

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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.

Supreme Court of Kentucky

FINAL

2004-SC-0030-MR

DATE 12-9-04 EIA Grov H, DC.

DEBORAH PIPER

APPELLANT

V.

APPEAL FROM MUHLENBERG CIRCUIT COURT
HONORABLE DAVID H. JERNIGAN, JUDGE
2003-CR-0159

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Deborah Piper, was convicted in the Muhlenberg Circuit Court on two counts¹ of first-degree trafficking in a controlled substance (methamphetamine), and for being a first-degree persistent felony offender. She was sentenced to a total of twenty years' imprisonment and appeals to this Court as a matter of right. Finding no error, we affirm.

The Commonwealth's evidence at trial established that Daniel Merlin approached Detective Charles Cobb of the Pennyryle Narcotics Task Force about acting as an informant in undercover drug buys in exchange for helping Merlin's girlfriend, Julie Carter, who was incarcerated. An agreement was reached and Merlin participated

¹ Appellant was initially indicted on four counts of first-degree trafficking in a controlled substance. On the morning of trial, the trial court granted the Commonwealth's motion to dismiss Counts 1 and 4, and they are not at issue in this appeal.

in several drug buys for the task force. After Carter was released from jail, the two worked together for the task force.

On February 28, 2003, Detective Cobb met Merlin and Carter in the parking lot of an elementary school close to Appellant's residence. Detective Cobb searched both individuals as well as their vehicle. After Merlin was equipped with a concealed audio recording device, he was given \$50 to purchase methamphetamine. Detective Cobb followed Merlin and Carter to Appellant's residence where he observed them knock on the door, enter the house and remain inside for about ten to fifteen minutes. After leaving Appellant's house, Detective Cobb followed Merlin and Carter back to the school parking lot where they turned over a baggie containing what Detective Cobb verified in a field test to be methamphetamine.

Four to five days later, Merlin and Carter arranged another buy with Appellant. On March 4, 2003, Detective Cobb again met the two in the school parking lot. They told him that they had spoken with Appellant about purchasing both methamphetamine and some Lortab pills. Carter was equipped with the recording device and they were given \$65 to purchase the drugs. Again, Detective Cobb followed Merlin and Carter to Appellant's residence, observed them enter and remain inside for about five minutes. Upon returning to the parking lot, Merlin and Carter turned over a quantity of methamphetamine. The recording device confirmed their story that Appellant had asked them to return later for the Lortabs.

Detective Cobb testified that Merlin received \$150 for each controlled buy either made by himself or with Carter. Further, Detective Cobb conceded that he had no idea what Merlin did with the money that was paid to him or whether Merlin and Carter used drugs themselves.

Merlin and Carter both testified and reiterated Detective Cobb's description of the drug buy procedure. Further, both confirmed that they provided Detective Cobb with Appellant's name. Finally, Carter acknowledged that she was released from jail and had an identity theft charge diverted in exchange for her participation in the undercover drug buys with Merlin.

At the close of the Commonwealth's case-in-chief, defense counsel made a general motion for a directed verdict on all charges. The trial court denied the motion, finding that there was sufficient evidence to submit the case to the jury. Although defense counsel did not present any evidence in the guilt phase (or penalty phase), she renewed the motion for a directed verdict.

Appellant argues on appeal that she was entitled to a directed verdict on both trafficking charges because the Commonwealth's evidence was insufficient and lacked the "atmosphere of verisimilitude" and "fitness to produce a conviction." Kentucky Power Co. v. Dillon, Ky., 345 S.W.2d 486 (1961), overruled in part, Perry v. Ernest R. Hamilton Assoc., Inc., Ky., 485 S.W.2d 505 (1972). See also Stopher v. Commonwealth, Ky., 57 S.W.3d 787 (2001), cert. denied, 535 U.S. 1059, 122 S. Ct. 1921, 152 L. Ed. 2d 829 (2002). Citing Davis v. Commonwealth, 290 Ky. 745, 162 S.W. 2d 778 (1942), Appellant contends that her convictions must be reversed in light of Merlin's and Carter's lack of credibility and trustworthiness to participate in the drug buys. Essentially, Appellant believes that Merlin and Carter targeted her for the sole purpose of obtaining money from the taskforce to purchase drugs for their own consumption. Specifically, Appellant posits that, "[I]f the police are allowed to let criminals select the targets for criminal investigation, rely on the criminals to conduct the

investigation and minimally supervise them, anyone at anytime can fall victim to a meritless prosecution."

Appellant also relies heavily on a recorded conversation between Detective Cobb, Merlin, and Carter that transpired immediately after the February 28 drug buy, wherein Merlin and Carter mention a fourth individual, Tammy Parker, who was apparently present during the drug transaction. Appellant offers this confusing and partially inaudible recording as proof that it was Parker, not Appellant, who sold the drugs to Merlin and Carter.

The audio recordings from both drug buys were played for the jury. And admittedly, the February 28 exchange between Merlin, Carter, and Detective Cobb that is set forth in Appellant's brief is difficult to follow. However, both Merlin and Carter unequivocally testified at trial that it was Appellant who sold them the methamphetamine on both occasions.

The jury was instructed that to convict Appellant of trafficking in a controlled substance, KRS 218A.1412, it had to find beyond a reasonable doubt that: (1) on each of the dates in question, "she sold a quantity of methamphetamine to Daniel Merlin or Julie Carter," and (2) "that she knew the substance being sold was methamphetamine." Further, the term "sell" was defined as "to dispose of a controlled substance to another person for payment or other consideration." The jury was presented with the testimony of Detective Cobb, Merlin, and Carter who corroborated each other's version of what took place during the drug buys. Furthermore, the jury was aware that both Merlin and Carter were prior drug users and that both had gained an advantage by participating in the drug buys - Merlin financially and Carter through her diverted criminal charge.

As we held in Commonwealth v. Jones, Ky., 880 S.W.2d 544 (1994),

The rule of appellate review of a criminal conviction has long been that the verdict of a jury must be sustained if there is substantial evidence to support it, taking the view most favorable to the Commonwealth. As explained by the Supreme Court in Jackson v. Virginia, 443 U.S. 307, 99 S. Ct 2781, 61 L. Ed. 2d 560 (1979):

But this inquiry does not require a court to "ask itself whether it believes that the evidence at the trial established guilt beyond a reasonable doubt." . . . Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. . . . This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts.

Jones, 880 S.W.2d at 545 (citations omitted).

It was within the exclusive province of the jury to weigh the Commonwealth's evidence and judge the credibility of Merlin's and Carter's testimony. Commonwealth v. Smith, Ky., 5 S.W.3d 126, 129 (1999). Certainly, the jury could have found Merlin and Carter untrustworthy and not believed their testimony. However, under the standard of appellate review for a directed verdict, we cannot conclude that under the evidence as a whole, it was clearly unreasonable for the jury to find Appellant guilty of trafficking in a controlled substance. Commonwealth v. Benham, Ky., 816 S.W.2d 186, 187 (1991). The Commonwealth produced more than sufficient evidence to withstand a directed verdict.

The judgment and sentence of the Muhlenberg Circuit Court is affirmed.

All concur.

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