

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-001711-MR
AND
NO. 2001-CA-002104-MR

THEATRICE DARWIN WORTHAM

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE REBECCA M. OVERSTREET, JUDGE
ACTION NO. 01-CR-00221

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * **

BEFORE: COMBS, GUIDUGLI AND SCHRODER, JUDGES.

GUIDUGLI, JUDGE. Theatrice Darwin Wortham ("Wortham") appeals from an opinion and order granting the Commonwealth's forfeiture motion, and a final judgment and sentence following a jury finding of guilt on charges of possession of marijuana and drug paraphernalia. We affirm both appeals.

On January 12, 2001, the Lexington Police Department executed a search warrant at Wortham's business in Fayette County, Kentucky. The warrant was obtained based on information provided by an undisclosed confidential informant who purchased marijuana from Wortham under police supervision. Upon searching

the business, the police located and seized various items of evidence including marijuana, cash, scales, baggies, and pipes. Wortham subsequently was indicted for trafficking in marijuana, second offense, and possession of drug paraphernalia, second offense.

The matter proceeded to trial on June 18, 2001, whereupon Wortham was found guilty of the lesser-included offense of possession of marijuana and possession of drug paraphernalia, second offense. Wortham received a total sentence of five years in prison.

On June 21, 2001, the Commonwealth tendered a motion seeking the forfeiture of the property found at the business during the search. The motion was granted, and this combined appeal followed.

Wortham first argues that the trial court erred in allowing the admission of evidence obtained by a faulty search warrant. Specifically, he maintains that the warrant which formed the basis of the July 12, 2001 search was faulty because it relied on a confidential informant and established no facts linking Wortham with the trafficking of marijuana. He also argues that no information was provided which would demonstrate the veracity of the informant.

We have closely examined this argument and find no error. Evidence was adduced prior to trial and in response to Wortham's motion on this issue that the confidential informant purchased marijuana from Wortham under police supervision in the 48 hour period preceding the execution of the warrant. This

fact, taken alone, forms a sufficient basis for a finding of probable cause and the issuance of the warrant. As both parties note, the dispositive question is whether the totality of the circumstances are sufficient to support a finding of probable cause. Beemer v. Commonwealth, Ky., 665 S.W.2d 912 (1984). We cannot conclude that the trial court erred in finding the confidential informant's purchase of marijuana to constitute probable cause that Wortham was trafficking in marijuana. Accordingly, we find no error on this issue.

Wortham next argues that a mistrial should have been granted when Detective Byron Smoot ("Smoot") gave testimony at trial regarding the drug transaction with the confidential informant when there was no evidence introduced of such a transaction. He maintains that the introduction of this testimony was prejudicial and constituted inadmissible hearsay because there was no independent evidence tendered that such a transaction occurred.

We do not find this argument persuasive. Smoot's comment regarding the transaction was a passing reference, and was made in response to Wortham's repeated questioning as to how long Smoot had been at Wortham's building. While the comment may not have been admissible, it did not result in the magnitude of harm sufficient to terminate the proceedings and retry the matter before a new jury. This is especially true in light of the fact that Wortham ultimately was acquitted on the trafficking charge. If, upon a consideration of the whole case, we do not believe there is a substantial possibility that the result would have

been any different, an irregularity will be held non-prejudicial. Abernathy v. Commonwealth, Ky., 439 S.W.2d 949 (1969). In the matter at bar, no harm resulted from Smoot's passing reference and as such we find no error.

Wortham next argues that the forfeiture of the confiscated money was improper and in violation of Kentucky case law. He maintains that the forfeiture statute's application is limited to transactions or exchanges. Since Wortham was found not guilty on the trafficking charge, he argues that the trial court erred in sustaining the Commonwealth's forfeiture motion. He seeks to have the order reversed.

The forfeiture statute, KRS 218A.410, provides in relevant part that,

(1) The following are subject to forfeiture:
. . . (j) Everything of value furnished, or intended to be furnished, in exchange for a controlled substance in violation of this chapter, . . . all moneys . . . used, or intended to be used, to facilitate any violation of this chapter; . . . It shall be a rebuttable presumption that all moneys, coin, and currency found in close proximity to controlled substances, to drug manufacturing or distributing paraphernalia . . . are presumed to be forfeitable under this paragraph. The burden of proof shall be upon claimants of personal property to rebut this presumption by clear and convincing evidence.

KRS 218A.410 was construed by the Supreme Court of Kentucky in Smith v. Commonwealth, Ky., 707 S.W.2d 342 (1986), and Osborne v. Commonwealth, Ky., 839 S.W.2d 281 (1992), which the parties cite in support of their respective positions. In Smith, upon which Wortham relies, the Court concluded that the defendant was not required to forfeit cash found on his person after he was

acquitted of a trafficking charge. Wortham argues that Smith is dispositive of the matter at bar since he (Wortham) was found not guilty of trafficking. Conversely, the Commonwealth relies on Osborne, which states that forfeiture may be ordered in the absence of a trafficking conviction, so long as a nexus is shown between the cash and a violation of KRS Chapter 218A.

In examining the Commonwealth's motion, and after taking proof, the trial court determined that the facts at bar more closely mirrored those of Osborne than Smith. The court noted that unlike in Smith, Wortham was found to have "buy money" in his pocket and under his bed, said money having been marked by the police and used by the confidential informant to purchase marijuana. The court opined that this established the nexus to link the money to drug trafficking as required by Osborne.

We find no error in this conclusion. While the "buy money" and drug transaction were not admitted at trial, they were made part of the record at the pre-trial suppression hearing. We agree with the circuit court's conclusion that the presence of the buy money in Wortham's pocket and under his bed constitute a nexus sufficient to support application of KRS 218A.410. Wortham's testimony was not sufficient to overcome the presumption set forth in KRS 218A.410, and accordingly we find no error on this issue.

Lastly, Wortham argues that his due process rights were violated by the trial court's refusal to grant a hearing on the issue of forfeiture. KRS 218A.460 requires a hearing only if requested by a party other than the defendant or the

Commonwealth. As to his claim of denial of due process, the matter was submitted by memoranda and was reviewed by the trial court in light of the record and the law. It cannot be said that Wortham was deprived of the cash in question without due process. As such, we find no error.

For the foregoing reasons, we affirm both the opinion and order granting the Commonwealth's forfeiture motion, and the final judgment of the Fayette Circuit Court.

ALL CONCUR.

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