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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-000594-MR

JEROME HAWKINS APPELLANT

v.

APPEAL FROM HENDERSON CIRCUIT COURT
HONORABLE KAREN L. WILSON, JUDGE
ACTION NO. 13-CR-00251

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, NICKELL, AND THOMPSON, JUDGES.

NICKELL, JUDGE: Jerome Hawkins challenges a judgment of conviction entered by the Henderson Circuit Court following a jury trial in which he was found guilty of first-degree trafficking in a controlled substance (cocaine, four grams or more)[1] —for which he was sentenced to an enhanced term of seventeen years after

[1] Kentucky Revised Statutes (KRS) 218A.1412, a Class C felony.

qualifying as a first-degree persistent felony offender (PFO I),[2] and trafficking in marijuana (over eight ounces)[3]—for which he was sentenced to an enhanced term of ten years as a PFO I. Both terms were ordered to run concurrently. On appeal Hawkins claims: 1) the Commonwealth should have been compelled to disclose the identity of a confidential informant (CI) on whose word search warrants for his home and vehicles were issued; and, 2) a directed verdict should have been granted when the Commonwealth failed to prove Hawkins trafficked in four or more ounces of pure cocaine. Upon review of the briefs, record and law, we affirm.

FACTS

Det. Brad Newman of the Henderson (Kentucky) Police Department had been receiving information from a CI for more than a year. Details provided by the CI had always proved reliable and had resulted in several felony convictions. In early 2013, the CI described drug activities at Hawkins' home, and based on that information and minimal independent investigation, on October 10, 2013, Det. Newman obtained two search warrants—one for Hawkins' home and one for his vehicles.

The next day both warrants were executed. Inside the home, officers found more than eighteen grams of crack cocaine, nearly one pound of marijuana, digital scales and more than $4,000.00 in cash. Hawkins showed no response as each item was shown to him. Of the crack cocaine he said it was "old dope" and

[2] KRS 532.080.

[3] KRS 218A.1421, a Class D felony.

he did not know where he got it. Inside Hawkins' vehicles, officers found more cocaine, pills and cash. All evidence was sent to the Western Laboratory Branch of the Kentucky State Police for testing.

A Henderson County grand jury indicted Hawkins for first-degree trafficking in a controlled substance, cocaine, over four grams; trafficking in marijuana, eight ounces to five pounds; and being a PFO I. Hawkins soon moved to compel disclosure of the CI's name claiming it was relevant and essential to his case. Following a hearing on the motion, at which the trial court questioned Det. Newman *in camera*, the trial court issued an order finding: the Commonwealth had asserted its right under KRE[4] 508(a) to keep the CI's name secret; and Hawkins had asserted an exception—relevance—as permitted by KRE(c)(2).[5] Finding the CI's information was the sole basis for the search warrants, and presuming Hawkins had established a valid exception to the Commonwealth's assertion of the privilege, the trial court denied the motion to compel because the Commonwealth had shown:

> Detective Newman had no reason to doubt the informant's reliability. Newman also testified that the

[4] Kentucky Rules of Evidence.

[5] The motion to compel filed with the trial court was based exclusively on the CI's testimony being relevant to the defense. Appellate counsel attempts to expand the grounds to include not only relevance, but also voluntary disclosure by the Commonwealth and the CI's role as a government witness, both under KRE 508(c)(1). Because those two grounds were not argued to the trial court, we will not entertain them on appeal. *Keeton v. Lexington Truck Sales, Inc*., 275 S.W.3d 723, 726 (Ky. App. 2008) ("[I]ssue not raised in the circuit court may not be presented for the first time on appeal.") (Internal citations omitted). Additionally, we note the Commonwealth did not intend to, and did not, offer testimony from the CI at trial—thus, he was not a government witness.

> informant in this case is still performing confidential work for the police on multiple cases, and that to expose this person as an informant would compromise those investigations and would possibly put his or her life in danger.

Following denial of the motion to compel, and wanting to test the CI's veracity, defense counsel requested a suppression hearing,[6] which the trial court granted, but made clear from the outset it would not permit to become a guessing game or fishing expedition to get the CI's name—because doing so would weaken its prior ruling.

