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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-001255-MR

DENNIS D. ELLIOTT — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE DENISE CLAYTON, JUDGE
ACTION NO. 00-CR-000535

COMMONWEALTH OF KENTUCKY — APPELLEE

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

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

JOHNSON, JUDGE: Dennis D. Elliott has appealed from a judgment of conviction and sentence of probation entered by the Jefferson Circuit Court on May 11, 2001, which convicted him of illegal possession of a controlled substance in the first degree[1] and illegal possession of drug paraphernalia.[2] Having concluded that the trial court did not abuse its discretion by denying Elliott's

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

[2]KRS 218A.500.

motion for a mistrial and that any errors made by the trial court in its evidentiary rulings were harmless errors, we affirm.

On March 8, 2000, the Jefferson County grand jury returned a three-count indictment against Elliott charging him with the offenses of trafficking in a controlled substance in the first degree;[3] illegal possession of drug paraphernalia; and being a persistent felony offender in the second degree (PFO II).[4] At his jury trial on February 8 and 9, 2001, Elliott was convicted of the lesser-included offense of illegal possession of a controlled substance in the first degree and illegal possession of drug paraphernalia. Elliott pled guilty to being a PFO II and waived jury sentencing.

On May 11, 2001, the trial court entered a judgment of conviction and sentence of probation. Elliott was given a five-year prison sentence for his convictions for possession of a controlled substance and PFO II and a $500.00 fine for his conviction for possession of drug paraphernalia. The five-year prison sentence was probated for five years. This appeal followed.

Elliott claims that the trial court erred by not declaring a mistrial when the Assistant Commonwealth's Attorney mentioned in his closing argument that Elliott was on parole. Elliott also claims that the trial court erred by allowing the

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[3]KRS 218A.1412.

[4]KRS 532.080(2).

Commonwealth to repeatedly introduce so-called "investigative" hearsay and to brand Elliott as a major drug dealer.

At trial, the Commonwealth called Detective Mike Halbleib of the Louisville-Jefferson County Metro Narcotics Unit as a witness. Det. Halbleib testified that on November 30, 1999, at approximately 5:30 p.m. he and his supervisor, Sergeant Chris Dunn, were observing a location at 15th Street and Jefferson Street in Jefferson County and observed several cars leave that location at approximately the same time. Det. Halbleib testified that one of the vehicles, a white 1996 Dodge Intrepid, included Elliott as a passenger. He further testified that several of the men in the vehicles were being targeted as suspected drug dealers, including Elliott.

Det. Halbleib testified that when the Intrepid pulled into the parking lot of a Long John Silvers restaurant, he stopped the vehicle by activating his emergency lights. Det. Halbleib testified that he approached the vehicle, knocked on the window, and questioned Elliott, who initially stated that the vehicle was his, but then immediately stated that it was his mother's car. Det. Halbleib testified that Elliott then gave him consent to search the vehicle. Det. Halbleib stated that during the search Elliott informed him that there was a scale in the glove box. Det. Halbleib testified that he located inside the glove box a digital scale with a leather carrying case. Elliott claimed the scale was used by his mother to cook Thanksgiving

dinner. Det. Halbleib testified that he decided not to make an arrest until the scale was checked for cocaine residue.

Det. Halbleib further testified that he contacted Elliott's mother by telephone and asked her about the digital scale. She indicated that she did own a scale and that she used it to cook Thanksgiving dinner, but that her scale was not digital and she had never owned a digital scale.[5] Det. Halbleib conceded that he waited several months before he provided the information to the Commonwealth's Attorney's Office that led to a grand jury indictment. Det. Halbleib also admitted that Elliott was approached by the police to work as a confidential informant, but that Elliott refused to provide any information to the police.

The Commonwealth then called Gary Boley, a forensic drug chemist for the Kentucky State Police Regional Laboratory in Jefferson County. Boley testified that he performed various tests on the digital scale and determined that there was cocaine residue on the scale. In fact, Boley testified that the residue was visible to the naked eye.

The Commonwealth then called Det. Bob O'Neil of the Louisville Jefferson County Metro Narcotics Unit as an expert witness. Det. O'Neil testified that he had 25 years of experience as an officer including 16 years as a narcotics investigator. Det. O'Neil was called as a narcotics expert for

[5]The jury was read a stipulation that Elliott's mother would testify accordingly.

the purpose of explaining that a digital scale is commonly used by drug traffickers. Det. O'Neil testified that drug traffickers depend on repeat customers and that a scale is used to accurately measure the quantity of drugs that they are selling.

