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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2008-CA-002194-MR

DEWAYNE BROWN

APPELLANT

v. APPEAL FROM WAYNE CIRCUIT COURT
HONORABLE VERNON MINIARD, JR., JUDGE
ACTION NO. 06-CR-00222

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: ACREE, CAPERTON, AND KELLER, JUDGES.

KELLER, JUDGE: A jury found Dewayne Brown (Brown), guilty of second-degree trafficking in a controlled substance and of being a persistent felony offender in the first degree. He appeals from the trial court's judgment consistent with that verdict, arguing that the trial court erred when it denied his motion for a directed verdict. For the following reasons, we affirm.

FACTS

On November 21, 2006, a Wayne County grand jury indicted Brown for second-degree trafficking in a controlled substance and for being a persistent felony offender in the first degree. Following trial, a jury convicted Brown on both counts and the court sentenced him to ten years' imprisonment. On appeal, Brown argues that the court should have granted his motions for a directed verdict because the confidential informant, Anna Williams (Williams), was not credible. Because Brown's arguments involve only his testimony and the testimony of Williams and a police officer, Detective Sheridan Wright (Wright), we will only summarize the testimony of those three witnesses.

Wright testified that a confidential informant must agree to certain terms. In pertinent part, those terms include agreeing to random drug testing; agreeing to random searches; and agreeing to refrain from using drugs. Before using an informant, Wright checks the Wayne County records to determine what, if any, other criminal activity the informant has engaged in. He does not perform a complete criminal background check and he does not attempt to determine the informant's reputation for truthfulness in the community.

In August 2006, Wright began using Williams as an informant. Wright testified that he was uncertain how Williams came to his attention as a possible informant; however, he stated that he thought it was through the Lake Cumberland Area Drug Task Force (the Task Force).

According to Wright, Williams contacted him on or about September 14, 2006, and told him she had scheduled a purchase of hydrocodone from Brown. At approximately 11:00 a.m. on September 14th, Wright and another officer met Williams in a parking lot. The officers searched Williams and her car, placed a recording device on Williams, and gave her \$40.00 in marked currency. Williams, with the officers following, then drove to Brown's residence. Williams went into the residence with Brown and, nine minutes later, came out, got in her car, and returned to the parking lot. The officers followed Williams to the parking lot, where they again searched Williams and her car. The officers retrieved the recording device, Williams returned \$20.00 of the \$40.00, and she gave the officers four pills. Wright then sent the pills to the police crime lab, where a technician determined they were hydrocodone.

When Wright returned to the police station, he made a cassette tape from the recording device. The Commonwealth played that cassette tape recording for the jury and entered it into evidence,¹ without objection from Brown. As noted by the Commonwealth and Brown, that recording, as it exists in the record, is essentially inaudible. However, we also note that, although the judge stated that he could not hear the recording, neither of the attorneys nor any of the jurors

¹ Although the recording was introduced into evidence, no separate copy of that recording is in the record. The only "recording" available for our review is what is contained on the video of the trial.

complained about the quality of the recording at the time it was played.²

Therefore, it is difficult to determine if the jury was able to hear what was said.

On cross-examination, Wright testified that he did not ask Williams to undergo any drug testing and that he could find no evidence that she had undergone any such testing. He also testified that he had not searched her residence. As to the search of Williams on September 14, Wright stated that he did not perform a strip search. Furthermore, he admitted that Williams could have hidden the four pills on her person and that the initial search might have failed to reveal them.

Williams testified that she was arrested by Wright in June 2006 for trafficking and that she was arrested by an agent from the Task Force later that same day for trafficking. In exchange for a promise of probation, Williams agreed to act as an informant for both Wright and the Task Force.

Williams further testified that on September 13, 2006, Williams contacted Wright and told him that she had scheduled a meeting with Brown for the following day. Williams met Wright and another officer in a church parking lot, where the officers searched Williams and her car. The officers placed a recording device on Williams and followed her to Brown's residence. Williams testified that, once inside Brown's residence, she asked Brown if he had any drugs. Brown took a cigarette pack from his pocket and took four pills from the cigarette

² We note that, during closing argument, Brown's counsel stated that he could not understand what was on the tape recording; however, he stated that it was up to the jurors to determine what they heard.

pack. He told Williams that the pills were \$8.00, but when Williams told him that she did not have exact change, he sold the pills to her for \$5.00 each. After purchasing the pills, Williams asked Brown if she could “bum a cigarette” then she left. Williams testified that she returned to the church parking lot, where she gave Wright the four pills and a marked \$20.00 bill. She stated that the officers removed the recording device and searched her and her car before leaving.