The Commonwealth maintained the CI had not been present during execution of the search warrants and would not be called as a witness. The Commonwealth's sole witness at the suppression hearing was Det. Newman. He stated he had been on the Henderson Police force more than eleven years and Judge Charles McCollom had signed two search warrants naming Hawkins based on affidavits the witness had prepared. The bulk of the information recited in the warrants had come from the CI, but Det. Newman had conducted a personal background check on Hawkins.

After being shown a copy of his affidavit, Det. Newman testified he had known the CI for more than a year; the CI had proven reliable in the past; the CI's information had resulted in felony convictions; and, the search results—both in other cases and in this case—were consistent with details provided by the CI. In

[6] Defense counsel asserted the search warrants were based on insufficient probable cause and were materially defective.

this case, the cocaine and marijuana were found precisely where the CI had said they would be. When the search warrants were executed in this case in October 2013, the CI was actively working other investigations—a fact that was still true when the suppression hearing was convened in January 2014. As a result, Det. Newman testified disclosure of the CI's name would be detrimental to both the active cases and to the CI's safety since retaliation was a distinct possibility.

On cross-examination, Det. Newman stated the CI had been paid for his work at various times and had received money in this case. He confirmed a felony case commands greater pay than a misdemeanor charge, but did not recall the amount paid to the CI in this case. Det. Newman also testified the CI had previously received leniency from criminal charges in return for providing information, but not in this case. Det. Newman testified he was unaware of this CI ever providing bogus information.

As cross-examination wore on, Det. Newman used the CI's name. The trial court immediately characterized the unexpected release of the CI's name as "inadvertent" and directed the clerk to obscure the CI's name and not disclose it. A mid-hearing attempt by the prosecutor and defense counsel to resolve the criminal charges against Hawkins was unsuccessful. At that point, defense counsel passed the witness, but asked that he be subject to recall.

The Commonwealth then questioned Det. Newman on redirect. He testified that on June 13, 2013, the CI had observed Hawkins with a small amount of crack cocaine concealed in shop towels inside Hawkins' truck—Det. Newman

later saw the crack cocaine inside the vehicle in a controlled buy. Det. Newman further testified the CI had observed Hawkins on August 2, 2013, remove crack cocaine from a drawer near the microwave in his home and weigh it on scales. The officer subsequently saw crack cocaine in the drawer and scales in the residence in another controlled buy. The Commonwealth submitted the two search warrants as Exhibit 1 during the suppression hearing, however, we located neither warrant, nor an affidavit for the warrants in the record provided to us on appeal.

At the conclusion of the suppression hearing, the trial court stated it had heard nothing to make it change its prior ruling—the CI's name would not be disclosed and the defense would not be permitted to call the person it believed to be the CI based on Det. Newman's inadvertent use of a particular name—a person the defense already had under subpoena and who attended the suppression hearing as a result of the subpoena.

Remaining firm in its decision not to reveal the CI's identity, the trial court called the case for jury trial on February 26, 2014. One of the witnesses called by the Commonwealth was Wendy Vent, a chemist at the Western Laboratory Branch. Vent had received for testing five items seized during execution of the warrants on Hawkins' home and vehicles; Vent analyzed three of those items. Of importance to this appeal was Item 3.1—described as "[w]hite solids weighing approximately 5.475 gram(s) in one (1) knotted plastic bag." Analysis of this item revealed it contained cocaine as well as a cutting agent. Item

3.2 was described as a [w]hite solid having a gross weight of approximately 13.267 gram(s) in thirteen (13) knotted plastic bags[;]" it was not analyzed.

David Hack, Director of the Western Laboratory Branch followed Vent on the witness stand. He explained drug chemists in Kentucky state labs work to a certain gram amount and then stop—for cocaine, that amount would be some amount over four grams since it is unusual to receive a sample weighing exactly four grams. In other words, if five similar items, each weighing five grams were submitted by an agency for testing in a single case, only one of the items would be tested because its weight alone would exceed the four-gram threshold needed to sustain a trafficking charge.

At a bench conference during Hack's direct examination, the prosecutor argued Kentucky is not a "purity state," meaning there is no statutory requirement that a defendant traffic in pure cocaine, nor that the Commonwealth prove the defendant had a specific amount of pure cocaine. Upon further questioning, Hack confirmed an agency may request testing in excess of the four-gram threshold, but that would be "rare." Hack went on to explain that since about August 2013, Kentucky labs have not performed quantitative analysis on drugs for purity—unless there is a chance the case will go to federal court, and only in that circumstance would suspected methamphetamine be tested for purity. Hack testified labs performing quantitative analysis have greater certification requirements than government labs in Kentucky have attained.

