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NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court Of Appeals

NO. 1997-CA-003246-MR

LEON COBB — APPELLANT

v.

APPEAL FROM FULTON CIRCUIT COURT
HONORABLE W. L. SHADOAN, JUDGE
INDICTMENT NO. 97-CR-25

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION

AFFIRMING

** ** ** ** ** ** **

BEFORE: HUDDLESTON, MCANULTY and SCHRODER, Judges.

HUDDLESTON, JUDGE. Leon Cobb appeals from a Fulton Circuit Court judgment based on a jury verdict convicting him of two counts of trafficking in cocaine. He was sentenced to a total of 13 years' imprisonment to run consecutively to a sentence imposed in an unrelated case.

Cobb's conviction stemmed from two occasions when he allegedly sold crack cocaine to a confidential informant.[1] On April 7, 1996, Cobb sold a rock of crack cocaine to a confidential

[1] Cobb was charged in an indictment with three counts of trafficking in cocaine, but one count was dismissed since Hickman police officer John Gardner did not view the transaction and the person to whom the cocaine was allegedly sold was not present to testify at trial.

informant for the sum of $20.00. The transaction was witnessed by Hickman police officer John Gardner who testified at trial that he searched the informant before the buy and gave him $20.00 and a tape recorder. Gardner followed the informant to the 7th Street Apartments in Hickman and watched as the informant made the drug buy. Gardner testified that the informant was approximately 50 to 60 feet in front of him and was in his view at all times (Gardner used a half-binocular), except for a "split second" when he turned around and walked backward into a doorway at a motel directly across from the area where the transaction took place. After the buy, the informant gave the cocaine to Gardner and was again searched. Gardner then locked up the cocaine at the Hickman Police Department and later delivered it to the Madisonville Forensic Laboratory. The second buy occurred on May 20, 1996, when Cobb sold another rock of crack cocaine to the same informant. The facts surrounding this transaction resemble the April 7, 1996, transaction, except that Gardner did not use the half-binocular.

After hearing the evidence, a jury found Cobb guilty of two counts of trafficking in cocaine and recommended a 10-year sentence on each count. The instructions did not provide for the jury's recommendation as to concurrent or consecutive sentences. See Ky. Rev. Stat. (KRS) 532.055(2). The trial court did not follow the jury's sentencing recommendation, but, instead, sentenced Cobb to eight years' imprisonment on the first count and five years on the second count. The sentences were run consecutively. This appeal followed.

Cobb urges this Court to reverse his conviction because, he claims, the trial court erred when it refused to grant his motion for a directed verdict of acquittal. Cobb argues that no reasonable juror could have believed that Gardner could have identified a piece of clear plastic with tiny granules of white powder passing from one hand to another from 40 to 50 feet away.

Ky. Rev. Stat. (KRS) 218A.1412(1) provides, in pertinent part, that:

> A person is guilty of trafficking in a controlled substance in the first degree when he knowingly and unlawfully traffics in: a controlled substance, . . . classified in Schedules I or II which is a narcotic drug;[2] a controlled substance analogue; lysergic acid diethylamide; or phencyclidine.

"Distribute," according to KRS 218A.010(9), means:

> [T]o deliver other than by administering or dispensing a controlled substance.

"Traffic," according to KRS 218A.010(28), means:

> [T]o manufacture, distribute, dispense, sell, transfer, or possess with intent to manufacture, distribute, dispense, or sell a controlled substance.

[2] Cocaine is a Schedule II controlled substance. Ky. Rev. Stat. (KRS) 218A.070.

We agree with the trial court that the issue of whether Cobb transferred cocaine to the informant was properly submitted to the jury and that the Commonwealth produced enough evidence to sustain Cobb's conviction on both counts. As the Supreme Court said in Commonwealth v. Benham, Ky., 816 S.W.2d 186, 187 (1991):

> On motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given. For the purpose of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but reserving to the jury questions as to the credibility and weight to be given to such testimony.

Given Gardner's testimony, it was not clearly unreasonable for the jury to find Cobb guilty of both counts of trafficking in cocaine.

Cobb next argues that the trial court erred by refusing to grant a continuance or dismissal based upon the Commonwealth's failure to provide a correct name for or the location of the confidential informant. Cobb insists that the Commonwealth's failure to provide the informant's name constituted a discovery violation which justifies setting aside his conviction under the principles set forth in Weaver v. Commonwealth, Ky., 955 S.W.2d 722 (1997).

