

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-000821-MR

KEVIN JONES

APPELLANT

V. APPEAL FROM GRAVES CIRCUIT COURT
HONORABLE JOHN T. DAUGHADAY, JUDGE
ACTION NO. 96-CR-93

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION AFFIRMING

* * * * *

BEFORE: GUDGEL, Chief Judge; ABRAMSON and JOHNSON, Judges.

GUDGEL, CHIEF JUDGE: This is an appeal from a judgment entered by the Graves Circuit Court. Appellant Kevin Jones was convicted of first-degree trafficking in a controlled substance and sentenced to ten years' imprisonment. On appeal, he principally contends that the trial court denied him a fair trial because certain evidence as to prior wrongful acts was admitted during his trial. We disagree. Hence, we affirm.

Appellant was indicted in June 1996. He filed a motion in limine seeking to exclude the introduction at trial of certain evidence as to prior bad acts, arrests, and convictions. The court orally granted the motion on the day of trial. The

evidence adduced at trial included testimony by a confidential informant that he initiated contact with the local police and provided them the names of persons, including that of appellant, who were allegedly trafficking in drugs. He also proposed that a drug transaction be arranged with appellant. The informant was further permitted to testify without objection that he had purchased drugs from appellant "a few different other times," and that he had "bought a lot of dope from [appellant]." As to the offense charged, the informant testified that after he was equipped with a listening device and given \$39 in cash, he purchased two rocks of crack cocaine from appellant at appellant's mother's house. At the conclusion of a jury trial, appellant was convicted of the offense charged and sentenced to ten years' imprisonment. This appeal followed.

Appellant contends that the trial court denied him a fair trial because the evidence noted above as to other crimes was admitted at trial in violation of the court's order. However, we are constrained to conclude that this issue was not adequately preserved for review.

Although the court orally granted appellant's motion in limine at the commencement of the trial to exclude certain evidence as to his prior wrongful acts, evidence was introduced by the Commonwealth without an objection or a request for an admonition that the jury should disregard it.

While, as appellant notes, KRE 103(d) states that "[a] motion in limine resolved by order of record is sufficient to

preserve error for appellate review," our supreme court has not interpreted KRE 103(d) as broadly as appellant. Indeed, in Tucker v. Commonwealth, Ky., 916 S.W.2d 181 (1996), which followed the adoption of the Kentucky Rules of Evidence including KRE 103(d), the court stated that

[w]hile this Court has approved the use of motion in limine as a means of obtaining pretrial rulings concerning the admission and exclusion of evidence, we have not repealed the contemporaneous objection rule. One claiming error may not rely on a broad ruling and thereafter fail to object specifically to the matter complained of. When trial counsel is aware of an issue and fails to request appropriate relief on a timely basis, the matter will not be considered plain error for reversal on appeal. (Citations omitted.)

Tucker, 916 S.W.2d at 183. While the court's holding in Tucker is clearly inconsistent with KRE 103(d), see Richard H. Underwood & Glen Weissenberger, Kentucky Evidence: 1997/98 Courtroom Manual Chapter 103 (1997), it is the most recent interpretation of KRE 103(d) by our supreme court. Hence, we are constrained to follow it. See SCR 1.030(8)(a). Thus, we hold that no issue regarding testimony of the informant covered by the court's order ruling on the motion in limine was adequately preserved for review since there was no contemporaneous objection to the admission of that evidence.

Moreover, given the overwhelming evidence adduced at trial as to appellant's guilt, we conclude that appellant was not prejudiced by the admission of the testimony complained of in any event.

Similarly, appellant's argument that the informant's testimony was unworthy of belief is also without merit. The jury was fully apprised as to certain matters affecting the credibility of the confidential informant. Given the fact that the jury believed his testimony, even though fully advised as to matters affecting his credibility, a conclusion that his testimony was unworthy of belief is not compelled. Cf. Clements v. Commonwealth, Ky., 424 S.W.2d 825 (1968).

Finally, we note that appellant's contention he was denied a fair trial because the Commonwealth failed to give notice of its intention to adduce proof as to certain prior wrongful acts was also not preserved for review. More important, we note that the purpose of the notice requirement is to reduce the possibility of surprise and to provide an opportunity to challenge the admission of such evidence prior to trial. Bowling v. Commonwealth, Ky., 942 S.W.2d 293 (1997), citing Robert G. Lawson, The Kentucky Evidence Law Handbook, §2.25 (3rd ed. 1993). Here, there was no surprise and appellant was given an opportunity to challenge the evidence complained of prior to trial. Hence, no error in this vein occurred in any event.

The court's judgment is affirmed.

ABRAMSON, J., CONCURS.

JOHNSON, JUDGE, CONCURS AND FILES SEPARATE OPINION.

JOHNSON, JUDGE, CONCURRING. I concur with the Majority Opinion, but I would also affirm the trial court on the basis that the evidence of the prior bad acts of the appellant selling

drugs to the confidential informant was admissible under KRE 404 (b)(1) to show the appellant's identity. Tucker v. Commonwealth, Ky., 916 S.W.2d 181, 183-184 (1996).

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