IMPORTANT NOTICE

NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.

RENDERED: MAY 20, 2004
NOT TO BE PUBLSIHED

Supreme Court of Kentucky

FINAL

DATE June 10, 04 ELIA GRAVITT, D.C.

2003-SC-0282-MR

LARRY W. KARR — APPELLANT

V.

APPEAL FROM LAUREL CIRCUIT COURT
HONORABLE RODERICK MESSER, JUDGE
02-CR-0046

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

Affirming

Appellant, Larry W. Karr, was convicted in the Laurel Circuit Court on two counts of trafficking in marijuana over eight ounces. He was sentenced to a total of twenty years imprisonment and appeals to this Court as a matter of right. Finding no error, we affirm.

In response to numerous complaints, the Laurel County Sheriff's Department and the Kentucky State Police conducted a joint drug investigation of Appellant. On May 7, 2001, Detective Thomas McKnight equipped a confidential informant, Janie Forbes, with a recording device and sent her to the home of Appellant's sister, where Forbes purchased 447.2 grams (approximately one pound) of marijuana from Appellant for

$1,200. After the transaction was completed, Forbes returned to the designated location and turned over the recording device and the marijuana to Detective McKnight.

On June 4, 2001, Forbes placed a recorded phone call to Appellant to arrange a second transaction. Again equipped with a recording device, Forbes met Appellant at his sister's home and paid $1,350 for 444.9 grams of marijuana.

In March 2002, Appellant was indicted for two counts of trafficking in marijuana over eight ounces. Following a trial, the jury found Appellant guilty of both charges and recommended a ten year sentence on each, to run consecutively for a total of twenty years imprisonment. Judgment was entered accordingly. This appeal ensued. Additional facts are set forth as necessary.

I.

Appellant first argues that the trial court erred in admitting testimony by Detective McKnight that the joint investigation ensued after both law enforcement agencies had received "numerous complaints on the accused." Appellant contends that this testimony constituted improper "investigative hearsay." Although Appellant concedes that this issue is not preserved, he urges review under RCr 10.26.

In Sanborn v. Commonwealth, Ky., 754 S.W.2d 534 (1988), this Court declared that there is no such concept as investigative hearsay. See Robert G. Lawson, The Kentucky Evidence Law Handbook, § 8.90[4] p. 733 (Lexis Nexis 2003). We held therein:

> Prosecutors should, once and for all, abandon the term "investigative hearsay" as a misnomer, an oxymoron. The rule is that a police officer may testify about information furnished to him only where it tends to explain the action that was taken by the police officer as a result of this information *and* the taking of that action is an issue in the case. Such information is then admissible, not to prove the facts told to the police officer, but only to prove why the police officer then acted as he did. It is

> admissible *only if* there is an issue about the police officer's action. (Emphasis in original)

Sanborn, supra, at 541.

However, in a subsequent case, Gordon v. Commonwealth, Ky., 916 S.W.2d 176, 178 (1995), we further noted that "an arresting officer should not be put in the false position of seeming just to have happened upon the scene; he should be allowed some explanation of his presence and conduct. His testimony that he acted 'upon information received,' or words to that effect, should be sufficient." (Quoting McCormick on Evidence 734 (3d ed.1984)).

Detective McKnight's testimony that the law enforcement agencies acted in response to numerous complaints received about Appellant is essentially the equivalent of stating that police "acted upon information received." Detective McKnight did not testify to the details of the complaints or statements received from third parties in conjunction therewith. Nor was his statement offered to prove the fact that complaints were filed, but rather only to explain why an investigation of Appellant was initiated.

Even if we were to conclude that Detective McKnight's testimony was improper, any error was cured during cross-examination when defense counsel challenged whether the actions taken by the detective were the result of legitimate complaints or allegedly erroneous information provided by the informant. Thus error, if any, "was erased by subsequent legitimation." Garland v. Commonwealth, Ky., 127 S.W.3d 529, 540 (Quoting Summitt v. Commonwealth, Ky., 550 S.W.2d 548, 550 (1977)).

II.

Appellant next argues that Detective McKnight improperly testified to evidence of other crimes in violation of KRE 404. While this issue is not preserved, Appellant claims palpable error under RCr 10.26.

