

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-000605-MR

RICKY WAYNE POE

APPELLANT

v. APPEAL FROM BRACKEN CIRCUIT COURT
HONORABLE ROBERT T. GALLENSTEIN, JUDGE
ACTION NO. 97-CR-00011

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: BUCKINGHAM, HUDDLESTON, AND KNOPF, JUDGES.

KNOPF, JUDGE. Ricky Wayne Poe (Poe) brings this direct appeal from a judgment of the Bracken Circuit Court sentencing him to twelve (12) years in prison following a jury conviction on three (3) counts of trafficking in marijuana. After reviewing the record and the arguments of counsel, we affirm.

In August 1996, a confidential informant working with a narcotics police agency contacted Poe about purchasing some marijuana. On August 23, 1996, Poe went to the informant's mobile home and sold him one (1) pound of marijuana for

\$1,600.00. During this meeting the two (2) men discussed possible future purchases and set up a second meeting. On August 29, 1996, Poe again went to the informant's mobile home and sold him two (2) pounds of marijuana for \$3,100.00, after which they then scheduled a third meeting. On September 26, 1996, Poe met with the informant again at his mobile home and sold him two (2) pounds of marijuana for \$3,100.00. During each of these transactions, the confidential informant was wearing a concealed audio transmitting device and microrecorder. On each occasion, Police Officers Wilson Harmon and Tim Fegan conducted surveillance outside the informant's residence and witnessed Poe's arrival and departure. Wilson and Fegan also monitored and listened to the conversations between Poe and the informant as the meetings were taking place. After completing each transaction, the informant met with the police and turned over the marijuana for use as evidence.

In November 1996, the Bracken County Grand Jury indicted Poe on three (3) felony counts of trafficking in eight (8) ounces or more but less than five (5) pounds of marijuana KRS 218A.1421). During the trial, the confidential informant, Tim Fegan and Ricky Poe all provided testimony. Poe testified that he was merely acting as a courier for another person when he transferred the marijuana to the informant. The jury convicted Poe on all three (3) counts. In March 1997, the trial court sentenced Poe in accord with the jury's verdict of four (4) years on each of the three (3) counts of trafficking in marijuana with

the sentences to be served consecutively for a total of twelve (12) years. This appeal followed.

Poe raises a single issue on appeal involving the admission of certain testimony by Officer Fegan. Poe argues that Officer Fegan's testimony concerning the conversations between Poe and the informant during each of the three (3) transactions was inadmissible. He contends that Officer Fegan's testimony was used improperly to bolster the credibility of the informant and did not fall within any recognized exception to the hearsay rule. See KRE 802. Poe acknowledges that there was no contemporaneous objection to this testimony at trial, nevertheless he asks us to review the issue under RCr 10.26, the substantial or palpable error rule. See also KRE 103(e).

Under RCr 10.26 and KRE 103(e), the defendant bears the burden of showing "a palpable error which affects the substantial rights of [the defendant] . . . and that manifest injustice has resulted from the error." In interpreting the term "manifest injustice", the Kentucky Supreme Court has stated that the defendant must demonstrate a "substantial possibility that the result of the trial would have been different." Partin v. Commonwealth, Ky., 918 S.W.2d 219, 224 (1996). Similarly, an evidentiary error under KRE 103(e) requires an error that seriously affects the fairness, integrity or public reputation of the judicial proceedings. See Brock v. Commonwealth, Ky., 947 S.W.2d 24, 28 (1997).

Poe contends that Officer Fegan's testimony concerning the conversations Poe had with the informant during the three (3)

drug transactions was inadmissible because it involved "investigative hearsay." Poe erroneously suggests that all testimony characterized as "investigative hearsay" is automatically inadmissible. In Sanborn v. Commonwealth, Ky., 754 S.W.2d 534 (1986), cert. denied, ___ U.S. ___, 116 S. Ct. 154, 133 L. Ed. 2d 998 (1995), the Kentucky Supreme Court discussed the nature and viability of so-called "investigative hearsay." The Court condemned the attempted use of an overbroad investigative hearsay exception to the hearsay rule.

Perhaps it would help to state forcefully at the outset that hearsay is no less hearsay because a police officer supplies the evidence. In short, there is no separate rule, as such, which is an investigative hearsay exception to the hearsay rule.

Id. at 541. Nevertheless, the Court in Sanborn and later cases has recognized that information furnished to a police officer may be admissible if it is offered for any recognized nonhearsay purpose. See id. at 542; Moseley v. Commonwealth, Ky., 960 S.W.2d 460, 463 (1997) (statements by defendant admissible as admissions); Gordon v. Commonwealth, Ky., 916 S.W.2d 176, 179 (1995) (informant equipped with recording device for drug buy admissible); Releford v. Commonwealth, Ky., 860 S.W.2d 770, 771 (1993) (so-called "investigative hearsay" admissible where it is not offered to prove truth of the matter asserted).

A review of the record indicates that Officer Fegan's testimony was admissible. The testimony at issue involved oral statements made by the informant and Poe during three drug transactions. Officer Fegan was competent to testify about these statements because he heard them as they were being uttered. A

statement is not hearsay if it is not offered for the truth of the matter asserted. KRE 801(c). In addition, a statement by a party is not excluded by the hearsay rule when offered against the party who made it. KRE 801A(b). In the case at bar, Poe's statements made during the three (3) drug transactions constituted admissions and thus their admission into evidence did not violate the hearsay rule.

Officer Fegan's testimony concerning the informant's alleged statements poses a harder problem. It is arguable, as the Commonwealth maintains that these statements did not violate the hearsay rule because they were not offered for the truth of matter asserted, but rather, were introduced for the nonhearsay purpose of placing both the conversations and Poe's comments in context in order to make them understandable to the jury. See United States v. Catano, 65 F.3d 219, 225 (1st Cir. 1995); United States v. McDowell, 918 F.2d 1004, 1007 (1st Cir. 1990).

We need not decide this issue, however, for even if this portion of Officer Fegan's testimony should have been excluded as inadmissible hearsay, Poe would not be entitled to relief under the palpable error rule. The evidence against Poe was overwhelming; the outcome of his trial was not tainted by the alleged hearsay.

During the trial, the informant testified about his contact with Poe in setting up the three (3) drug transactions. He stated that Poe gave him the five (5) pounds of marijuana in exchange for \$7,800.00. More importantly, Poe testified that he met with the informant on each of the three (3) occasions and

exchanged the marijuana for money. Poe's own testimony was consistent with that of the informant and Officer Fegan.

A person is guilty of trafficking in marijuana when he, inter alia, sells, transfers, or possesses it with the intent to distribute or sell. KRS 218A.010(24). For the purposes of KRS Chapter 218A, "sell" means to dispose of a controlled substance, including marijuana, to another person for consideration, and "transfer" means to dispose of a controlled substance to another person without consideration. KRS 218A.010(22) and (25). Despite his claim that he was merely acting as a courier or middleman for a third party, Poe's own admissions at trial were sufficient to support a finding that he had trafficked in marijuana. See Commonwealth v. Day, Ky., 983 S.W.2d 505 (1999) (defendant's admissions at trial that he transferred cocaine to informant on two occasions subjected him to conviction on trafficking rather than possession or criminal facilitation). Clearly, Poe has failed to establish manifest injustice by demonstrating a substantial possibility that the result of the trial would have been different without Officer Fegan's testimony.

For the foregoing reasons, we affirm the judgment of the Bracken Circuit Court.

ALL CONCUR.

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