At the close of the proof, defense counsel moved for a directed verdict on the cocaine trafficking charge. Counsel argued the Commonwealth had not shown Hawkins had trafficked in four grams or more of cocaine (because Vent could not say what amount of the more than five grams she tested was pure cocaine and what amount was a cutting agent) as he maintained was required for conviction under KRS 218A.1412(1). That statute reads in relevant part:

> (1) A person is guilty of trafficking in a controlled substance in the first degree when he or she knowingly and unlawfully traffics in:
>
> (a) Four (4) grams or more of cocaine[.]

Relying on KRS 218A.010(5), which defines "cocaine" as:

> a substance containing any quantity of cocaine, its salts, optical and geometric isomers, and salts of isomers[,]

the trial court denied the request for a directed verdict. Jurors ultimately convicted Hawkins and recommended concurrent enhanced sentences for a total of seventeen years which the trial court imposed in its final judgment.

Hawkins filed a timely notice of appeal from the judgment and order of conviction, as well as the earlier order denying the defense motion to suppress. Upon review of the briefs, the law, and the record, we affirm.

ANALYSIS

Hawkins' first complaint is the trial court should have ordered disclosure of the CI's name; without that fact, Hawkins claims he was denied due process of law since the CI was a material witness he was not allowed to cross-

examine. He specifically argues the Commonwealth failed to sustain its burden under KRE 508 to demonstrate why the CI's "identity should remain privileged." We disagree.

As noted previously, KRE 508(a) grants states—including the Commonwealth—

> a privilege to refuse to disclose the identity of a person who has furnished information relating to or assisting in an investigation of a possible violation of a law to a law enforcement officer or member of a legislative committee or its staff conducting an investigation.

The Commonwealth asserted that privilege on behalf of the CI who provided information about Hawkins. Its rationale for invoking the privilege was the CI was still actively working drug investigations which could jeopardize those cases and/or place the CI in harm's way if his/her name were exposed.

Heard v. Commonwealth, 172 S.W.3d 372, 374 (Ky. 2005), sets forth the protocol for a trial court's handling of a motion to compel disclosure of a CI's identity. First, the Commonwealth asserts the privilege. Second, the defendant invokes one or more of three specified exceptions. Third, once the defendant makes the required showing, the burden shifts to the Commonwealth to preserve the privilege. *See United States v. McManus*, 560 F.2d 747 (6th Cir. 1977). Fourth, the trial court balances the unique facts of each case—specifically considering "the crimes charged, the possible defenses, the possible significance of the informer's testimony and other relevant factors." *Taylor v. Commonwealth*, 987 S.W.2d 302, 304 (Ky. 1998). Fifth, if the trial court believes the CI may have

relevant testimony, under KRE 508(c)(2) the court conducts an *in camera* hearing —either by affidavit or via live testimony—at which the government offers proof in support of its claim of privilege. Sixth, if after the hearing the court is satisfied the informer can give relevant testimony, but the government chooses not to reveal the CI's identity, the court has an array of steps it may take to provide appropriate relief to the defense.

The steps outlined in *Heard* were followed meticulously in this case, with the trial court ultimately finding the CI was needed for ongoing investigations and there was reason to be concerned for the CI's safety—two items specifically mentioned in *Heard*, 172 S.W.3d at 374, as justifying nondisclosure. It has been a decade since *Heard* was rendered. During that time it has not been disturbed and we have no reason to do so now. Thus, we discern no error in the trial court's handling of the matter.

Hawkins' other complaint is the trial court should have directed a verdict on the cocaine trafficking charge. Again, we disagree.

Statutory interpretation is a purely legal matter; our review is *de novo*. *Commonwealth v. Long*, 118 S.W.3d 178, 181 (Ky. App. 2003) (internal citations omitted). Because we are tasked with giving effect to the legislature's intent when reviewing a statute, we cannot simply ignore the definition of "cocaine" adopted by the General Assembly in KRS 218A.010(5). *See Commonwealth v. Wright*, 415 S.W.3d 606, 609 (Ky. 2013) (*citing Osborne v. Commonwealth*, 185 S.W.3d 645, 648–49 (Ky. 2006)). This is especially true in this case since KRS 218A.010(5),

defining cocaine, and KRS 218A.1412, establishing a four-gram threshold for trafficking in cocaine, were adopted simultaneously—they were both part of 2011 HB 463. As a result, we must presume legislators were aware of both provisions; intended to adopt both provisions; intended both provisions to have meaning; and intended all related statutes to be harmonized. *Id.* at 609 (*citing Hall v. Hospitality Resources, Inc.*, 276 S.W.3d 775, 784 (Ky. 2008)).

