RENDERED: October 13, 2000; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-001948-MR

REGINALD V. YOUNG — APPELLANT

v.

APPEAL FROM HARRISON CIRCUIT COURT
HONORABLE ROBERT W. MCGINNIS, JUDGE
ACTION NO. 98-CR-00015

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING
** ** ** ** **

BEFORE: COMBS, JOHNSON AND McANULTY, JUDGES.

JOHNSON, JUDGE: Reginald V. Young has appealed from the final judgment entered by the Harrison Circuit Court on July 24, 1998, that convicted him of two counts of trafficking in a controlled substance in the first degree (cocaine),[1] convicted him as a persistent felony offender in the second degree (PFO II),[2] and sentenced him to two 15-year prison terms to run concurrently.

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[1]Kentucky Revised Statutes (KRS) 218A.1412.

[2]KRS 532.080(2).

Having concluded that the trial court did not abuse its discretion in refusing to sever the two counts for trafficking for separate trials, we affirm.

Young was indicted by the Harrison County Grand Jury on May 1, 1998, on one count of trafficking in cocaine for a sale that allegedly occurred on January 3, 1997, and on a second count of trafficking in cocaine for a sale that allegedly occurred on May 1, 1997, and for being a PFO II. On June 18, 1998, Young moved the trial court for separate trials on the trafficking charges pursuant to RCr[3] 9.16. In his motion, Young alleged the following:

> 2. In addition to the Persistent Felony Offender offense, the Defendant is charged with two (2) separate offenses of violation of KRS Chapter 218A.1412,

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[3]Kentucky Rules of Criminal Procedure 9.16 provides:

> If it appears that a defendant or the Commonwealth is or will be prejudiced by a joinder of offenses or of defendants in an indictment, information, complaint or uniform citation or by joinder for trial, the court shall order separate trials of counts, grant separate trials of defendants or provide whatever other relief justice requires. A motion for such relief must be made before the jury is sworn or, if there is no jury, before any evidence is received. No reference to the motion shall be made during the trial. In ruling on a motion by a defendant for severance the court may order the attorney for the Commonwealth to deliver to the court for inspection in camera any statements or confessions made by the defendants that the Commonwealth intends to introduce in evidence at the trial.

trafficking in a controlled substance in the first degree, one occurring on January 3, 1997, and the other occurring on May 1, 1997.

3. The transactions were not closely related in time, there being four (4) months between the occurrences.

4. Two (2) different confidential informants were involved in the alleged transactions, which occurred in two (2) different locations.

5. While technically correct under RCr 6.18, as the offenses are of the same or similar character, they are not based on the same acts or transactions connected together, nor do they constitute parts of a common scheme or plan.

6. It is respectfully submitted that to try the Defendant on two (2) separate trafficking in drugs charges would unduly prejudice his right to fair trials, as the cumulative effect of the evidence may tend to influence the jury when, as a matter of evidentiary law, were the offenses to be tried separately, evidence of one transaction would be inadmissible in the trial of the other, at least in the first phase of the trial.

On June 23, 1998, the trial court summarily denied Young's motion for separate trials.

At the jury trial held on July 10, 1998, the Commonwealth's witnesses included Kentucky State Police (KSP) Troopers Steven K. Owen and Robert Wilson; paid informants William C. Banks and Susan Wornall; and KSP evidence and crime lab personnel. The jury convicted Young on both trafficking counts and the PFO II charge. The jury recommended a 15-year

prison sentence on each of the PFO enhanced trafficking convictions, with the sentences to run concurrently. The trial court sentenced Young in accordance with the jury's recommendation and this appeal followed.

The only issue raised on appeal concerns the trial court's denial of the motion for separate trials. In his brief, Young states:

