

RENDERED: November 7, 1997; 10:00 a.m.
NOT TO BE PUBLISHED

NO. 96-CA-1594-MR

CHESTER SHIPP

APPELLANT

v.

APPEAL FROM MARION CIRCUIT COURT
HONORABLE WILLIAM M. HALL, JUDGE
CRIMINAL ACTION NO. 95-CR-000063

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

* * * * *

BEFORE: GARDNER, GUIDUGLI and HUDDLESTON, Judges.

GUIDUGLI, JUDGE. Chester Shipp (Shipp) appeals from a judgment of the Marion Circuit Court entered on May 24, 1996, following a jury trial, finding Shipp guilty of trafficking in a controlled substance, first degree, and persistent felony offender, first degree. We affirm.

Officer Danny Triplett (Officer Triplett), of the Kentucky State Police, conducted an undercover narcotics investigation at the Galaxy Nightclub (the nightclub) in Lebanon, Kentucky. Triplett visited the nightclub on March 11, 1994, March 17, 1994, and March 24, 1994. On the third visit, Triplett approached Shipp and asked if he knew where he could buy some "powder," meaning cocaine. Shipp indicated that his niece, Cathy

Harlow (Harlow) might have some, but Triplett told Shipp that he did not want to buy from her because he did not know her.

Triplett then went to the rest room. When he came out, Shipp approached him by the rest room and asked him if he was still interested in buying some cocaine. Triplett looked down into Shipp's cupped hands and saw several packets of white powder. When Triplett indicated that he wanted to buy the cocaine, Shipp called Harlow over again. Shipp passed two packets behind his back to Harlow, who reached behind her back and took the packets. Harlow handed the packets to Triplett, and Triplett paid Harlow \$100. Harlow gave the money to Shipp.

Triplett turned the packets over to the Kentucky State Police Crime Lab. The substance in the packets was tested and found to be cocaine. Shipp was indicted by the Marion County Grand Jury on June 5, 1995. Additional facts will be developed as warranted.

Shipp argues on appeal that the trial court erred in allowing Officer Triplett to testify regarding his undercover investigation at the nightclub. Characterizing Officer Triplett's testimony as "investigative hearsay", Shipp contends that Officer Triplett's testimony was both irrelevant and prejudicial.

Shipp's argument is entirely without merit as there is no investigative hearsay in Officer Triplett's testimony. The rule regarding investigative hearsay is that an officer "may testify about information furnished to him only where it tends to

explain the action that was taken by the police officer as a result of this information and the taking of that action is an issue in the case." (emphasis in original). Sanborn v. Commonwealth, Ky., 754 S.W.2d 534, 541 (1988). Where there is no extrajudicial statement relayed to the court by the officer's testimony, there is no investigative hearsay. Releford v. Commonwealth, Ky., 860 S.W.2d 770, 771 (1993).

As pointed out by the Commonwealth, Officer Triplett did not testify as to any extrajudicial statements made to him regarding Shipp's activities at the nightclub. Instead, Officer Triplett testified as to what he personally observed at the nightclub and as to the events which led to Shipp's indictment. This testimony in no way can be characterized as investigative hearsay and is clearly admissible.

Shipp also contends that the trial court erred in denying his pretrial motion to allow the jury to view the nightclub. Shipp contends that the trial court abused its discretion in denying the motion because the basis of his defense was that due to the layout and dim lighting of the nightclub Officer Triplett's testimony was not credible.

Under Kentucky Revised Statutes (KRS) 29A.310(3), the trial court may permit the jury to view the place where an offense was allegedly committed "if necessary." However, a trial court's decision denying a request for a jury view does not amount to an abuse of discretion where the scene of the crime can

be adequately described by witness testimony. Dawes v. Commonwealth, Ky., 349 S.W.2d 191, 193 (1960).

At the trial, the layout and lighting of the nightclub was described in depth by Officer Triplett, Shipp, Harlow, Corine Mattingly, who is the manager of the nightclub, and Jo Lynn Deering, the bartender. Furthermore, all of the aforementioned witnesses drew diagrams of the interior of the nightclub as they testified. We also agree with the Commonwealth's statement that the prosecutor presented sufficient evidence to refute Shipp's contention that Officer Triplett could not have seen everything he testified to due to poor lighting. Thus, the trial court did not abuse its discretion in denying Shipp's motion for a view.

Shipp further argues that the trial court erred in denying his motion for independent testing of the remainder of the substance in the packets given by Officer Triplett to the crime lab. In support of his argument, Shipp relies on Green v. Commonwealth, Ky., 684 S.W.2d 13 (1985). This argument is also entirely devoid of any merit.

Shipp filed a motion for testing pursuant to Green on June 28, 1995. In his brief on appeal, Shipp alleges that hearings were held on this motion on July 3, 1995 and July 17, 1995. We have reviewed the transcript of the proceedings before the trial court on July 17, 1995, and find it to be devoid of any mention of Shipp's Green motion. There is no transcript of the hearing allegedly held on July 3, 1995.

Our review of the record and transcripts in this matter also shows that Shipp never formally requested a ruling on the Green motion. As Shipp's failure to request the trial court to rule on his motion constitutes a waiver of the matter, we cannot consider the issue on appeal. Brown v. Commonwealth, Ky., 890 S.W.2d 286, 290 (1994). See also, Bell v. Commonwealth, Ky., 473 S.W.2d 820 (1971).

Finally, Shipp contends that the trial court erred in denying his pro se verified motion for a new trial dated April 15, 1996 and filed with the trial court on April 16, 1996. As the jury's verdict was rendered on April 8, 1996, Shipp's motion was not timely as Kentucky Rules of Criminal Procedure (RCr) 10.06 requires all motions for a new trial be filed within five days after the return of the jury's verdict.

Having considered the parties' arguments on appeal, the judgment of the Marion Circuit Court is affirmed.

ALL CONCUR.

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