

Commonwealth of Kentucky
Court of Appeals

NO. 2007-CA-001178-MR

JAMES B. COMBS

APPELLANT

v. APPEAL FROM FLOYD CIRCUIT COURT
HONORABLE DANNY P. CAUDILL, JUDGE
ACTION NO. 06-CR-00010-001

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: COMBS, CHIEF JUDGE; STUMBO, JUDGE; GUIDUGLI,¹ SENIOR JUDGE.

GUIDUGLI, SENIOR JUDGE: A jury found James B. Combs guilty of possession of a controlled substance in the first degree, tampering with physical evidence, and of being a persistent felony offender in the second degree. He was sentenced to serve ten years. Combs raises two issues on appeal. He first argues

¹ Senior Judge Daniel T. Guidugli sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

that he was denied effective assistance of counsel due to the dual representation of both himself and his codefendant girlfriend. He then argues that the trial court erred when it failed to suppress certain evidence. After our review of the record, we find there was no error and affirm the convictions and judgment of the Floyd Circuit Court.

Suspicious activities alerted police officers to the possibility that drugs were being sold from a trailer in Hueyville, Kentucky. The officers decided to conduct what they termed a “knock and talk” and investigate the situation at the trailer. Two officers walked towards the front of the trailer where an unused entrance door was located. Two others went to the rear entrance and knocked. After a short time, Kimberly Burns answered the door with a small child. When the child saw the police officers, she ran down the length of the trailer excitedly announcing that the police were at the door. One police officer followed the child down the hallway and came into a kitchen area where he observed Combs with his hand in a garbage container.

The two officers who went to the front of the trailer heard the loud knocks on the door and then heard running inside the trailer. They went around to the end of the trailer and looked inside a large bay window. They could see two men and a woman sitting at a kitchen table. One of the men, who was later identified as Combs, was ingesting a white powdery substance through a straw. The officers then saw a small child come running down the hallway into the

kitchen area. They saw Combs scraping the white power onto a cardboard carton and stuffing it into the trash along with a plastic bag containing a white power just as the other officer came into the kitchen.

A search of the trailer yielded the white powder from the trash container, a can used as a pipe, a spoon and a straw used to ingest the drugs, three sets of scales used to weigh drugs, a bottle containing twelve prescription drugs, two reference books about prescription drugs, a handgun possessed by Combs's girlfriend, additional prescription drugs, and a large amount of cash secreted in a closet.

Combs first argues that he was denied effective assistance of counsel when his attorney also represented his codefendant girlfriend. He argues that he was not adequately informed of the pitfalls of dual representation. We disagree. Combs presented a signed waiver of dual representation to the trial court. The trial court then reviewed the possible problems such dual representation could create. Combs acknowledged that he understood and wished to proceed.

The trial court had a duty to explain possible problems related to dual representation. It fulfilled that duty. Kentucky Rules of Criminal Procedure (RCr) 8.30. Even if there was a failure of the trial court to abide by every single requirement of RCR 8.30, that does "not mandate automatic reversal." *Kirkland v. Commonwealth*, 53 S.W.3d 71, 75 (Ky. 2001). Combs must show actual prejudice and he is unable to do so. We give the written waiver great weight and find

nothing deficient in it. *Brock v. Commonwealth*, 627 S.W.2d 42 (Ky. App. 1981).

We find no error.

Next, Combs argues that the trial court erred when it allowed admission into evidence of three sets of scales, books concerning prescription drugs, and a large amount of cash. Again, we find no error. Combs argues that the evidence indicated that he was trafficking in drugs and not merely using them. We agree that the scales were evidence tending to show that Combs possessed paraphernalia, which supported the charge of possession of a controlled substance. Likewise, the books on prescription drugs tended to show knowledge concerning those drugs.

There is a three-part test used to determine the admission of evidence. It must be relevant, it must be probative, and it must not be unduly prejudicial. *Bell v. Commonwealth*, 875 S.W.2d 882, 889 (Ky. 1994). The admission of evidence is within the sound discretion of the trial court. *Matthews v. Commonwealth*, 709 S.W.2d 414 (Ky. 1985). We are unable, however, to determine the relevance of the cash to any of the charges faced by Combs. It bears little, if any, probative value in the determination of whether he possessed illegal drugs. We are not clear how it was “so interwoven with evidence of the crime charged that its introduction is unavoidable.” *Funk v. Commonwealth*, 842 S.W.2d 476, 480 (Ky. 1993). The question remains, however, whether it significantly affected his right to a fair trial.

The evidence of guilt was overwhelming. After our own review of the entire record in this case, we are not convinced that the admission of the cash into evidence materially affected the outcome. If it was error to allow the admission of cash into evidence, we are required to examine the entire situation and make a determination of whether there is “any reasonable possibility that, absent the error, the verdict would have been different.” *Taylor v. Commonwealth*, 995 S.W.2d 355, 361 (Ky. 1999). Here, with the overwhelming evidence of guilt, we find the admission of the cash into evidence to be harmless error, if error at all. Combs received a fundamentally fair trial.

The judgment of the Floyd Circuit Court is affirmed.

ALL CONCUR.

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