

RENDERED: NOVEMBER 8, 2019; 10:00 A.M.
NOT TO BE PUBLISHED

OPINION OF NOVEMBER 1, 2019, WITHDRAWN

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-001481-MR

KELVIN WILSON

APPELLANT

v. APPEAL FROM RUSSELL CIRCUIT COURT
HONORABLE VERNON MINIARD, JR., JUDGE
ACTION NO. 17-CR-00060-001

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * ** * ** *

BEFORE: DIXON, MAZE, AND SPALDING, JUDGES.

SPALDING, JUDGE: Kelvin Wilson appeals from a judgment based on a jury verdict convicting him of first-degree trafficking in a controlled substance (less than two grams) and first-degree trafficking in a controlled substance (more than two grams) for which he received sentences of one year and five years to be served

consecutively for a total of six years' imprisonment. We reverse that judgment and remand for further proceedings.

The convictions which form the basis of this appeal arose from two separate drug transactions with a confidential informant. Appellant's two co-defendants pled guilty to the trafficking charges and both testified at the trial. Additional facts will be developed as they relate to appellant's arguments for reversal of the judgment against him.

The key issue in this appeal is the propriety of introducing the audio recordings of the drug transactions in question. This situation is unique in that appellant and confidential informant never met. At trial, the jury heard testimony from Officer Joey Hoover that he had orchestrated a controlled buy operation in which a confidential informant would purchase drugs with money provided by Officer Hoover. Equipped with a recording device, the confidential informant was to enter a pool hall to purchase drugs from an individual unrelated to these proceedings. Although the intended target of the operation was not present at the pool hall, the confidential informant was directed to co-defendant David "Frosty" Williams, who indicated that he could help her obtain methamphetamine. Mr. Williams and the informant subsequently got into her car and drove to appellant's

home which he shared with his girlfriend, co-defendant Crystal Rabbeth.¹ It appears from the recordings that on both this first occasion, and on a second occasion, Mr. Williams took the money the officer had given the informant and went into appellant's home out of the sight and hearing of the informant. Mr. Williams subsequently returned to the vehicle with the drugs and without the money the informant had given him to make the buys. Appellant's voice does not appear on either recording. It is significant to note at this point that appellant did not object to the introduction of either recording into evidence.

Review of the recordings discloses three distinct types of statements. First, the recordings contain the voice of Officer Hoover at the beginning and end of each recording. In fact, Officer Hoover, who had observed the transactions from afar, specifically states at the end of the first recording that the informant had gone to appellant's home to make the drug purchase. Second, the recordings contain conversations between the informant and Mr. Williams discussing the drug buys at appellant's home, drug buys in the future, the use of drugs in general, and, at times when she's alone, the informant's own commentary about what is taking place. Third, the recordings contain Mr. Williams' statements about what was occurring, plans for future drug transactions, and who they were dealing with.

¹ At trial, Ms. Rabbeth testified on behalf of the Defendant stating appellant had no involvement in the transaction and she was the guilty party.

Appellant insists that the introduction of these recordings constitutes palpable error and thus the judgment must be reversed on that basis.

To begin our analysis, we emphasize that the Commonwealth is permitted to introduce an audio recording of a drug transaction so long as it is introduced for non-hearsay purposes and is evidence of the event as it occurred. This Court's result in *Norton v. Commonwealth*, 890 S.W.2d 632 (Ky. App. 1994), explained the requirements for determining whether statements such as those in question here constitute inadmissible hearsay:

We conclude that the tapes at issue do not constitute hearsay; instead, they were evidence of the event itself, introduced for a non-hearsay purpose. The issue here is not whether someone else (for instance, the undercover officer) may testify as to what other persons said during the transaction but, instead, **whether the tapes of the actual voices of the persons conversing during the course of the transaction are admissible as competent evidence, arguably the best evidence that the transaction or meeting did, in fact, occur and that the statements were, in fact, made.**

Id. at 635 (emphasis added). More recently, in *Baker v. Commonwealth*, 234 S.W.3d 389 (Ky. App. 2007), we held that the trial court did not err in admitting recordings as non-hearsay under the authority of *Norton* on the basis that a cooperating witness's statements to a police officer were "nothing more than verifying a version of events that Detective Burch had personally witnessed." *Id.* at 394.

The recordings at issue in this appeal were not audio recordings of the actual drug transactions for which the appellant is on trial. Appellant's voice is never recorded on the recordings and the majority of the discussions on the recordings were not about the transactions for which the appellant is charged. The statements on the recordings clearly are not a recording of the crime itself but constitute hearsay.

In reaching this conclusion, we note the Commonwealth's argument that appellant was not prejudiced by the introduction of the recordings because much of the recorded statements were properly admissible in other ways. However, in analyzing the Commonwealth's contention, it is important to relate the manner in which the case was presented to the jury. Officer Hoover testified first; the informant second, during which the audio recordings were played; the laboratory technician third; the deputy jailer fourth; and finally Mr. Williams. Notably, the informant essentially testified that she did not remember what had occurred in the drug transactions because she was high at the time. Mr. Williams testified that he had only dealt with Ms. Rabbeth and that he had no interaction with appellant in regard to these drug transactions. Under KRE² 801A, a witness's prior statement is not excluded by the hearsay rule if it is inconsistent with his or her testimony at trial:

² Kentucky Rules of Evidence.

