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OPINION OF JULY 2, 2010, WITHDRAWN

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000220-MR

OTIS LEE HOLLAN — APPELLANT

v.

APPEAL FROM BREATHITT CIRCUIT COURT
HONORABLE FRANK ALLEN FLETCHER, JUDGE
ACTION NOS. 04-CR-00088 & 05-CR-00130

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: CAPERTON AND COMBS, JUDGES; WHITE,[1] SENIOR JUDGE.

CAPERTON, JUDGE: The Appellant, Otis Lee Hollan, conditionally pled guilty in Breathitt Circuit Court in reliance upon the Commonwealth's offer of a five-year prison sentence to trafficking in a Schedule II controlled substance, first offense, possession of a Schedule II controlled substance, possession of marijuana,

[1] Senior Judge Edwin White 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.

and receiving stolen property over $300. Sentencing has been postponed until the final adjudication of the appeal, and pursuant to RCr 8.09, Hollan has retained his right to withdraw his guilty plea should his appeal be successful.

On appeal, Hollan makes three arguments. First, he argues that the preliminary testing conducted by the lab to identify the drugs at issue failed to meet evidentiary standards of reliability and should therefore have been excluded. Secondly, Hollan asserts that the reliability of the confidential informant, Brian Smith, was not corroborated, and that the warrant based on that information was defective. Finally, Hollan argues that the audio tape produced by the informant was both irrelevant and more prejudicial than probative pursuant to KRE 403. Having reviewed the record, the arguments of the parties, and the applicable law, we reverse and remand for additional proceedings not inconsistent with this opinion.

On September 20, 2004, Smith apparently walked into the Breathitt County Sheriff's Office and told Deputy Sheriff Daniel Turner that he knew someone who was selling Oxycontin. Deputy Turner testified that he knew Smith from town, but had never used him as an informant, nor was he aware of anyone else who had done so. Turner further testified that he gave Smith $120 in marked bills and a tape recorder, and arranged for Smith to record a drug purchase. Turner testified that prior to the purchase he had searched Smith's person, but not his vehicle. Smith then drove to the Hollan residence. Turner followed Smith in his

own vehicle and watched Smith park and enter the house. Turner testified that he could not see inside the residence, but saw Smith enter and exit the home.

Afterwards, the two drove in separate cars to another location, where they had previously agreed that Smith would bring the drugs to Turner. At that location, Smith gave Turner two Oxycontin pills, which Smith stated that he purchased from Hollan for $120. Smith also provided Turner with the audio tape, which allegedly contained a recording of the transaction between Smith and Hollan. Turner did not search Smith or his vehicle after Smith exited Hollan's residence.

On the following day, Turner procured a warrant to search Hollan's home. In the affidavit in support of the warrant, Turner stated that, (1) a confidential informant said Hollan was selling Oxycontin from his residence, and (2) Turner and the informant went to Hollan's residence where the informant bought two Oxycontin pills for $120 as the deputy was watching said transaction. A search of Hollan's home revealed a number of pills, a small bag of marijuana, a pill cutter, and two small insulin syringes.

On October 1, 2004, Hollan was indicted by the Breathitt County Grand Jury on the charges of trafficking in a Schedule II controlled substance (Oxycontin), possession of a Schedule II controlled substance (Oxycontin), and possession of marijuana, all of which stemmed from the aforementioned controlled drug buy. During the pendency of the case, the grand jury also charged Hollan with receiving stolen property over $300 in a second indictment.

Hollan filed three motions to suppress concerning the drug charges in the first indictment. The first was a motion to suppress evidence seized in the search of Hollan's home conducted pursuant to the search warrant. Specifically, Hollan argued that there was nothing in the affidavit upon which the warrant was based to indicate that Smith was a reliable informant. In addressing this issue, the court below found that based upon the totality of the circumstances, including Turner's personal observations of Smith, probable cause existed for the search warrant. Accordingly, Hollan's motion to suppress the evidence seized as a result of the search was denied.

