

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-000093-MR

WILLIAM DAVID PENNINGTON

APPELLANT

v.

APPEAL FROM JOHNSON CIRCUIT COURT
HONORABLE DANIEL R. SPARKS, JUDGE
ACTION NO. 98-CR-00008

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING
** **

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

JOHNSON, JUDGE: William David Pennington has appealed as a matter of right from a final judgment and sentence of imprisonment entered by the Johnson Circuit Court. Pennington was found guilty by a jury of trafficking in a controlled substance in the second degree,¹ and sentenced to prison for one year. Having concluded that no reversible error occurred, we affirm.

The evidence in the light most favorable to the Commonwealth was as follows: On March 22, 1996, Johnny Pennington, while working as a paid informant for the Kentucky

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

State Police, attempted to purchase prescription pain pills² from the appellant, who is his first cousin. In an attempt to gather evidence against the appellant, Detective Doyle Wilson of the Drug Enforcement Special Investigations unit of the Kentucky State Police gave the informant marked bills to use in purchasing the drugs and equipped him with a tape recorder to record the conversations pertaining to the sale. During the first attempted drug buy, the appellant told the informant that he did not have the pain pills that the informant had requested, but that he would meet the informant at a later time after he had time to get the pills.

The appellant contacted the informant the following day on March 23, 1996, and the two men agreed to meet at Kelly's Game Room³ in Paintsville, Kentucky to transact the drug deal. Det. Wilson once again gave the informant marked bills to use in purchasing the drugs, and he once again outfitted the informant with a tape recorder to record the transaction. Following the sale of the pills in the bathroom of Kelly's Game Room, the informant left and went to meet Det. Wilson. The informant gave Det. Wilson the pills he had bought and the unused money that Det. Wilson had given him for the purchase of the drugs. The pills recovered by Det. Wilson tested positive for the Schedule III narcotic, hydrocodone.

²The pills involved all contained hydrocodone, a schedule III narcotic. Nine of the pills were the brand name, Lortab, and eleven of them were the brand name, Lorcet.

³According to testimony at trial, Kelly's Game Room was an establishment operated by the appellant at the time of the drug buy. Testimony also indicated that Kelly's Game Room may have also gone by the name of Kelly's Amusement.

The appellant was indicted by the Johnson County grand jury on January 19, 1998, for trafficking in a controlled substance in the second degree. On April 7, 1999, the appellant was convicted by a jury of the charge.⁴ The final order sentencing the appellant to one year in prison was entered on January 9, 2001.

The appellant has raised four claims of error: (1) that the trial court erred by admitting the audio tapes into evidence without first establishing a proper foundation; (2) that witness Johnny Pennington was improperly permitted to interpret the audio tapes for the jury; (3) that the trial court improperly admitted the pills into evidence without proof of a complete chain of custody; and (4) that the prosecutor made improper remarks in his closing argument during the penalty phase of the trial. We affirm on all issues.

The appellant claims that the trial court erred by admitting the audio tapes into evidence without first establishing a proper foundation. Specifically, he argues:

The Commonwealth clearly did not lay a proper foundation for the introduction of the two (2) audio tapes. The informant witness, Johnny Pennington, merely testified that he had recently had an opportunity to listen to the audio tapes, and that, based upon that earlier listening, that the tapes were a fair and accurate recording of the conversations

⁴Sentencing was originally scheduled for May 21, 1999. The appellant filed several motions which have delayed his direct appeal to this Court, including a motion for new trial on June 3, 1999. On June 4, 1999, a final judgment and sentence of imprisonment was entered, but on November 20, 2000, a motion for resentencing was filed, and a motion to vacate sentence was filed two days later on November 22, 2000. The order providing for the appellant's "Final Sentencing" was signed on December 15, 2000, and entered on January 9, 2001. This appeal then followed.

between the witness and the appellant. The witness Johnny Pennington never made a proper authentication of the tapes by testifying in court that, after actually listening to the tapes in court, that they were a fair and accurate recording of the purported conversations between him and the appellant[.]

. . .

Present, in-court authentication is what is contemplated and required by KRE⁵ 901(a) and Brock v. Commonwealth⁶ [citations to record omitted].

The trial court ruled that in order for the informant to testify as to the accuracy of the tapes, he need only have listened to them at some prior time, and that it was not necessary for him to actually listen to the tapes in court. We agree.

The appellant's reliance on Brock for the proposition that a witness must first listen to an audio tape in court before testifying as to the tape's accuracy is misplaced. In Brock, the defendant attempted to introduce a tape recording to impeach one witness and to refresh the memory of another witness. The trial court in Brock erred by not allowing the witnesses to hear the audio tape, in court or otherwise. Thus, the witnesses were not qualified to testify as to the tape's accuracy. Our Supreme Court stated:

Thus, if Della Partin's voice on the tape recording can be identified, and/or if either Della Partin or Shirley Williams should testify that the recording is an accurate reproduction of their conversation, the recording would be sufficiently authenticated to permit its introduction into evidence. Since Appellant was prevented from playing

⁵Kentucky Rules of Evidence.