> The Appellant concedes that for the purposes of RCr 6.18 the indictment is technically correct insofar as the offenses charged involve allegations of violation of the same statute. The facts, however, do not meet the requirement that the [ ] two charged offenses be based on the same acts or transactions connected together, or constituting parts of a common scheme or plan. The acts [alleged] to have been committed by the Appellant are separated by almost five months in time; are [alleged] to have occurred at different locations in Harrison County, Kentucky, one at the residence of Theodore Custard, in Cynthiana and the other at the residence of Robert Commodore, also in Cynthiana, but different; involve different parties in attendance at each location, and most importantly, are very different in regard to the acts [alleged] to have been performed by the Appellant. In the January 1, 1997 instance, the seller was admitted to be Theodore Custard at his residence, with the acts of the Appellant [alleged] to have been minimal, by handing contraband to the informant, William Banks. Taken at it's [sic] fullest for the prosecution, the Appellant did no more [than] assist Mr. Custard in a chance sale of some of Mr. Custard[']s cocaine. In the May 1, 1997 instance, the Appellant was the [alleged] owner and seller of the contraband to Susan Wornall, at the residence of another named party, who was not identified as being present. The only inferances [sic] that can be drawn from one instance and applied to the other is that the Appellant was disposed to

> commit both. There is no special connection between the two that would warrant their joinder. Keith v. Commonwealth, Ky.[,] 251 S.W.2d 850 (1952).

The Commonwealth argues that the trial court did not abuse its discretion[4] in denying the motion for separate trials. We agree. In Spencer v. Commonwealth,[5] our Supreme Court stated:

> The granting or denial of a motion for separate trials is a discretionary function of the trial court. A conviction resulting from a trial in which such a motion has been denied will be reversed on appeal only if the refusal of the trial court to grant such a severance is found to amount to a clear abuse of discretion and prejudice to the defendant is positively shown. Russell v. Commonwealth, Ky., 482 S.W.2d 584 (1972). In determining whether a joinder of offenses for trial is prejudicial, a significant factor to be considered is whether the evidence of one of the offenses would be admissible in a separate trial for the other offense. If the evidence is admissible, the joinder of offenses, in most instances, will not be prejudicial. Marcum v. Commonwealth, Ky., 390 S.W.2d 884 (1965). It is well established that evidence of the commission of crimes independent of those for which the accused is on trial is not admissible for the purpose of showing the commission of the particular crime charged unless the evidence of the other offenses has some special connection to the crime charged. Keith v. Commonwealth, Ky., 251 S.W.2d 850 (1952). To be admissible, in other words, the evidence must be relevant to the issues in some manner other than in proof of a general criminal disposition in the accused to commit the

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[4]"'Abuse of discretion in relation to the exercise of judicial power implies arbitrary action or capricious disposition under the circumstances, at least an unreasonable and unfair decision.'" . . . "The exercise of discretion must be legally sound." Kuprion v. Fitzgerald, Ky., 888 S.W.2d 679, 684 (1994).

[5]Ky., 554 S.W.2d 355, 357-58 (1977).

> particular crime. For example, as was recognized in Ringstaff v. Commonwealth, Ky., 275 S.W.2d 946, 949-950 (1955), evidence of an independent crime ". . . is competent when it tends to establish identity, or knowledge of guilt, or intent or motive for the commission of the crime under trial, or malice, or when other offenses are so connected or interwoven with the one being tried that they cannot well be separated from it in the introduction of relevant testimony, or when the independent offense was perpetrated to conceal the crime for which the accused is on trial, or committed by novel means, or in a particular manner, or is a part of a plan or system of criminal action."

The Supreme Court in O'Bryan v. Commonwealth,[6] provided an excellent summary concerning the admissibility of evidence of other crimes.[7]

> Evidence of the commission of other crimes, generally speaking, is not admissible to prove that an accused is a person of criminal disposition. Arnett v. Commonwealth, Ky., 470 S.W.2d 834 (1971); Pankey v. Commonwealth, Ky., 485 S.W.2d 513 (1972). See, also, Lawson, Kentucky Evidence Law Handbook, § 2.20. The reasons for the rule are salutary. Ordinarily, such evidence does not tend to establish the commission of the crime. It tends instead to influence the jury, and the resulting prejudice often outweighs its probative value. Ultimate fairness mandates that an accused be tried only for the particular crime for which he is charged. An accused is entitled to be tried for one offense at a time, and evidence must be confined to that offense. Pankey, supra. The rule is based on the fundamental demands of justice and fair play.

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[6]Ky., 634 S.W.2d 153 (1982).

[7]See Kentucky Rules of Evidence 404(b).