Hollan's second motion was a motion to limit the Kentucky State Police ("KSP") lab analyst from testifying about certain pills which had not undergone chemical analysis. Apparently, the analyst had tested only one pill, and had determined that it was Oxycodone.[2] The three other pills submitted by police and identified as 1A, 1B and 2, were not chemically tested according to the report. Instead, the analyst conducted a preliminary visual inspection test and found that the pills matched the description of Diazepam, Methadone, and Oxycodone, respectively. Hollan requested that the trial court suppress any mention of this evidence, as the pills had not been chemically tested, and were therefore either irrelevant, or in the alternative, unduly prejudicial.

The trial court indicated that it would initially overrule the motion and allow the person who examined the alleged controlled substances to testify

[2] Oxycontin is the commonly used trade name for Oxycodone.

regarding their examinations and findings, after which time the court would entertain any motions relevant to the testimony. Following the testimony and cross-examination of the lab analyst, the court sustained the motion to suppress with respect to the marijuana, as that substance was identified only by appearance and not by chemical testing. The motion was denied with respect to the remainder of the evidence.

Hollan's third motion concerned the audio tape of the informant's alleged interaction. Hollan argued that the tape was not relevant because it was supposedly inaudible. The Commonwealth argued that there might be differing interpretations of the recording, and that accordingly, the tape should be submitted to the jury in order for the individual jurors to make their own determinations as to its contents. After listening to the tape, the trial court overruled Hollan's motion, and stated that the jury could listen to the tape, with the exception of the portion at the end, wherein Turner could be heard speaking to Smith.

Hollan ultimately pled guilty to all charges in exchange for the Commonwealth's offer of five years for the trafficking charge, and one year for possession of Oxycontin, to run concurrently, all conditional on appeal. The trial court then entered final judgments in each of the two actions in accordance with the plea agreement, and sentenced Hollan to a total of five years. This appeal followed.

Believing the issues pertaining to the search warrant to be determinative, we shall address those issues first upon review. As noted, Hollan

argues that Smith's reliability as an informant was unknown and uncorroborated, and that accordingly, the warrant based upon the information he provided was defective. Specifically, Hollan asserts that Turner failed to ensure credibility by failing to search Smith's car either before or after the transaction, and failing to search Smith himself after he came back from Hollan's house. Further, Hollan argues that the affidavit upon which the warrant was based contained an untrue assertion, as Turner did not actually watch the transaction itself, but instead only observed Smith enter and exit the residence.

Hollan therefore argues that the portion of the affidavit in which Turner asserted that he "was watching said transaction," should be redacted. Hollan asserts that once redacted, the affidavit itself would be insufficient to support probable cause for the search, as the veracity and reliability of Smith himself are unknown, and uncorroborated. Accordingly, Hollan argues that everything collected pursuant to the buy and the search warrant should be suppressed.

In response, the Commonwealth argues first that Hollan failed to preserve any arguments concerning the misleading statement made by Deputy Turner in the affidavit. While the Commonwealth acknowledges that Hollan's counsel alluded to the misleading nature of the statement, it asserts that this was only in the context of the reliability issue, and not as a separate basis for suppression. Hollan seems to concede that this is not a separate basis of appeal, and instead asserts that as Turner himself admitted that he did not see the

transaction at the suppression hearing, the only remaining issue on appeal concerns the reliability of the informant.

The Commonwealth argues that even though Turner did not observe the actual transaction, the warrant was nevertheless valid, as Turner did not make the false statement recklessly or intentionally, and as the totality of the circumstances described in the affidavit provided sufficient information to establish a finding of probable cause. We disagree.

