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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-002288-MR

CALVIN ABBOTT — APPELLANT

v.

APPEAL FROM OHIO CIRCUIT COURT
HONORABLE RONNIE C. DORTCH, JUDGE
ACTION NO. 98-CR-00008

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING IN PART; REVERSING IN PART AND REMANDING
** ** ** ** **

BEFORE: GUDGEL, CHIEF JUDGE; BUCKINGHAM AND JOHNSON, JUDGES.

JOHNSON, JUDGE: Calvin Abbott has appealed from the judgment of conviction entered by the Ohio Circuit Court on September 17, 1998, which convicted him of conspiracy to traffic in a controlled substance in the second degree (methamphetamine)[1] and sentenced him to prison for a term of one year and fined him "a sum of $10,000.00 plus penalized an additional $5,000 to be forfeited to the Ohio County Sheriff's Department Drug Fund." Having concluded that the errors committed by the trial court in

[1]Kentucky Revised Statutes (KRS) 218A.1413.

allowing the detective during his testimony to interpret the surveillance tape and in allowing into evidence other inadmissible testimony were harmless errors, we affirm on those issues. Having concluded that the trial court did not err in allowing the paid informant to testify and in refusing to give a jury instruction on the defense of renunciation, we also affirm on those issues. Having concluded that the $10,000 fine was proper, we affirm as to the fine; however, we must reverse and remand as to the "$5,000 to be forfeited to the Ohio County Sheriff's Department Drug Fund."

During 1997, Kentucky State Police Detective Eric Walker retained the services of Brian Godak to work as a confidential informant during a series of controlled drug buys in Ohio County. Godak, who was an admitted drug addict, had burglary charges pending against him in Ohio County. The testimony revealed that in July 1997, Godak attempted to purchase one-eighth of an ounce[2] of methamphetamine[3] from Abbott for $300. After Godak had, in his words, "infiltrated" Abbott's life and in some ways befriended him, Godak asked Abbott to get him "an eight ball of crank."

At trial, the Commonwealth contended that Abbott conspired with Godak to sell Godak the crank by taking $300 from

[2]The quantity of one-eighth of an ounce is commonly referred to as "an eight ball."

[3]Methamphetamine is a Schedule II, non-narcotic drug that is commonly referred to as "crank."

him, by discussing the sale of crank with Godak, and by attempting, but failing, to obtain the drug from a supplier.[4] Abbott testified in his own defense and claimed that he had no intention to conspire with Godak to sell drugs, but was merely attempting to mislead Godak and to get Godak to leave him alone. The jury convicted Abbott of the conspiracy charge and recommended a one-year prison term. In addition to sentencing Abbott to prison for one year, the trial court also ordered that he be fined $15,000. This appeal followed.

The first issue that we address concerns the testimony of Det. Walker that consisted in part of his own interpretation of the tape recording that had been made of the events surrounding the alleged attempted drug buy on July 23, 1997. Before Godak left to meet with Abbott, Det. Walker searched Godak, provided him with $500 cash, and "wired" him with a concealed tape recorder and transmitting device. Det. Walker strategically located himself to observe Godak as much as possible and to hear Godak's conversations that were transmitted over the listening device. During Det. Walker's testimony, the Commonwealth introduced the surveillance audio tape into evidence and it was played for the jury.

In his brief, Abbott states that "[t]he trial court erred in permitting Detective Walker and Brian Godak to interpret the 'surveillance tape' after same had been played to the jury."

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[4]The Commonwealth alludes to Godak's son, Kevin, who lived near Abbott, as being the drug supplier.

Abbott relies on Gordon v. Commonwealth,[5] wherein our Supreme Court found error in the testimony of the paid informant and reversed a drug trafficking conviction.

> As with any participant in a conversation, the informant witness was entitled to testify as to his recollection of what was said. In this case the tape recording was played for the jury. Thereafter, the witness gave his recollection of the salient portions of the conversation and then, upon replay of a portion of the tape, the witness was asked if he could hear it. When he answered "yes," he was then asked what he said. Unresponsively, he answered,
>
> > Yes, I went and asked Maurice if he had any stuff. And he told me yes. And I told him I wanted a fifty dollar piece. And he gave it to me. And I said, alright, I sure thank you, Maurice.
>
> From our examination of the transcript, it is apparent that the witness purported to interpret the tape recording rather than testify from his recollection. This was in error. Upon retrial, the court must determine whether the tape should be admitted and, of course, the witness should be permitted to testify. The court should refrain, however, from permitting the witness to interpret what is on the tape. It is for the jury to determine as best it can what is revealed in the tape recording without embellishment or interpretation by a witness [citation omitted].[6]

Unfortunately, in the case sub judice, Abbott fails to clearly set forth the testimony that he finds objectionable. In the three pages of his brief that Abbott devotes to this issue, he makes reference to various parts of the video record; but he

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[5]Ky., 916 S.W.2d 176 (1995).