On cross-examination, Williams testified that her fiance, Billy Evans (Evans), was arrested and charged with trafficking hydrocodone approximately one month before she was. According to Williams, the police asked Evans to act as an informant, but he could not because he did not have a valid drivers’ license. Evans was convicted and served seven months and twenty-two days in jail.

Furthermore, Williams testified that, while working as an informant, she made four drug buys, two at the request of Wright and two at the request of the Task Force. At the time Williams set up the buy from Brown, she felt some pressure to act quickly because she thought delaying might jeopardize her deals with Wright and the Task Force.

Brown testified that he recognized Williams “from friends,” but denied selling or giving any pills to Williams in September 2006. Brown did not realize that he had any legal problems until he was arrested in January 2007.

On cross-examination, Brown testified that he was the only one present in his residence in September 2006. He stated that Williams visited him in September 2006, and that she asked to purchase drugs. However, Brown stated

that he refused to sell her any drugs, telling her that he did not sell drugs and that he was close to getting off probation. According to Brown, he had told Williams the same thing the previous five or six times she had approached him to buy drugs.

Brown made a motion for directed verdict at the close of the Commonwealth's case and again at the close of all proof. In both motions, Brown argued that there was not credible evidence that he had sold Williams any illegal drugs. The court held that the credibility of witnesses was within the purview of the jury and denied the motions.

STANDARD OF REVIEW

On a motion for directed verdict, the trial judge must draw all fair and reasonable inferences from the evidence in favor of the party opposing the motion. When engaging in appellate review of a ruling on a motion for directed verdict, the reviewing court must ascribe to the evidence all reasonable inferences and deductions which support the claim of the prevailing party. *Meyers v. Chapman Printing Co., Inc.*, 840 S.W.2d 814, 821 (Ky. 1992). Once the issue is squarely presented to the trial judge, who heard and considered the evidence, a reviewing court cannot substitute its judgment for that of the trial judge unless the trial judge is clearly erroneous. *Bierman v. Klapheke*, 967 S.W.2d 16, 18 (Ky. 1998).

ANALYSIS

Brown argues that the trial court erred in denying his motions for three reasons: (1) Williams was "devoid of credibility"; (2) the tape recording was of poor quality and the trial court speculated what the jurors may have heard; and

(3) Brown testified that he did not sell or give any pills to Williams. We will address the first and third arguments together.

The trial court correctly stated that judging the credibility of witnesses is a matter for the jurors, not for a court on a motion for directed verdict. *See Commonwealth v. Jones*, 880 S.W.2d 544, 545 (Ky. 1994); and *Meyers v. Chapman Printing Co., Inc.*, 840 S.W.2d 814 (Ky. 1992). Although Brown is correct that appellate courts in Kentucky have reversed trial courts on the issue of witness credibility, such reversals occurred when that “testimony asserted the occurrence of physically impossible or inconceivable events.” *Potts v. Commonwealth*, 172 S.W.3d 345, 349 (Ky. 2005).

Brown argues that, because Williams’s husband was a drug dealer, Williams could have gotten the pills from him or from her home. Brown also argues that Wright’s failure to test Williams for drug usage; his failure to search Williams’s residence; and his failure to strip search her before sending her to Brown’s, indicate that Williams could have hidden pills on her person or in her vehicle and then provided those pills to Wright. Finally, Brown argues that Williams’s fear that she would go to jail like Evans and her belief that she needed to act quickly or she would lose her “deal,” indicated that she lied about obtaining the pills from Brown.

These facts may bring into question the veracity of Williams’s testimony; however, they do not rob it of all credibility. Furthermore, we discern nothing in Williams’s testimony that described physically impossible or

inconceivable events. Finally, we note that, even if this Court considers Williams's testimony as "lacking in credibility," Wright's testimony that Williams went into Brown's residence with \$40.00 and no pills and emerged with \$20.00 and four pills would have been sufficient to support the trial court's denial of Brown's motions for directed verdict.

As to the tape recording, Brown is correct that the judge stated that he could not hear what was said. However, because there was sufficient evidence from Williams and Wright to support a conclusion that Brown was guilty, the court was not required to consider the tape recording in addressing Brown's motion for directed verdict. Therefore, the inaudibility of the tape recording was not relevant to the court's determination to deny Brown's motions for directed verdict.

CONCLUSION

For the foregoing reasons, we affirm the trial court's denial of Brown's motions for directed verdict.

ALL CONCUR.

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