In addressing this issue, we note that the test for sufficiency of an affidavit underlying a search warrant is a totality of the circumstances test[3], namely, whether given all the circumstances set forth in the affidavit, including the veracity and basis of knowledge of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. *See Illinois v. Gates*, 462 U.S. 213, 238-39, 103 S.Ct. 2317, 2332, 76 L.Ed.2d 527, 548 (1983). The information in the affidavit must establish a substantial basis for concluding that the contraband or evidence described will be found in the place to be searched. *Commonwealth v. Hubble,* 730 S.W.2d 532 (Ky.App. 1987).

[3] We note that prior to *Gates*, the Fourth Amendment was understood by many courts to require strict satisfaction of a "two-pronged test" whenever an affidavit supporting the issuance of a search warrant relied on an informant's tip. It was thought that the affidavit, first, must first establish the "basis of knowledge" of the informant, and secondly, that it must provide facts establishing either the general "veracity" of the informant or the specific "reliability" of his report in the particular case. The *Gates* court specifically rejected this test for the totality of the circumstances test.

We further acknowledge, our review must be in light of the Constitutional preference for warrants. Otherwise, we would be inconsistent both with the desire to encourage use of the warrant process by police officers and with the recognition that once a warrant has been obtained, intrusion upon interests protected by the Fourth Amendment is less severe than otherwise may be the case. *See Gates, supra*, at 237 n. 10, 103 S.Ct. at 2331 n. 10. Thus, a deferential standard of review is appropriate to further the Fourth Amendment's strong preference for searches conducted pursuant to a warrant. *See Massachusetts v. Upton*, 466 U.S. 727, 104 S.Ct. 2085 (1984).

Lastly, the standard of review applicable to appellate review of a suppression hearing ruling regarding a search pursuant to a warrant:

> [I]s to determine first if the facts found by the trial judge are supported by substantial evidence, RCR 9.78, and then to determine whether the trial judge correctly determined that the issuing judge did or did not have a "substantial basis for ... conclud[ing]" that probable cause existed. *Gates,* 462 U.S. at 236, 103 S.Ct. 2317; *see also Beemer*, 665 S.W.2d at 915 (Applying the "substantial basis" test to the decision of the warrant-issuing judge to determine if there was probable cause). In doing so, all reviewing courts must give great deference to the warrant-issuing judge's decision. We also review the four corners of the affidavit and not extrinsic evidence in analyzing the warrant-issuing judge's conclusion. *Commonwealth v. Hubble,* 730 S.W. 2d 532 (Ky.App. 1987).

Commonwealth v. Pride, 302 S.W.3d 43, 49 (Ky. 2010).

In analyzing the search warrant in the case sub judice, we believe it would be helpful in understanding the language used in the affidavit in support thereof. The affidavit, in relevant part, stated "On September 20, 2004, a confidential informer stated that Mr. Hollan was selling Oxycontin from his residence as described herein." The affidavit further addressed the independent investigation initiated by Deputy Turner, stating: "Deputy Turner and the said informant went to the residence of Mr. Hollan. The deputy gave informant marked money, and bought 2 O.C.'s 40 for $120.00 as the deputy was watching said transaction."

At the suppression hearing, Deputy Turner's statements in light of the challenge to the reliability of the informant were that he did know the informant, that he had never used this individual as an informant prior to this instance, that he did not check nor was he aware of the informant's criminal history, and that his knowledge of the informant was basically limited to the informant presenting himself at the Sheriff's office and stating that he could buy drugs. These factors doe not establish the trustworthiness or reliability of the sort which was found to meet the necessary standards set forth by our Supreme Court in *Olden v. Commonwealth*, 203 SW.3d 672 (Ky. 2006) (Informant had been stopped twice after recently been seen at the residence of Olden and both times had drugs on his person which he said were purchased from Olden).

As to the specifics of the drug buy itself, Deputy Turner testified that he rode in a separate vehicle from the informant and waited for the informant after

the alleged drug buy at another location, that he never searched the informant's vehicle before or after the drug buy, that the informant was searched before the drug buy but not after he returned with the drugs allegedly purchased from Hollan. It is noteworthy that during the informant's testimony that he never stated he had observed Hollan sell drugs, nor had he seen Hollan with drugs, had ever been to Hollan's residence, offered no description of the residence or its interior, nor of the type or quantity of drugs he expected to buy from Hollan.

