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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-002235-MR

TIMOTHY E. MACKEY — APPELLANT

v.

APPEAL FROM MUHLENBERG CIRCUIT COURT
HONORABLE DAVID H. JERNIGAN, JUDGE
ACTION NO. 99-CR-00043

COMMONWEALTH OF KENTUCKY — APPELLEE

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

BEFORE: BUCKINGHAM, JOHNSON AND MILLER, JUDGES.

JOHNSON, JUDGE: Timothy E. Mackey has appealed from the judgment of the Muhlenberg Circuit Court that convicted him of the offenses of possession of a controlled substance (methamphetamine),[1] possession of drug paraphernalia,[2] and as a

[1]Kentucky Revised Statutes (KRS) 218A.1415.

[2]KRS 218A.500.

persistent felony offender in the second degree (PFO II).[3] Having concluded that any errors that occurred at trial were either harmless or were not preserved and not palpable, we affirm.

On March 10, 1999, a Muhlenberg County grand jury indicted Mackey for possession of methamphetamine, possession of drug paraphernalia, and PFO II. At the jury trial held on July 30, 1999, the Commonwealth's evidence in the guilt phase of the trial included the testimony of Muhlenberg County Sheriff Jerry Mayhugh; Deputy Charles Perry; Assistant Police Chief Darren Harvey; and Forensic Chemist William E. Bowers. Mackey's only witness was Deputy Perry. The jury convicted Mackey of all three charges and recommended five-year sentences for each of the two underlying convictions, which were then enhanced based on the PFO II conviction to six years each, with the sentences to run consecutively for a total of 12 years. The trial court entered a final judgment on August 24, 1999, and ordered a 12-year sentence. This appeal followed.

Mackey claims the Sheriff, the Deputy, and the prosecutor improperly referred to an anonymous tip that led the police to investigate allegations of possession of methamphetamine. While Mackey concedes that no objection was made concerning the references to the anonymous tip and that the issue was not otherwise preserved for appellate review, he claims

[3]KRS 532.080.

that the reference to and admission of this evidence constituted palpable error under RCr 10.26.[4]

Sheriff Mayhugh, the Commonwealth's first witness, testified that on November 27, 1998, the Muhlenberg County Sheriff's Office received an anonymous tip that illegal drug activity was taking place in the Bremen area of Muhlenberg County. The tipster claimed that methamphetamine could be found in a truck owned by Larry Edmonds. Sheriff Mayhugh and Deputy Perry responded to the tip by going to the Bremen area in a patrol car. The officers testified that while they were conducting a patrol of the Bremen area, they observed Edmonds' truck and followed it.

Sheriff Mayhugh testified he was familiar with both Edmonds and Mackey; and he was able to observe Edmonds driving the truck and Mackey as a passenger. As they were following the truck, the officers detected the smell of ether, a chemical that Sheriff Mayhugh knew to be associated with the manufacturing of methamphetamine. Based upon the tip and the ether odor, the

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[4]RCr 10.26 provides:

> A palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error.

officers stopped the truck.

After stopping the truck and approaching it, the officers noticed that the smell of ether was becoming increasingly stronger. Sheriff Mayhugh testified that after Mackey exited the passenger side of the truck, he noticed an oblong hole in the floorboard on the passenger side of the truck and beside the hole was a fruit jar which contained a liquid he believed to be ether. Sheriff Mayhugh also discovered a camouflage jacket in the bed of the truck directly behind the passenger seat where Mackey had been sitting. The camouflage jacket matched the camouflage pants Mackey was wearing.[5] The camouflage jacket found in the truck bed contained methamphetamine, syringes, and rolling papers.

In the Commonwealth's opening statement, the Commonwealth's Attorney told the jury:

> This will not be either a lengthy or complicated trial. The evidence will establish that on November the 27th, last year, Deputy Perry received a telephone call concerning possible methamphetamine being in a truck that was owned by Larry Matthew Edmonds.

Mackey claims this statement by the Commonwealth's Attorney was improper because it was in reference to the following testimony from Sheriff Mayhugh and Deputy Perry, which he argues constituted inadmissible hearsay:

Commonwealth's Attorney:

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[5]Another jacket, which was found in the cab of the truck, belonged to Edmonds.