In Weaver, a pre-trial discovery order directed the Commonwealth to "'provide the defendant with the names and addresses, if known, of all persons known by the Commonwealth to have been personally present at the scene during the commission of the offense charged.'" Id. at 725. In the present case the discovery order provided that "if all the parties agree they may exchange with the other the list of the witnesses intended to be called on direct at least three (3) days prior to the date scheduled for trial." Cobb failed to request, and the trial court did not order, the Commonwealth to provide the name and/or address of the informant.[3]

On September 22, 1997, Gardner met with the informant to remind him that two trials were scheduled in October, including Cobb's. The informant told Gardner that he had been threatened by a criminal suspect against whom he was to testify. On September 24, 1997, Gardner attempted to subpoena the informant for Cobb's trial, but failed to locate him. On October 6, 1997, the Common-

[3] The Commonwealth has a continuing duty to turn over exculpatory evidence to a defendant whether or not he requests it. Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). The Commonwealth's failure to produce favorable evidence amounts to a constitutional error only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. "[A] constitutional error occurs, and the conviction must be reversed, only if the evidence is material in the sense that its suppression undermines confidence in the outcome of the trial." United States v. Bagley, 473 U.S. 667, 678, 105 S.Ct. 3375, 3381, 87 L.Ed.2d 481, 491 (1985). During a pre-trial conference, the trial court determined that because these were "controlled buys," the informant would not be able to provide Cobb with any evidence essential to his defense.

wealth notified Cobb's counsel that the informant had disappeared. Apparently, the informant was to testify against another individual represented by Cobb's counsel in a trial scheduled for October 8, 1997.

Ky. R. Crim. Proc. (RCr) 9.04 governs the postponement of trials:

> The court, upon motion and sufficient cause shown by either party, may grant a postponement of the . . . trial. A motion by the defendant for a postponement on account of the absence of evidence may be made only upon affidavit showing the materiality of the evidence expected to be obtained, and that due diligence has been used to obtain it. If the motion is based on the absence of a witness, the affidavit must show what facts the affiant believes the witness will prove, and not merely the effect of such facts in evidence, and that the affiant believes them to be true. If the attorney for the Commonwealth consents to the reading of the affidavit on the . . . trial as the deposition of the absent witness, the . . . trial shall not be postponed on account of his absence. If the Commonwealth does not consent to the reading of the affidavit, the granting of a continuance is in the sound discretion of the trial judge. (Emphasis supplied.)

Cobb was aware 14 days before trial that the informant could not be located. He did not submit the required affidavit so that the court could determine whether the witness had relevant testimony to offer or so that the Commonwealth might consent to its reading as the deposition of the absent witness. Cobb also failed to request that the Commonwealth provide the name and address of the informant in order to avail himself of the subpoena power available to him to compel the informant's appearance at trial. Thus, the trial court did not abuse its discretion when it denied Cobb's motion for a postponement of the trial. Morris v. Slappy, 461 U.S. 1, 103 S.Ct. 1610, 75 L.Ed.2d 610 (1983); Dishman v. Commonwealth, Ky., 906 S.W.2d 335 (1995).[4]

Cobb's third ground for reversal is that the trial court erred when it failed to grant a mistrial after Gardner testified that the informant disappeared because he feared for his life. During cross-examination, Cobb's counsel asked Gardner several questions about the identity and whereabouts of the informant. Gardner testified that he attempted to subpoena the informant but was unable to locate him. On redirect, Gardner testified that the informant told him that he was in "fear of his life" and that his fear had "nothing to do with this defendant [Cobb] whatsoever." Cobb objected on hearsay grounds.

[4] The Commonwealth, citing Ky. R. Evid. (KRE) 508, argues that the identity of the informant was privileged. Inasmuch as the Commonwealth did not invoke and support its claim of privilege below, we will not consider it on appeal.

Hearsay is not admissible except as provided in the Rules of Evidence or by rules of the Supreme Court. Ky. R. Evid. (KRE) 803. KRE 801(c) defines "hearsay" as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."