These are not the factual circumstances wherein our Supreme Court found that specificity and detail in the informant's description of wrongdoing was sufficient to uphold a search warrant in *Lovitt v. Commonwealth*, 103 S.W.3d 72 (Ky. 2003) (Informant gave detailed descriptions of methamphetamine manufacturing operation, contents of methamphetamine laboratory, and had personally observed same on more than one occasion over the preceding two months). While true that Deputy Turner attempted to make an audio recording of the drug transaction itself, the audio tape was, unfortunately, almost entirely inaudible and to no avail to support the search warrant.

The second challenge by Hollan to the affidavit in support of the search warrant concerned the last statement made by Deputy Turner that the drug transaction occurred "As the deputy was watching the transaction." Deputy Turner candidly admitted at the suppression hearing that he did not actually observe the transaction between the informant and Hollan.

The false statement of the deputy in the affidavit bears scrutiny, though we do not need to decide herein whether it was intentional or reckless. As noted, our standard of review of the determination made by the trial judge at the suppression hearing requires only that we decide if, under the totality of the circumstances, the facts found by the trial judge reviewing the search warrant were supported by substantial evidence, and then to determine whether the trial judge correctly determined that the issuing judge did or did not have a substantial basis for concluding that probable cause existed. We find that there was not, and hereby reverse the decision of the trial court and remand with instruction to sustain Hollan's suppression motion as to the evidence collected as a result of the search warrant.

Having so found, we now briefly address Hollan's argument concerning the preliminary testing conducted on the pills[4]. Hollan argues that the preliminary testing conducted on the pills at issue failed to meet the reliability standards of KRE 702 and *Daubert*, and should accordingly, be excluded. Specifically, Hollan asserts that the visual observation tests conducted on samples 1A, 1B, and 2 in the matter *sub judice* were both inconclusive and preliminary. Essentially, he asserts that visual observation of the pills is sufficient only to select more likely samples for further definitive testing, and is not sufficient for identification in and of itself. Thus, Hollan argues that untested pills are both

[4] Upon review of the record, it is unclear exactly which pills were tested, those collected during the search, or those purchased by the informant, or both. Accordingly, we address the issue concerning preliminary testing in the interest of being thorough.

irrelevant under KRE 401, and alternatively, are more prejudicial than probative under KRE 403.

In support of this argument, Hollan relies upon two unpublished Kentucky decisions,[5] which he asserts hold that preliminary toxicology tests are unreliable by definition, lack probative value, and are highly prejudicial. He also states that Kentucky courts routinely exclude the results of the Preliminary Breath Test, noting that although KRS 189A.104 permits mention during trial that a PBT was conducted, any testimony regarding specific results is inadmissible.[6] In addition, Hollan directs this Court to holdings in sister states, and in martial courts concerning preliminary testing, which he asserts, hold that presumptive tests are too unreliable to be relevant.[7]

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[5] *See Thacker v. Commonwealth*, 2003 WL 22227194 (Ky. 2003)(Holding that victim's toxicology report was not admissible, as test indicating a very low level of Oxycodone in murder victim's blood and only a "presumptive presence" of cocaine metabolites in his urine was not admissible in murder trial because evidence of cocaine lacked any probative value as toxicology report did not confirm presence of cocaine in victim's system, only metabolites in his urine, and Oxycodone evidence had limited probative value in that level of drug in system was within therapeutic range, and its admission would have been highly prejudicial to Commonwealth), and *Williams v. Commonwealth*, 2003 WL 1403336 (Ky. App. 2003)(holding that mention of the PBT was admissible, but testimony regarding the specific results was inadmissible.)

