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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-000432-MR

KERMIT EUGENE HAYES — APPELLANT

v.

APPEAL FROM BOYD CIRCUIT COURT
HONORABLE C. DAVID HAGERMAN, JUDGE
ACTION NO. 04-CR-00173

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: SCHRODER, JUDGE; KNOPF,[1] SENIOR JUDGE; MILLER,[2] SPECIAL JUDGE.

SCHRODER, JUDGE: Kermit Eugene Hayes appeals from a judgment of the Boyd Circuit Court convicting him of first-degree trafficking in a controlled substance. Having reviewed the record and the applicable law, we affirm.

In June, 2004, Sergeant Rod Williamson, of the Boyd County Sheriff's Department, began a drug investigation

[1] Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

[2] Retired Judge John D. Miller, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

involving appellant and his girlfriend, Geneva Gard. Pursuant to the investigation, Sergeant Williamson utilized a confidential informant, Robert McCormick. McCormick had a pending charge in Boyd County, and had come to the police wanting to do some work to try to get leniency for himself. On June 5, 2004, McCormick told Sergeant Williamson that he had a drug sale set up at the residence of appellant and Geneva Gard. After being searched, given money which had been photocopied, and wired by Sergeant Williamson, McCormick went to the trailer where appellant and Gard lived. McCormick returned to Williamson with a folded post-it note in which there were three pills containing oxycodone. As a result of the transaction, on July 29, 2004, appellant was indicted on one count of trafficking in a controlled substance.

A jury trial commenced in January, 2005. At trial, McCormick testified that when he went to the trailer, Geneva Gard answered the door and did almost all the talking, but that when it came time to hand over the pills, it was appellant who got them from the bedroom and handed them to him. McCormick testified that because Gard and appellant couldn't find any cellophane or baggies, they put the pills in a post-it note. McCormick admitted that the reason he offered to assist the police was to try to get leniency for himself, because he had a pending charge did not want to go back to prison. McCormick

further admitted that because of his assistance, he received probation in his case.

Sergeant Williamson testified that when he met up with McCormick after the transaction, McCormick told him that appellant had handed him the drugs. Williamson acknowledged that he did not see the transaction, and was relying on McCormick's version of what occurred. Williamson acknowledged that on the tape recording of the transaction, which was played for the jury, Geneva Gard could be heard complaining that "we're out of baggies, Kermit give me a cellophane." Sergeant Williamson testified that McCormick made two other buys at the trailer for the investigation, on June 2 and June 16, both of which were made from Geneva Gard.

Assistant Police Chief Dean Akers, of the Catlettsburg Police Department, testified that he took a statement from appellant on August 3, 2004. Akers read the statement to the jury, which had been written by appellant. Therein, appellant stated that he and his girlfriend had sold drugs for a couple of months, which he (appellant) thought were April and May, to make some extra money to go on vacation. Appellant stated that they stopped at about the end of May, except that a couple of times he went to get some marijuana for a friend.

Geneva Gard testified on appellant's behalf. Gard testified that it was mainly she, not appellant, who dealt with

McCormick on June 5, 2004, and that appellant did not take the money nor hand McCormick the drugs.

The jury found appellant guilty of first-degree trafficking in a controlled substance. Appellant was sentenced to five years' imprisonment. This appeal followed.

Appellant first argues that the trial court erred in denying his request for a facilitation instruction in light of the evidence presented at trial. In support of his argument, appellant points to the following evidence. On cross-examination, Sergeant Williamson acknowledged that the June 2 and June 16 buys were made from Geneva Gard, and that appellant was not even in the house during the June 2 buy. On the tape, Gard could be heard asking appellant for cellophane, and Gard testified that it was "mainly" she who dealt with McCormick during the June 5 transaction. In light of the aforementioned evidence, appellant contends that a reasonable juror could have found him culpable as some type of accomplice, rather than the principal.

KRS 506.080(1) provides:

> A person is guilty of criminal facilitation when, acting with knowledge that another person is committing or intends to commit a crime, he engages in conduct which knowingly provides such person with means or opportunity for the commission of the crime and which in fact aids such person to commit the crime.

Additionally, "[f]acilitation reflects the mental state of one who is 'wholly indifferent' to the actual completion of the crime." Perdue v. Commonwealth, 916 S.W.2d 148, 160 (Ky. 1995).

The trial court found that the evidence did not support the giving of a facilitation instruction. We agree that appellant was not entitled to a facilitation instruction, but on other grounds as well. In Houston v. Commonwealth, 975 S.W.2d 925 (Ky. 1998), the Kentucky Supreme Court held that facilitation is not a lesser-included offense of trafficking. The Court stated:

> The offenses of trafficking in or possession of a controlled substance require proof that the defendant, himself, knowingly and unlawfully committed the charged offense. The offense of criminal facilitation requires proof that someone other than the defendant committed the object offense and the defendant, knowing that such person was committing or intended to commit that offense, provided that person with the means or opportunity to do so. Thus, criminal facilitation requires proof not of the same or less than all the facts required to prove the charged offenses of trafficking in or possession of a controlled substance, but proof of additional and completely different facts. *A fortiori*, it is not a lesser included offense when the defendant is charged with committing either of the object offenses.