There are a number of exceptions to the hearsay rule. See generally David F. Binder, The Hearsay Handbook (3rd ed. 1991). Pertinent here is the exception contained in KRE 803(3): "A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health)" is not excluded by the hearsay rule. According to Professor Lawson,

> Internal states of mind (e.g., intention, love, malice, knowledge, fear, etc.) are frequently pertinent to issues arising in litigation. They are no less difficult to prove than pain or bodily condition, not being observable to the naked eye, and thus have long been the subject of an important exception to the hearsay rule:
>
> > Assuming that the state of mind of a person at a particular time is relevant, his declarations made at that time are admissible as proof on that issue, not withstanding they were not made in the presence of the adverse party. [Quoting Goin v. Goin, 313 Ky. 259, 263, 230 S.W.2d 896, 898 (1950).]
>
> The critical element of the exception is the contemporaneity of the statement and the state of mind it manifests.

Robert G. Lawson, The Kentucky Evidence Handbook § 8.50 II (3rd ed. 1993). See also The Hearsay Handbook, supra at § 301; Mutual Life Ins. Co. v. Hillman, 145 U.S. 285, 12 S.Ct. 909, 36 L.Ed. 706 (1892); DeGrella v. Elston, Ky., 858 S.W.2d 698, 709 (1993); and L.K.M. v. Department for Human Resources, Ky. App., 621 S.W.2d 38 (1981).

A statement is not admissible under the KRE 803(3) exception to the hearsay rule unless the state of mind expressed in the statement is relevant, The Kentucky Evidence Law Handbook, supra at § 8.50 II, because only relevant evidence is admissible. KRE 402. Gardner's testimony as to the informant's state of mind, fear for his life, that apparently led him to absent himself from Cobb's trial was relevant because Gardner had been pressed to account for the informant's absence and because the Commonwealth was entitled to explain to the jury that it had not procured the absence of a witness who might have given pertinent testimony. Thus, the circuit court did not err in declining to grant Cobb's motion for a mistrial when the testimony was elicited.

Cobb's next argument is that the Commonwealth failed to establish the chain of custody of the cocaine because the Commonwealth did not offer the testimony of the informant who made the buy. Cobb insists that the Commonwealth failed to produce evidence which showed "Cobb hand the cocaine to the informant."

True enough, the Commonwealth had the burden of identifying and tracing the chain of custody of the cocaine admitted into

evidence. Commonwealth v. Hubble, Ky.App., 730 S.W.2d 532, 534 (1987). The proof must show when and where the evidence was obtained, and in whose possession it had been since it was found. To meet this burden, the Commonwealth introduced the testimony of Gardner who observed Cobb sell the informant cocaine on two separate occasions. Gardner also testified that he searched the informant before and after the exchange and watched the transactions from start to finish. After the buys, Gardner secured the cocaine at the Hickman Police Department and later transported it to the Madisonville Forensic Laboratory. Brandon Werry, a forensic chemist, testified that the powder was, in fact, cocaine.[5] Indeed, there is nothing in the record to suggest that the integrity of the evidence was compromised or that anyone had a reason or an opportunity to tamper with it. Reneer v. Commonwealth, Ky., 784 S.W.2d 182, 185 (1990). The chain of custody was adequately established.

Lastly, Cobb asserts that the trial court erred when it failed to instruct the jury in the penalty phase of the trial to recommend whether the sentences it recommended be imposed were to run concurrently or consecutively. Cobb concedes that this issue was not properly preserved for appellate review, but requests that this Court address this by finding Cobb's counsel ineffective.

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[5] The parties stipulated in regard to the chain of custody that the cocaine was received at the Western Regional Laboratory by Lonnie Henson, an employee, who turned it over to Brandon Werry. Henson received the cocaine from the Hickman Police Department.

We first note that there is no error appropriate for appellate review concerning ineffective assistance of counsel inasmuch as that issue was not raised at the trial level by means of a post-trial motion. White v. Commonwealth, Ky. App., 695 S.W.2d 438, 440 (1985).

While the jury should be given an opportunity to recommend whether two or more sentences should be served concurrently or consecutively, the trial court is not bound to accept the jury's recommendation. KRS 532.110; KRS 532.055; Dotson v. Commonwealth, Ky., 740 S.W.2d 930,931 (1987). Thus, even if the trial court had submitted an appropriate instruction and the jury had recommended a concurrent sentence, the court would have been free to sentence Cobb to consecutive sentences, as it did. Cobb has shown no prejudice. The error was harmless and, as a result, it must be disregarded. RCr 9.24.

The judgment is affirmed.

All CONCUR.

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