[6]Id. at 180.

fails to specify the testimony that he finds objectionable. In an effort to give Abbott a thorough review of his appeal, we have reviewed the video record in toto.

Our review of the record demonstrates that before the surveillance audio tape was played for the jury, Det. Walker testified from his notes and made several references to what "you could hear on the tape;" and that while the surveillance audio tape was being played for the jury, Det. Walker stopped the audio tape on several occasions for the purpose of further explaining what had been said on the audio tape. While Godak also made reference to the audio tape during his testimony, the audio tape was not played during his testimony. Since all the citations to the record that were provided by Abbott concerning this issue refer to Det. Walker's testimony, we will address only his testimony.

The Commonwealth responds to Abbott's argument by misstating the record.

> The Commonwealth's witnesses in the case at bar testified from their recollection. Det. Walker testified from recollection to what he observed and heard through the real-time electronic transmitter of the conversation between Informant Godak and appellant. He played the tape and made comments, based on his recollection, about the terrain and events happening during the meeting between the appellant and the informant, not about the contents on the tape. The tape was not played during the examination of Informant Godak. Det. Walker testified about the drug transaction from his recollection of the events. There was no interpretation of the tape. Therefore, there was no error [citation to record omitted].

Clearly, the record shows that Det. Walker interpreted the tape on several occasions; and counsel for Abbott objected several times to this improper commentary by Det. Walker. Abbott first raised his concerns in this regard when he filed a motion in limine. Even though the trial court in ruling on Abbott's motion said, "you can't interpret the tape Detective Walker," during Det. Walker's testimony the trial court overruled all of Abbott's objections. On one occasion when the trial court addressed Abbott's objection, it erroneously instructed Det. Walker to "just say, 'the tape says.'" Thus, the trial court failed to draw a distinction between what Det. Walker actually heard in real time from the listening device and what he heard at a later time from the recording device.

As our Supreme Court stated in Gordon, supra, "it is apparent that the witness purported to interpret the tape recording rather than testify from his recollection. This was in error." However, since Abbott testified in his own behalf and did not challenge Det. Walker's interpretation of the tape recording, this error was harmless.[7] Abbott, in fact, admitted

[7]Kentucky Rules of Criminal Procedure (RCr) 9.24, the "harmless error" rule, states: "No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order, or in anything done or omitted by the court or by any of the parties, is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order unless it appears to the court that the denial of such relief would be inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding that does not affect the substantial rights of the parties."

that he took $300 from Godak on two separate occasions on July 23, 1997, and that Godak wanted to buy some crank. It was Abbott's defense that he was duping Godak; that he had no intention of ever selling Godak crank and was only going along with Godak to "get rid of him." Since the content of the conversations between Abbott and Godak was not really in issue, the improper commentary by Det. Walker was harmless error, and we affirm on this issue.

In the same section of Abbott's brief where he made his argument concerning the interpretation of the tape, he also makes various references to what he claims were the erroneous admissions of other testimony. These include: (1) "Detective Walker at one point referred to the Defendant [ ] as being someone who the confidential informant had dealt with in the past when the confidential informant was an addict[;]" (2) "When Brian Godak testified, he immediately stated the Defendant was a person from whom he had purchased marijuana previously[;]" (3) "Brian Godak then testified [ ] he knew Defendant's son, Kevin Abbott, by stating [,] 'he is supposed to be a drug dealer[;]'" (4) "Detective Walker [ ] advise[d] the jury that Defendant was arrested and promptly made a $25,000.00 cash bond[;]" and (5) "Det. Walker advised the jury [ ] that Defendant had made a statement on the tape that he may wish to purchase marijuana from the confidential informant, and some discussion ensued regarding

the 'cooking of meth.'"[8] Abbott claims that under KRE[9] 404(c) none of this testimony was admissible because the Commonwealth failed "to give reasonable pre-trial notice to [the] Defendant of their intention to introduce evidence of other crimes, wrongdoings or acts." We agree with Abbott that each of these objections should have been sustained, but we believe so for different reasons.