[6] *See Williams, supra*.

[7] *See State v. Kelly*, 770 A.2d 908 (Conn. 2001)(Court held that expert testimony that victim's bloodstains showed traces of drugs lacked scientific reliability required to be admissible, as physician did not follow up less reliable multiple enzyme immunoassay test (EMIT) test with a confirmatory gas chromatography mass spectroscopy test, because using EMIT test for dried blood samples was a new procedure not recognized as accurate in relevant community, and there was no peer review, no manual, no standard operating procedures within laboratory, no independent validation done, nor any published articles by physician concerning his scientific methodology). *See also* State v. Moody, 573 A.2d 716, 722-23 (Conn. 1990)(Holding that a presumptive test for blood has no probative value), and *United States v. Hill*, 41 M.J. 596 (Army Ct. Crim. App. 1994)(Court excluded results of a luminol tests which was "presumptively positive" for blood, when there was no follow-up testing to establish that the substance causing the luminol reaction was, in fact, human blood related to the alleged murder.)

On the basis of these authorities, Hollan argues that preliminary, presumptive tests should be considered reliable only for preliminary use, that is, to eliminate forensic samples with a low probability of yielding probative results, and to select more likely samples for further, definitive testing. While conceding that such preliminary tests are admissible in pre-trial proceedings, Hollan asserts that they do not meet the standards of *Daubert* or KRE 702, and therefore, should not be admitted at trial.

In two related arguments, Hollan asserts that totally untested pills which could be anything are also irrelevant under KRE 401. Finally, he argues that by inviting the unsupported inference that the untested pills are, in fact, illegal drugs, admission would be more prejudicial than probative under KRE 403. Hollan asserts that the admission of the untested pills would invite the jury to conclude that all of the pills which were not chemically tested were illegal, thereby providing evidence that would not otherwise exist to support the separate possession charge.[8]

In response, the Commonwealth argues first, that Hollan never specifically argued that the lab evidence violated KRE 702, and instead, asserted only that the KSP analyst should not be able to testify concerning the appearance of the pills on relevancy grounds, specifically citing KRE 401 and 403. The Commonwealth further notes that Hollan never requested a *Daubert* hearing

[8] On these same bases, Hollan argues that admission of the pills was in violation of the 5th, 6th, and 14th Amendments to the United States Constitution, as well as §§2, 3, 10, and 11 of the Kentucky Constitution.

below. Accordingly, the Commonwealth argues that this Court should not consider Hollan's arguments under KRE 702 for the first time on appeal.

Having reviewed the record, we are compelled to agree with the Commonwealth that this issue was unpreserved. The record reveals that Hollan's counsel neither mentioned KRE 702, nor requested a *Daubert* hearing. Hollan argues that counsel's assertion to the court that "you cannot know for sure what those substances are, therefore, it would make them irrelevant ..." was sufficient to implicitly preserve the issue under KRE 702. We disagree. As we have previously held on numerous occasions, appellants are not permitted to feed one can or worms to the trial judge, and another to the appellate court. *See Kennedy v. Commonwealth*, 544 S.W.2d 219, 222 (Ky. 1976).

Further, as our Supreme Court has previously held, we decline to speculate on the outcome of an unrequested *Daubert* hearing, or to hold that the failure to conduct such a hearing *sua sponte* constitutes palpable error. *See Tharp v. Commonwealth*, 40 S.W.3d 356 (Ky. 2000).