> Would you tell us the circumstances leading up to the initial stop of this vehicle?

Sheriff Mayhugh:

> We received an anonymous phone call saying that Mr. Edmonds would be going from point "A", which I think was in Gishton, to somewhere in Bremen, point "B", and we would find him driving down the road with probably a meth lab in his vehicle.
>
> . . .

Commonwealth's Attorney:

> Deputy, in that capacity, back on November 27, 1998, were you involved in a traffic stop in which Defendant Timothy Mackey was a passenger

Deputy Perry: Yes. I was.

Commonwealth's Attorney:

> Would you just tell us briefly what happened on that day and why - what occurred and what you did?

Deputy Perry: Yeah. I got a call into the office that there had been some illegal drug activity in a drug [sic] driven by Larry Edmonds.

Mackey argues that this testimony concerning the anonymous tip deprived him of his right to confront the witnesses against him pursuant to the Sixth and Fourteenth Amendments to the United States Constitution and Section 11 of the Kentucky Constitution. Mackey relies on Gordon v. Commonwealth,[6] where our Supreme Court held it to be reversible error to allow

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

testimony over the objection of the defendant which implicated the defendant as a drug dealer. However, we believe this case is both legally and factually distinguishable from Gordon, where the Court's analysis did not involve the palpable error rule. In Gordon, the testimony directly implicated the defendant; whereas the anonymous tip in this case did not mention Mackey.

The police in Gordon used a paid informant to make a controlled drug buy from a suspected dealer. The informant "had been 'wired' with a tape recorder [, but] this device essentially failed and produced a tape recording of poor quality. As such, the evidence at trial was hotly disputed." The informant "testified for the Commonwealth that he had made the cocaine purchase and [Gordon], testifying on his own behalf, denied it. Jury assessment of the witnesses' credibility was crucial."[7]

The Supreme Court discussed the hearsay testimony as follows:

> Appellant claims reversible error arising out of hearsay testimony given by Detective Robert Link on direct examination. The Commonwealth's first witness was Detective Link, a narcotics officer for the City of Russellville Police Department. Without objection, he testified that in the course of a county-wide investigation, he had reason to suspect appellant of drug trafficking. He was then asked how he proceeded to further investigate appellant. In response, Detective Link replied,
>
> > On June 4 we did what's called preliminary surveillance of the area around Sportman's Lounge at Fifth and

[7] Id. at 178.

> Morgan, which we had had quite a bit of drug activity go on in that area. Mr. Gordon was suspected to be selling narcotics from the Fifth and Morgan Area.
>
> Appellant, by counsel, objected on hearsay grounds and an extensive colloquy then ensued between counsel for the parties and the trial court. In essence, appellant claimed that the answer was based on hearsay statements and indeed, upon voir dire of the witness, established that the witness had relied in part on information from others including confidential informants. The Commonwealth contended that the testimony was not hearsay because it was not offered for the truth of the matter asserted; that it was only to show the course of the investigation. The trial court overruled the objection.[8]

In reversing Gordon's conviction and ordering a new trial, the Supreme Court cited Lawson, The Kentucky Evidence Law Handbook,[9] Releford v. Commonwealth,[10] Sanborn v. Commonwealth,[11] and Hughes v. Commonwealth.[12] The Court noted that "hearsay may be admissible to prove why the police acted in a certain manner, but not to prove the facts given to the officer" and that "such information is admissible only if there is an issue about the action of the police officer."[13]

The Supreme Court concluded:

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[8] Id.

[9] §8.05 (3d ed., 1993).

[10] Ky., 860 S.W.2d 770, 771 (1993).

[11] Ky., 754 S.W.2d 534 (1988).

[12] Ky., 730 S.W.2d 934 (1987).

[13] Gordon, supra at 179.