Id. at 930 (citations omitted). Appellant was charged with trafficking. Per Houston, as facilitation is not a lesser

included offense of trafficking, the trial court did not err in denying the request for a facilitation instruction.

Appellant's second argument is that the trial court erred when it failed to allow defense counsel to sufficiently cross-examine Robert McCormick concerning the nature of the consideration he received from the Commonwealth in exchange for his testimony. On direct, McCormick testified that he is a convicted felon, was facing legal problems, and therefore agreed to work with the Boyd County Sheriff's Department as an informant. McCormick testified that he was not promised anything for his help, but believed that there was a good chance that he could get a leaner sentence. McCormick testified that he entered a plea and received five years' probation. On cross-examination, McCormick admitted that he uses drugs, had been convicted of a felony, and that he sought to get a lenient sentence by helping out the police. McCormick admitted that he seriously doubted that he would have received a lenient sentence if he didn't help the police by making buys. McCormick admitted that he had been to prison before, that it was "not a fun place", and that he was worried about having to go back. McCormick explained that there was no set number of buys he had to make, but agreed that the more people he bought from the more leniency he believed he might receive.

On re-cross, McCormick admitted that because of his assistance, he received probation. The defense then attempted to question McCormick about the number of felonies he had been convicted of. When asked if he had been convicted of three felonies, the Commonwealth objected. In the subsequent bench conference, defense counsel informed the court that he wished to point out to the jury that McCormick was a three-time convicted felon, and question McCormick as to whether, in exchange for his assistance, he would not be prosecuted under the PFO statute. The prosecutor informed the court that he had made no such offer. The trial court ruled that while the defense was not permitted to inquire as to the number of felonies, the defense could ask McCormick if he was promised that no additional charges would be brought against him in his case. Subsequently, defense counsel reconfirmed with McCormick that as a result of his assistance, he received probation and served no jail time in his case.

Appellant contends that McCormick, as a three-time convicted felon, was facing prosecution and a severe penalty as a persistent felony offender, which therefore gave him motive to be a productive confidential informant. Appellant contends that a juror could have formed reasonable doubt as to the veracity of McCormick's testimony if defense counsel had been allowed to fully cross-examine him as to the nature of his understanding of

the consideration he was afforded for cooperating with the Commonwealth against appellant, in particular, whether the Commonwealth had agreed not to bring PFO charges against him. Appellant contends, therefore, that the cross-examination he was afforded was not "adequate to develop the issue of bias properly to the jury." Davis v. Alaska, 415 U.S. 308, 318, 94 S. Ct. 1105, 1111, 39 L. Ed. 2d 347 (1974).

As the trial court correctly noted, the general rule is that a witness may be impeached by being asked if he has been previously convicted of a felony, and if his answer is yes, the questioning must stop. Commonwealth v. Richardson, 674 S.W.2d 515 (Ky. 1984). However, appellant is correct that a defendant must be afforded adequate opportunity to develop the issue of bias, prejudice, or motivation, in order for the jury to "make an informed judgment as to the weight to place on [the witness's] testimony." Davis, 415 U.S. at 317. See also Williams v. Commonwealth, 569 S.W.2d 139, 145 (Ky. 1978). "[O]nce the essential facts constituting bias have been admitted, a trial court may . . . impose reasonable limits on defense counsel's inquiry into the potential bias of a prosecution witness . . . ." Weaver v. Commonwealth, 955 S.W.2d 722, 726 (Ky. 1997)(citations and quotation marks omitted).

In the present case, we believe appellant was afforded sufficient cross-examination to develop the issue of bias on the

part of McCormick. Davis, 415 U.S. 308; Weaver, 955 S.W.2d 722. McCormick admitted that he was helping the police to get leniency for himself, and that he believed he would get more favorable treatment by making more buys. McCormick admitted that he was a convicted felon, that he had been to prison, and that he did not want to go back to prison. Most importantly, McCormick was unequivocal in his testimony that he was helping the police in order to help himself, and that because of his assistance, he did, in fact, receive probation. Accordingly, the jury was well apprised of McCormick's self-serving motivation. Further, the prosecutor informed the court that he did not offer to not bring a PFO charge. Similarly, McCormick, although admitting he hoped for leniency, testified that he had no set deal with the Commonwealth. Error, if any, was harmless.

Appellant finally argues that the trial court erred in denying his motion to suppress the statement given to Assistant Police Chief Akers. At trial, appellant moved to suppress the statement as irrelevant, on grounds that it specified conduct in April and May, and did not apply to the June, 2004, indictment, and that its introduction would only serve to substantially prejudice the jury. The trial court overruled the motion.

Appellant contends that because the trial court overruled the motion without holding an evidentiary hearing or making findings of fact, it is impossible to determine whether

the statement was voluntary. This argument was not made before the trial court, where appellant argued irrelevance and undue prejudice. It is well settled that an appellant "will not be permitted to feed one can of worms to the trial judge and another to the appellate court." Kennedy v. Commonwealth, 544 S.W.2d 219, 222 (Ky. 1976). Accordingly, appellant's argument is not properly before this court.

For the aforementioned reasons, the judgment of the Boyd Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

Gregory D. Stumbo
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