⁶Ky., 947 S.W.2d 24 (1997).

the tape to either Della Partin or Shirley Williams, he was never afforded the opportunity to authenticate it.⁷

Thus, Brock does not stand for the proposition that a witness must listen to a tape in court before testifying as to its accuracy. Obviously, the witness must be given an opportunity to listen to a tape before testifying, but there is no requirement that the witness listen to the tape in court. Rather, in accordance with KRE 901(a), authentication requires "only that evidence be introduced sufficient to support a finding that the matter in question is what its proponent claims."⁸

Further, in Woods v. Commonwealth,⁹ the Supreme Court discussed the broad discretion afforded to a trial court judge in determining the admissibility of evidence when authenticity is at issue:

As stated in Lawson, The Kentucky Evidence Law Handbook, 2d ed., § 7.10 (1984), the cases from the federal courts hold the "trial court has broad discretion in determining admissibility and that his judgment will not be disturbed on appeal if there is sufficient evidence of the accuracy of the recording to assure its reliability." We cannot say the trial court abused its discretion in the present case in admitting the tape recording.

⁷Id. at 30.

⁸Id. See also Campbell v. Commonwealth, Ky., 788 S.W.2d 260, 264 (1990) (holding that "testimony sufficient to support a finding that tape recordings are what they are purported to be is sufficient evidence of authenticity for introduction of the recordings into evidence.") (citing Lawson, The Kentucky Evidence Law Handbook, § 7.10(III) (2d. ed., 1976)).

⁹Ky., 793 S.W.2d 809, 815 (1990).

In the case at bar, the informant testified that he had listened to the two audio tapes, that he did recognize his voice and the appellant's voice on those tapes, and that the tapes were a fair and accurate recording of their conversations. Accordingly, in light of both the informant's testimony and the lack of any evidence or even any allegation of tampering, we hold that the trial court did not abuse its discretion in admitting the audio tapes into evidence.

The appellant next argues that the trial court impermissibly allowed the informant to interpret the conversations on the audio tapes for the jury. Specifically, he argues:

The jury listened to the first audio tape. The witness Johnny Pennington was then asked[,] "Mr. Pennington, could you just tell us. . . tell the jury what we just heard on that tape?" The witness Johnny Pennington then testified that it concerned his first visit with the appellant, and stated what was said on the tape. In reference to the second tape, the witness Johnny Pennington interpreted the tape by stating that it was the appellant who said ".75" (meaning 75 milligrams). This amounted to improper "interpretation" of the audio tape by the witness, a practice which was condemned by the Supreme Court of Kentucky in Gordon v. Commonwealth, Ky., 916 S.W.2d 176 (1995), a case in which a party to a recorded conversation attempted to interpret what was on a tape, after the tape had been played. The appellant herein submits that this practice is objectionable because it is for the jury to determine and decide what it is that they hear on an audio tape, if they are able to hear and understand anything [citations to record omitted].

We note that the appellant has conceded that this issue was not properly preserved for appellate review. As such, RCr¹⁰ 10.26 dictates that relief should be granted from such an alleged error only "upon a determination that manifest injustice has resulted from the error." In Partin v. Commonwealth,¹¹ our Supreme Court explained what must be shown by a party seeking review of an alleged error not properly preserved at trial:

[A]ppellant contends we should review the alleged error of the Commonwealth Attorney in closing argument under the palpable error rule. RCr 10.26. A palpable error is one which affects the substantial rights of a party and relief may be granted for palpable errors only upon a determination that a manifest injustice has resulted from the error. This means, 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 [citation omitted].

In the case sub judice, we do not believe that the appellant has made the required showing of manifest injustice.

The appellant points to two instances in which he contends the informant was impermissibly allowed to interpret the conversation on the audio tapes while testifying. The relevant testimony reads as follows:

[Commonwealth's Attorney]: Mr. Pennington, could you just tell us. . . tell the Jury what we just heard on that tape?

[Johnny]: That was the first visit to the game room which David was telling me that he didn't have the pain pills; that he would have them the next day. He would call me on my mobile phone or pager.

¹⁰Kentucky Rules of Criminal Procedure.

¹¹Ky., 918 S.W.2d 219, 224 (1996).

Later on during the informant's testimony, the following exchange took place:

[Commonwealth's Attorney]: Alright. Now, who actually said .75?¹² Was that you or the Defendant?

[Johnny]: David Pennington.