Det. Walker's statement that Godak knew Abbott because he had dealt with him in the past when Godak was an addict constituted inadmissible investigative hearsay.[10] The fact that there had been a prior relationship between Godak and Abbott should have been, and was, testified to by Godak. Since Abbott claimed that he was entrapped by Godak, and received an instruction on entrapment, evidence of any prior drug dealing between the two was clearly relevant.[11] Since Godak did in fact testify to this same evidence, the trial court's error in allowing Det. Walker to testify to this hearsay was harmless error.

As to the second objection, Abbott is correct that any

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[8]Abbott did not include this last issue in the argument section of his brief, but only raised it in his statement of the case.

[9]Kentucky Rules of Evidence.

[10]Gordon, supra at 179; Sanborn v. Commonwealth, Ky., 754 S.W.2d 534, 541 (1988).

[11]See Fuston v. Commonwealth, Ky.App., 721 S.W.2d 734, 735 (1986).

allegation that he had previously sold marijuana to Godak should have been disclosed as a prior bad act under KRE 404(c). The fact that this alleged prior bad act may have been admissible to refute the entrapment defense does not eliminate the need for disclosure.[12] However, since Abbott was claiming entrapment and his prior relationship with Godak was relevant, we believe any error was harmless.

Godak's testimony that he knew Kevin Abbott as someone who "supposedly [is] a drug dealer" was also improper. When Godak blurted out this statement, Abbott's counsel moved for a mistrial. The Commonwealth's Attorney responded by saying that he expected Godak to merely state that Kevin Abbott was Calvin Abbott's son. The trial court denied the motion for a mistrial and Abbott requested no further relief. We agree that the witness' answer was not responsive to the Commonwealth's question and that the testimony was clearly improper. However, we cannot conclude that the trial court abused its discretion in refusing to grant a mistrial. The trial judge was in the unique position to determine whether a mistrial was required.[13] We cannot conclude that the record reveals "'a manifest necessity for such

[12]Apparently the trial court permitted this testimony to allow the Commonwealth to establish that Godak knew Abbott and could identify him. This was erroneous since Abbott's identity as not in issue.

[13]Grimes v. McAnulty, Ky., 957 S.W.2d 223, 228 (1997).

an action or an urgent or real necessity.'"[14]

Det. Walker's testimony concerning Abbott making "a $25,000.00 full cash bond" when he was arrested on February 12, 1998, was also clearly improper. However, Abbott's counsel told the trial court, "I don't want an admonition to the jury. I want it struck from the tape." What counsel meant by this is unclear, but clearly he did not ask for a mistrial. The trial judge did admonish the jury as follows: "Ladies and Gentlemen, the last remark by Detective Walker shall have no bearing upon [your] deliberation in this matter." Based on this objection, the trial court provided Abbott with the only relief that was appropriate. The remark could not be "struck from the tape." Since Abbott did not request a mistrial, he has not preserved that issue for our review.

As to the fifth issue, Abbott claimed that any testimony concerning his interest in buying marijuana or in "cooking of meth" was inadmissible as uncharged bad acts under KRE 404(c) and that under KRE 403 its probative value was outweighed by its prejudicial effect. The trial court ruled that the probative value of this evidence outweighed its prejudicial effect and overruled the objection. Abbott fails to state in his brief why this ruling by the trial court was erroneous and how any error would be harmful; and we cannot say that the trial

[14] Skaggs v. Commonwealth, Ky., 694 S.W.2d 672, 678 (1985)(quoting Wiley v. Commonwealth, Ky.App., 575 S.W.2d 166 (1969); Brown v. Commonwealth, Ky., 558 S.W.2d 599 (1977)).

court abused its discretion in allowing the evidence. Thus, we affirm the trial court on all five evidentiary rulings.

Abbott also claims the trial court erred in denying his motion in limine to prohibit the Commonwealth from calling Godak as a witness. The Commonwealth concedes that it failed to comply with the trial court's discovery order by not timely disclosing that Godak was the confidential informant. The trial judge stated to Abbott's counsel that if he did not know that Godak was the confidential informant, he "would probably be the only one in the county" who did not know it.

Abbott's counsel agreed and stated:

> That was my assumption, and I have prepared a subpoena based on that assumption. But, technically I don't think we are suppose to have to assume that. They are under the obligation to provide the name if they intend to use the witness; and they just simply haven't done so.