> In the case at bar, it was not improper to admit evidence that appellant had become a suspect in the county-wide drug investigation. This avoided any implication that appellant had been unfairly singled out and explained why the police equipped an informant with a recording device and money with which to attempt a drug buy from appellant. The next question, however, was utterly unnecessary and unfairly prejudicial. There was no legitimate need to say or imply that appellant was a drug dealer or that he was suspected by the police department of selling drugs in a particular vicinity. Such testimony was admittedly based in part on hearsay and was thus unassailable by appellant. Admission of this evidence branded appellant a drug dealer, violated his right to confront and cross-examine witnesses, denied his right to be tried only for the crime charged, and in general, bolstered the credibility of the police informant to the point where appellant's denial of criminal conduct would have appeared preposterous.[14]

Applying Gordon to the case sub judice, we believe the testimony from Sheriff Mayhugh and Deputy Perry was proper. This testimony was not offered to prove that Mackey was involved in illegal drug activity, but instead it was used to show why the police acted in a certain manner and to show the course of the investigation. Furthermore, even if we were to conclude that this testimony was inadmissible hearsay which should have been excluded if properly objected to, we cannot conclude that this unpreserved error meets the palpable error test.

As our Supreme Court has stated:

> [T]he requirement of 'manifest injustice' as used in RCr 10.26 (formerly RCr 9.26) [ ]

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[14] Id.

> mean[s] that the error must have prejudiced the substantial rights of the defendant, Schaefer v. Commonwealth, Ky., 622 S.W.2d 218 (1981), i.e., a substantial possibility exists that the result of the trial would have been different. Partin v. Commonwealth, Ky., 918 S.W.2d 219, 224 (1996). One federal court has interpreted FRE 103(e), which is identical to KRE 103(e), as requiring that the error must seriously affect the fairness, integrity or public reputation of judicial proceedings. United States v. Filani, 74 F.3d 378 (2d Cir. 1996).[15]

In Partin, supra, the Supreme Court stated that "upon consideration of the whole case, the reviewing court must conclude that a substantial possibility exists that the result would have been different in order to grant relief. Jackson v. Commonwealth, Ky.App., 717 S.W.2d 511 (1986)."[16]

Based on all of the evidence in the case sub judice, we hold that there is not a substantial possibility that without this testimony from Sheriff Mayhugh and Deputy Perry concerning the anonymous tip that the result of the trial would have been any different.[17] While Mackey contends that the Commonwealth was attempting to use evidence of a tip to have the jury unfairly draw a conclusion that he had been implicated by reliable information in a drug deal, we do not believe that this isolated testimony was so persistent and prejudicial to cause a manifest

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[15]Brock v. Commonwealth, Ky., 947 S.W.2d 24, 28 (1997).

[16]See also Byrd v. Commonwealth, Ky., 825 S.W.2d 272, 276 (1992).

[17]See Renfro v. Commonwealth, Ky., 893 S.W.2d 795, 796 (1995).

injustice.[18] As Mackey readily concedes in his brief, the central issue at trial was whether the jacket found in the bed of the truck containing illegal drugs and drug paraphernalia belonged to Mackey. Even if the testimony concerning the tip were viewed as improper hearsay evidence, we cannot conclude that this isolated testimony was so prejudicial as to constitute a manifest injustice. Upon consideration of the whole case, we cannot conclude that a substantial possibility exists that the result would have been any different.[19]

Mackey claims he was prejudiced during the penalty phase of his trial when the circuit clerk testified that he had been charged with a felony that was later amended to a misdemeanor. Once again, no objection was made to this testimony and Mackey claims palpable error.

During the penalty phase of the trial, the Commonwealth presented evidence of Mackey's previous convictions through the testimony of the circuit clerk. The following colloquy between the Commonwealth's Attorney and the circuit clerk occurred:

> Commonwealth's Attorney:
> Now direct [sic] your attention to 95-CR-108. Would you tell us the name of the defendant in that particular case?
>
> Circuit Court Clerk:
> Timothy E. Mackey
>
> Commonwealth's Attorney:

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[18]Cf. Schaefer, supra at 219.

[19]Cf. Jackson, supra at 514.

And the date of the charge?

Circuit Court Clerk:
He was indicted on October 3, 1995.