(a) Prior statements of witnesses. A statement is not excluded by the hearsay rule, even though the declarant is available as a witness, if the declarant testifies at the trial or hearing and is examined concerning the statement, with a foundation laid as required by KRE 613, and the statement is:

(1) Inconsistent with the declarant's testimony[.]

It appears that all three previously-identified categories of statements on the recordings have different degrees of interaction with this rule.

First, it is clear that Officer Hoover's statements on the recording are inadmissible under KRE 801A(a)(1). He testified consistently with his statements on the recordings and, therefore, his commentary on the recordings must be construed to be purely hearsay. Next, the informant testified, essentially, that she did not remember what occurred during the transactions. Forgetfulness is only inconsistent testimony if it appears that hostility of the witness is the driving force for her forgetfulness. Our Supreme Court emphasized this principle in *Wiley v. Commonwealth*, 348 S.W.3d 570, (Ky. 2010), stating that:

the relevant inquiry in determining if a lack of memory is (or should be treated as) a prior inconsistent statement, is whether, within the context of the case, there is an appearance of hostility of the witness which is the driving force behind the witness's claim that he is unable to remember the statement. As the above cases demonstrate, the claimed lack of memory of the witness appeared to be a purposeful attempt to frustrate the search for the truth. Within that context, a witness's claimed inability to remember a statement does amount to an inconsistent statement under KRE 801A(a)(1).

Id. at 578-79 (footnote omitted). In this case, because there was no objection, the trial court did not inquire into the basis for the informant's inability to remember. However, if it were due to her stated reason that she was simply too high to remember, then absent a showing of hostility by the Commonwealth, her recorded statements would also be considered to be inadmissible.

Finally, in this regard, Mr. Williams' statements on the recording are inconsistent with his trial testimony about the transactions. Appellant objects to two specific statements Mr. Williams made on the recording, both of which specifically implicated appellant as the person from whom the informant was purchasing the drugs. These statements are inconsistent with Mr. Williams' trial testimony that appellant was not involved in the drug transactions at all and that he had only dealt with Ms. Rabbeth. Thus, these statements could have been introduced under KRE 801A(a)(1). However, before that can occur, KRE 801A mandates that a foundation as required by KRE 613(a) be laid prior to the introduction of the inconsistent statement.

- (a) Examining witness concerning prior statement.
Before other evidence can be offered of the witness having made at another time a different statement, he must be inquired of concerning it, with the circumstances of time, place, and persons present, as correctly as the examining party can present them; and, if it be in writing, it must be shown to the witness, with opportunity to explain it. The court may allow such evidence to be introduced when it is

impossible to comply with this rule because of the absence at the trial or hearing of the witness sought to be contradicted, and when the court finds that the impeaching party has acted in good faith.

That foundation was not laid in this case because the recordings were introduced *prior* to Mr. Williams' trial testimony.

Although not explicitly arguing that any error in the introduction of Mr. Williams' prior inconsistent statements constituted harmless error, the Commonwealth asserts that there was adherence to the substance, if not the form, of KRE 801A in this case. This presents an interesting and unique situation in that both parties ask this Court to ignore well-defined formalities and procedures concerning the conduct of trial proceedings. Appellant asks us to ignore the fact that he failed to preserve this issue for our review and nevertheless reverse the judgment below arguing manifest injustice which affected the result of his trial. The Commonwealth asks us to ignore the fact that what is contained in the recordings is hearsay alleging that *had* it followed the procedure set out in KRE 801A, much of the evidence would have come in anyway. Balancing the equities of this situation, the weight falls most heavily in favor of a finding of manifest injustice which has been defined as error, which "seriously affects the fairness, integrity or public reputation of judicial proceedings." *Martin v. Commonwealth*, 207 S.W.3d 1, 4 (Ky. 2006) (quoting *Johnson v. United States*, 520 U.S. 461, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997)).

Applying this standard to appellant's case, we are convinced that it was palpable error to permit the introduction of the recordings in this manner. The most significant and the only direct evidence connecting appellant with the drug transactions in question is contained in Mr. Williams' audio statements. Had the Commonwealth proceeded correctly and called Mr. Williams to testify prior to the introduction of the recordings, there would have been a significant difference in the manner in which they were presented to the jury. Instead of being played as a single story, each would have played in individual segments requiring Mr. Williams to confirm or deny the statements he made on the recordings. That process is not a technicality which merely elevates form over substance, but rather, it is the threshold by which otherwise inadmissible hearsay is permitted to become actual evidence at trial. Thus, we reverse the judgment on this basis and remand the case for further proceedings.

