

# Commonwealth of Kentucky

## Court of Appeals

NO. 2005-CA-001936-MR

MICHAEL E. ABELL

APPELLANT

v. APPEAL FROM CASEY CIRCUIT COURT  
HONORABLE JAMES G. WEDDLE, JUDGE  
ACTION NO. 05-CR-00032

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: ABRAMSON, JUDGE; KNOPF AND ROSENBLUM,<sup>1</sup> SENIOR JUDGES.

ABRAMSON, JUDGE: Michael Abell appeals his conviction for various drug related offenses following a trial by jury in the Casey Circuit Court. He seeks reversal of his conviction under the palpable error rule found in Kentucky Rule of Criminal Procedure (RCr) 10.26 because a police officer testified at trial that the police had previously received complaints that Abell was a drug trafficker. Finding no reason to believe that

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<sup>1</sup> Senior Judges William L. Knopf and Paul W. Rosenblum sitting as Special Judges by assignment of the Chief Justice pursuant to Section 110(5) of the Kentucky Constitution and KRS 21.580.

the outcome below would have been different had the challenged statement not been made, we affirm.

On April 30, 2005, Abell, believing that his ex-wife had stolen from him over \$800 and an ounce of marijuana earlier in the day, arranged a meeting with her in a park. Seeing Abell sitting in his pickup truck in the park, Sara Hardwick, Abell's girlfriend, drove her own vehicle next to his so that the two were side-by-side. According to the testimony offered at trial, Hardwick gave Abell a few cigarettes to help him until he could get his money returned from his ex-wife. They then talked until approximately 2:00 p.m., when Abell left.

Steven Garrett, an off-duty police officer, observed Abell and Hardwick sitting next to each other in their vehicles. While watching them, Officer Garrett saw Abell hand a baggy to Hardwick, though he could not identify its contents. Believing that a drug transaction was taking place, he called Officer Joey Miller to tell him what he had seen.

Later, when Abell started to drive off, Officer Miller decided to follow him and called Trooper Mike Woodrum for assistance. Officer Miller eventually stopped Abell. After explaining his reason for performing the stop, he then patted Abell down, finding ten Klonopin pills in Abell's pocket. Klonopin is a brand name of the generic drug Clonazepam, a Schedule IV controlled substance. Officer Miller arrested Abell.

Following the arrival of Trooper Woodrum and Officer Dennis Allen, the officers performed a search of Abell's truck. Inside, they found a CD case under the

driver's seat containing empty baggies, marijuana, \$60 in cash, rolling papers and scales. While the search was ongoing, Hardwick arrived in her own vehicle and asked the officers what was happening to her boyfriend. Detecting the odor of marijuana emanating from her car, they asked her about it. In response, Hardwick admitted that she had been smoking marijuana. Trooper Woodrum then arrested her for driving under the influence of intoxicants.

Following the issuance of a search warrant, police officers also searched the house belonging to Abell's grandmother where he resided. They discovered marijuana seeds, more pills, plastic baggies containing residue, and a police scanner. On May 25, 2005, the Casey County grand jury returned an indictment against Abell charging him with trafficking in marijuana (second or subsequent offense), third-degree possession of a controlled substance, possession of marijuana, possession of drug paraphernalia (second or subsequent offense), and driving on a suspended license. After severance of the driving on a suspended license charge, a trial was held on August 16, 2005, on the remaining four charges. At its conclusion, the jury returned a verdict convicting Abell of two counts of possession of marijuana as well as third degree possession of a controlled substance and the drug paraphernalia charge. This appeal followed.

During the course of his testimony, Officer Garrett was asked on cross-examination *by Abell's own counsel* about his reasons for calling Officer Miller. Garrett explained that he believed that Abell was engaged in a drug deal. Abell's counsel then asked if that was the only reason, and Officer Garrett stated that "I knew we've had,

we've got a lot of complaints on him for trafficking drugs.” Abell's counsel raised no objection to this statement. Less than a minute later, on redirect examination, the Commonwealth asked Garrett about the nature of the complaints the police had received regarding Abell. Officer Garrett replied that the department got “complaints that he is a drug trafficker and, um, just from different people that comes and tells me that knows him that we need to watch him more often, you know, closer, and, uh, one of our Officers have arrested him with drugs before.” This time, the trial court interrupted the testimony and told Officer Garrett to stop answering the question. The judge then admonished the jury to ignore Garrett's last statement and not to consider it for any purpose. He also instructed the Commonwealth not to pursue the issue any further.

Though Abell's counsel did not object to Officer Garrett's initial statement on cross-examination, Abell argues that this Court should consider the prejudicial effect of this statement, as well as the follow-up statement during redirect examination, under RCr 10.26. This rule states:

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.

In reviewing claims made pursuant to RCr 10.26, the appellate courts of this Commonwealth have routinely held that where no substantial possibility exists that the result in the trial court would have been any different, the error complained of on appeal is nonprejudicial and does not warrant reversal. *See, e.g., Richardson v. Commonwealth,*

161 S.W.3d 327 (Ky. 2005); *Schoenbachler v. Commonwealth*, 95 S.W.3d 830 (Ky. 2003); *Jackson v. Commonwealth*, 717 S.W.2d 511 (Ky. App. 1986).

In this matter, the record reveals that the first statement made by Officer Garrett while on cross-examination was elicited by Abell's own counsel and was received without objection. When the subject of Garrett's motivation was readdressed by the Commonwealth during redirect examination, the trial court quickly intervened and put an end to any further discussion of information received by the police concerning Abell's alleged drug-related activities. The trial court further admonished the jury to disregard Officer Garrett's statement and not consider it for any purpose. We believe that this action was sufficient to remedy any possible unfairness resulting from the disputed testimony.

An admonition given by the trial court is presumed to cure the defect in the testimony for which it was requested. *Combs v. Commonwealth*, 198 S.W.3d 574 (Ky. 2006). Abell has shown nothing in the record to overcome this presumption. Rather, the record reveals that after the admonition, no other testimony was elicited from Officer Garrett and the subject of tips given to the police was not addressed again. Moreover, the jury did not convict Abell of drug trafficking but instead the lesser charge of possession of marijuana. Taken in conjunction with the fact that any failure to seek an admonition after Garrett's first statement was Abell's own, there is no basis for concluding that either the admonition was unsuccessful or that the jury was unfairly prejudiced by the statements.

Moreover, we are not persuaded that Officer Garrett's testimony somehow created a manifest injustice. The fundamental facts of this matter are undisputed and plainly reveal that at the time of his arrest, Abell was found to possess several pills on his person, as well as marijuana and drug paraphernalia in his vehicle. The subsequent search of his residence resulted in the discovery of yet more contraband. Under the totality of these circumstances, we do not believe that the result of this matter would have been any different had Officer Garrett not made the statements now challenged by Abell in this appeal. In sum, though we do not believe that the trial court made any error with respect to Garrett's testimony, if such error did occur it was harmless and, therefore, not palpable. For this reason, we affirm the September 15, 2005 judgment of the Casey Circuit Court.

ALL CONCUR.

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