The trial judge responded:

> That is correct. And if there is any prejudice to you, simply let me know and I will give you a continuance of whatever time is necessary to investigate any prejudicial conduct or actions that may have occurred by the Commonwealth's failure to provide that name.

Abbott never requested a continuance and has not shown any prejudice from this discovery violation. Clearly, the trial court acted properly when, pursuant to RCr 7.24(9), it offered Abbott a continuance to allow him additional time to prepare for this witness who had not been properly disclosed during discovery. There is no merit to Abbott's argument, and we affirm

on this issue.

Abbott further claims that the trial court erred when it refused to give his proposed jury instruction on the defense of renunciation, which stated: "That the Defendant did not manifest a voluntary and complete renunciation of his criminal purpose before the crime of trafficking in a controlled substance second degree was committed." KRS 506.060 provides:

> (1) In any prosecution for criminal solicitation or criminal conspiracy in which the crime solicited or the crime contemplated by the conspiracy was not in fact committed, it is a defense that, under circumstances manifesting a voluntary and complete renunciation of his criminal purpose, the defendant prevented the commission of the crime.
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> (2) A renunciation is not "voluntary and complete" within the meaning of this section when it is motivated in whole or in part by:
>
> (a) A belief that circumstances exist which pose a particular threat of apprehension or detection of the accused or another participant in the criminal enterprise or which render more difficult the accomplishment of the criminal purpose; or
>
> (b) A decision to postpone the criminal conduct until another time or to transfer the criminal effort to another victim or another but similar object.

In his brief, Abbott claims

> that since he had returned the funds to the confidential informant and since there was no agreement to postpone their conspiracy to a later date or to transfer the criminal effort to another victim or object, the Defendant renounced his intention to conspire.

However, Abbott also admits that he is not aware of any Kentucky case law that supports his position.

> Defendant is unable to find any specific Kentucky case law on this point however, [sic] feels that denial of the trial Judge to instruct on a renunciation defense was fundamentally unfair to this Defendant and warrants reversal of his conviction.

We agree with the Commonwealth that Abbott clearly was not entitled to a renunciation instruction. The Commonwealth's theory of the case was that the only reason Abbott did not complete the sale was because he was unable to obtain the drugs. Abbott's defense was that he was not predisposed to, and never intended to, supply the drugs to Godak and was merely trying to mislead him and to get rid of him. Since neither version of the evidence supports a renunciation instruction, we affirm on this issue.[15]

Additionally, Abbott contends that he is entitled to a reversal of his conviction and a new trial because of the cumulative effect of the various errors that occurred. While we agree with Abbott that several errors did occur, we cannot conclude as a whole that these errors were such that denying Abbott a new trial is inconsistent with substantial justice. We conclude that such errors did not affect Abbott's substantial

[15]See Trimble v. Commonwealth, Ky., 447 S.W.2d 348, 350 (1969).

rights, and we affirm his conviction.[16]

Finally, we affirm Abbott's sentence in part and reverse and remand in part. As conceded by the Commonwealth, under KRS 534.030 (1) the statutory maximum fine for a person convicted of a felony was $10,000.00. Even though the jury was not instructed concerning a fine, the trial court was within its authority to impose the statutory maximum.[17] Thus, we affirm the one-year prison sentence and the $10,000 fine. However, the trial court exceeded its authority when it ordered "[t]hat in addition to the defendant's sentence, the defendant is hereby fined a sum of $10,000.00 plus penalized an additional $5,000.00 to be forfeited to the Ohio County Sheriff's Department Drug Fund."[18] Since there is no statutory basis for this $5,000 "forfeiture," we reverse and remand on this issue.[19]

Accordingly, Abbott's conviction is affirmed; but the judgment is vacated as to the sentence imposing a fine of $15,000, and this matter is remanded for the trial court, within its discretion if it should so choose, to impose a fine consistent with KRS 534.030(1).

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[16]RCr 9.24; Bowling v. Commonwealth, Ky., 942 S.W.2d 293, 308 (1997).

[17]See Simpson v. Commonwealth, Ky., 889 S.W.2d 781, 783-84 (1994).

[18]The trial court apparently recognized that the sentence was contrary to law since the trial judge stated, "Probably if you challenged that, that would be overturned."

[19]This was not a forfeiture within the meaning of KRS 218A.405 to 218A.460.

ALL CONCUR.

BRIEF FOR APPELLANT:

Dan Jackson
Hartford, KY

BRIEF FOR APPELLEE:

A.B. Chandler, III
Attorney General

Brian T. Judy
Assistant Attorney General
Frankfort, KY