chapter 31 and noted the dilemma that can arise in cases, such as this one, in which the defendant is determined to be ineligible for public representation but persists in refusing to hire counsel. Such refusal may be deemed a waiver of counsel and an election to proceed *pro se*, *Greeley v. Commonwealth*, 825 S.W.2d 617 (Ky. App. 1992), but in that event, the *Tinsley* court noted, the trial court is obliged, under *Hill v. Commonwealth*, 125 S.W.3d 221 (Ky. 2004) and *Faretta v. California*, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975), to assure itself on the record that the defendant realizes the serious risks entailed by waiving counsel and that his waiver is voluntary. To ensure that the defendant's right to counsel is protected, the *Tinsley* court opined,

first, if a defendant raises the issue of indigency, a hearing must be held thereon for a determination in accordance with the requirements set forth in KRS Chapter 31, and the court must enter findings at the conclusion thereof. If the findings support indigency, counsel shall be appointed. Second, if the findings do not support indigency, and the defendant persists in not employing counsel, he shall be deemed to have waived counsel, whereupon he is entitled to the protections of *Faretta*. Should the trial court fail in the foregoing, the trial is defective.

Tinsley v. Commonwealth, 185 S.W.3d at 675.

Jackson's trial was not defective under this standard. First, although the trial court appears to have employed the old Chapter 31 presumption that Jackson was not needy because he owned real property, even under the current version of KRS 31.120, property ownership is an important factor to consider, and none of the other statutory factors suggests that Jackson was indigent. As the trial court noted, had Jackson been willing to encumber his realty he could certainly have borrowed funds for an attorney. He was, moreover, capable of working, had at least some income, and was not burdened either by outstanding obligations or by dependents. His case was not unduly complicated, and so was not apt to be unduly expensive. The trial court did not abuse its discretion, therefore, by finding that Jackson was able to "provide for the payment of an attorney."

Second, although the trial court did not label any of its many conferences and hearings on this issue a "*Faretta*" hearing, on several occasions it urged Jackson to obtain counsel, emphasized the serious penalties Jackson faced if found to be a persistent felon, warned him that the failure to obtain counsel would result in his having to proceed

pro se, and detailed many of the procedural and evidentiary hurdles he would face at trial without counsel's assistance. We deem these warnings adequate under *Hill* and *Faretta*. The trial court did not err, therefore, by ruling that Jackson's repeated refusals to hire counsel constituted a knowing and voluntary waiver of that right.

In sum, although Jackson's defense undoubtedly suffered from the lack of counsel, that lack resulted from Jackson's knowing refusal to hire an attorney, not from any error by the trial court in refusing to appoint one. The trial court's determination that Jackson's home equity in excess of \$20,000.00 enabled him to afford his own representation did not constitute an abuse of discretion, particularly coupled with Jackson's ability to work, his freedom from outstanding obligations, and the relative simplicity of his case. The trial court also adequately warned Jackson of the hazards of not obtaining counsel and thus proceeding *pro se*. Jackson's trial, furthermore, was fundamentally fair. It was not tainted by an error in the indictment of which Jackson was duly apprised, and it properly included the introduction of surveillance recordings obtained in public and with the cooperation of a confidential informant. Accordingly, we affirm the December 23, 2003, judgment of the McCracken Circuit Court.

ALL CONCUR.

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