

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-001377-MR

ANTHONY MEREDITH

APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE GREGORY M. BARTLETT, JUDGE
ACTION NO. 09-CR-00011

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: KELLER, NICKELL, AND STUMBO, JUDGES.

STUMBO, JUDGE: Anthony Meredith appeals from his conviction of first-degree possession of a controlled substance and possession of drug paraphernalia. He argues that he was the victim of prosecutorial misconduct and prosecutorial vindictiveness. We affirm the conviction.

In January, 2009, Meredith was initially charged with incest, rape, and sodomy in connection with the alleged molestation of his daughter. During the investigation of this case, police found a baggie with cocaine residue and a pipe in a shed at Meredith's residence. On May 7, 2009, a superseding indictment was issued adding the possession of a controlled substance and drug paraphernalia charges. The trial began on May 27, 2009, and ended on May 29. The jury could not reach a verdict on the sex charges, but found Meredith guilty of the two drug charges. He was sentenced to a total of five years. This appeal followed.

Meredith's first argument is that the conduct of the Commonwealth Attorney was so offensive as to constitute prosecutorial misconduct and deny him a fair trial. We disagree.

In any consideration of alleged prosecutorial misconduct . . . we must determine whether the conduct was of such an "egregious" nature as to deny the accused his constitutional right of due process of law. *Donnelly v. DeChristoforo*, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974). The required analysis, by an appellate court, must focus on the overall fairness of the trial, and not the culpability of the prosecutor. *Smith v. Phillips*, 455 U.S. 209, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982).

Slaughter v. Commonwealth, 744 S.W.2d 407, 411 - 412 (Ky. 1987).

Meredith points to about five instances of alleged prosecutorial misconduct during this three-day trial. None of these, either individually or collectively, amount to prosecutorial misconduct. Actually, in a majority of these examples, defense counsel objected, the Commonwealth Attorney apologized, and the objected to conduct was not repeated. Counsel requested no further relief from

the court. None of them were egregious, flagrant, inflammatory, or even came close to being intended to illicitly sway the jury. We cannot find reversible error.

Furthermore, the five examples of alleged prosecutorial misconduct only dealt with the sex charges, not the drug charges. In fact, Meredith never challenged the drug charges. In defense counsel's opening statement, he stated that Meredith would not be disputing the drugs and paraphernalia found in his shed. Even if the alleged instances of prosecutorial misconduct were actually prejudicial, Meredith was only found guilty of the undisputed drug charges.

Meredith also argues that he was a victim of prosecutorial misconduct because the drug charges were added after the initial indictment. Meredith argues the drug charges were only brought after he refused to accept a plea deal from the Commonwealth. We cannot find that the timing of the charges constitutes vindictiveness on the part of the Commonwealth.

The drugs and paraphernalia were found at his residence and Meredith did not dispute their existence. Adding legitimate charges to an indictment is not vindictive behavior, even if they are brought after failed plea negotiations.

Bordenkircher v. Hayes, 434 U.S. 357, 98 S.Ct. 663, 54 L.Ed.2d 604 (1978).

For the foregoing reasons we affirm Meredith's conviction.

NICKELL, JUDGE, CONCURS.

KELLER, JUDGE, CONCURS IN RESULT ONLY.

BRIEFS FOR APPELLANT:

Lisa Bridges Clare
Linda Roberts Horsman
Department of Public Advocacy
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Jeffrey A. Cross
Assistant Attorney General
Frankfort, Kentucky