

RENDERED: DECEMBER 10, 2010; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2009-CA-001519-MR

JUSTIN BROWN

APPELLANT

v. APPEAL FROM CAMPBELL CIRCUIT COURT  
HONORABLE JULIE REINHARDT WARD, JUDGE  
ACTION NO. 09-CR-00085

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: CLAYTON, DIXON, AND WINE, JUDGES.

WINE, JUDGE: Justin Brown appeals from his conditional plea of guilty to three counts of second-degree robbery and one count of first-degree fleeing and evading. Brown was sentenced to a total of twelve and one-half years' imprisonment. On appeal, Brown contends that the trial court erred by failing to grant his motions to suppress certain key evidence in the case. Brown contends that the motions should

have been granted (1) because there was a break in the chain of custody, and (2) because police failed to preserve the evidence in question for testing. Upon a review of the record, we disagree and affirm the Campbell Circuit Court.

On the evening of January 12, 2009, Officer Brady Buemi of the Newport Police Department was on patrol when he saw a man jogging across the road carrying a bag. When the man saw the police cruiser, he began to run away. Officer Buemi saw a group of people on the other side of the street who were indicating that the man had just robbed them at gunpoint. Officer Buemi began to pursue the man in his police cruiser. While pursuing the man, Officer Buemi noticed the man toss a handgun under a nearby vehicle. Officer Buemi then began to pursue the man on foot, chasing him for several blocks. Another officer joined the “foot chase” and observed the man throw a purse over a nearby fence while running. When the officers finally caught up with the man, they found ten dollars in his hand. The man was identified as Justin Brown, the appellant herein.

One of the victims of the robbery claimed to have lost ten dollars in the same denominations as that found in Brown’s hand. The officers retrieved the purse and gun which were thrown during the chase. They returned the purse and ten dollars in cash to the persons from whom they were taken. The officers retained the gun (which was a BB gun) as evidence.

On February 19, 2009, Brown was indicted on four counts of first-degree robbery and one count of first-degree fleeing and evading. On April 30, 2009, Brown filed motions to exclude both the purse that was given back to one of

the victims and the money that was given back to the other victim. Brown argued that he did not have the opportunity to test the purse and money for fingerprints, and that the integrity of the evidence was compromised by a violation of the chain of custody when the items were returned to their original owners. Following a hearing on May 20, 2009, the trial court denied Brown's motions on the grounds that chain of custody was established and any gap in the chain would go to the weight of the evidence rather than its admissibility. The trial court additionally noted that the witnesses would be present to testify and would be available for cross-examination and found that Brown suffered no due process violation due to the unavailability of the evidence for testing.

Thereafter, Brown entered into a conditional guilty plea of guilty, reserving his right to appeal the denial of his motions to suppress. Brown was sentenced to twelve and one-half years' imprisonment. He now appeals the trial court's denial of said motions.

Our review of a denial of a motion to suppress "is a two-step process that first reviews the factual findings of the trial court under a clearly erroneous standard. The second step reviews *de novo* the applicability of the law to the facts found." *Welch v. Commonwealth*, 149 S.W.3d 407, 409 (Ky. 2004) (internal citations omitted).

Findings are not clearly erroneous unless unsupported by substantial evidence. *Owens-Corning Fiberglas Corp. v. Golightly*, 976 S.W.2d 409, 414 (Ky. 1998). Thus, we begin our analysis by asking whether the trial court's factual

findings were supported by substantial evidence. Here, the trial court found that the money and purse were recovered by police after the chase and then returned to the victims. Thus, the items went from the victims, to the robber, to the police, then back to the victims. These findings are not in dispute and are clearly supported by substantial evidence.

Our next task, then, is to undertake a *de novo* review of (1) whether these items should have been suppressed due to a break in the chain of custody; or (2) whether the defendant was denied due process because the items were unavailable for testing after being returned to the rightful owners. The trial court held that Brown's arguments concerning chain of custody would go to the weight of the evidence rather than to admissibility. Further, the trial court found that Brown's due process rights were not violated by the unavailability of the items for testing as police officers did not act in bad faith by returning the items to the victims. We agree.

To begin, we note that Brown's argument regarding chain of custody is unpersuasive insofar as he argues that the evidence should have been suppressed along with any testimony referencing the evidence. Indeed, a "perfect" chain of custody need not be established, nor is it necessary to preclude all possibility of tampering or misidentification. *Rabovsky v. Commonwealth*, 973 S.W.2d 6, 8 (Ky. 1998). Gaps in the chain of custody typically go toward the weight of the evidence rather than admissibility. *Id.* Further, in the present case it is clear that the money and purse went from the victims, to the robber, to the ground where police

retrieved them, and then back to the victims. There is no indication of tampering or misidentification.

Further, the items were not subjected to any testing by police but were simply referenced as items in themselves. We find these to be the sort of items discussed in *Rabovsky, supra*, which are the type of evidence clearly distinguishable or identifiable on its own (unlike blood or bodily fluid samples, for example). “With items of physical evidence which are clearly identifiable and distinguishable, there is no requirement of proof of chain of custody.” *Hunt v. Commonwealth*, 304 S.W.3d 15, 29 (Ky. 2010), *citing Rabovsky*, 973 S.W.2d at 8. This Court sees no reason why the fact that the money and purse were returned to their rightful owners would preclude their admission at trial or testimony about their existence. Rather, any questions raised by the defense would go to the weight of the evidence rather than its admissibility. Thus, we find no error in the trial court’s denial of the motion to suppress on this ground.

We next consider Brown’s argument that his due process rights were violated when he was denied the opportunity to test the purse and money for fingerprints because the police failed to preserve them. Kentucky courts have recognized that a defendant has a right to testing. *See, e.g., Green v. Commonwealth*, 684 S.W.2d 13, 16 (Ky. App. 1984). However, denial of the right to testing is not always a ground for reversal. Rather, reversal is not warranted unless a defendant can show bad faith on the part of the police in failing to preserve evidence. *St. Clair v. Commonwealth*, 140 S.W.3d 510, 552 (Ky. 2004).

Indeed, absent a showing of “bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law.”

*Allen v. Commonwealth*, 817 S.W.2d 458, 462 (Ky. App. 1991). Here, Brown did not even allege bad faith on the part of police in his motion to suppress, nor is there any support for such a contention in the record. The police returned the purse and money to the victims, which was reasonable given the circumstances, and given the fact that the evidence was not even exculpatory in nature.

Accordingly, we affirm the Campbell Circuit Court.

ALL CONCUR.

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