> However, as with all good rules there are certain exceptions [footnote omitted]. Evidence of the commission of crimes other than the one charged is admissible if, (1) it is offered to prove motive, intent, knowledge, identity, plan or scheme, or absence of mistake or accident; (2) such evidence is relevant to the issues other than proof of a general criminal disposition, and (3) the possibility of prejudice to the accused is outweighed by the probative worth and need for the evidence. Rake v. Commonwealth, Ky., 450 S.W.2d 527 (1970); Lindsay v. Commonwealth, Ky., 500 S.W.2d 786 (1973); Hendrickson v. Commonwealth, Ky., 486 S.W.2d 55 (1972). Arnett v. Commonwealth, supra.
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> The application of the exceptions to the general rule should be closely watched and strictly enforced because of the dangerous quality and prejudicial consequences of this kind of evidence. Jones v. Commonwealth, 303 Ky. 666, 198 S.W.2d 969 (1947). Before evidence of other crimes can be admitted to show a scheme, plan or system, the evidence must show acts, circumstances or crimes similar to, clearly connected with, and not too remote from the one charged, Holt v. Commonwealth, Ky., 354 S.W.2d 30 (1962).[8]

In order to show that the two crimes were sufficiently connected, the Commonwealth relies upon Howard v. Commonwealth,[9] where this Court affirmed a conviction for trafficking in marijuana. Howard was indicted in Warren County for allegedly offering to sell a pound of marijuana on September 17, 1987. The trial court allowed the Commonwealth to introduce testimony that Howard "sold a pound of marijuana to an undercover policeman in Hart County approximately four months after the offense for which

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[8]O'Bryan, supra at 156-57.

[9]Ky.App., 787 S.W.2d 264 (1989).

he was indicted." At the time of the trial, Howard had not been indicted in Hart County. In affirming the conviction, this Court stated:

> One of the exceptions is evidence of a plan, scheme or system. "[T]he evidence must show acts, circumstances or crimes similar to, clearly connected with, and not too remote from the one charged. . . ." O'Bryan v. Commonwealth, [supra]. Applying this rule to the facts before us we believe this evidence to be admissible. Appellant was on trial for trafficking in marijuana. Proof of another sale four months later is evidence of a "crime similar to, clearly connected with, and not too remote from the one charged." It is, therefore, evidence of a plan, scheme or system and could be considered by the jury in determining appellant's guilt or innocence of the crime with which he was charged.[10]

In the case sub judice, the Kentucky State Police were involved in a drug investigation in Harrison County during 1997. The police were using paid informants, such as Banks and Wornall, to make controlled drug buys. When Banks and Wornall went to buy drugs, they were searched, given money for the drug purchase and "wired" with an audio transmitter and microcassette recorder.

The Commonwealth's evidence supported a finding that on the night of January 3, 1997, Young sold crack cocaine to Banks for $80.00. Young and Banks were at the residence of Theodore Custard which was located on West Mill Street in Cynthiana. Banks testified that Custard told Young to "give him 80 of mine;" and that Young gave Banks crack cocaine "out of his sweats." The lab report showed the substance to be 0.322 gram of cocaine.

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[10] Id. at 266.

However, since neither Custard nor Young would take the $80.00, Banks laid it on a table.

The Commonwealth's evidence also supported a finding that on the night of May 1, 1997, Young sold crack cocaine to Wornall for $100.00. Young was at the residence of Robert Commodore which was located on Water Street in Cynthiana. Wornall testified that she met Lee Custard and Marcellus Custard and they went to Commodore's house. Wornall claimed that while she stood next to the residence's yard she gave Young $100.00 over the fence and he gave her crack cocaine. The lab report showed the substance to be 0.432 gram of cocaine.

Based on all the evidence of record, we hold that the two drug transactions involving Young were sufficiently similar and not too remote whereby each transaction was relevant evidence of a plan, scheme or system to traffick in crack cocaine. Both transactions occurred in Cynthiana, at night, either in or near a private residence other than Young's residence. On both occasions the paid informant paid cash for a similar quantity of crack cocaine that Young allegedly had on his person. The transactions occurred approximately four months apart. Based on these similarities, we cannot hold that the trial court abused its discretion in denying the motion for separate trials. Certainly, a different trial judge may have granted the severance, but the decision to deny separate trials was based on sound legal principles and was not unreasonable and unfair.

Accordingly, the judgment of the Harrison Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Thomas F. Towles
Georgetown, KY

BRIEF FOR APPELLEE:

A.B. Chandler, III
Attorney General

Michael G. Wilson
Assistant Attorney General
Frankfort, KY