If the General Assembly intended to require trafficking in pure cocaine, or in a percentage of pure cocaine, it certainly could have said so, but it did not, and we are not at liberty to add such language now.

> Were we to adopt such an interpretation, we would be impermissibly adding words to the statute that are "not reasonably ascertainable from the language used." *Beckham v. Board of Education of Jefferson County,* 873 S.W.2d 575, 577 (Ky.1994) (citing *Gateway Const. Co.* [*v. Wallbaum*], 356 S.W.2d [247,] 248 [Ky. 1962)].

Commonwealth, Finance and Administration Cabinet, Dept. of Revenue v. Saint Joseph Health System, Inc., 398 S.W.3d 446, 453 (Ky. App. 2013). We can only determine the legislature's intent by reading the precise language it adopted, not by adding or subtracting words it did not choose, *Bohannon v. City of Louisville,* 193 Ky. 276, 235 S.W. 750, 752 (1921), nor by guessing what it might have intended to say but did not say. *Lewis v. Creasey Corporation,* 198 Ky. 409, 248 S.W. 1046, 1048 (1923).

The Commonwealth proved Hawkins had more than four grams of a white solid containing cocaine and a cutting agent. Because KRS 218A.010(5)

defines "cocaine" as "a substance containing any quantity of cocaine," we must conclude the trial court correctly applied both KRS 218A.010(5) and 218A.1412 in denying the directed verdict motion. Thus, we discern no error and affirm.

CLAYTON, JUDGE, CONCURS.

THOMPSON, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

THOMPSON, JUDGE, DISSENTING: Respectfully, I must dissent. I cannot agree that the evidence presented by the Commonwealth was sufficient to convict Hawkins of a Class C felony, first-degree trafficking in a controlled substance. The Commonwealth failed to establish that the amount of cocaine seized satisfied the quantity required under KRS 218A.1412(1)(a) and (b).

This is not the first time this issue has been presented to this Court and not the first time I have differed with my judicial colleagues in resolving the issue. In *Commonwealth v. Leary*, 2013-CA-000204-MR, 2015 WL 832256 (Ky. App. 2015), I disagreed with the majority's conclusion that the Commonwealth is not required to establish the amount of cocaine and heroin in a "lump" to satisfy the quantity required under KRS 218A.1412(1)(a) and (b). A motion for discretionary review is pending in that case and, if accepted, will ultimately resolve the issue in this Commonwealth under the current statutes. Until then, I will continue to express my view when given the opportunity.

Sweeping changes were made to the Kentucky Penal Code and Controlled Substances Act in 2011 through House Bill 463 including to KRS Chapter 218A relating to the trafficking of controlled substances. Different classes of felonies

were established depending upon the amount of drugs trafficked. Legislative Research Commission, *Report of the Task Force on the Penal Code and Controlled Substances Act*, Research Memorandum No. 506, at 17 (2011). Under current law, it is a Class C felony for a first offense and Class B for subsequent offenses, when four grams or more of cocaine, two grams or more of heroin or methamphetamine, or ten or more dosage units of a controlled substance were trafficked. It is a Class D felony for a first offense and a Class C for subsequent offenses when a lesser quantity of those substances were trafficked. KRS 218A.1412(1)(a)(b)(c)(e), (3)(a)(b).

