

RENDERED: NOVEMBER 14, 2008; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2007-CA-002189-MR

TOMMY L. BARNETT

APPELLANT

APPEAL FROM BELL CIRCUIT COURT
v. HONORABLE JAMES L. BOWLING, JR., JUDGE
ACTION NO. 07-CR-00052

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

*** * * * *

BEFORE: KELLER AND WINE, JUDGES; LAMBERT,¹ SENIOR JUDGE.

WINE, JUDGE: On March 14, 2007, a Bell County grand jury indicted Tommy L. Barnett on one count each of first-degree trafficking in a controlled substance, first offense, and theft by unlawful taking (under \$300). Following a trial, the jury found Barnett guilty on both counts. The jury fixed Barnett's sentences at ten

¹ Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes ("KRS) 21.580.

years for the trafficking count, and six months on the theft count, to be served consecutively. The trial court imposed the jury's sentence, and also imposed a \$300.00 fine. Barnett now appeals. Finding no error, we affirm.

The charges arose from an undercover drug buy conducted by the Kentucky State Police in Middlesboro on June 13, 2006. Trooper Brian Greene and Detective Roy Pace employed Crystal Money to conduct the drug buy. Money regularly worked for the Kentucky State Police, the Kentucky Drug Enforcement Agency, and the Middlesboro Police Department as a paid informant. Money testified that she called Barnett, who agreed to sell her two methadone tablets for \$20.00 and one ounce of marijuana for \$150.00.

After meeting with Money to discuss the buy, Trooper Greene and Detective Pace searched her person and car and found both to be free of money and drugs. Detective Pace then gave Money \$170.00 to purchase the drugs. He also gave her an audio recorder, which she concealed on her body, and a video recorder, which she concealed in her car.

Money then drove alone to the Binghamtown Market in Middlesboro. Trooper Greene and Detective Pace followed in their car. Barnett and his wife, Anna Bowling, were already there. According to Money, both Barnett and Bowling approached her car. Barnett said that he and Bowling only had one methadone pill because they had already snorted the other. Bowling told Money that they did not have the marijuana on them and they would return with it within one hour. Barnett then returned to the other automobile. Money then gave

Bowling \$160.00 (\$150.00 for the marijuana and \$10.00 for one methadone pill).

Bowling then returned to the car where she apparently obtained the methadone pill from Barnett. Upon returning, Bowling gave Money the methadone pill. As instructed, Money went to the BP station across the street from her house and waited for Barnett and Bowling to return with the marijuana. However, they never returned.

Barnett first argues that he was entitled to a directed verdict because the Commonwealth failed to present sufficient credible evidence for the jury to find him guilty beyond a reasonable doubt. The standard for granting a directed verdict is set out in *Commonwealth v. Benham*, 816 S.W.2d 186 (Ky. 1991), as follows:

On motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given. For the purpose of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but reserving to the jury questions as to the credibility and weight to be given to such testimony.

On appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal.

Id. at 187 (internal citations omitted).

Barnett first argues that the Commonwealth put forth no credible evidence that he was involved in the drug transaction or the theft of the money.

Barnett notes Money's admission that she is a "professional" informant who is routinely paid by law enforcement agencies to participate in controlled drug buys. As such, he contends that Money is an inherently unreliable witness.

He further argues that Money's testimony was not corroborated by the police witnesses or by the surveillance tapes. Neither Trooper Greene nor Detective Pace saw the drug exchange described by Money. The surveillance video only shows Bowling approaching the car and Money's hand reaching out from the car to pass money to Bowling. Barnett's voice is not identified on the audio tape. Barnett also points out that the officers did not closely supervise Money during the one hour period after he and Bowling left. During this time, Money left her car several times to go to her apartment and to the BP station. Barnett maintains that Money had ample opportunity to obtain drugs or take the missing \$150.00 for herself.

In this case, however, Money clearly testified about Barnett's involvement in the transaction. Any inconsistencies in her testimony and the lack of direct corroboration in the recordings were purely questions of weight and credibility that are within the jury's province to determine. Likewise, Barnett pointed out to the jury that the police did not closely supervise Money after the initial transaction. She left her car several times during this period and had conversations with several people, including a person selling television equipment for \$150.00 – the same amount which was the basis for the theft charge.

Nevertheless, the jury found Money's testimony to be credible. The jury's determination of the credibility of witnesses "will not be disturbed unless it is so incredible on its face as to require its rejection as a matter of law." *Taylor v. Commonwealth*, 301 Ky. 109, 113, 190 S.W.2d 1003, 1005 (1945). *See also Bussey v. Commonwealth*, 797 S.W.2d 483, 484 (Ky. 1990), and *Holland v. Commonwealth*, 272 S.W.2d 458, 459 (Ky. 1954). Considering the totality of the evidence, we cannot say that Money's testimony was so improbable as to render her account unworthy of credence.

Barnett also argues that the trial court abused its discretion by allowing the Commonwealth to play all of the audio surveillance tape and a portion of the video surveillance tape to the jury. He maintains that the recordings are ambiguous regarding any drug transaction, and that neither depicts any involvement by him. Consequently, he asserts that the recordings' prejudicial effect substantially outweighed any probative value which they had. We disagree.

Under Kentucky Rules of Evidence ("KRE") 403, relevant evidence may be excluded if its probative value is substantially outweighed "by the danger of undue prejudice, confusion of the issues, or misleading the jury, or by consideration of undue delay, or needless presentation of cumulative evidence." In making an evidentiary determination under KRE 403, the trial court's ruling will be reviewed for abuse of discretion. *Partin v. Commonwealth*, 918 S.W.2d 219, 222 (Ky. 1996). "The test for abuse of discretion is whether the trial judge's

decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

The audio and video recordings were clearly relevant to depict the circumstances surrounding the alleged drug transaction. They were also relevant to show the procedures which the officers followed in setting up the controlled buy. Although neither recording directly implicated Barnett, they were clearly admissible against Bowling, who was also a defendant at this trial.

And as previously noted, Barnett had the opportunity to point out that the recordings did not directly implicate him. Under the circumstances, we cannot say that the unfair prejudicial effect of the recordings substantially outweighed their probative value. Therefore, the trial court did not abuse its discretion by allowing the Commonwealth to present them to the jury.

Accordingly, the judgment of conviction by the Bell Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Jennifer J. Hall
Assistant Public Advocate
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

David W. Barr
Assistant Attorney General
Frankfort, Kentucky