Turning to the alleged errors with respect to the preliminary testing that were preserved by Hollan, namely, his relevancy objections under KRE 401 and KRE 403, we do not believe that the court committed error under either of those standards. We review evidentiary rulings for an abuse of discretion. *See Johnson v. Commonwealth*, 105 S.W.3d 430 (Ky. 2003). The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *See Commonwealth v. English*, 993

S.W.2d 941, 945 (Ky. 1999). Having reviewed the record and applicable law, we do not find that any such abuse occurred in the matter *sub judice.*

As the Commonwealth correctly notes, the trial court initially overruled Hollan's motion only to the extent that it permitted the lab analyst to testify as to what she did with the exhibits, and reserved its ruling on the admissibility of the pills until trial. Following cross-examination of the expert, the evidence concerning the drugs was admitted, with the exception of testimony pertaining to the substance alleged to be marijuana. We believe this to have been the correct result. As we have held previously, in *Miller v. Commonwealth*, 512 S.W.2d 941 (Ky. 1974), witnesses are allowed to identify controlled substances solely by appearances in instances where the witness has specialized knowledge of the substance, gained through education, experience, or even use. *Id.* at 943.

It is the opinion of this Court that in a situation, such as the one in the matter *sub judice*, where an analyst has sufficient training in the identification of the substance at issue, and the substance conforms to standard identifying markers, then a visual inspection is sufficient to establish authenticity absent some indication that the substance is not what it appears to be. In this case, the physical appearance of the pills was found by the lab analyst to correspond to the typical appearance of controlled substances with which the lab analyst was familiar by nature of her specialized knowledge and experience. Thus, this information was certainly relevant pursuant to KRE 401.

Having so found, we disagree with Hollan's assertion that the admission of this evidence was more prejudicial than probative under KRE 403. Hollan argues first, that admission of the expert's testimony concerning the pills would have invited the jury to conclude that all of the pills gathered during the search were illegal.[9] Secondly, Hollan asserts that admission of the testimony would be prejudicial because "without the additional pills, there is no evidence to support the separate possession charge."[10]

While Hollan is correct that this evidence certainly would be prejudicial to his case, this alone does not constitute a basis for exclusion. As we have previously held, virtually all material evidence is prejudicial. To be excludable, the prejudice must be unfair. *See Ford Motor Co. v. Fulkerson*, 812 S.W.2d 119, 127 (Ky. 1991). In this instance, we cannot find that to be the case. A review of the record reveals that the court below was within its discretion to admit the pills. We find that evidence to be relevant, and while certainly prejudicial to Hollan's defense, not prejudicial to the point that would justify the remedy he seeks. Accordingly, the trial court did not err in admitting the testimony of the lab analyst authenticating the evidence.

We now turn to Hollan's final basis for appeal, namely, his argument that the trial court abused its discretion in admitting the audio tape purportedly containing a recording of the drug transaction. Specifically, Hollan argues that the

[9] As this issue was not raised before the trial court, we decline to address it now, for the first time on appeal. *See Kennedy*, *supra*.

[10] *See* Appellant's Brief, p. 7.

tape was entirely unintelligible, and accordingly, was irrelevant and prejudicial. The Commonwealth argues that the audio tape was probative of the trafficking charges because it served to corroborate Smith's testimony.[11] The Commonwealth argues that only a slight increase in probability must be shown for evidence to be admissible[12], and states that the tape serves this purpose. Further, the Commonwealth asserts that Hollan has failed to show how he was prejudiced by admission of the tape. Having reviewed the law, and the tape at issue in detail, we are compelled to disagree, and find that admission of the tape was in error.

In reviewing this issue, we again note that this Court reviews evidentiary rulings only to determine if there has been an abuse of discretion by the trial court. *See Barnett v. Commonwealth*, 979 S.W.2d 98, 103 (Ky. 1998); *Hall v. Commonwealth*, 956 S.W.2d 224, 227 (Ky.App. 1997). The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *See Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

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[11] Specifically, the Commonwealth cites as probative the portion of the tape which includes a "short conversation" between the deputy and the CI, followed by the sound of an automobile's door chime and a motor running for several minutes. The Commonwealth asserts that this portion of the tape corroborates the testimony of Smith and Turner that Turner gave Smith money to buy drugs, and that he got into his car and drove for several minutes. Further, the Commonwealth states that the tape clearly records the engine stopping, a sound similar to a car door shutting, and the sound of someone knocking on the door, followed by a conversation, and noise from a television. The Commonwealth argues that these noises corroborate Smith's testimony that he drove to a residence, knocked at the door, and entered the residence. Additionally, the Commonwealth asserts that the tape contains references to specific amounts of money; however, having reviewed the tape, we are unable to discern any distinct references, aside from the sound of a voice, or voices, which are unintelligible, and various other background noises, none of which were identifiable to any degree of certainty.

