

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 1998-CA-001695-MR

KEVIN A. WEATHERS

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE JAMES KELLER, JUDGE  
ACTION NO. 98-CR-00491

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING  
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BEFORE: EMBERTON, GUIDUGLI AND SCHRODER, JUDGES.

GUIDUGLI, JUDGE. Kevin A. Weathers (Weathers) appeals from a final judgment of conviction and sentence of imprisonment, based on a jury verdict in the Fayette Circuit Court entered July 1, 1998, finding him guilty of Count One: first-degree trafficking in a controlled substance and a motion to waive sentencing by jury and guilty plea to Count Two: persistent felony offender second degree (PFO II), sentencing him to ten years in a correctional facility. We affirm.

On March 26, 1998, Detective James Ensminger (Ensminger) and Detective Lynne Thompson (Thompson) participated

in an undercover surveillance operation in the area of Third and Race Streets in Lexington. When they arrived at their destination, they parked the surveillance van next to a vacant Toyota Tercel. A short time later, Weathers approached the Toyota, opened the door and sat down with his feet hanging outside the car. Ensminger observed Weathers pulling a plastic bag from the door handle, the contents of which appeared to be "rocks" of crack cocaine. Ensminger observed Weathers placing the "rocks" into the hands of an unknown male who approached the vehicle. Ensminger did not see any money transferred between the two men, and the unknown male left the area and was not arrested. Ensminger did not arrest the unknown male because an immediate arrest would have "blown their cover."

Ensminger then observed Weathers replace the plastic bag in the door. Weathers grabbed a second bag, briefly examined it and then replaced it in the door as well. Weathers then walked away. In a continuing effort to maintain secrecy of the surveillance van, Ensminger called in uniformed police officers to arrest Weathers. The uniform officers arrived, detained Weathers and secured the Toyota. Ensminger and Thompson drove to a nearby fire station and Ensminger doubled back to the scene. Although Weathers denied both ownership and knowledge of the Toyota, he was later linked to the Toyota independent of Ensminger's observations. A search of Weathers revealed the keys to the Toyota, a digital pager and \$429.00 in cash. The bulk of the cash was \$20 bills: nineteen \$20's, four \$10's, one \$5 and four \$1's. The plastic bags were observed in plain view and

confiscated. The plastic bags contained white powder, later confirmed through laboratory tests as cocaine. No items of drug paraphernalia were found.

On May 5, 1998, Weathers was indicted by a Fayette County Jury for Trafficking in a Controlled Substance in the First Degree and Persistent Felony Offender in the Second Degree.<sup>1</sup> Weathers was tried before a jury on June 8, 1998. At trial the Commonwealth presented eight witnesses, but the bulk of its case rested upon the testimony of Ensminger. In addition to recounting the events of March 26, 1998, Ensminger testified that, in reference to the large amount of \$20's found on Weathers, the standard selling price for crack is in increments of \$20. Further, he concluded that, based upon his observation of the hand to hand transfer and Weather's possession of a beeper and large amounts of cash, Weathers was trafficking in cocaine. The trial court instructed the jury that Weathers could be found guilty of Trafficking by either transfer of a controlled substance, or, in the alternative, possession with the intent to sell. Weathers objection to this instruction was overruled. The jury returned a guilty verdict plea to PFO II in exchange for a total sentence of ten years. This appeal followed.

Weathers argues on appeal that the trial court erred by denying his motion for a directed verdict. He argues that he could not have been found guilty of Trafficking in a Controlled Substance because: 1) the Commonwealth could not prove the

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<sup>1</sup>Weathers had previously been convicted of a felony in the state of Georgia.

"transfer" of a controlled substance because the "rocks" were not recovered by the police officers, and 2) the Commonwealth did not charge him with "possession with intent to sell" in the indictment. However, ultimately, Weathers argues that he was denied a unanimous verdict by virtue of the alternative jury instruction. We disagree.

The Kentucky Supreme Court articulated the standard for determining when a directed verdict is warranted in Commonwealth v. Benham, Ky., 816 S.W.2d 186, 187 (1991). In Benham, the Supreme Court held that:

On a motion for directed verdict, the trial court must draw all 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 purposes 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.

On appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal.

Id. at 187. We believe the Commonwealth presented sufficient evidence to warrant a guilty verdict and, thus, a directed verdict was not warranted.