In Gordon, our Supreme Court discussed the prohibition on permitting witnesses to interpret conversations on recordings:

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].¹³

We agree with the appellant that portions of the informant's testimony constitute his interpreting of what was being said on the audio tapes, particularly his response to the Commonwealth's Attorney's request that he "tell the jury what we just heard. . . ." However, we hold that this limited error does not rise to the level of a manifest injustice. We cannot say that "a substantial possibility exists that the result would have been different[.]"¹⁴

¹²The phrase ".75" in the recorded conversations refers to the strength of the pain pills. The chemist from the state crime lab testified that the pills allegedly sold by the appellant were in the range of 5.0 to 7.5 milligrams in strength.

¹³Gordon, supra at 180.

¹⁴Partin, supra at 224.

The evidence against the appellant was considerable even without the improper interpretation of the audio tapes. Before the audio tapes were played to the jury, the informant testified extensively as to the events leading up to his purchase of the pills, and he testified in some detail about the actual money-for-drugs exchange between the appellant and himself. Det. Wilson also testified concerning the steps he took to help ensure that the pills were in fact sold by the appellant to the informant. For example, before both the failed attempted drug buy on March 22, 1996, and the successful drug buy the following day, Det. Wilson stated that he searched the informant's car and his person to make sure the informant did not have any drugs or money with him before going to meet the appellant at Kelly's Game Room. Further, Det. Wilson testified that he followed the informant to and from Kelly's Game Room on both occasions. Accordingly, we do not believe that this error resulted in a manifest injustice.

The appellant next argues that the pills were improperly admitted into evidence due to an insufficient showing of the chain of custody. Specifically, he argues:

The critical flaw in the Commonwealth's presentation of chain of custody evidence regarding the pills which were tested by witness Tom Morrow is that the witness could not testify to whom he gave transferred [sic] the pills after he tested them. In response to a question as to the disposition of the pills which were tested, the witness Tom Morrow testified simply that ". . . they were returned eventually. . .", without saying to whom. . . .

. . .

This is the type of evidence which is prone to tampering or change, and the Commonwealth should be required to complete the circle of the various transfers of these pills so as to reasonably establish their authenticity, prior to being admitted into evidence and displayed to the jury.

Although there may have been a gap in the chain of custody of the evidence offered by the Commonwealth, a gap does not necessarily preclude admission of the item into evidence.

In Grundy v. Commonwealth,¹⁵ our Supreme Court discussed chain of custody as it relates to the admissibility of evidence:

Grundy's argument rests on a common misconception regarding the authentication of tangible evidence, and we must emphasize that "a break in the chain of custody is not necessarily fatal to the admissibility of physical evidence" [footnote omitted].

. . .

We grant trial courts wide discretion over issues relating to the admissibility of tangible evidence because the foundation sufficient for admissibility will vary based on the nature of the item:

. . .

[I]f the offered evidence is of such a nature as not to be readily identifiable, or to be susceptible to alteration by tampering or contamination, sound exercise of the trial court's discretion may require a substantially more elaborate foundation. A foundation of the latter sort will commonly entail testimonially tracing the "chain of custody" of the item with sufficient completeness to render it improbable that the original item has either been exchanged with

¹⁵Ky., 25 S.W.3d 76, 79-80 (2000).

another or been contaminated or tampered with [footnote omitted].

Further, in Rabovsky v. Commonwealth,¹⁶ our Supreme Court stated:

Even with respect to substances which are not clearly identifiable or distinguishable, it is unnecessary to establish a perfect chain of custody or to eliminate all possibility of tampering or misidentification, so long as there is persuasive evidence that "the reasonable probability is that the evidence has not been altered in any material respect." Gaps in the chain normally go to the weight of the evidence rather than to its admissibility [citations omitted].

The chain of custody established at trial regarding the pills was as follows:

1. After purchasing the pills from the appellant on March 23, 1996, the informant turned the pills and the plastic baggy container over to Det. Wilson. Both the informant and Det. Wilson initialed the baggy at that time, and identified the baggy produced at trial as being the same baggy each had previously initialed.
2. Det. Wilson locked the baggy containing the pills inside the trunk of his car, where they were kept until he turned them over to Tom Morrow for testing on March 26, 1996. Det. Wilson testified that he personally handed the pills to Tom Morrow.
3. Tom Morrow testified that he received the baggy containing the pills from Det. Wilson, after which he placed his own label and initials on the baggy. At trial, Morrow identified the baggy produced by the Commonwealth as being the same baggy he had previously initialed.
4. After testing the pills, Morrow testified that on June 27, 1996, he placed the pills back into the baggy, and then placed the

¹⁶Ky., 973 S.W.2d 6, 8 (1998).

baggy inside a locker at the lab, to which only he had access.