Elliott called one witness on his behalf, Juan Ashford. Ashford testified that he was Elliott's friend and that he was driving the Intrepid when it was stopped at Long John Silvers. Ashford testified that he attempted to tell the police that he had put the scale in the glove box, but that the police told him to be quiet. Ashford testified that he had been given permission by Elliott's mother to drive the car for the entire day. Ashford testified that he dropped Elliott off at barber school in the morning and returned to pick him up later that afternoon. He testified that after he picked Elliott up from barber school, Elliott stated that he needed to go to his grandmother's house to take a shower. Ashford testified that while he was waiting in Elliott's grandmother's front yard he noticed the digital scale laying on the ground against some shrubbery. He testified that he knew he was in a high crime area and he knew that the scale was drug paraphernalia. He claimed that he was worried about Elliott and Elliott's grandmother getting into trouble, so he put the scale in the glove box with the intention of disposing of it later. During cross-examination, Ashford was asked by the Assistant Commonwealth's Attorney why he was concerned about Elliott getting into trouble. Ashford testified that he was worried because Elliott was "on paper, parole." The defense

objected and the trial court admonished the jury to disregard the answer. However, for inexplicable reasons, the Assistant Commonwealth's Attorney chose to bring Elliott's parole status to the attention of the jury during his closing argument. Once again, the defense objected, and this time counsel asked for a mistrial. The trial court instead chose to admonish the jury to disregard the comment.

The Commonwealth argues that Ashford's statement about Elliott being on parole should have been admitted as evidence because it tended to establish Ashford's bias in favor of Elliott.[6] We have reviewed the cases submitted by the Commonwealth and we do not believe that they are on point. In the case sub judice, Ashford made no attempt to hide the fact that Elliott was his friend. In fact, he testified that he felt like Elliott's grandmother was his grandmother also. He also testified that he had been given permission by Elliott's mother to drive her car throughout the day. Thus, we believe it was quite clear that Ashford had a favorable bias toward Elliott and there was no need to tell the jury of the prejudicial fact of Elliott being on parole. It certainly was not an abuse of discretion for the trial court to conclude that this evidence

[6]The Commonwealth cited this Court to United States v. Abel, 469 U.S. 45, 105 S.Ct. 465, 83 L.Ed.2d 450 (1984); Byrd v. Commonwealth, Ky., 825 S.W.2d 272 (1992); and People v. Layher, 464 Mich. 756, 631 N.W.2d 281 (2001).

should be excluded because its probative value was substantially outweighed by the danger of undue prejudice.[7]

When Elliott's counsel objected to the Assistant Commonwealth's Attorney's remark during closing arguments, he pointed out that the trial court had already admonished the jury during Ashford's testimony. The Assistant Commonwealth's Attorney acknowledged the previous admonishment, but then he argued that the admonishment only prevented him from using the statement as to Elliott's guilt or innocence and not for other purposes. We find this argument to be totally refuted by the record. The record shows that the trial court sustained the defense objection to the question which had elicited the answer concerning Elliott's parole status and the trial court clearly admonished the jury to disregard the answer. The trial court did not give the jury a limited admonition, such as an admonition that is given when a defendant who has a prior felony conviction testifies. While the trial court refused to grant the defense a mistrial based on the improper closing argument, it did instruct the Commonwealth not to make any further reference to Elliott being on parole, and it admonished the jury to disregard the previous statement made by the Assistant Commonwealth's Attorney.

While we agree with Elliott that the statement by the Assistant Commonwealth's Attorney in closing arguments concerning his being on parole was improper, it did not rise to such a level for us to hold that the trial court abused its discretion by

[7]Kentucky Rules of Evidence (KRE) 403.

denying the motion for a mistrial, nor do we believe that it was so prejudicial as to affect the outcome of the trial. In Gosser v. Commonwealth[8], the Supreme Court of Kentucky stated:

> A defendant's motion for a mistrial should only be granted where there is a "manifest necessity for such an action or an urgent or real necessity." Skaggs v. Commonwealth, Ky., 694 S.W.2d 672 (1985), cert denied, 476 U.S. 1130, 106 S.Ct. 1998, 90 L.Ed.2d 678 (1986). The trial court has broad discretion in determining when a mistrial is necessary. As explained in Wiley v. Commonwealth, Ky.App., 575 S.W.2d 166 (1979), "Where, for reasons deemed compelling by the trial judge, who is best situated intelligently to make such a decision, the ends of substantial justice cannot be attained without discontinuing the trial, a mistrial may be declared. . . ." Id. at 169, quoting Gori v. United States, 367 U.S. 364, 81 S.Ct. 1523, 6 L.Ed.2d 901 (1961).