The offense of trafficking in cocaine in the first degree is defined in KRS 218A.1412, which states in relevant part:

A person is guilty of trafficking in a controlled substance in the first degree when he knowingly and unlawfully traffics in: a controlled substance....

The term "traffic" is defined by KRS 218A.010(24) as follows:

"Traffic" means to manufacture, distribute, dispense, sell transfer or possess with intent to manufacture, distribute, dispense, or sell a controlled substance. (emphasis added).

Therefore, both the "transfer" of a controlled substance or the possession of a controlled substance with the intent to sell are sufficient to warrant a conviction for trafficking in a controlled substance in the first degree.

Although circumstantial, the Commonwealth presented sufficient evidence under its "transfer" theory of the case to overcome a directed verdict. In Kentucky, the offense of trafficking in a controlled substance may be proven by circumstantial evidence. Faught v. Commonwealth, Ky., 656 S.W.2d 740 (1983). Ensminger testified that he observed Weathers transfer what appeared to be crack cocaine to an unknown male who left the scene. He watched the transfer from no more than two feet away. He further testified that Weathers possessed both a digital pager and large amounts of cash. This Court, in Jett v. Commonwealth, Ky. App., 862 S.W.2d 908 (1993) (overruled on other grounds by Weaver v. Commonwealth, Ky., 955 S.W.2d 722 (1997)), held that evidence of phone pagers and large amounts of cash was relevant circumstantial evidence of trafficking. Finally, Ensminger testified that the cash was mostly in \$20 denominations, which coincides with the standard price for crack. Based upon this evidence, viewed in a light most favorable to the Commonwealth, a reasonable jury could have found that Weathers was trafficking in cocaine.

Weathers argues that the Commonwealth's failure to produce the "rocks" of crack cocaine at trial required a directed verdict in his favor on the "transfer" theory of the case. However, this argument must fail pursuant to our holding in Howard v. Commonwealth, Ky. App., 787 S.W.2d 264 (1989). In Howard, we held that the marijuana that the defendant had attempted to sell was not required to be produced at trial to support his trafficking conviction. The police, during a surveillance operation, had observed Howard attempting to sell marijuana to a buyer. However, in order not to "blow their cover" the police did not arrest Howard at that time. As a result, the Commonwealth could not produce the marijuana during Howard's visit.

The facts of the case sub judice are similar to Howard. Ensminger observed Weathers transfer what appeared to be crack cocaine to an unknown male. However, in order not to jeopardize the surveillance operation, Weathers and the unknown male were not arrested at that time. As a result, the Commonwealth could not produce the crack cocaine during the trial. However, pursuant to our ruling in Howard, Weathers was not entitled to a directed verdict based upon the Commonwealth's inability to produce the crack cocaine at trial. There was sufficient circumstantial evidence to justify sending the case to the jury.

Ultimately, Weathers argues that the alternative jury instruction denied him a unanimous verdict. The relevant portion of the instruction states that the jury will find Weathers guilty

under this instruction if it believes beyond a reasonable doubt that:

- A. That in this county on or about 26<sup>th</sup> [sic] day of March, 1998, he transferred a quantity of cocaine to another person OR he had in his possession a quantity of cocaine with the intent to sell it to another person;....

The law is clear that a jury verdict in a criminal case must be unanimous. KRS 29A.280(3). However, the law is equally clear that:

[A] verdict cannot be successfully attacked upon the ground that the jurors could have believed either of two theories of the case where both interpretations are supported by the evidence and the proof of either constitutes the same offense.

Wells v. Commonwealth, Ky., 561 S.W.2d 85, 88 (1978). See also, Bedell v. Commonwealth, Ky., 870 S.W.2d 779 (1993); Davis v. Commonwealth, Ky., 967 S.W.2d 574 (1998).

The Commonwealth produced sufficient evidence for a reasonable jury to find Weathers guilty of trafficking in a controlled substance either for transferring crack cocaine or possession of cocaine with the intent to sell. Either theory supports a conviction for trafficking in a controlled substance in the first degree pursuant to KRS 218A.1412 and KRS 218A.010(24). Therefore, the trial court did not deny Weathers a unanimous verdict by allowing the jury to consider guilt under the alternative instruction.

For the foregoing reasons, the decision of the trial court is affirmed.

ALL CONCUR.

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