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Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-001599-MR

BRANDON JOEY MOMENT APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE ERNESTO M. SCORSONE, JUDGE
ACTION NO. 12-CR-00297

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, KRAMER, AND STUMBO, JUDGES.

CLAYTON, JUDGE: Brandon Joey Moment brings this appeal from a Fayette Circuit Court judgment following his conviction by a jury of several drug-related offenses. He argues that the trial court improperly admitted prior bad acts evidence, and that the Commonwealth failed to give sufficient notice of a police

officer's expert testimony. Having reviewed the record and applicable law, we affirm.

Moment was attending a party at a friend's home when the police executed a search warrant on the house, which had been the site of a shooting the week before. When the police arrived, Moment had been drinking, had smoked a "blunt" with crack on it, and had taken a Xanax bar. Officer Stewart Fowler entered the home from the rear and found Moment in the kitchen area, standing within three to four feet of a set of digital scales placed on the kitchen counter. The scales contained a white substance which was later tested and found to contain cocaine residue. Officer Fowler patted Moment down, and then obtained his consent to search his person. Moment's pants pocket contained a partial cocaine "cookie" weighing over seven grams, three Xanax tablets and 1.4 grams of marijuana, as well as $40 in cash.

Detective David Lewis gave the *Miranda* warning to the eight individuals found in the house, and then proceeded to question Moment. The interview was recorded. Although the quality of the audio recording was poor, the parties agree that it contained the following statements by Moment: When he was asked if he had crack cocaine, he responded "Yes, sir," and that it was about seven grams. When he was asked by Lewis if he was selling it, he replied, "Yes." Officer Lewis then asked Moment how much he usually sold, and what was the most he sold and the least he sold. Moment discussed what he sold, although the tape is almost inaudible at this point. Lewis asked him why he came over to the

house and he replied that he usually came over to play games. When he was asked if he had sold from the house before, he replied that he does not sell to anyone else but "rakes it off and gives it to the people."

A jury found Moment guilty of first-degree trafficking in a controlled substance, third-degree possession of a controlled substance and possession of marijuana. This appeal followed. Moment's arguments on appeal concern the trial court's rulings on evidentiary issues, which are reviewed under an abuse of discretion standard. *The Goodyear Tire & Rubber Co. v. Thompson*, 11 S.W.3d 575, 577 (Ky. 2000). The test for abuse of discretion is "whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

On the day before Moment's trial, his defense counsel filed a motion to bar the introduction of the audio recording of his responses to Detective Lewis's questions regarding how much he usually sold, what was the most and least he had ever sold, and whether he had ever sold out of the house before. He argued that the questions and responses indicated that he had a past history of trafficking in controlled substances and did not satisfy the requirements of Kentucky Rules of Evidence (KRE) 404(b) for admitting evidence of prior bad acts, and that the prejudicial effect of the evidence greatly outweighed any probative value. Defense counsel also claimed that the Commonwealth had not given notice that it was introducing evidence of uncharged acts as required under KRE 404(c).

The trial court ruled that because the "crux of the case" was whether Moment intended to sell the crack in his possession, the statements on the tape, while prejudicial, were highly relevant and therefore admissible. As a preliminary matter, we address Moment's argument that the Commonwealth failed to give adequate pretrial notice that the recording would be introduced. KRE 404(c) requires the prosecution to "give reasonable pretrial notice to the defendant of its intention to offer" KRE 404(b) evidence. The record shows that the defense moved to suppress the tape over a year before the trial on the grounds that there was insufficient evidence that the *Miranda* warning had been given. Following a hearing on September 26, 2013, the trial court denied the motion in an order entered on October 4, 2013. Moment's trial was held on July 23, 2014.

"[W]here the accused has received 'actual notice' of the intention to introduce KRE 404(b) evidence and the accused has suffered no prejudice, the notice requirement in KRE 404(c) is satisfied. Whether reasonable pre-trial notice has been given is decided on a case-by-case basis." *Matthews v. Commonwealth*, 163 S.W.3d 11, 19 (Ky. 2005) (internal citations omitted). The defense was on notice ten months prior to trial that the Commonwealth planned to introduce the recording. This length of time constitutes reasonable pretrial notice, and, in any event, Moment has failed to show any prejudice stemming from the lack of formal KRE 404(c) notice.

KRE 404(b) provides that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Such evidence may be admissible, however:

> (1) If offered for some other purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident; or
>
> (2) If so inextricably intertwined with other evidence essential to the case that separation of the two (2) could not be accomplished without serious adverse effect on the offering party.

