

Commonwealth of Kentucky
Court of Appeals

NO. 2012-CA-000686-MR

ANDRE BURNS

APPELLANT

v. APPEAL FROM MONTGOMERY CIRCUIT COURT
HONORABLE BETH LEWIS MAZE, JUDGE
ACTION NO. 11-CR-00118

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: CLAYTON, LAMBERT, AND VANMETER, JUDGES.

VANMETER, JUDGE: Andre Burns appeals from the Montgomery Circuit Court's judgment sentencing him to eight years, nine months and one day in prison. Burns argues the circuit court erred by denying his motion to suppress evidence and motion for a directed verdict of acquittal. For the following reasons, we affirm.

Burns was indicted for the charge of trafficking in controlled substance (cocaine) in the first degree, second offense arising out of a controlled buy with confidential informants “(CIs)” on February 1, 2011. The Commonwealth sought to have the cocaine, along with Kentucky State Police (“KSP”) lab reports positively identifying the substance as cocaine, admitted into evidence at trial. Burns filed a motion to suppress the cocaine and several KSP lab reports identifying the cocaine, arguing that the Commonwealth could not prove the cocaine tested by the KSP lab was the same substance the CIs allegedly purchased from him.

The facts reveal that the Mount Sterling Police Department’s (“Department”) evidence log shows the cocaine was sent to the KSP lab for testing on February 1, 2011; the KSP lab report confirms the evidence was received on February 18, 2011. Department Chief David Charles also incorrectly labeled the cocaine prior to sending it to the KSP lab. According to Charles’s testimony, the cocaine was sent to the lab with evidence from another case, identified as a pink tablet. The cocaine and pink tablet were mailed together, but were separately sealed and accompanied by an evidence form. When filling out the forms, Charles incorrectly wrote the case number of the case involving the pink tablet on the form for the cocaine. Sergeant Jimmy Daniels called the KSP lab and informed Susan Vanlandingham, an employee of the KSP lab, of the error and identified the proper case number associated with the cocaine. Vanlandingham tested the substance and positively identified it as cocaine. She then amended the lab report to indicate the

proper case number. The weight of the cocaine tested, as specified on the lab reports, was one-third of the weight of the alleged cocaine purchased by the CIs and noted in the police record following Burns's arrest.

The circuit court denied Burns's motion to suppress, except for the amended lab report, which it suppressed due to the Commonwealth not providing Burns with a copy prior to trial. Following the Commonwealth's case-in-chief, Burns moved for a directed verdict, alleging the Commonwealth failed to prove the cocaine tested at the KSP lab was the same substance purchased by the CIs. The circuit court denied the motion and the jury found Burns guilty, recommending the maximum sentence. Burns was sentenced to eight years, nine months and one day. This appeal followed.

Our review of a court's denial of a motion to suppress "is a two-step process that first reviews the factual findings of the trial court under a clearly erroneous standard. The second step reviews *de novo* the applicability of the law to the facts found." *Welch v. Commonwealth*, 149 S.W.3d 407, 409 (Ky. 2004) (internal citations omitted). *See also* RCr¹ 9.78. Since no factual findings of the circuit court are in dispute, we review *de novo* the court's legal analysis. On review of a denial of a directed verdict of acquittal, "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." *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991) (citations omitted).

¹ Kentucky Rules of Criminal Procedure.

KRE² 901 requires a proper foundation be laid to authenticate evidence as a condition precedent to admissibility. The purpose of a laying a proper foundation is “to prove that the proffered evidence was the same evidence actually involved in the event in question and that it remains materially unchanged from the time of the event until its admission.” *Thomas v. Commonwealth*, 153 S.W.3d 772, 779 (Ky. 2004) (citations omitted). Evidence which is fungible, or more highly susceptible to change, requires a more elaborate foundation. *Id.* See *Rabovsky v. Commonwealth*, 973 S.W.2d 6, 8 (Ky. 1998) (laboratory-tested blood sample), *Greene v. Commonwealth*, No. 2010-SC-000776-MR, 2012 WL 3637142, at *2 (Ky. Aug 23, 2012) (laboratory-tested cocaine samples). Proponents of fungible evidence do not need to “establish a perfect chain of custody or to eliminate all possibility of tampering or misidentification, so long as there is persuasive evidence that ‘the reasonable probability is that the evidence has not been altered in any material respect.’” *Rabovsky*, 973 S.W.2d at 8 (quoting *United States v. Cardenas*, 864 F.2d 1528, 1532 (10th Cir. 1989)).

Here, the Commonwealth elicited sufficient testimony to establish a reasonable probability that the cocaine analyzed at the KSP lab was the same substance obtained from the CIs during Burns’s arrest. Chief Charles testified that the cocaine was sealed on February 1, 2011 in preparation to be mailed to the KSP lab. He stated that the Department typically waits several weeks to mail sealed evidence, so that they can send multiple pieces of evidence at once. Charles also

² Kentucky Rules of Evidence.

confirmed that he mislabeled the cocaine prior to sending it to the KSP lab. Vanlandingham testified that she received the sealed substance and after testing it, identified it as cocaine. She was made aware of the labeling error, and amended the final lab report to reflect the appropriate case number. With respect to the weight discrepancy, Charles testified that he estimated the substance's weight, and due to field testing, the amount sent to the lab was less than the amount seized from the CIs. Based on this testimony, we do not find the circuit court erred by denying Burns's motion to suppress the cocaine, the KSP lab report and testimony from KSP employees and his motion for a directed verdict. Additionally, we note that discrepancies in the chain of custody are generally matters that "go to the weight of the evidence rather than to its admissibility." *Rabovsky*, 973 S.W.2d at 8 (citation omitted). Here, the jury was free to take into account the reliability of the drug evidence raised by Burns; it still found that he sold the CIs cocaine during the controlled buy.

The judgment of the Montgomery Circuit Court is affirmed.

ALL CONCUR.

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