The challenged testimony is as follows:

Defense counsel: At the end of your investigation, did you ever search Mr. Karr's residence?

Det. McKnight: Mr. Karr had several residences.

Defense counsel: Did you search them?

Det. McKnight: I did not, no ma'am.

Defense counsel: Were you aware of any other officer searching him or his residence?

Det. McKnight: I have searched his person and also his vehicles and located marijuana.

Defense counsel: And when was this?

Det. McKnight: That was on a traffic stop in Pulaski County.

Prosecutor [bench conference]: Your honor, I feel for appellate purposes, just for the record, this is in response to the Defendant's questions. We did not elicit this testimony.

Defense counsel [bench conference]: I understand.

Defense counsel: How much approximate marijuana did you find?

Det. McKnight: At which time?

Defense counsel: This traffic stop you mentioned just a moment ago.

Det. McKnight: It was a small amount of marijuana, as well as a set of digital scales.

Incredulously, Appellant now argues on appeal that defense counsel never asked Detective McKnight whether he had searched Appellant, whether he had found marijuana on Appellant's person or vehicle, or whether he had found digital scales. Based on his interpretation of the above testimony, Appellant concludes that Detective

McKnight's "volunteered" answers were non-responsive and plainly inadmissible under any interpretation of KRE 404(b).

Without question, Detective McKnight's answers were precisely in response to defense counsel's questions. Counsel even conceded as much during the bench conference. "One who asks questions which calls for an answer has waived any objection to the answer if it is responsive." Hodge v. Commonwealth, Ky., 17 S.W.3d 824, 845 (2000), cert. denied, 531 U.S. 1018 (2000). While defense counsel's line of questioning certainly may have been unwise, Detective McKnight's answers did not constitute error, palpable or otherwise.

III.

Finally, relying on this Court's opinion in Dillingham v. Commonwealth, Ky., 995 S.W.2d 377 (1999), cert. denied, 528 U.S. 1166 (2000), Appellant argues that the Commonwealth's introduction of a collection of documents during the penalty phase was unduly prejudicial, and that there is a substantial possibility he would not have received the maximum sentence had they been excluded from evidence. Again, the issue is unpreserved and Appellant urges review under RCr 10.26.

The documents at issue included a "Case History" from the Laurel District Court which showed a prior arrest and conviction for the misdemeanor offense of trafficking in marijuana, less than eight ounces, as well as a notation that a cash bond was posted. The document also reflected that a show cause hearing was held regarding that prior offense, although no indication is given as to the grounds or disposition of the hearing. Appellant points out that the case jacket on the misdemeanor case, which was also included in the documents, showed that he posted a $2,500 bond, thus creating the inference that he kept "a large amount of cash on hand."

Appellant's reliance on Dillingham, supra, is misplaced. In Dillingham, the only evidence introduced during the penalty phase was a computer printout from the National Crime Information Center (NCIC) that was neither certified as required by KRS 422.040 nor properly introduced as a business record. Further, the NCIC printout indicated both the defendant's arrests and convictions. This Court held on appeal that, although not objected to, the manner in which the printout was introduced was palpable error. Id. at 384.

Here, in addition to the admission of the challenged documents, the Commonwealth introduced the testimony of Susan Phelps, an employee of the Department of Corrections. Through Phelps, the Commonwealth presented certified records of Appellant's prior convictions for second-degree wanton endangerment and trafficking in marijuana, less than eight ounces, as well as information on Appellant's parole eligibility. Thus, aside from the amount of the bond posted in connection with the misdemeanor case, which we fail to perceive as prejudicial, the same information that was contained in the case history sheet was properly admitted through Phelp's testimony. KRS 532.055(2)(a)(2). We are compelled to agree with the Commonwealth that the jury could have reasonably believed that Appellant's selling of two pounds of marijuana, in addition to a prior offense for the same, warranted the maximum sentence of imprisonment. No palpable error resulted.

The judgment and sentence of the Laurel Circuit Court are affirmed.

Graves, Johnstone, Keller, Stumbo, and Wintersheimer, J.J., concur.

Lambert, C.J., and Cooper, J., concur in result only.

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