Moment argues that, given the fact he had seven grams of crack in his pocket and replied "yes" when he was asked if he was selling "it," there was no need to introduce his answers to the additional questions regarding how much he usually sells, what's the most and least he's ever sold and whether he ever sold out of the house before. He argues that this evidence suggested to the jury that he was a habitual drug dealer, and was precisely the type of evidence that KRE 404(b) is designed to exclude.

In his testimony, Moment admitted that he had been to the residence several times before to gamble, party, and smoke marijuana and crack. On the night he was arrested, he stated that he was there to play poker, dice, to party, drink and use drugs, but that he did not intend to profit from the sale of any cocaine. He stated that his intent was to get high with his buddies and that he had enough for two or three of them. He explained that he would not have sold the cocaine to his friends. He said that he did not know why he had agreed with Detective Lewis that

he had sold cocaine from the residence previously, and intimated that his prior admissions should not be held against him because he was intoxicated when his statement was taken.

Moment also testified that the night he was arrested was the last occasion that he got high, and that he had since obtained full-time employment, had passed multiple random drug tests, and was successfully caring for his infant daughter. Three inquiries from the framework for determining the admissibility of other crimes evidence include: (a) is the other crimes evidence relevant for some purpose other than to prove the criminal disposition of the accused? (b) Is evidence of the uncharged crime sufficiently probative of its commission by the accused to warrant its introduction into evidence? (c) Does the potential for prejudice from the use of other crimes evidence substantially outweigh its probative value? *Bell v. Commonwealth*, 875 S.W.2d 882, 889-90 (Ky. 1994).

As to the first inquiry, the taped interview was relevant to proving that Moment had sold drugs to people attending parties at that house before. The evidence is probative of his intent to traffic in drugs and undercuts his defense that the drugs were for his own personal use and possibly to share with friends. Thus, it falls squarely within the "intent" exception of KRE 404(b)(1).

As to the second inquiry, the evidence was sufficiently probative because it consisted of Moment's own admissions. Moment argues that the fact his statements were "uncorroborated" renders the evidence insufficient, but there is no requirement that this type of evidence must be substantiated with other

evidence. Thirdly and finally, although the evidence was highly prejudicial, it did, as the trial court observed, relate directly to the disputed element of the case - Moment's intent. Under these circumstances, the trial court did not abuse its discretion in admitting the evidence.

Next, Moment argues that the trial court erred when it allowed the prosecution to call Detective Jared Curtsinger as an expert witness without providing sufficient notice that he would be testifying and what the substance of his expert testimony would be. Curtsinger was not an investigating officer on the case. Kentucky Rules of Criminal Procedure (RCr) 7.24(1)(c) provides that "upon written request by the defense, the attorney for the Commonwealth shall furnish to the defendant a written summary of any expert testimony that the Commonwealth intends to introduce at trial. This summary must identify the witness and describe the witness's opinions, the bases and reasons for those opinions, and the witness's qualifications."

Defense counsel raised this issue for the first time on the morning of trial, apologizing that he had not filed a motion regarding Detective Curtsinger's testimony. He explained that the Commonwealth had given him notice "a couple of days ago" that Detective Curtsinger would be testifying, but that he had not received a statement regarding the substance of his testimony or his qualifications. He admitted that he had not made a written request for this information pursuant to RCr 7.24(c).

Moment's trial began on a Wednesday. The prosecutors told the trial court that they sent two emails to defense counsel regarding Detective Curtsinger: the first on the previous Saturday, stating that he would be testifying as an expert, and the second on the following Monday, specifying that Curtsinger would testify that the amount of crack cocaine recovered from Moment was not consistent with personal use. The prosecutors also pointed out that the Commonwealth had subpoenaed Curtsinger on April 11, 2014, three months before, thereby putting the defense on notice that he was being called as a witness.

The trial court allowed Curtsinger's testimony, reasoning that the subpoena meant the defense should have expected that Curtsinger would testify regarding trafficking since he was not an investigating officer on Moment's case. On appeal, Moment argues that the trial court's decision meant that he was deprived of the opportunity to locate an expert to refute Detective Curtsinger's testimony that drug users usually only have a maximum of one gram of crack on their persons. But Moment's own testimony suggested that the amount of cocaine in his pocket was more than the amount necessary for his personal use, necessitating his explanation that he was planning to share with his friends. Furthermore, we agree with the trial court that the subpoena provided Moment with adequate notice to allow him to secure his own expert to refute Curtsinger's testimony. The trial court did not abuse its discretion in allowing Curtsinger to testify.

For the foregoing reasons, the Fayette Circuit Court judgment is affirmed.

ALL CONCUR.

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