While under KRS 218A.1412(1)(d) "[a]ny quantity of lysergic acid diethylamide, phencyclidine; gamma hydroxybutyric acid (GHB), including its salts, isomers, salts of isomers, and analogues; or flunitrazepam, including its salts, isomer, and salts of isomers," is sufficient for conviction of a Class C or Class B felony under KRS 218.1412(3)(a), this "any quantity" language is not contained in the provisions relating to trafficking larger amounts of cocaine and heroin. KRS 218.1412(1) (a), (b). Instead, the statute provides two categories of punishment for trafficking in these substances. The "any quantity" language is only contained in the provision regarding lesser penalties for amounts below those listed in (1)(a)(b) and (c). KRS 218.1412(1)(e), (3)(b). If the General Assembly intended that "any quantity" of cocaine or heroin support a conviction under section (3)(a) under that same statute, it would have used identical language in section (1)(a), (b) and (c). Although cocaine and heroin are defined in KRS 218A.010(5) and (16) to include

a substance containing "any quantity" of these drugs, the wording of the trafficking statute itself, which uses the "any quantity" language solely in reference to the substances listed in KRS 218.1412(1)(d) and to amounts less than those specified in (a), (b) and (c), indicates the General Assembly did not intend the more severe penalty described in (3)(a) to apply when a mixture meets the weight requirement but may be comprised almost entirely of adulterants.

It is noteworthy that many of the states which explicitly include mixtures in the minimum quantities required for trafficking have much higher minimum quantities. *See, e.g.,* Ark. Code Ann. § 5-64-440(b)(1) (trafficking requires 200 grams or more of cocaine "by aggregate weight, including an adulterant or diluents"); Fla. Stat. Ann. § 893.135(1)(b) (twenty-eight grams of cocaine or a mixture necessary for trafficking in cocaine); Ga. Code Ann. § 16-13-31(a)(1), (2) (felony trafficking requires "28 grams or more of cocaine or of any mixture with a purity of 10 percent or more of cocaine" or "any mixture with a purity of less than 10 percent of cocaine . . . if the total weight of the mixture multiplied by the percentage of cocaine contained in the mixture exceeds any of the quantities of cocaine specified in paragraph (1) of this subsection.") These statutes reflect that four grams of a matter containing cocaine is not generally thought to be a sufficient amount to be trafficked but is generally for the use of the possessor.

I would follow the lead of the North Carolina Court of Appeals. In *State v. Conway*, 194 N.C.App. 73, 84-5, 669 S.E.2d 40, 47 (2008), the Court interpreted its former comparable trafficking statute which included the clause "any mixture

containing such substance" for other controlled substances but omitted in reference to methamphetamine. The Court concluded the distinction evidenced a legislative intent to require proof as to the actual weight of methamphetamine, rather than proof of the weight of a mixture containing methamphetamine, to sustain a trafficking conviction.

After *Conway* and perhaps in response, North Carolina amended the applicable statute in 2009 and it now allows a conviction based on the weight of the entire "mixture." *See State v. Davis,* 762 S.E.2d 886, 893-94 (N.C.App. 2014). However, the reasoning in *Conway* applies to the current wording of Kentucky's statute.

I am guided by the precept that "doubts in the construction of a penal statute will be resolved in favor of lenity and against a construction that would produce extremely harsh or incongruous results or impose punishments totally disproportionate to the gravity of the offense[.]" *Holland v. Commonwealth*, 192 S.W.3d 433, 436 (Ky.App. 2005) (quoting *Commonwealth v. Colonial Stores, Inc*., 350 S.W.2d 465, 467 (Ky. 1961)). Followed to its logical conclusion, the majority's interpretation allows arbitrary classifications unrelated to the seriousness of the crime committed. A defendant with 4.1 grams of 10% pure cocaine could be convicted of a Class C or B felony, while a defendant with 3.9 grams of 90% pure cocaine could only be convicted of a D or C felony. Such an outcome would undermine the General Assembly's intent to classify a defendant's punishment based on the quantity of drugs trafficked and have the nonsensical

result of punishing low-level traffickers with drug mixtures of lower purity but of higher weight more severely than source dealers with pure uncut drugs of a much higher street value of relatively low weight.

Appropriate testing exists to determine purity. Our case law indicates that such testing has been done. *See, e.g., Collins v. Commonwealth*, 574 S.W.2d 296, 297 (Ky. 1978) (heroin tested to be 58% pure); *Brown v. Commonwealth*, 914 S.W.2d 355, 357 (Ky.App. 1996) (rocks of crack cocaine tested to be 99.9% pure). In fact, David Hack acknowledged that if a case might go to federal court, drugs are tested for purity.

The current statutes require the Commonwealth prove beyond a reasonable doubt that the defendant trafficked in four or more grams of cocaine to sustain a conviction for a Class C felony. The mere weight of the matter containing an undetermined of amount of cocaine is insufficient.

I would reverse.

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