5. Morrow stated that the baggy containing the pills was turned over to the Kentucky State Police on February 3, 1997.

6. Det. Wilson then brought the baggy containing the pills into court for the trial.

While Tom Morrow could not identify the individual at the Kentucky State Police to whom he gave the pills after testing was completed, this slight "gap" should have, at most, affected the weight of the evidence and not its admissibility. Thus, based upon the chain of custody of the pills as established by the Commonwealth, we hold that the trial court did not err by ruling that there was a reasonable probability the evidence had not been altered in any material respect, and that the pills were properly admitted as evidence.

Finally, the appellant claims that the Commonwealth's Attorney made improper remarks in his closing argument during the penalty phase of the trial. Specifically, he argues:

In his closing remarks following the penalty phase of the trial, counsel for the Commonwealth spoke to the jury as follows:

"I want you to take into consideration that [] you're dealing with a defendant who is remorseless and who denies having done this. Take that into consideration,

I want you to consider the pervasiveness of drug dealing in our society and I want you to consider how easy it is for this crime to be committed. All it takes is somebody with money to walk in anywhere and do this. Take that into consideration. What are we going to do with this scourge of drug dealing in our society?" [Citation to record omitted].

The first remark by the prosecutor abridged the appellant's right against self-incrimination, as William David Pennington was entitled to deny his guilt. Thus, said remark attempted to shatter the presumption of innocence rule as well. This remark thus violated the restrictions of KRE 511, which prevents counsel from commenting on a claim of privilege.

The second comment by the prosecutor wrongly implies to the jury that the appellant is a large-scale drug dealer, involved in perpetuating and inflicting, by himself, a massive "scourge" upon society. This was not the evidence, and the prosecutor's comments were a direct attempt to improperly inflame the jury's passions and ignite their fears. This is the type of prosecutorial misconduct which was condemned by the Supreme Court of Kentucky in Jacobs v. Commonwealth, Ky., 551 S.W.2d 223 (1977) and the cases cited therein. In Jacobs, a drug case, the prosecutor admonished the jury that it was their duty to keep this poison out of the system of the citizenry, and that they should send a loud message by their verdict.

We once again note that this alleged error was not properly preserved for review on appeal; the appellant's trial counsel failed to make a contemporaneous objection to these comments.¹⁷ Therefore, as previously discussed, relief will be granted only "upon a determination that manifest injustice has resulted from the error,"¹⁸ and that but for the alleged error, "a substantial possibility exists that the result would have been different[.]"¹⁹ We hold that the appellant has failed to meet this burden.

¹⁷Weaver v. Commonwealth, Ky., 955 S.W.2d 722, 728 (1997).

¹⁸RCr 10.26.

¹⁹Partin, supra at 224.

First, the appellant is correct that KRE 511 prohibits comment by counsel upon a claim of privilege. However, in the case at bar, the appellant testified in his own defense. Therefore, his credibility was then subject to attack in the same manner as any other witness. In Tamme v. Commonwealth,²⁰ our Supreme Court stated:

The prosecutor is entitled to attack a defendant's credibility if the defendant testifies as a witness on his own behalf. An accused who testifies on his own behalf is subject to the same rules as an ordinary witness [citation omitted].

Accordingly, since the appellant specifically denied having sold drugs to the informant at any time, the Commonwealth's Attorney was entitled to attack his credibility. Further, these comments were not an attempt by the prosecutor to violate the presumption of innocence, "because the presumption of innocence applies only to the guilt phase of the trial,"²¹ and the appellant had already been found guilty when the comments were made during the penalty phase.

Second, the appellant's argument that the Commonwealth's Attorney's comments were an improper attempt to "inflame the jury's passions and ignite their fears," is also without merit. The standard for determining prosecutorial misconduct is "whether the conduct was of such an 'egregious' nature as to deny the accused his constitutional right of due

²⁰Ky., 973 S.W.2d 13, 39 (1998).

²¹Tamme, supra at 39 (citing Delo v. Lashley, 507 U.S. 272, 278-79, 113 S.Ct. 1222, 1226, 122 L.Ed.2d 620 (1993)).

process of law."²² Further, a prosecutor is allowed "reasonable latitude in argument to persuade the jurors the matter should not be dealt with lightly."²³ We do not believe that these comments by the Commonwealth's Attorney were of such an "egregious nature" so as to deny the appellant due process; we note that the jury recommended the minimum sentence for a Class D felony.²⁴ We hold that these comments did not constitute error.

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

ALL CONCUR.

BRIEF FOR APPELLANT:

Stephen W. Owens
Pikeville, Kentucky

BRIEF FOR APPELLEE:

Albert B. Chandler, III
Attorney General

Janine Coy Bowden
Assistant Attorney General
Frankfort, Kentucky

²²Roberson v. Commonwealth, Ky., 913 S.W.2d 310, 317 (1994).

²³Harness v. Commonwealth, Ky., 475 S.W.2d 485, 490 (1971).

²⁴Class D felonies are punishable under KRS 532.060(2)(d) in the range of a minimum of one year, to a maximum of five years.