Commonwealth's Attorney:
And what was the charge?

Circuit Court Clerk:
Theft over three hundred.

Commonwealth's Attorney:
And was there a conviction obtained in that particular case?

Circuit Court Clerk:
Yes, sir. There was.

Commonwealth's Attorney:
And I believe, for the record, the conviction was under three hundred, is that correct.

Circuit Court Clerk:
That is correct.

Commonwealth's Attorney:
And what was the sentence that he was given in that charge?

Circuit Court Clerk:
Twelve months in the county jail.

Mackey relies on Perdue v. Commonwealth,[20] where several reversible errors occurred, including the introduction of testimony from the circuit clerk that Perdue had been charged with four counts of murder which had been amended to manslaughter. The Supreme Court stated:

> During the penalty phase the circuit court clerk was called by the Commonwealth to testify as to appellant's prior criminal convictions. In the course of his testimony, the clerk stated that appellant had been

[20]Ky., 916 S.W.2d 148 (1996).

> convicted of "murder, four counts." In fact, appellant had been charged with four counts of murder arising out of a vehicular homicide but the charges had been amended and appellant had pled guilty to manslaughter in the second degree for which he was sentenced to seven years on each count.
>
> When this error was brought to the attention of the trial court, and after appellant's motion for a mistrial had been overruled, the trial court admonished the jury to disregard the reference to murder. The court explained that the jury should consider only the conviction for manslaughter in the second degree and make no presumptions as to murder. The effect of the admonition was to inform the jury that appellant had been permitted to plea bargain four counts of murder into four convictions for manslaughter in the second degree.
>
> It is difficult to conceive of information which would have been more prejudicial than that which came to the jury here. By that time, appellant had been convicted of what may be the most heinous of all crimes, murder for hire, and the jury which was about to fix his punishment was informed that he had been previously charged with four counts of murder but had escaped with second degree manslaughter. Inevitably, such information would lead the jury to conclude, notwithstanding the court's inartful admonition to disregard any reference to murder, that appellant had previously escaped just punishment and motivate it to see that it did not happen again.[21]

In the case before us, the circuit clerk testified during the sentencing phase of the trial to Mackey's 11 prior convictions, five of which were drug related. We believe as a matter of degree that the case sub judice is distinguishable from

[21] Id. at 164-65.

Perdue and that it more closely resembles Taylor v. Commonwealth,[22] where the Supreme Court stated:

> It was not reversible error when a court clerk witness erroneously testified in the penalty phase that Taylor previously had been convicted of trafficking in cocaine. The deputy clerk immediately corrected himself and testified that it had been amended to illegal possession of a controlled substance. The trial judge overruled the defense motion and allowed the prosecution to proceed. The clerk then testified that Taylor had been convicted of trafficking in a controlled substance, operating on a suspended license and wanton endangerment in other cases.
>
> Citation to Perdue, supra, to support the arguments for a new trial is without merit. Perdue is easily distinguishable from this case because Taylor did not receive the maximum penalty for either offense, and the situation is not one involving a heinous crime or the death penalty, as was the case in Perdue. There was no error.[23]

Similarly, we believe the case sub judice is distinguishable from Perdue. In the present case, Mackey did not receive the maximum sentence as a PFO II for either the drug possession conviction or the drug paraphernalia conviction. Also, unlike Perdue, Mackey's charges did not involve a heinous crime or the death penalty. It is much more likely that Mackey was adversely affected by his long history of drug-related convictions than by the claimed error. Since we hold that there was no error, obviously there was no palpable error.

Finally, Mackey argues that a jury instruction which

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[22]Ky., 987 S.W.2d 302 (1998).