[12] *See Harris v. Commonwealth*, 134 S.W.3d 603, 607 (Ky. 2004).

The Commonwealth correctly notes that when portions of a tape are inaudible, it is within the discretion of the trial court to determine whether to admit the entire tape into evidence. *Potts v. Commonwealth*, 172 S.W.3d 345, 352 (Ky. 2005). However, that discretion is properly exercised in instances where the inaudible portions are not so substantial as to render the recordings untrustworthy as a whole. *See Potts,* citing *Norton v. Commonwealth*, 890 S.W.2d 632, 636 (Ky.App. 1994). Essentially, a trial court may admit recordings in instances where those recordings are sufficiently audible to be probative. *See Johnson v. Commonwealth*, 90 S.W.3d 39, 25 (Ky. 2002)(overruled on other grounds by *McClanahan v. Commonwealth*, 308 S.W.3d 694 (Ky. 2010)).

Our review of the audio tape at issue reveals that it is almost entirely inaudible, particularly as to any conversations between Smith and Hollan. The test for admission of such tapes, as set forth by *Johnson*, consists of a two-part analysis. In this instance, the tape meets neither part, being both inaudible, and accordingly, lacking any probative value. While the Commonwealth is correct that tapes may still be admissible when many parts are inaudible, our courts have nevertheless consistently required that at least some portions be sufficiently audible *and* probative of the charges. *Id.* Such is not the case in the matter *sub judice*. While the tape in question does support an argument that Smith did go somewhere in an automobile and listen to a television, it supports little else.

Having found this to be the case, we turn now to the question of whether admission of the inaudible tape was unduly prejudicial to Hollan. The

Commonwealth urges this Court to rely upon *Potts v. Commonwealth*, 172 S.W.3d 345 (Ky. 2005) in making the determination that the audio tape in the case herein has at least some probative value. In *Potts*, counsel submitted a videotape of a drug transaction, which was "largely inaudible," but which nevertheless showed the defendant inside the informant's car. The court found the tape probative of the charges, and therefore admissible, because it placed the defendant at the scene where the trafficking occurred. The Commonwealth argues the same of the audio tape in the instant case, and asserts that it is probative of the charges because it corroborates Smith's testimony that he went to Hollan's residence, and because it contains references to specific amounts of money.[13] Thus, the Commonwealth argues that the tape should be admitted, as it makes some matters of consequence to the trafficking charge at least slightly more probable.

Having reviewed *Potts*, we find it to be distinguishable from the situation in the matter *sub judice*, in which the audio tape simply does not identify Hollan, Hollan's residence, or even Smith.[14] In the opinion of this Court, it neither increases nor decreases the probability that Hollan sold drugs to Smith. Moreover, we are of the opinion that the admission of the tape into evidence certainly may

[13] Once again, we note that we were unable to discern any such references on the copy of the tape provided for our review.

[14] In *Potts*, at issue were an audio tape and two video tapes. The audio tape, unlike the one *sub judice*, had inaudible portions but those portions were not so substantial as to render the recording untrustworthy. The video tapes, found admissible, were inaudible but had video that established the presence of the defendant at the scene. This is obviously not an argument that can be made supporting the admission of an audio-only tape.

have given the jury the impression that it contained something of significance. Accordingly, we believe that the admission of the audio tape was in error.

Wherefore, for the foregoing reasons, we hereby reverse and remand for additional proceedings not inconsistent with this opinion.

ALL CONCUR.

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