We have reviewed the videotape of the entire trial; and when we consider the case as a whole, we do not believe that the trial court abused its discretion by denying Elliott's motion for a mistrial. Although we agree that the comment on Elliott's parole status was clearly improper, we do not believe that the error created an "urgent or real necessity" for the trial court grant a mistrial. The comment was not a point of emphasis for the Commonwealth and the trial court admonished the jury to disregard the statement. There was no manifest necessity requiring a mistrial; the trial court did not abuse its discretion in denying Elliott's motion.

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[8]Ky., 31 S.W.3d 897, 907 (2000).

Elliott's final claim of error is that the trial court erred by allowing the Commonwealth to portray him as a major drug dealer through the repeated introduction of so-called "investigative" hearsay. The theory of the case as set forth by the Commonwealth from its opening statement was that Elliott was a target of a major drug investigation. The Commonwealth elicited testimony from Det. Halbleib that the center of the investigation was Derrick Smith, Reggie Rice and Dennis Elliott.

During his opening statement, the Assistant Commonwealth's Attorney stated that the Commonwealth would prove that Elliott was "in the business of selling cocaine." Further, the Assistant Commonwealth's Attorney stated that officers would testify that they were investigating Elliott and the officers only worked on cases involving "medium to large scale drug dealers."

During Det. Halbleib's testimony for the Commonwealth, he testified that his duties included investigating all aspects of the drug community. He testified that he is "assigned to the major case unit" that "investigates mid to upper level traffickers in Louisville metro area."

Elliott argues that the Assistant Commonwealth's Attorney's opening statement and the testimony of Det. Halbleib interjected inadmissible "investigative" hearsay into the trial. In Gordon v. Commonwealth,[9] our Supreme Court stated:

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

> 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.
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> In view of the foregoing, the conviction must be reversed and a new trial granted.[10]

We do not believe that the testimony in the present case branded Elliott as a drug dealer to the extent of the prejudicial evidence in Gordon. In the case at bar, the claim by the Assistant Commonwealth's Attorney in his opening statement that the evidence at trial would support a finding that the Elliott was a drug dealer was proper since Elliott was indeed charged with trafficking in cocaine. The statement did not allege that Elliott had a history of drug dealing other than to the extent that he was being charged for trafficking in cocaine.

[10]Id. at 179.

The testimony that is alleged to be in error is more closely akin to the testimony that was held to be proper in Gordon. The testimony by Det. Halbleib on direct examination that he was a drug investigator and that Elliott was a target of his investigation was used to explain why the officers were watching Elliott and subsequently approached his mother's car in the Long John Silvers parking lot. Since Det. Halbleib conceded that Ashford was not cited for a traffic violation and that the traffic violation for which he was pulled over was minor and in fact served only as a pretext for pursuing a drug investigation, an explanation concerning the fact that Elliott and some other men who were Elliott's acquaintances were targets of a drug investigation was proper. The testimony by Det. Halbleib on re-direct examination that he had asked Elliott to work as an informant because he knew Elliott was involved in drug dealing with Smith and Rice was proper since it explained his responses to questions of him during the cross-examination by the defense. Defense counsel apparently was attempting to show that Elliott had refused to cooperate with the police by working as an informant because he did not have any information that would be helpful. Conversely, the Commonwealth was entitled to attempt to show that Elliott in fact had been involved in drug dealing with a couple of drug dealers (Smith and Rice) but he just did not want to cooperate with the police.

Finally, even assuming it was error to admit the evidence, we hold the errors to be harmless errors.[11] Elliott has argued that these statements were prejudicial because he was branded as a major drug dealer from the outset of trial. However, as evidenced by the jury's verdict, the jury flatly rejected the Commonwealth's theory of the case and returned a verdict only for the lesser-included offense of possession of cocaine. Also, Elliott waived jury sentencing and was given the minimum sentence possible by the trial court and his sentence was probated. Thus, we cannot say that Elliott was harmed by any of the comments made by the Assistant Commonwealth's Attorney or by Det. Halbleib's testimony.

For the foregoing reasons, the judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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[11]RCr 9.24.