[23]Id. at 305-06.

required the jury to determine that the Commonwealth intentionally destroyed evidence before it could infer that the missing evidence would have been favorable to Mackey and unfavorable to the Commonwealth was erroneous. As stated previously, the critical factual determination the jury had to make in this case was the ownership of the camouflage jacket found in the bed of the truck. While it is unclear why the police officers did not confiscate the camouflage jacket and Mackey's camouflage pants, Sheriff Mayhugh and Deputy Perry did take a picture of Mackey standing beside the jacket. Since this picture was lost before trial, Mackey asked the trial court to give the following missing evidence instruction:

> If you believe from the evidence that there existed [p]hotographs of a coat that Sheriff's Deputy's identify as [c]ontaining methampetamine [sic] and syringes, and that agents or [e]mployees of the Commonwealth destroyed or lost said photographs, [y]ou may, but are not required to, infer that the photographs [w]ould be, if available, adverse to the Commonwealth and favorable [t]o the Defendant.

The instruction given by the trial court stated:

> There existed a photograph of a jacket. If you believe from the evidence that agents or employees of the Commonwealth intentionally destroyed it, you may, but are not required to, infer that the photograph would be, if available, adverse to the Commonwealth and favorable to the Defendant.

The main difference in these two instructions is that the instruction proposed by Mackey would have allowed the jury to infer that the missing evidence was adverse to the Commonwealth,

since the photograph had been lost; whereas the instruction that was given allowed for an inference only upon a finding that agents or employees of the Commonwealth intentionally destroyed the photograph.

In Johnson v. Commonwealth,[24] physical evidence was lost after it had been examined by the Kentucky State Police and then returned to the victim's family. The trial court rejected the defendant's tendered instruction which would have required the jury to assume that the missing evidence would have been favorable to Johnson. Instead, the trial court gave a missing evidence instruction which was very similar to the one used in the case sub judice. The Johnson instruction read:

> If you believe from the evidence that there existed certain items that were potential evidence, and that the agents or employees of the Commonwealth intentionally destroyed the same, you may, but are not required to, infer that these items would be, if available, adverse to the Commonwealth and favorable to the defendant.[25]

As in the present case, in Johnson there was absolutely no evidence of any bad faith on the part of the police or the Commonwealth.

In Collins v. Commonwealth,[26] our Supreme Court adopted a standard which requires the defendant to show that the evidence was missing as a result of bad faith on the part of the

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[24]Ky., 892 S.W.2d 558 (1994).

[25]Id. at 561.

[26]Ky., 951 S.W.2d 569 (1997).

government and it approved a jury instruction similar to the one given here. Collins was convicted of raping his step-daughter and sentenced to life in prison. He claimed the Commonwealth violated his due process rights by failing to collect and preserve a towel in which he allegedly ejaculated.

In rejecting Collins' argument that his due process rights had been violated, the Court cited a United States Supreme Court opinion with approval:

> [T]he Due Process Clause requires a different result when we deal with the failure of the State to preserve evidentiary material of which no more can be said than it could have been subjected to tests, the results of which might have exonerated the defendant. . . . We think that requiring a defendant to show bad faith on the part of the police both limits the extent of the police's obligation to preserve evidence to reasonable bounds and confines it to that class of cases where the interests of justice most clearly require it, i.e., those cases in which the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant. We therefore hold that unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process.[27]

The Supreme Court held that the failure to collect and to preserve the towel did not meet this standard. The Court stated:

> The Commonwealth concedes, and we agree, that it was negligent in failing to collect and preserve the towel. Nonetheless, mere negligence simply does not rise to the level of bad faith required by Youngblood, supra. Appellant cannot substantiate any ill motive

[27] Id. at 572 (citing Arizona v. Youngblood, 488 U.S. 51, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988)).

> or intention on the part of the Commonwealth in failing to collect the towel.[28]

Similarly, in the case sub judice, Mackey has not claimed that the Commonwealth acted in bad faith in not preserving the photograph. In fact, the Commonwealth has contended throughout the proceedings that the photograph would have supported the arresting officers' testimony that the camouflage jacket matched Mackey's pants. Since there was no evidence that the Commonwealth intentionally destroyed or lost the photograph, the jury instruction that was given was proper.

For these reasons, the judgment and sentence of the Muhlenberg Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Christopher F. Polk
Louisville, KY

BRIEF FOR APPELLEE:

A.B. Chandler, III
Attorney General

Gilbert L. Busby, III
Assistant Attorney General
Frankfort, KY

[28] Id. at 573.