Because the matter is to be retried, we will address appellant's other arguments for the benefit of the trial court and the parties. First, appellant asserts that the trial court erred in allowing the deputy jailer to testify as to statements appellant made on the telephone while at the detention center. Contrary to appellant's contention that the statements were not relevant or evidence of other bad acts, we are persuaded that they were properly admitted as an admission under KRE 801A(b)(1). That subsection of KRE 801A provides:

- (b) Admissions of parties. A statement is not excluded by the hearsay rule, even though the declarant is available as a witness, if the statement is offered against a party and is:
- (1) The party's own statement, in either an individual or a representative capacity[.]

The deputy jailer's testimony was not, as alleged, evidence of appellant's prior bad acts, but clearly evidenced part of the ongoing investigation of the cases against him. As part of that investigation, a search of appellant's home revealed evidence of drug trafficking paraphernalia. Thus, we believe that evidence of appellant's telephonic statements at the detention center was clearly relevant to that investigation and constituted admissible evidence as to the crimes with which he was charged. There was no error, let alone palpable error, with respect to this unpreserved issue.

Appellant next argues that the evidence obtained from his residence pursuant to two search warrants should have been excluded. While appellant advances a litany of arguments supporting this contention, the issue is basically one of relevancy. KRE 401 defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Under this standard, the buy money in the purse and drug trafficking paraphernalia found in the residence certainly tend to prove appellant was engaged in drug trafficking and are thus admissible under KRE 401. The

evidence is not unduly prejudicial and is precisely the kind of evidence which is appropriate in drug trafficking prosecutions. In our view, appellant's argument goes to the weight and import of the evidence obtained, not to its admissibility. There was no error.

Finally, appellant argues the trial court erred in failing to grant his motion for a directed verdict. In essence, appellant maintains that because the evidence against him was not properly introduced, there are no grounds upon which to sustain the conviction. This argument fails for two reasons.

First, because appellant failed to object to the introduction of the evidence at the time it was admitted, the court had Mr. Williams' recorded statements from which it could conclude that appellant was implicated in the drug transactions. Second, even absent consideration of Mr. Williams' recorded statements, there was also the evidence that the confidential informant made two trips to appellant's home with drug buy money and no drugs and returned to the officer in charge with drugs and no money; the appellant's incriminating telephone call from the jail; and the search of appellant's home revealed drug trafficking paraphernalia and the money used to buy the drugs in question. While most certainly circumstantial, this evidence was sufficient to withstand appellant's motion for a directed verdict. Again, we perceive no error in the refusal to grant appellant's directed verdict motion.

In sum, because we are convinced that introduction of the audio recordings of the two drug transactions without a proper foundation constituted palpable error, we reverse the judgment of the Russell Circuit Court and remand the case for a new trial.

DIXON, JUDGE, CONCURS.

MAZE, JUDGE, CONCURS IN RESULT ONLY AND FILES SEPARATE OPINION.

MAZE, JUDGE, CONCURRING IN RESULT: While I agree with the result reached by the majority opinion, I am not convinced that the hearsay issues identified rise to the level of palpable error. When reviewing an unpreserved error, we may grant relief of a palpable error if we find that “manifest injustice has resulted from the error.” RCr 10.26. Such injustice occurs only when the alleged error “seriously affected the fairness, integrity, or public reputation of the proceeding.” *Newcomb v. Commonwealth*, 410 S.W.3d 63, 79 (Ky. 2013) (quoting *Martin v. Commonwealth*, 207 S.W.3d 1, 4 (Ky. 2006)) (internal quotations omitted). In other words, we inquire as to whether the result of the proceeding would have been different absent the alleged error. *See Brewer v. Commonwealth*, 206 S.W.3d 343, 349 (Ky. 2006).

As the majority notes, Officer Hoover testified what happened at the defendant’s residence and specifically related what he observed. Because he was

subject to cross-examination, I believe this was sufficient to quell any hearsay concerns regarding his recorded statements. I agree with the majority that the recorded statements by Mr. Williams and the informant did not clearly fall within an exception to the hearsay rule. But since most, if not all, of that evidence would have been admissible if a proper foundation were laid, I am not convinced that these issues rise to the level of palpable error.

Nevertheless, I would find palpable error because admission of those recorded statements violated Wilson's rights under the Confrontation Clause. In *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), the United States Supreme Court held that out-of-court testimonial statements are inadmissible under the Confrontation Clause regardless of their admissibility under an exception to the hearsay rule. The recorded statements by Mr. Williams and the informant were clearly testimonial in nature with respect to the events being described and Wilson's involvement. Given the informant's inability to testify about the recorded events, the Confrontation Clause issue becomes more important. Likewise, the lack of foundation for Mr. Williams's testimony is much more significant when considered in light of the confrontation issue rather than only hearsay. Therefore, I agree with the majority that this matter must be remanded for a new trial at which a proper foundation is laid for the introduction of

the recordings under the Confrontation Clause. I agree with the rest of the analysis in the majority opinion.

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